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## Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System

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# Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System

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*In Zambia it is generally agreed on by all stakeholders that the judicial system needs reform to make it more accountable, independent, and able to deliver justice efficiently and effectively. This article discusses judicial reform in the context of the independence of the judiciary. It tries to unpack the term judicial reform. It argues that for the rule of law and constitutionalism to prevail it is crucial that the judiciary is independent and there is separation of powers between the executive and the judiciary, and legislature and the judiciary. For judges to be personally and substantively independent they need security of tenure, and an appointment system that is transparent, takes merit and competence seriously and minimizes political influence in the appointments. While judges need to be accountable for their judgments there is need to guard against those who interpret accountability as getting judges who will deliver desired outcomes in judgments.*

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## 1. Introduction

I want to share with you my thoughts on judicial reform and the legal profession in Zambia. I am aware that I am offering these remarks against the background of an intense debate underway in the country about judicial reform and the state of our judiciary. The Law Association of Zambia (LAZ) has raised the need to reform the Zambian judiciary, and has argued that the judiciary in Zambia is inefficient, corrupt and has lost its sense of accountability to society. The Association has stated:

*While we are strong proponents of judicial independence, we are equally stronger proponents of judicial accountability. Judicial independence and judicial accountability are not inconsistent and can therefore coexist. The judiciary should not be ungovernable and elitist or untouchable. The old days of respectful deference and fearful silence have gone forever (LAZ, 2012).*

To ordinary Zambians, the issues of delay, expense and corruption are the most worrisome. For lawyers, there is concern about competence, lack of independence and lack of accountability. In addition, there are a number of problematic issues with respect to the operations of the courts that tend to

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undermine the integrity of the judicial system and the confidence of the people in the judiciary. For example, the lack of an objective system for allocating cases to judges encourages “judge shopping” and the perception of corruption. There are also inordinate delays in the determination of litigation by courts. At the High Court level, the process and reasons why some cases are heard by three judges and others by one has never been explained or rationalized by objective criteria.

As we discuss reform, we must be mindful of the fact that the judiciary does not operate in isolation; it is afflicted by the same objective conditions that undermine other Zambian institutions. It would be wrong to assume that the country, apart from the judiciary, is run by a competent executive and parliamentary branch. Indeed, meaningful reform in Zambia should encompass the whole system of governance: we need a comprehensive plan rather than piecemeal actions. Reform should be aimed at transforming society and the way we conduct matters of politics and the economy. Importantly, in order to strengthen our institutions, we must depersonalize them.

That said, a word of caution: reform should not proceed on the assumption that there is nothing of value in the current judicial system. Over the years, we have created working institutions and have gained valuable experience. We have evolved as a democratic society. What is required now is reforming and improving what is already in place -- not wholesale replacement. We are not in a revolution.

A first step is to define the goals of reform and the methodology to be used to achieve it. It is important to be mindful of the fact that reform does not mean the same thing to all people; there always will be people with their own agendas that often attempt to hijack genuine reform processes. It is therefore necessary to clarify to all stakeholders what is meant by reform. As regards judicial reform, judicial accountability is properly understood as a fundamental democratic requirement. Put simply, it means that judges must be accountable to the public for their constitutional role of applying the law fairly and impartially. Unfortunately, as Justice Sandra Day O'Connor of the USA has pointed out, “judicial accountability, however, is a concept that is frequently misunderstood at best and abused at worst” (O'Connor, 2008:1). Experience shows that “judicial accountability” sometimes becomes a rallying cry for those who want to dictate substantive judicial outcomes. Such a warped representation of what is meant by accountability ignores the role of the judiciary and, indeed, the very structure of a democratic government based on the separation of powers, the rule of law and constitutionalism.

With this in mind, and mindful of the context of Zambia's current reform debate, I would like to address several interrelated issues: (a) the rule of law and democratic governance; (b) judicial independence; (c) appointment of judges and tenure (d) competence; (e) the judiciary and non-judicial functions; (f) magistrates; (g) representation in the judiciary; (h) financial autonomy; (i) the status of the judiciary; (j) effectiveness of the judiciary; and (k) the criticism of judges and contempt of court.

The Law Association, as reflected in a letter to the Minister of Justice dated 11 January 2012, demands that we – at the very least – open a conversation on

issues of corruption, independence, appointment of judges, competence and delays in the delivery of justice. The alleged decay and decline in public confidence in the judicial system, an institution we have all sworn to defend and promote, should be of concern to all of us and should prompt us to seek to redress the situation. A cardinal principle of justice is that no judge, no lawyer and no citizen should be above the law, let alone be beyond the law. The judiciary in any country is central to the protection of the rule of law and the protection of human rights and freedoms. It is also an essential check and balance on the other branches of government, ensuring that laws of Parliament and acts of the executive comply with the constitution and the rule of law. Over one hundred years ago, Alfred Deakin, Australia's first Attorney-General, described the courts as being the final authority on the interpretation of the constitution. He noted that the Australian High Court was to be given "a most potent voice." It was to determine the powers of the Commonwealth, the powers of the states, and the validity of the legislation (Ponnambalam, 1998: 38). Emphasizing the role that courts play in the protection of rights and the delivery of justice in any society, Justice Lewis Powell of the United States Supreme Court observed:

*Equal justice under the law is not merely a caption on the façade of the Supreme Court Building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system existed. It is fundamental that justice should be the same, in substance and availability, without regard to economic status (Powell Jr., 1965).*

Only a judiciary that has integrity and is competent, independent, and efficient can protect the rights of citizens and deliver equal justice. It is, therefore, imperative that we look at the factors that can help ensure that competence, integrity and efficiency are the hallmark of a judicial system. We must remember that, as Reginald Smith observed: "without equal access to the law, the system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever created" (Smith, 1919).

## **2. Rule of Law and Democratic Governance**

As the "rule of law" is one of the most important political and legal conceptions in democratic governance, it is important to begin our conversation with an examination of the concept: What does "rule of law" mean? To some, the rule of law calls for the elimination of wide discretionary authority from government processes. To others, the rule of law means the existence of formal rules which do not discriminate between citizens and to still others it means due process of law. The concept assumes the existence of inalienable rights and liberties which government should not touch or violate. Predominant among such rights are property rights, the right to free expression, freedom of association, equality before the law, due process and protection against discrimination. To some extent, the essence of the rule of law lies in its juxtaposition to the "rule of men." It is comprised of the following basic principles: that all state power ought to be exercised under the authority of laws, and that there should be rules of law

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governing the election and appointment of those who make and execute policy, as well as the manner in which policies are made and executed. It demands that policies be executed in such a way as to ensure rationality and fairness. The rule of law connotes the use of state power, through rules of law for the establishment of the economic and social system agreed upon by the people via constitutionally sanctioned representative institutions or other acceptable surrogates. It calls for governance in accordance with the constitution. All power, whether of Parliament, the executive or the courts, must be exercised in accordance with the constitution, which is the final word on the powers and roles of each branch.

