POLICY BRIEF

A JUDICIARY FIT FOR DEMOCRACY: A SUGGESTION OF REFORM FOCUS AREAS

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INTRODUCTION

The judiciary is often criticized and vehemently attacked for various reasons. Often it is alleged that it is insufficiently autonomous from the Executive. However, the critics rarely pinpoint specific areas of concern for reform. This policy brief intends to highlight some areas of concern that require reform in order to enhance the legitimacy and credibility of the judiciary. These include the funding of the judiciary, the appointment of judges, the removal of judges as well as the judicial culture of service.

FUNDING THE JUDICIARY AND SETTING CONDITIONS OF SERVICE FOR JUDGES

Funding and setting conditions of service for the judges potentially impacts the independence of the judiciary. The judiciary does not make money or raise taxes to fund its operations. It depends on the legislature and executive to be adequately funded. This creates a natural weakness long recognized by scholars and commentators. Alexander Hamilton, for example, considered the lack of power of the purse by the judiciary to be a major weakness, making the judiciary the weakest of the three branches of government, [1] and as a result, De Montesquieu stated that "the judiciary is in some measure next to nothing." [2]

There have been efforts in many countries to overcome this structural weakness of the judiciary by reducing the proximity of the executive from the judiciary when it comes to funding the judiciary and setting conditions of service. It is also assumed that judges who are not paid adequately could be bought or who ever sets the conditions of service for jusges has an indirect mechanism for controlling judges through reward or punishment. [3] As a result, it is often argued that "Pay rates for an independent judiciary should not be set by the executive, the most frequent clients of the courts,"[4] or as Kate Malleson argued, "The way in which judges are ... paid ... provide the potential means for punishing or rewarding judges for their decisions." [5]

When it comes to the setting of conditions of service for judges in Zambia, until 2016 when the constitution was amended, the President had the sole discretion in determining their emoluments.[6] Article 123 of the Constitution of Zambia (Amendment) Act No 2 of 2016 now requires the judiciary to be a self-accounting institution and shall deal directly with the Ministry responsible for finance in matters relating to its finances and to be adequately funded in order to enable it to effectively carry out its functions. Article 232 establishes the Emoluments Commission and Article 264 vests the Commission with power to determine the emoluments of judges. That the Emoluments Commission is the legally correct body to set conditions of service for judges was confirmed by the Constitutional Court in the case of *John Sangwa v Attorney General 2021/CCZ/0012.* The Court, however, correctly acknowledged that this arrangement takes away from the independence of the judiciary as it entails that another body outside the judiciary would set the conditions of service for judges.

The recognition that the setting of salaries/conditions of service by the Emoluments Commission vitiates the independence of the judiciary requires further reflections and a search for a better model for setting the conditions of service for judges.

However, when it comes to the funding of the operational expenses of the judiciary, Kenya provides an option the country may wish to explore. Article 173 establishes the Judiciary Fund which is administered by the Chief Registrar of the Judiciary. The Fund is intended for the administrative expenses of running the judiciary. Through this Fund, the judiciary determines its own budget and presents it directly to the legislature for approval.