Constitutionalism as an element of the rule of law largely depends on how constitutional limitations imposed on government are interpreted and enforced. Integral to the rule of law and constitutionalism is the doctrine of the separation of powers, which I will come back to. As Nwabueze has observed: “Liberty implies the limitation of power by law and the one institution above all others essential to the preservation of the rule of law has always been and still is an honest, able, learned, and independent judiciary” (Nwabueze, 1993:189).

The maintenance of an independent and accountable judiciary is fundamental to constitutionalism and the protection of human rights. The worldwide emergence of constitutions with wide-ranging and justiciable Bills of Rights has rekindled public awareness and interest in the role of courts as a forum through which to seek individual and collective justice and the sustenance of a democratic culture.

In democratic states, courts are asked to review government’s acts for compliance with the Bill of Rights. An independent body’s review of governmental acts – in the interests of maintaining the efficacy of the constitutional guarantee of individual rights – is an essential and important mechanism of democratic governance. Moreover, such a review being at the instance of an individual assures personal participation in government. In the famous case of *Marbury v. Madison*, Chief Justice Marshall of the USA observed: “It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule of particular cases must of necessity expound and interpret the law. A law repugnant to the constitution is void. Courts as well as other departments are bound by that instrument.”<sup>1</sup> The courts are the guardians of fundamental rights and provide a forum for public debate so that the exercise of public power by democratically elected persons remains accountable. Judges’ interpretations of the constitution and other laws support the rule of law, not executive whims; and judicial review permits courts to declare as invalid law or conduct that is inconsistent with the constitution. Only an independent judiciary can effectively review governmental acts and ensure the constitutional guarantee of human rights.

Equally, the executive must support the independence of the judiciary. About a year after Nelson Mandela became President, the Constitutional Court of South Africa heard an urgent application (*The Executive Council of Western Cape Legislature and Others v. President of South Africa and Others*, Constitutional Court of South Africa, 1995)<sup>2</sup> challenging legislation that purported to confer powers on the President to legislate, which President Mandela did by way of

proclamations. The proclamations dealt with the vital local government elections that were soon to be held. An application was brought on the basis that the legislature may not empower the President to legislate and, to the extent that the President purported to do so, he acted in conflict with the constitution. Mr. Mandela was named as one of the respondents. The challenge was successful. The court held that the provision purporting to empower the President to enact legislation was inconsistent with the constitution; enacting legislation was a function of Parliament and not within the President's powers. The court came to this conclusion notwithstanding the fact that all political parties had agreed that the President should have the power to do what he did. In a remarkable display of leadership, the same day of the court's decision, Mr. Mandela rushed to the television and radio stations and declared that, while he had signed the proclamation believing that he had the power to do so, he respected the decision of the Constitutional court and appealed to all concerned to similarly accept the court's decision. As George Bizos has lamented: "What a pity that many African leaders do not follow this example" (Bizos, 2011).

Some would argue that the power vested in the judiciary to set aside the laws made by a legislature constitutes a subversion of democracy. In response, I would draw upon the words of the Constitutional Court of South Africa in the case involving a challenge to the Presidential appointment of Simelane as head of the South African National Prosecution Authority – *Democratic Alliance V. The President of South Africa and Others*,<sup>3</sup> (which in turn quoted former Chief Justice Mahomed's words to the International Commission of Jurists):

*That argument is, I think, based on a demonstrable fallacy. The legislature has no mandate to make a law which transgresses the powers vesting in it in terms of the constitution. Its mandate is to make only those laws permitted by the constitution and to defer to the judgment of the court, any conflict generated by an enactment challenged on constitutional grounds. If it does make laws which transgress its constitutional mandate or if it refuses to defer to the judgment of the court on any challenge to such laws, it is in breach of its own mandate. The court has a constitutional right and duty to say so and it protects the very essence of a constitutional democracy when it does. A democratic legislature does not have the option to ignore, defy or subvert the court.*<sup>4</sup>

The same observations are valid for the executive branch. It too lacks a mandate beyond that which is granted to it by the constitution. The executive can only do what it is authorized by the constitution to do. The determination of whether an executive action is constitutional is a judicial matter – in other words, it is a matter constitutionally left to the courts to decide. Executive actions are, therefore, properly subject to judicial review to determine their compliance with the constitution. This process of checks and balances among the branches of government supports the rule of law and democratic governance.

### **3. Judicial Independence**

It is beyond dispute that to sustain a democracy in the modern world, an independent, impartial and upright judiciary is an absolute necessity. Therefore, the constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the state. Judicial independence is recognized in many international and regional human rights instruments<sup>5</sup> as one of the cornerstones of good governance.<sup>6</sup> The principle is also enshrined in all democratic constitutions.<sup>7</sup> It involves two tenets; (a) judicial power must exist as a power separate from and independent of, executive and legislative power and (b) judicial power must repose in the judiciary as a separate organ of government, composed of persons different from and independent of those who compose the executive and legislature.

As the United States Supreme Court observed in *O' Donoghue v. United States*:

*If it be important to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows as a logical corollary, equally important, that each department should be kept completely independent of the others - independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other department.*<sup>8</sup>

The United Nations Special Rapporteur on the independence of judges and lawyers has underscored the importance of the separation of powers and stated that: "The principle of the separation of powers is the bedrock upon which the requirement of judicial independence and impartiality are founded" (International Commission of Jurists, 2004: 1).<sup>9</sup> The principle was further underscored in the South African constitutional Court judgment *S. v. Mamabolo*<sup>10</sup> (E.T.V. and others intervening, 2001). In the words of Justice Krigler: "In our constitutional order the judiciary is an independent pillar of the state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially under the doctrine of the separation of powers. It stands on an equal footing with the executive and legislature as pillars of the state."<sup>11</sup>

As Sandra Day O'Connor has similarly observed: "Judicial independence is the vital mechanism that empowers judges to make decisions that may be unpopular but none the less correct" (O'Connor, 2008). In so doing, the judiciary vindicates the principle that no person, or group, however powerful, is above the law. And it gives life to the promise that the rule of law safeguards the minority from the tyranny of the majority (O'Connor, 2008). As discussed further below, judicial independence rests on the pillars of institutional and financial autonomy. These pillars encompass the need for an appropriate appointment procedure, security of tenure, satisfactory conditions of service that the executive cannot adversely affect, the provision of adequate financial resources, and appropriate terms and conditions for all those involved in the administration of justice. These elements,

in turn, are founded on the principle that the exercise of judicial functions is vested solely in the judiciary.<sup>12</sup> Whilst discussion of the independence of the judiciary in rule of law discourse often centres on protecting and promoting the rights of judges in the higher courts, we must also recognize that magistrates require comparable protection, not least because it is they who deal with the vast majority of cases, both criminal and civil, and it is upon them that much of the public confidence in the legal system resides.

An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent from wrongful interference by the other branches of government. As to the independence of individual judges, there are at least two avenues for securing that independence. First, judges must be protected from the threat of reprisals, so that fear does not direct their decision-making. Second, the method by which judges are selected, and the ethical principles imposed upon them, must be constructed so as to minimize the risk of corruption and outside influence. Thus, the first endeavor is to protect judicial independence from outside threats, and the second is to ensure that judicial authority is not abused and it is the core concern of judicial accountability. To permit judges to be independent means that they must be left alone by the other judges, including the Chief Justice, to make their own decisions. Should superior judges disagree with a lower court's judgment, the appeal process enables the superior courts to have a bite at the case.

Yet independence comes at a price. In Zambia this is quite evident in the number of able lawyers who have been bypassed for appointments to the bench solely because they are perceived by "the powers that be" as unfriendly to government. In spite of such challenges, judges and magistrates must recognize that they are duty bound to provide society with the highest possible standards of service and commitment, and that a failure to maintain this is rightly a matter of public concern. That means the judiciary and judges must be accountable. Independence does not mean that judges can decide cases according to their personal preference. To the contrary, judges have a right and duty to decide cases before them according to the law, free from fear of reprisals of any kind. The United Nations Declaration of Human Rights in article 9 recognizes 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 and of any criminal charge against him."<sup>14</sup> (United Nations, 1948: Article 9) But as Cartwright observes: "*What ultimately protects the independence of the judiciary is a community consensus that such independence is a quality worth protecting*" (Cartwright, 1998: 39).

It is sometimes alleged that calls for accountability are designed to weaken the independence of the judiciary. These are legitimate concerns that need to be addressed. There are sound ways to achieve judicial accountability while safeguarding the role of the courts, consistent with the larger role of the judiciary in our democratic society. Judicial accountability advances judicial independence and the rule of law. Accountability and independence are two sides of the same

coin: accountability ensures that judges perform their constitutional role, and judicial independence protects judges from pressures that would pull them out of that role. Indeed, as Kourlis and Singer suggested: “The enterprise of accountability for fair and efficient processes may help stave off irresponsible demands for accountability for decisional outcomes” (Kourlis and Singer, 2008).

True judicial accountability furthers judicial integrity. An independent and honourable judiciary is indispensable to the rule of law. If judges are to be the independent guarantors of the rule of law values, they must be incorruptible. Judges are entrusted with ultimate decisions over the life, freedoms, duties, rights, and property of citizens. Judges will never win the respect and trust of citizens if they are subject to corrupt influences. Whenever a judge makes a decision for personal gain, or to curry favour, or to avoid censure, that judge and that act denigrates the rule of law. Further, judicial accountability advances judicial competence. A fundamental value of the rule of law is that judicial decisions are not made arbitrarily, but through a process of reasoned decision making. The rule of law requires that decisions be justified in law, and therefore be reasoned, analytical, rational and non-arbitrary with respect to general legal standards. Independence, integrity and competence, then, are the hallmarks of a judiciary committed to upholding the rule of law and they are the principles to which a judiciary should be held accountable.

#### **4. The Appointment of Judges and Tenure**

In order to guarantee the independence and impartiality of the judiciary, best constitutional practices and international law require states to appoint judges through strict selection criteria and in a transparent manner. Unless judges are appointed and promoted on the basis of their legal skills, the judiciary runs the risk of not complying with its core function: imparting justice independently and impartially.

Judicial Service Commissions (JSC) remain responsible for overseeing judicial appointments in most African countries, although there remain significant divergences of opinion as to their composition. With one exception, all are chaired by the Chief Justice. As head of the judiciary, this is entirely appropriate. But where the Chief Justice is appointed by the President, the issue of possible excessive Presidential influence in the appointment of the judges arises. The concern is a real one although, arguably, the matter is best dealt with by providing a suitably independent and transparent appointment system for the Chief Justice. The involvement of other senior judicial figures in the appointment process is also commonplace and necessary, for their experience together with their personal knowledge of potential candidates makes them well qualified to identify suitable individuals for appointment or advancement. Even so, the Presidential influence as to the choice of the JSC’s judicial members is a cause of concern in many jurisdictions.<sup>15</sup> The point here is that it is not sufficient for the executive to say “Oh, we never dictate to the judges how to decide individual cases” when more potent but subtle pressures can be exercised on the judiciary to make it conform to the

wishes of the executive. The awarding of contracts is one such powerful incentive that should have no place in an independent judiciary. Having judges on contract is unacceptable. It has a serious detrimental impact on citizens' right to proper justice and on the judges' right to stability in their positions as a guarantee of judicial independence and autonomy.

Limiting membership of a JSC to the senior judiciary is now outdated and yet many countries continue the model. Fears that 'outsiders' may seek to unduly influence judicial appointments (or removal) for political or other improper motives are understandable and must be addressed. However, without a more representative membership, appointments may be (or may be perceived as being) part of an 'old boys' network' designed to maintain the *status quo* and which imports potential bias (unconscious or otherwise) towards particular individuals, political parties or ethnic groups. In addition, there are sometimes fears that members of the senior executive are elitist and do not necessarily represent or understand the views of the wider community.<sup>16</sup> These are real concerns and provide strong support for opening up the membership of a JSC to others who have a legitimate interest in, and expectation of, involvement in judicial appointments and removals.

It is certainly desirable to include members from the wider legal community for they can offer peer assessment on fitness for office and can also identify candidates who might otherwise be overlooked through the official channels because of, for example, their perceived anti-government attitudes. Representation by practitioners and law teachers designated by their peers is desirable.<sup>17</sup> Law teachers are often in an excellent position to evaluate the academic capabilities of prospective appointees.<sup>18</sup> In addition, this provides an important link between the profession and law teachers. Government representation in the appointment process is also legitimate and is often provided for by the Attorney-General's inclusion as *ex officio*.<sup>19</sup>

Opening the commission to lay members is a feature in both South Africa and Uganda. A lay presence is often justified on the grounds that the public and their elected representatives have a legitimate interest in the matter and can make it more difficult for political influence to sway appointments. Whilst these are valid considerations, it is still hard to justify the presence of such persons unless they also bring to the commission some specific expertise or experience that is otherwise lacking. It is certainly vital that judges enjoy a significant input in the selection and removal process, but the objective must be to provide for a demonstrably independent body whose membership comprises the necessary range of expertise and experience with which to assess the quality and competence of candidates.

Even with a suitably constituted JSC, there remains the question of its role in the appointment process itself.<sup>20</sup> Many African constitutions provide that the President must appoint "after consultation with the JSC." This is the weakest formulation, for the President is not bound by the Commission's views.<sup>21</sup> A stronger approach is one that requires the President to act "on the advice of"

or “on the recommendation of” the JSC. This is the approach in the new Kenya constitution adopted in 2010. This approach implies that the appointment by the President is a purely formal function. It may be argued, however, that the head of government does have a legitimate right to more than just a formal role in appointments. A possible solution here is for the JSC to provide a shortlist of appointable candidates from which the head of government can select his/her preferred candidate(s),<sup>22</sup> with the President not being allowed to deviate from this list. The process for appointments to judicial bodies should be transparent and accountable, and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection should safeguard the independence and impartiality of the judiciary. The Universal Charter of the Judges in article 9, states that: “the selection and appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualifications.”<sup>23</sup> Whichever approach is adopted, it is essential that candidates for judicial appointment are professionally competent persons of proven integrity who enjoy the confidence of both the governors and governed alike.