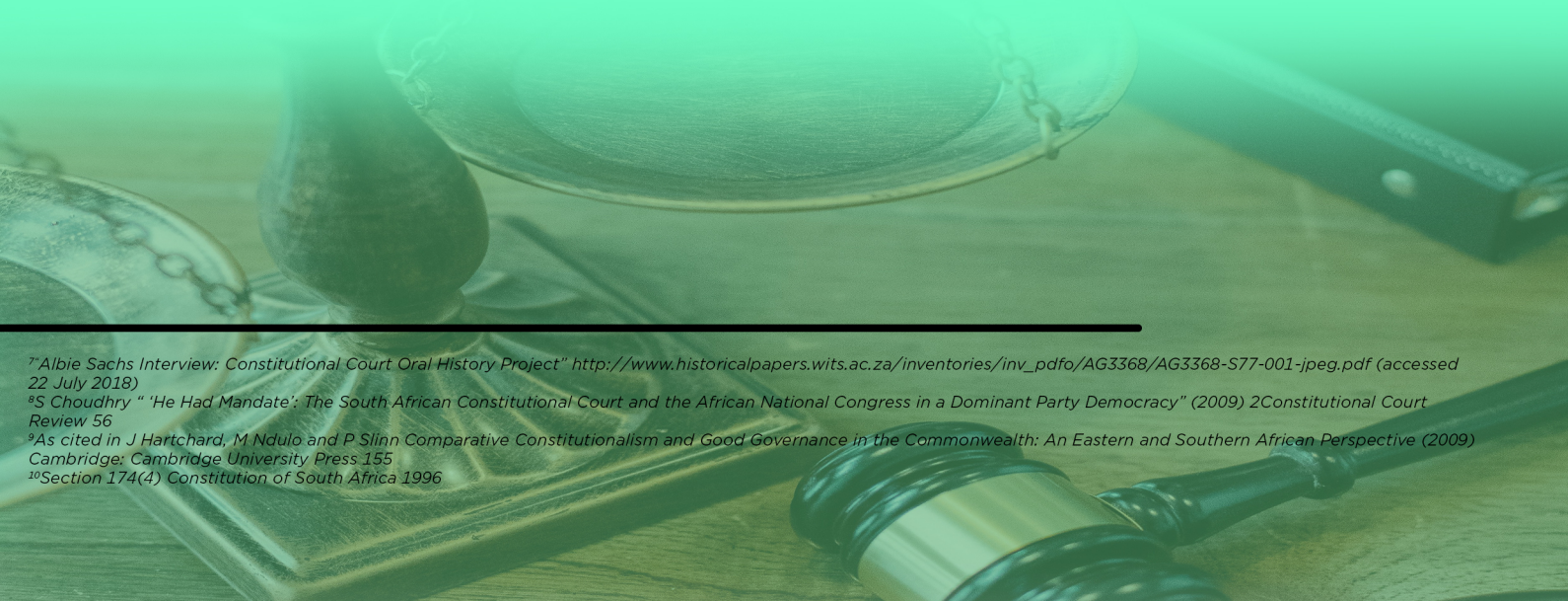
[1] *Cited in Koos Malan, There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism (African Sun Media, 2019), 146*
[2] *Ibid*
[3] *Michael J Beloff, "Paying Judges: Why, Who, Whom, How Much?" (2006) Denning Law Journal, 6*
[4] *Ibid, 22*
[5] *Ibid, 22*
[6] *See section 3 The Judges (Conditions of Service) Act Chapter 277 of the Laws of Zambia*

APPOINTMENT OF JUDGES

When asked why the South African Constitutional Court had made a major contribution towards the development of progressive and democracy enhancing jurisprudence, former Constitutional Court Judge, Albie Sachs stated that it was because the Court from start was staffed by judges who were "in total sympathy with the values of the Constitution."[7] The deployment of judges committed to constitutional values ensures that Judges will carry out their role in fidelity to those values and not see themselves as an extension of the executive. The commitment of a court to the constitutional values therefore depends in large measure on the disposition of the judges staffing that court.

It therefore follows that the mechanism of procedure adopted for appointment of judges is as important as the court itself. As Sujit Choudhry has argued, if that process is politicized, "institutional independence, no matter how well designed will be meaningless."[8] It is cardinal that the appointment system of judges is insulated from being based mainly on partisan political considerations, as former Chief Justice of Zimbabwe, PT Georges stated, "no one should be appointed a judge for purely political reasons when he [or she] is not otherwise fitted for office."[9] Judges appointed for purely political reasons are more likely to see themselves as agents of the ruling regime and not enforcers of constitutional values.