A different type of safeguard adopted in some African countries is a requirement that the appointments of High Court and apex court judges be subject to ratification by the legislature.<sup>24</sup> For this requirement to be meaningful, however, requires that the ratification process be properly structured, preferably with the matter being considered by a fully representative and suitably qualified Parliamentary Committee. In the United States, where this system is widely practiced in most senior appointments, Senate Committees are charged with the task of examining nominated candidates in a transparent manner. However, given the ongoing weakness of many African legislatures, the attempt to incorporate elements of legislative ratification into the appointment system is more likely than not to have the effect of politicizing appointments (e.g., voting simply along party lines) rather than providing for an independent assessment as to the suitability of nominees.<sup>25</sup> In Zambia, Parliamentary Ratification has turned out to be no more than getting a security clearance from the security services and Anti-Corruption commission; the structure fails to serve as a test of competence.

Security of tenure is key to judicial independence and explains the importance of maintaining judges on permanent appointment and prohibiting the abolition of their tenure of office without their consent.<sup>26</sup> Lack of tenure breeds insecurity and can only lead to compliant judgments. In some jurisdictions, the executive has discretion to extend a judge’s term of office. Where such discretion is unlimited, it undermines the independence of the judiciary, for it is likely that only those that the executive considers “good judges” will receive extensions. In order to close this conduit of executive influence over the judiciary, many jurisdictions provide for a compulsory retirement age with no exceptions. A judge who reaches retirement age should remain in office beyond the retirement age only to complete proceedings commenced before the attainment of retirement age.

## **5. Competence of the Judiciary**

Throughout the centuries, common law jurisprudence on which Zambian law is founded has relied on the judiciary to move the law forward and keep it relevant to the needs of contemporary society. Many of our most fundamental principles and liberties are founded directly upon judicial decisions. One of the perceived shortcomings of the Zambian judiciary has been the alleged lack of knowledge and competence in the law.

The duty of judges is to apply the law and develop it through the use of precedent. The appellate courts' focus on determinations of law (versus facts) should allow appellate judges in particular to develop the law to meet the changing needs of society. Law cannot stand still; to do so would fail to meet the ever-changing needs of society.

To develop the law a judge must possess good knowledge of the law and a sufficiently high intellect so that he or she can quickly understand not only intricate matters of evidence, but also principles of other relevant sources of knowledge. Although Zambia has some great judges, on the whole, the average Zambian judge seems unable to develop the law, and instead retreats into a mechanical application of precedent to the facts before him or her. One of the factors that contribute to this situation is the fact that Zambian judges are largely drawn from the magistracy. The key qualification to serve as a judge has typically been seven years of service as a lawyer or magistrate - irrespective of the quality and manner of service. Sadly, academic intellect has never been a significant criterion. In contrast, a well-qualified judiciary would comprise a mixture of accomplished academics, practitioners and persons drawn from the magistracy. It is therefore not surprising that while judgments from countries like Ghana, Nigeria, Botswana and South Africa have made a major contribution to international jurisprudence, one is hard pressed to find a Zambian judgment that has contributed to world jurisprudence.

It is important to note that Zambia's hurdles to achieving a highly capable judiciary are made steeper by our lack of a well-structured continuing legal education programme through which Zambian lawyers can avail themselves of the opportunity to learn and improve lawyering and professional skills. It should not go unnoticed that developing and maintaining highly competent judicial ranks also requires providing skills and development opportunities for the legal community, especially those serving or hoping to serve as magistrates or judges.

## **6. The Judiciary and Non-Judicial Functions**

The use of senior judges to head Presidential or Governmental commissions of inquiry and the like is relatively common in Africa. In my view, judges should not agree to head (or be a member of) a commission in circumstances that affect, or may be seen to affect, the independence of the judiciary or which could undermine the separation of powers.<sup>27</sup> Unfortunately, there have been cases where judges have accepted positions leading commissions which adversely impact the independence of the judiciary. Further, where a judge of the High Court

or even of the Supreme Court is sitting as the sole member or chair of a tribunal, he or she effectively becomes an inferior court insofar as the judge is now amenable to discipline through an order of certiorari, mandamus or prohibition. This is exactly what happened in the case of Justice Chirwa in the Dora Siliya inquiry (2010). Zambia has a large number of persons who have held, but have retired from high judicial posts. There is no reason why these persons should not be called upon to head and participate in commissions of inquiries. It would be in the best interest of the country if the members of commissions of inquiry and any similar bodies were not chosen from the ranks of the judiciary.

## **7. Magistrates**

In Africa, magistrates are often the “forgotten” persons in discussions on judicial independence and judicial reform. This is most unfortunate, for they play a crucial role in the entire judicial system given that they hear the vast majority of criminal cases and make other key decisions such as the granting of bail to criminal suspects. Magistrates’ courts are also the places where the most impoverished, powerless and defenceless in society often come. If citizens have no confidence in magistrates and their court officials, perceiving them to be pro-executive and pro-police, this has a significant detrimental effect on society. Not only does it impact adversely on the administration of justice, but also it carries with it significant social and economic consequences including potential resort to the unfortunate practice of instant justice by the frustrated public (Hatchard and Ndulo, 1994:94).

Yet in many African countries, the magistracy faces serious difficulties. Firstly, continuing the colonial practice of retaining magistrates as public servants can lead to their politicization. To counter this, the trend towards bringing magistrates under the auspices of the JSC should become the norm.<sup>28</sup> Secondly, magistrates often face considerable operational problems including serious structural and resource limitations.<sup>29</sup> Thirdly, magistrates often experience poor conditions of service. These constraints, combined with isolation from a supportive legal community, can lead to poor morale and performance. Here the only real solution is for states to provide magistrates with facilities and support comparable to that given to other judges. Addressing such issues will inevitably take time and resources but the goal must be to ensure that magistrates enjoy, as far as possible, comparable training and conditions of service as judges do in the higher courts.

## **8. Towards a Fully Representative Judiciary**

Upholding the judicial oath of office to administer justice to all persons represents a considerable challenge for judges who are inevitably the product of their social conditioning, education, gender and ethnicity. If they are to discharge fully their judicial oaths and to enjoy the broad confidence of the people, they must be drawn from a wide array of different backgrounds to ensure a better understanding of the experiences of those with whom they will be dealing.<sup>30</sup> The need to maintain

a gender balance within the judiciary is now widely recognized.<sup>31</sup> As Cartwright notes:

*It goes without saying that women start with a better understanding of women's lives because that is our conditioning. It does not mean that women judges are biased in favour of women . . . but because gender means assumptions about men and women . . . it is essential for one half of the population to have one half of the judiciary understand something of their lives while the other half strive to learn more about them (Cartwright, 1998: 45).*

Although Zambia now has a fair number of women judges in the judiciary, the numbers remain disappointingly low with very few women sitting in apex courts. The position is particularly serious at the local court level where the indications are that women are grossly under-represented, despite the fact that no formal professional qualifications are required for appointment as a justice in the local courts and that the majority of cases involve the family and domestic relations.<sup>32</sup> Encouraging equality requires states to identify and tackle the factors that inhibit the entry of women onto the bench. For example, certain judicial policies and practices – such as the duty to go on circuit or be posted away from the home area – disproportionately impede women from serving as judges given that women are still typically the primary caregivers to children.

The “fast-tracking” of appropriate candidates is necessary to correct imbalance, although this should not be at the expense of applying less rigorous qualification requirements on either gender, for the principle that judicial appointment are made on merit is inviolable. Arguably, the appropriate approach to redressing imbalances is for all levels of the judiciary to have, as an objective, a selection system based on “merit with bias.” In other words, where two candidates are of equal merit, the bias should be to appoint a woman or member of an under-represented minority.

## **9. Financial Autonomy of the Judiciary**

Another area that has a great impact on the independence of the judiciary is the approach taken to funding the judiciary. Sufficient funding to enable the judiciary to perform its functions to the highest standards should be provided. Appropriate salaries, supporting staff, resources and equipment are essential to the proper functioning of the judiciary. As a matter of principle, judicial salaries and benefits should be set by an independent commission. The salaries and benefits should be secured by law. The administration of monies allocated to the judiciary should be under the control of the judiciary. Moreover, financial autonomy is fundamental. Without it, the executive can seriously impinge upon judicial independence by limiting the judiciary's access to funds voted to it by Parliament and/or by assuming control of the services and staff upon which the judiciary depends. Providing budgetary independence enables the judiciary to control its own funds and to make use of them according to its own priorities.<sup>33</sup> This is not the case in many African countries where the judiciary is required to go “cap in hand” to the relevant

government ministry with a request for funds. This results in the executive as sole decision maker regarding whether the judiciary is granted any or all of the funds requested — and, without proper checks, the executive is left to exercise such discretion according to its own policy or priorities or Presidential dictates.

## **10. Maintaining the status of the judiciary**

Judicial independence and judicial accountability are closely related. A society must support and protect the judiciary for, as the Zimbabwe crisis demonstrates, judges remain an easy target for those wishing to make partisan political capital. In return, society can expect judges to accept fair and temperate criticism of judgements and to maintain appropriate standards of ethical behaviour. The preamble to the Bangalore Principles of Judicial Conduct states that public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

To help retain the sensitive balance between independence and accountability, several African states have developed codes of judicial ethics. These are an extremely desirable means of establishing the parameters for public expectations and criticism of judicial conduct. The method of creation of such codes varies. Providing a statutory code, as in the case of Zambia, raises concern that the legislature or Minister may have too much input into determining the appropriate conduct for judges. In any event, a statutory code is arguably inappropriate in that ethical rules are seldom absolute and it is preferable to set out standards of conduct rather than to lay down legally enforceable rules. This in some countries has led to the development of codes by members of the judiciary themselves.<sup>34</sup> These have the advantage of ensuring that the code has judicial support although, of course, it runs the risk of being viewed from the outside as being a self-serving document. Given its potential relevance to so many, the development of a code is best undertaken as a result of a co-operative effort on the part of judges, the legal profession, legal academics and civil society,<sup>35</sup> preferably based on internationally agreed standards.<sup>36</sup>

Ideally, such a code should deal with both the exercise of judicial duties and extra-judicial activities and, in particular, require judges to disclose their assets: This is essential to guard against potential corruption. Whilst many lay down rules that are seemingly straightforward and obvious to lawyers, they provide the public with a clear statement as to what they can expect from their judges. It is extremely useful, for example, to know that judges who cause undue delay in the hearing of cases, or serve in a politically sensitive capacity are justifiably open to public criticism. The effectiveness of such codes largely depends upon their wide public dissemination, and much more effort is required in this respect.<sup>37</sup>

In most jurisdictions, curiously, there is rarely any formal procedure for the taking of disciplinary action for any breach of the code of ethics where the complaint does not involve the possibility of removal from the bench. Such matters are usually dealt with as an internal matter by the Chief Justice, with no public admonition of the judge. This is not adequate. To maintain public confidence it is

necessary to develop an effective method of upholding judicial accountability as well as offering appropriate protection for judges against unfounded criticism. A suitable approach is the establishment of an independent Judicial Ombudsman to serve as the link between the judges and the public. This might be a separate institution or an additional responsibility given to the JSC. For example, in Uganda the JSC is mandated to receive recommendations and complaints concerning the judiciary and the administration of justice from members of the public, and to investigate complaints and to take 'appropriate action' in collaboration with the judiciary. This is useful so far as it goes, but a serious shortcoming is the lack of a requirement to make public the results of its enquiries. There is a need for transparency in such matters and there is no reason why details of disciplinary action against any judicial officer should not be made public. Transparency has the added advantage of serving as a deterrent to other judges.

The relationship between Parliament and the judiciary remains a potentially tense and acrimonious one. Paragraph I of the Executive Summary to the *Latimer House Guidelines* emphasizes the need to apply the doctrine of 'mutual restraint':

*Relations between Parliament and the judiciary should be governed by respect for Parliament's primary responsibility for the making of legislation and for the judiciary's role in interpreting legislation and in ensuring its compatibility with the constitution.*

Experience has shown that the judicial role of interpreting legislation (as well as the constitution) can bring the courts into conflict with both Parliament and the executive and make it the subject of harsh and bitter criticism. Constitutional adjudication is inherently controversial and political disputes inevitably enter the judicial arena. Yet it is inimical to the rule of law if political pressure is directed towards the judges by those who have not succeeded in the judicial adjudication or who wish to influence future decisions. Parliamentarians and Ministers, like everyone else, must accept court decisions until they are either overturned by a superior court or through a constitutionally authorized process. They are entitled to criticize a ruling but what is never acceptable is the making of vague allegations of improper motives for decisions, personal attacks on the integrity of individual judges or threats against their personal safety.

The protection of judicial security of tenure means strictly limiting the grounds for removal.<sup>39</sup> Judges must enjoy security of tenure if they are to act independently and serve as a check on government. Accordingly, there is serious cause for concern when such removal can be for "any other cause."<sup>40</sup> Given that judges and magistrates hold office during "good behaviour", invariably misbehaviour is a ground for removal. Equally, removal for mental incapacity is unexceptional. "Incompetence" is sometimes an additional ground for removal. This is a somewhat vague concept but can perhaps be judged against the criteria for judicial performance set out in the Judicial Code of Conduct.<sup>41</sup>

A transparent and independent removal procedure is essential. A fundamental constitutional issue here concerns who has the right to initiate such proceedings. Whilst any person or body is entitled to call for removal, arguably the initiation is

best left to an independent JSC (or Judicial Ombudsman) or the Chief Justice. If left in the hands of the President, Cabinet or Parliament, it provides a potential weapon through which to intimidate judges and thus help create or maintain a pliant judiciary. In effect, it undermines the separation of powers and the independence of the judiciary.