A look at the mechanism for appointment of judges in Zambia demonstrates that the process leaves a lot of room for appointment of executive-minded judges. The Executive appears to have a dominant role in the appointment of judges. Article 140 of the Constitution governs the appointment of judges. The President appoints judges "on the recommendation" of the JSC. The use of the word "recommendation" has been defined by the Supreme Court in the case of Minister of Information and Broadcasting v. Chembo and others SCZ Judgment no. 11 of 2007 narrowly. According to the court, to recommend "implies discretion in the person to whom it is made to accept or reject the recommendation." Thus understood, it means the President has a free hand, untrammelled by any requirements of integrity, impartiality, commitment to constitutional values and competence in constituting the judicial bench. This can be contrasted the situation under the South African Constitution where, in appointing judges of the Constitutional Court (except the Chief Justice and his/her deputy), the President is limited to the candidates listed by the JSC. [10]



[7] "Albie Sachs Interview: Constitutional Court Oral History Project" http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-S77-001-jpeg.pdf (accessed 22 July 2018)
[8] S Choudhry " 'He Had Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2009) 2Constitutional Court Review 56
[9] As cited in J Hartchard, M Ndulo and P Slinn Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective (2009) Cambridge: Cambridge University Press 155
[10] Section 174(4) Constitution of South Africa 1996

Further, the appointment process lacks transparency. Vacancies are never advertised and the whole recruitment and appointment process is shrouded in secrecy. As a result, it is impossible to know what qualified one candidate above another for office of a judge. The reported response of one judge to a parliamentary committee question about his suitability for office is telling. Africa Confidential reported that when the Judge was asked about his suitability for office he answered as follows: "I did not apply for the position I am being considered for…The fact that I have been recognized by the Appointing Authority is evidence of my competence and suitability." [11]

Articles 219 and 220 dealing with the Judicial Service Commission (JSC), which is an important institution in the appointment of judges. Article 220(2)(b) indicates that it is the duty of the Judicial Service Commission to "make recommendations to the president on the appointment of judges." As already noted above, the use of the word "recommend" entails discretion to whom the recommendation is made.

Further, the provisions leave the composition and structure of the JSC to be prescribed in subordinate legislation. Section 5 of the Service Commissions Act Number 10 of 2016 provides for the composition of the JSC in its current form. The members include the chairperson who is appointed by the President, a judge nominated by the Chief Justice, the Attorney General, the Permanent Secretary responsible for public service management, a magistrate nominated by the Chief Justice, a representative of the Law Association nominated by the Association, the Dean of a Public law school nominated by the minister, and another person appointed by the President. As can be seen, the JSC is mainly made up of persons who either directly or indirectly owe their office to the President and, therefore, does not give the impression of a truly independent JSC. This can be contrasted with the South African JSC which seems to have wider representation. [12]

To align the appointment system with the independence of the judiciary, some countries have reformed their laws to provide for an open, transparent, meritorious and inclusive system for the appointment of judges. England and Wales, for example, through the enactment of the Constitutional Reform Act 2005 abandoned the tap-on the shoulder approach in favour of a more open and inclusive system for appointment of judges; the Kenyan Constitution of 2010 requires a "competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary." Zambia might wish to explore these new models of appointing judges which remove the process from the robes of secrecy and Executive control.

[11] *"Opposition MPs accuse the President of putting an unqualified Judge on the Constitutional Court" (2018) 59 Africa Confidential 3*
[12] *Section 178(1) Constitution of South Africa 1996*

REMOVAL OF JUDGES

Although the mechanism through which judges are appointed is the principal too that a regime would use to pack the court, the life of the court can also be affected by the kind of mechanism in place for the removal of judges. Sujit Choudhry argues that the power of removal is directly related to the power of appointment for at least two reasons.[13] First, the power of removal allows the appointing regime to remove individuals who may have been appointed on a non-partisan basis or have behaved independently in order to pave way for a partisan appointment. Second, the power to remove judges may serve as a tool to enforce the "the principal-agent relationship" between the appointing regime and the appointed judge.