### **11. Effectiveness of the Judiciary and the Rule of law**

In every country a national constitution articulates the vision of the society; defines the fundamental principles by which the country is organized, distributes power within the country; and plays an important role in national building and consolidating the nation state. As earlier observed, the idea of constitutionalism and good governance connotes a government defined, regulated and limited by a constitution. Constitutional democracy is founded upon the notion of checks and balances, namely the judiciary and the executive, while operating independently of one another, act to check each other's operations and balance each other's power. The commitment to principles and enactment of constitutional provisions that provide for checks and balances alone cannot guarantee adherence to those provisions. Institutional effectiveness and accountability are central to good governance and the rule of law. It requires independent, functional and credible courts in order to translate constitutional provisions and principles into practice and into meaningful checks on government.

In most African states it is widely acknowledged that the performance of the judiciary is hampered by the shortage of both human and operational resources availability. Typically courts are congested and are perceived as slow in their disposal of cases or complaints that are brought before them. The courts operate without computers, stenographers or even adequate stationery. Libraries are outdated and inadequate. In some jurisdictions, hundreds of judgements remain unenforced. In yet some countries, scores of cases remain undecided in instances where it appears that the political costs of deciding the cases would be too high.

Another major area of deficiency in the African judicial system is lack of access to courts, and corruption. Access to justice in Africa is notoriously hampered by delays in trials in the law courts. The legal system is not perceived by many as protecting the rights of all citizens equally and effectively. The poor and marginalized groups in society have generally received poor protection from the law. The general perception is that education and economic status play a major role in one's ability to access justice. These difficulties tend to undermine the public's confidence in the ability and suitability of the courts to act as a check on the executive and as forums for the protection of human rights and the advancement of the rule of law. Further, corruption completely undermines the legitimacy of the judiciary. It leads people to regard courts as an inappropriate forum for the resolution of disputes and protection of human rights. The challenge for national institutions is to develop mechanisms that not only improve the functioning of the courts, but facilitate accessibility.

## 12. Criticizing the Courts and Contempt of Court

Judges administer criticism of each other through appeal decisions and they do this publicly. The debate in Zambia has centred on whether members of the public have a right to criticize courts. Legitimate criticism of judges arising from the discharge of their duties, even if somewhat emphatic and unhappily expressed, is permissible as being the exercise of the freedom of expression.<sup>42</sup> Law teachers in their writings must likewise feel unencumbered in exposing flawed judgments, although this must never extend to personal attacks on judges. If the judiciary is to remain healthy, vigorously autonomous and able to perform its constitutional functions without improper influences, it must be immune to attacks that seek to influence judicial decisions making. Unjustified, uninformed, and unreasonable attacks on judicial integrity strike at the judiciary's constitutional role and must be condemned. In extreme cases, a court may cite its critics for contempt of court.<sup>43</sup> Since the media is often the only means by which Zambians learn about the judiciary, the media bears extraordinary power to affect public perception, and thereby to affect the judiciary itself. The media bears a collective responsibility to ensure that issues affecting the judiciary are covered fully, fairly and accurately. Reporting about the judiciary accurately and fairly requires journalists to keep judicial independence in mind when producing a court related story. An inaccurate or out of context story can misinform an enormous segment of the population and can simultaneously generate a backlash against the case, the law or the judge involved or against the judiciary as a whole.

Unfortunately, however, courts in Zambia appear to regard any comment on a matter before the courts as contempt of court. This practice is rooted in an outdated interpretation of the contempt of court under the common law, and is an approach that has been rejected by courts in other common law jurisdictions around the world. The current international approach has been influenced by the increasing appreciation of the importance of free speech in a democracy. Courts in Africa need to learn that it is better to be respected than feared. The right to criticize judges and their judgments is an integral part of a good system of the administration of justice. If honest and fair criticism is considered contempt, that takes away the very foundation of a democratic society – free speech. Justice Black of the United States Supreme Court, outlining the underlying justification for the protection of free speech in the American constitution, observed in *New York v. Times Company* that “the press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”<sup>44</sup> The Chief Justice Gajendragadkar of the Indian Supreme Court has observed: “We ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness

and objectivity of their approach, and by restraint, dignity and decorum which they observe in their judicial conduct.”<sup>45</sup>

What the legal profession should detest – indeed, what any civilized society should detest -- are vile abuses and the derision of judges, baseless accusations of impropriety, corruption, and interference with witnesses. As the Indian Supreme Court observed in *Narmada Bachao Andolan v. Union of India and Others*: “We wish to emphasize that under the cover of the freedom of speech and expression no party can be given a license to misrepresent the proceedings and orders of the court and deliberately paint an absolute wrong and incomplete picture which has the tendency to scandalize the court and bring it into disrepute or ridicule.”<sup>46</sup> The right to criticize the courts is an integral part of the constitutionally guaranteed freedom of expression. The criminal justice system should not be used to intimidate people who in good faith criticize the courts and seek to promote the accountability of the judiciary.

As the leading English Judge Lord Aitkin observed a long time ago in *Ambard v. Attorney-General* (Trinidad and Tobago):

*But where the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.*<sup>47</sup>

As to the view that comments will allegedly interfere with the work of the court, in trials that are by judge alone, (which is the case in most countries of the world), as the Nigerian Court of Appeal observed in *Attorney General v. Anambra State*<sup>48</sup> it is proper to assume that a judge, as a professional lawyer, will not be improperly influenced in any way.<sup>49</sup> As South African courts have observed, there are broader values that deserve protection. The South African constitutional Judge, Justice Krigler observed in the *State v. Russell Mamabolo*.<sup>50</sup> “free and frank debate about judicial proceedings serves more than one vital purpose. Self-evidently such informed and vocal public scrutiny provides impartiality, accessibility and effectiveness.”<sup>51</sup> It constitutes a democratic check on the judiciary. In the same case, Judge Abbie Sachs, observed: “indeed, bruising criticism could in many circumstances lead to improvement in the administration of justice. Conversely, the chilling effect of fear of prosecution for criticizing the courts might be conducive to its deterioration.”<sup>52</sup>

### **13. The Legal Profession**

Thus far I have focused my remarks on the judiciary. It would be wrong to end there. The judicial system includes the wider legal profession. I do not think that whatever is wrong with our judicial system can be the fault of the judges alone. The legal profession and indeed the law schools bear equal blame, and they comprise part of both the problem and the solution. The incompetence, delays, judge

shopping and many other issues discussed in this article cannot happen without the participation of members of the legal profession. Lawyers have an obligation to provide professional service to the courts and their clients to the best of their abilities.

According to the United Nations' Basic Principles, the basic obligations of a lawyer include the following: (a) advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) assisting clients in every appropriate way, and taking legal action to protect their interests; (c) assisting clients before courts, tribunals or administrative authorities, where appropriate.<sup>53</sup> As with other individuals with public responsibilities, lawyers must conduct themselves according to ethical standards. The codes governing lawyers must include clear norms of behaviour and the possibility of lawyers to be held accountable in case of misconduct. Complaints against lawyers must be processed expeditiously. For lawyers to discharge their responsibilities they, like the judges, need to be well trained.

The mushrooming of law schools in Zambia with low admission standards, inadequate libraries and inadequately trained teachers can only but pose a serious risk to the high standards demanded of the legal profession. It seems to me that its most likely contribution to law practice is the institutionalization of mediocrity in the practice of law. The problem is that Zambia has adopted the United States' approach to allowing the establishment of private universities without instituting the American controls such as the accreditation system to ensure that universities are centres of intellectual adventures and discovery, and places where students of a subject are prepared by competent teachers. As a result, we have law schools staffed by inadequately prepared law teachers producing large numbers of half-baked graduates. Urgent action to reverse this trend is needed.

#### **14. The Way Forward**

Having discussed judicial reform and challenges facing the judiciary and the legal profession, I should sum up by discussing the way forward. Assuming that all stakeholders agree on the need for judicial reform, the biggest challenge facing the country is going to be figuring out where we go from here. How to proceed is a question that must be addressed carefully and intelligently. This requires us to answer questions such as: What sort of provisions do we want to have in the new constitution to advance the independence, competence and integrity of the judiciary? What do we do to correct and transcend the deficiencies of the past so that our courts can come to enjoy the confidence of the public and become a central element in our democratic society? As we plot the future, we must recognize that while there are bad apples in the judiciary, there are many men and women who have served with competence and distinction. The good judges deserve respect and to be retained in the judiciary.

Kenya provides one approach to reform. The 2010 Kenyan constitution required all judges to step down and reapply for their positions. A vetting

committee was established to ascertain the competence and integrity of the judges. The vetting Committee is composed of Kenyan and international judges. The international judges include Justice Albie Sachs of South Africa, Justice Fredrick Chomba of Zambia and Chief Justice Georgina Woods of Ghana. Among other things they review the judges' judgements. Whether this is what should happen in Zambia is up to Zambians to decide. The biggest challenge is going to be how to ensure that the process is not politicized or hijacked by political opportunists with their own agendas.

If we emulate the Kenyan process we must emulate both its substance and its form – and resist the temptation to adopt its form without its substance. This requires a good understanding of the Kenyan process and how it is being implemented. The Kenyan process is transparent. Its modalities are structured around objectives, processes and values identified by the 2010 constitution. The Review Board is functioning carefully and appropriately within these specific constitutional and statutory parameters. The Board's role is not to carry out a purge but to conduct a vetting process. As the Board has observed, a purge would involve automatic exclusion based purely on actual or presumed membership of an identified group.<sup>54</sup> The vetting procedure, on the other hand, is founded on the rule of law involving the assessment of an individual's responsibility in the light of an overall evaluation of the extent to which the conduct at issue is compatible with the criteria established by the constitution. The Board has warned that determinations of suitability cannot be made in a preordained or mechanical manner. We must be mindful of the fact that many litigants who lose a case are convinced that the court could only have gone against them because of bias or corruption. As the Chief Justice of Kenya, Willy Mutunga, noted in remarks to the members of the vetting Board: "The unparalleled exercise your Board has been tasked with is both delicate and difficult, but it is not for purposes of mere ritual or spectacle. It fulfills a requirement of the constitution as a first step towards realizing the national aspiration of a transformed society. It is an exercise that is unprecedented in the Commonwealth – one that requires a delicate balance of high-level professionalism and deep sensitivity to both the judicial officials whose record your Board continues to examine, as well as the public that has exceedingly high expectations of those who would sit in judgment over its affairs."<sup>55</sup> In deciding the way forward for Zambia, we must likewise strike a "delicate balance" to thoughtfully develop a comprehensive, transparent and workable reform process that duly emulates the integrity, independence and effectiveness that we wish to characterize our judiciary and all branches of government.

## **15. Conclusion**

I would like to conclude my remarks by going back to where I started. Although the Zambian public is not always clear as to how to achieve judicial reform, its thirst for quality, accessible and affordable justice is loud and clear -- and it is our duty to provide it. As we embark on this journey, I want to once again emphasize the importance of the independence of the judiciary, the rule of law and the separation

of powers in a democratic society. These are principles that should never be compromised. An independent judiciary is central to the protection of human rights, promotion of good governance and as a check on executive abuses. It is an essential check and balance on other branches of the government, and in ensuring that laws of the legislature and acts of the executive comply with the constitution. Only a truly independent judiciary, free of pressure from and indebtedness to political parties, public officials, interest groups, and popular whim can be truly accountable to the public it serves. The judiciary can be effective only if it is run by competent, upright and courageous men and women.

I would like to conclude with a piece of advice which is directed at those who wish to join the judiciary. It is taken from the Ecclesiasticus in the Apocrypha. A long time ago, Jesus the Son of Sirach said (as recorded in Ecclesiasticus in Chapter, 7, verse 6): “*Do not aspire to be a judge, unless you have the strength to put an end to influence; for you may be intimidated by a man of rank and so compromise your integrity.*” This piece of advice was given over 3,000 years ago. It is as sound today as it was at the time it was given.

## Notes

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- 1 5 U.S. (1 Cranch) 137, 2 L.Ed.60 (1803)
- 2 (CCT27/95); 1995 (4) SA 877; (1995) ZACC 8; 1995 (10) BCLR 1289.
- 3 1 CCT, 122/11; (2012) 1 All SA 243 (SCA); BCLR 291291; 2011 ZA (SCA 241
- 4 (2012) 1 All SA 243 (SCA); Mohamed, The Independence of the Judiciary (1998) 115 SALJ 658, at pp.662-663.
- 5 ‘Everyone is entitled to a fair and public hearing by an independent tribunal . . .’ (art. 10 Universal Declaration of Human Rights); ‘. . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’ (art. 14.1 International Covenant on Civil and Political Rights). See also art. 7(1) African Charter on Human and Peoples’ Rights.
- 6 Its significance has also led to the development of the United Nations Basic Principles on the Independence of the Judiciary that are designed to ‘secure and promote’ judicial independence (para 1). See also the similar views of the International Commission of Jurists, States of Emergency: their Impact on Human Rights ICJ, Geneva, 1983, pp. 434-7 and J. Nyerere, *Freedom and Socialism*, Oxford, 1968, pp. 109-14.
- 7 Art. 128(1). See also s.103 (1) Constitution of Malawi and Article 91 Constitution of Zambia, 1991.
- 8 289, US 516, 1933.
- 9 International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, A Practitioners’ Guide, 2004, p1
- 10 (CCT44/00; 2001 (3) SA 409; 2001 BCLR 449(cc) 11 April 2001.
- 11 Ibid.