In the case of Zambia the power to remove judges is shared between the President and the Judicial Complaints Commission (JCC). Previously, the President could of his/her own motion initiate the process of removal of a judge but this was departed from under the 2016 constitutional amendment. Currently Article 144 governs the removal of judges from office. A judge is removable for mental or physical disability that impedes their performance of their work, gross misconduct, incompetence, and bankruptcy.[14] The removal process can be embarked upon by the JCC acting on its own initiative or by being seized of a complaint made to it.[15] Where the JCC investigates and finds against the concerned judge, the JCC recommends the removal of the judge to the President who shall remove such judge immediately.[16] Although on the face of it, it appears the Executive only plays a peripheral role, it is actually the President who appoints members of the Judicial Complaints Commission as its members are directly appointed by the President. [17] As Hatchard et al argued, leaving such power in the hands of the President "provides a potential weapon through which to intimidate judges and thus help create or maintain a pliant judiciary."[18] By simply wielding that power, even when not invoked, it sends a clear message to judges that the President has the levers of power over them.

[13] *Sujit Choudhry " 'He Had Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2009) 2Constitutional Court Review 57*
[14] *Article 143 Constitution of Zambia 2016*
[15] *Ibid, Article 144(1)*
[16] *Ibid, Article 144(5)(b)*
[17] *Section 20(2) Judicial (Code of conduct) (Amendment) Act No. 13 of 2006*
[18] *J Hartchard, M Ndulo and P Slinn Comparative Constitutionalism and Good Governance in the Commonwealth*

JUDICIAL CULTURE OF SERVICE AND EXCELLENCE

The judiciary can be semi-dysfunctional and of limited service to the people it is intended to serve. As former Chief Justice of Kenya, Willy Mutunga stated, the judiciary can easily be detached from the people and be characterized by "insularity, impunity, judicial and intellectual laziness, self-centeredness, arrogance, insensitivity, and failure to recognize its pro-people calling." [19] To be of relevance and play a transformative role in society, the judiciary should be people-centered, pursue excellence through on-going training and commitment; abandon outdated rituals and posturing; and embrace inclusive technologies. The following may be important factors in trying to reform the judiciary in this regard:

a) Judicial Training

No on is a good judge by default. Being a good judges requires deliberate effort and quality training and appropriate exposure. There should be "continuous training, learning, and regular informal discourses among judges without compromising the right of a judge to dissent."[20] In recognition of the need for continuous training for judges and judicial staff, the Zambian legislature enacted the Judicial Training Institute of Zambia Act 2023. Although this is a step in the right direction, the value of the Institute will depend on how open the judges are open to learning and criticism of the work. Without being open to critical intellectual engagement, as Justice Mutunga bemoaned, such an Institute could easily degenerate into a "colloquium where judges made merry and shunned intellectual reflection and engagement."[21] The judiciary will need a deliberate policy of spporting high quality commentary on the constitutional and ordinary laws as well as on judgments. Academic commentaries and criticisms of judgments must be courted as theu provide a useful feedback on the quality of decision making by the courts.

[19] *Sylvia Kang'ara, Duncan Okello and Kwamchetsi Makokha (eds), Beacons of Judiciary Transformation: Selected Speeches, Writings and Judicial Opinions of Chief Justice Willy Mutunga(Sheria Publishing House, 2021), 52*
[20] *Ibid, 84*
[20] *Ibid, 85*

b) Technology

Technology is insufficiently used by Courts in Zambia. Many countries are increasingly using technology to enhance court efficiency, lower costs for the courts and litigants, secure information and connect with the ordinary person on the streets by making court proceedings easily accessible to the public. It is not clear why simple procedures such as Mention, status conferences and some preliminary motions, for example, cannot be held virtually in Zambia. The use of technology in case allocation could also help the Judiciary avoid accusations of bias in allocating files especially in poiticlly sensitive cases.

c) Dress and Address

How judicial officers are dressed and addressed by the litigants sends a clear message to the people as to the culture of the institution. The judiciary should consider exploring new forms of dress and address that are contextually meaningful and resonate with the public.

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