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- 12 S.103 (2). See also s.165 (1) Constitution of South Africa. On the other hand, Zimbabwe's already beleaguered judicial system is also threatened by the power of Parliament to vest adjudicating functions in a person or authority other than court.
- 13 United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August 1985 to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- 14 Universal Declaration of Human Rights, Adopted 1948
- 15 For instance, the Namibian JSC includes a judge appointed by the President (art. 85 Namibian constitution) whilst in Malawi, the judge is designated by the President acting in consultation with the Chief Justice (s.117 Constitution of Malawi). See also the similar position in Kenya and Lesotho.
- 16 This was a particular problem in the South African context and helps explain the determined efforts to ensure that membership of the constitutional Court reflected a broad spectrum of society.
- 17 This is the position in South Africa.
- 18 One advantage here is that it is not uncommon for senior legal academics to have taught the prospective appointees during their legal studies.
- 19 As is the case in, for example, Lesotho, Zimbabwe, Kenya and Namibia. The steady politicization of the office emphasizes the need to ensure the independence of other JSC members.
- 20 In view of the importance of the office-holder, the position of the Chief Justice.
- 21 A futile attempt to provide Presidential accountability appears in the Zimbabwean Constitution. Here if an appointment is inconsistent with the JSC's recommendation, the President must inform Parliament as soon as practicable (s.84 (2)). However, the legislature has no power to overturn the decision and has no duty to even debate the matter. In practice, the task of the JSC is reduced to raising concerns about the suitability of individuals the President wishes to appoint to the Bench.
- 22 In the appointment of judges to the South African Constitutional Court, the President is required to make appointments from a list prepared by the JSC, which contains three names more than the number of appointments to be made. S/he can reject the nominees in which case a supplementary list must be prepared but it appears that the President cannot again ask for such a list. The procedure is necessary because of the multiple appointments to the Constitutional Court, see s.174 (4) Constitution of South Africa 1996. The acute shortage of suitable candidates in several SEA states makes such a system more difficult to operate, but it does provide a mechanism for compromise between the JSC and President over judicial appointments. The 2010 Kenyan Constitution has improved on this by providing the President names which he or she must appoint.
- 23 The Universal Charter of the Judge approved by the International Association of Judges (IAJ) on 17 November 1999.
- 24 See, for example, Constitution of Zambia, 1991, art. 93(2). The system was intended to reflect the approach in the United States.
- 25 In the case of Zambia, the relevant Parliamentary Committee considered that security clearance of candidates was its prime task.
- 26 Cf. Kenya where the Constitution of Kenya (Amendment) Act 1988 repealed the security of tenure provisions in the 1962 constitution. This blatant attempt to make judges serve at the whim of the President provoked considerable internal and external criticism and led to a 1990 constitutional amendment that substantially resorted to the pre-1988 position: see Constitution of Kenya (Amendment) Act 1990. See also G.K. Kuria and A.M. Vaquez,

- 'Judges and Human Rights: the Kenyan Experience' (1991) 35 *Journal of African Law* 142, at pp. 145-6.
- 27 See paragraph 24 of Judicial Ethics in South Africa. The 'code' was issued in March 2000 by the Chief Justice and other senior judges. See also E. Kahn, 'Extra-judicial Activities of Judges' (1980) *De Jure* 188. Widner notes that Chief Justice Nyalali 'agonized' as to whether to accept President Mwinyi's request to chair the commission on the future of the one-party state in Tanzania precisely because he feared it might adversely affect the independence of the judiciary: J. Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, Norton and Company, New York, 2001, pp. 293-4.
  - 28 A good approach is that in Malawi where magistrates are appointed by the Chief Justice on the recommendation of the JSC and hold office until the age of seventy. See s.111 (3) Constitution of Malawi.
  - 29 These extend to such basic items as run down buildings, no lockable cupboards to store records and evidence securely, lack of reference materials and inadequate security for personnel buildings.
  - 30 See, for example, paragraph 7 of the Bloemfontein Statement of 1993: '... it is fundamental to a country's judiciary to enjoy the broad confidence of the people it serves: to the extent possible, a judiciary should be broad-based and therefore not appear (rightly or wrongly) beholden to the interest of any particular section of society'.
  - 31 One of the Principles enshrined in the Latimer House Guidelines states: 'It is recognized that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights. Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment'. The UN Basic Principles on the Independence of the Judiciary state that in the selection of judges there shall be no discrimination against a person on ground of sex (para 10).
  - 32 For example, a report on Zambia found that there were only sixteen female local-court justices out of a total of 907 (1.6 percent). See 'The Dilemma of Local Courts in Zambia' Report of the Inter-African Network for Human Rights and Development, 1998, <http://afronet.org.3a/reports/Lcourts.htm>.
  - 33 Ideally a constitution should also provide for a judiciary that is self-accounting. See, for example, s.118 (3) Constitution of Lesotho.
  - 34 The Latimer House Guidelines call for the development and adoption by each judiciary of a code. Such codes exist in Tanzania, Namibia and South Africa.
  - 36 A suitable body for drafting, revising and overseeing the working of the code is therefore a fully representative JSC.
  - 37 See, for example, the Bangalore Principles of Judicial Conduct which was drawn up by the Judicial Group on Strengthening Judicial Integrity in February 2001 and whose drafting Committee included senior judges from Uganda, Tanzania and South Africa. The Code highlights six values: Propriety (propriety, and the appearance of propriety, is essential to the performance of all the activities of a judge); Independence; Integrity; Impartiality; Equality (ensuring equality of treatment to all before the courts); Competence and Diligence.
  - 38 For example, ensuring a copy of the code in all the major languages is readily available to all litigants.
  - 39 Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence adopted on June 19, 1998, Guideline No. II.
  - 40 Although there seems to be no bar to a President 're-assigning' a serving judge, with their consent, to another position within the public service. See for example, s.119 (7) Constitution of Malawi. Whilst in the past this may have been necessary as a means of making the best

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use of scarce human resources, the provision now poses a potential threat to judicial independence. Of course this does not apply to the secondment of a judge to a senior international judicial posting, such as to the International Court of Justice.

- 41 E.g., s.87 (1) of the Constitution of Zimbabwe.
- 42 See art. 144 Constitution of Uganda. A poor legal knowledge might perhaps fall into this category. Kahn refers to several South African judges who were known amongst practitioners as 'Old Necessity' because either 'Necessity knows no law' or 'Necessity is the mother of invention' (see Kahn, *Law, Life and Laughter*, Juta, Cape Town, 1984, p. 15).
- 43 See, for example, Ogilvie Thompson C.J. in *S. v. van Niekerk* 1972 (3) SA 711 (A) at 720. *Attorney General v. Times Newspaper Ltd.*, 1973 3 All E.R. 54 at p.60.
- 44 There are two modes of conduct that fall within the scope of criminal contempt. One is contempt in the face of the court. The other is conduct calculated to bring a court, a judge or the administration of justice through the courts generally into contempt. It is sufficient 'if it is a scurrilous attack on the judiciary as a whole, calculated to undermine the authority of the courts and endanger public confidence, thereby obstructing and interfering with the administration of justice. See *Chokolingo v. A-G of Trinidad and Tobago* [1981] 1 All ER 244 (PC) at 248' per Gubbay C.J. In *re Chinamasa* [2001] 3 LRC 373 at p. 384.
- 45 403 U.S. 713, 1971.
- 46 *Narmada Bachao Andolan v. Union of India and Others*, (1919) 8SCC 308
- 47 *Ibid.*
- 48 *Ambard v. Attorney General (Trinidad and Tobago)* 1936 AC 322, 335  
*Akinrisola v. Attorney-General of Anambra State*, (1980) 2 NC R 17
49. *Ibid*
50. (CCT 44/00) (2001) ZACC 17; 2001 (3) SA 409 (CC)
- 51 *Ibid.*
- 52 *Ibid.*
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