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Appointment and removal of judges of Zambia's constitutional court: Questioning the legitimacy of the process

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Abstract

The Constitution (Amendment Act No. 2) 2016 provides the qualifications for and mechanisms on the appointment process of judges that superintend on the Constitutional Court. The Court, which ranks in parri passu with the Supreme Court, is mandated to determine matters that are purely 'constitutional' and those out of the realm of other courts such as the High Court. Despite this noble responsibility, there has been public outcry that the appointment process is flawed leading to the appointment of either unqualified persons or those considered loyal to a political party in office. This, in turn, results in a compromise of the court's decision making thus leading to an exacerbation of the erosion of public confidence in the court. Of primary concern also, is the legitimacy of the decisions by the court in matters where there is political interest or where the ruling party seemingly has interest. The article questions the legitimacy of the appointment and removal of judges of Zambia's Constitutional Court arguing that the process is flawed and prone to abuse.

Keywords: Accountability, appointment, constitutional court, independence, removal

Introduction

The selection of constitutional judges is a highly problematic and potentially controversial area. Given the political importance of the constitutional court, there is much interest in who is selected, what the qualifications for selection are, and who has the power to select. The rule of law, as a constitutional concept, can only have meaning in a society which has an independent judiciary. Suffice it to state that the manner in which judges are appointed can adversely affect the independence of the judiciary. Judges who have been appointed on the basis of membership in political parties and/or political connections may not be impartial and independent. A leap into history establishes that when politicians are permitted unfettered powers in judicial selection, the whole administration of justice is more likely than not be put into disrepute ^[1]. The real challenge, however, is whether the promotion of judicial independence continues with the spirit that underscores the observance of the rule of law and good governance. For the judiciary to act in this manner, it needs to have some level of autonomy which requires it to be 'divorced' from the political or other influences ^[2]. Lagon posits that judicial independence has two key components: decisional independence, defined as respect for and compliance with the courts' decisions, and structural independence, which means freedom from political leaders' interference in the selection, promotion, compensation, and daily operations of judicial personnel ^[3].

An assessment of whether a judicial selection process promotes an independent judiciary turns on two important considerations: *first*, the criteria for judicial selection, and *second*, transparency and openness in selection processes. The process of appointing judges is one of the major indicators that signifies whether a country subscribes to the rule of law and democracy. A political appointment process that pays lip service to merit will inevitably produce judges only chosen by their name and will continue to impact the judiciary years after. Constitutionally entrenched criteria for judicial selection is an important safeguard against appointments motivated by political considerations.

¹ JVZ Smit "Appointment, Tenure and Removal of Judges under Commonwealth Principles: a Compendium and Analysis of Best Practice" (2015) 28-29.

² C Mulenga & M Chibbonta "The dearth of judicial independence in Zambia's new constitutional dispensation" (2024) *International Journal of Research in Social Science and Humanities*.

³ SS Lagon "The Role of the Independent Judiciary" (1993) Institute for Contemporary Studies.

The appointment process should ensure that persons selected have the necessary qualifications and experience. Generally, the prospects for an independent judiciary are enhanced when the judicial selection mechanisms are transparent.^[4] It follows therefore that for a country like Zambia to have an independent judiciary and a proper system of rule of law, there is need to have a transparent process of appointing judges to be entrenched in the constitution. A transparent process entails advertising positions and interviewing the judges' in order for the process to be merit based and for the public to have confidence in the judiciary. It can be said that having an independent judiciary is affected when the appointment is not based on the professional competence and suitability of a judge and/or if the judges do not have the proper legal training.

To perform their functions with integrity, judges must be professionally competent, politically impartial and independent from undue influence-whether from the executive, legislature or other influential public or private interests. A country like Zambia must ensure that its provisions regarding judicial appointments conform to institutional standards of judicial independence and accountability such as the UN Basic Principles on the Independence of the Judiciary^[5]. Also, there must be a system that holds judges accountable in cases where they misconduct themselves e.g. misbehaviour which can include commission of a crime, serious or repeated violations of codes of judicial ethics, or corruption^[6].

The article, therefore, questions the legitimacy of the appointment and removal of judges of Zambia's Constitutional Court arguing that the process is flawed and prone to abuse. This is unlike South Africa and Kenya's process Zambia can learn from to enhance its legislation.

Materials and methods

This research adopted a desk based doctrinal research and was primarily qualitative in nature thus relied on examination and interpretation of existing legal material. The primary sources included the Constitution of Zambia (Act No. 2 of 2016) and other relevant international instruments such as the United Nations Basic Principles on the Independence of the Judiciary, 1986. Secondary sources comprised of journal articles, policy papers and publications from civil society groups such as Action Aid Zambia. A comparative study was adopted to assess how other countries such as South Africa and Kenya have implemented the process of appointment and removal of judges. The study involved evaluation of the legal and policy frameworks in order to identify the similarities and gaps. Credit was given in footnotes where applicable in accordance with academic and copyright requirements.

⁴ O Bethuel *et al.* "Appointment of Judges and the Threat to Judicial Independence: Case Studies from Botswana, Swaziland, South Africa, and Kenya" Open Society Institute, 2013.

⁵ Article 10 provides: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives..."

⁶ United States Institute of Peace "Judicial Appointments and Judicial Independence" (2009). Available: <https://www.usip.org/sites/default/files/Judicial-Appointments-EN.pdf> (accessed 1 July 2025).

History of the constitutional court in Zambia

Although the Constitution of Zambia had been amended numerous times, there was no Constitutional Court established until 2016. The history of the Court is rather a peculiar one stemming from 1964. The Independence Constitution of 1964 contained an entrenched Bill of Rights, however, there was fear that any government might arbitrarily amend the Constitution. This led to the entrenchment of the Bill of Rights which gave the High Court jurisdiction to hear matters that pertained to violation of human rights. In 1996, there were Constitutional amendments, however, Part III containing the Bill of Rights remained intact. Successive Commissions such as Mwanakatwe 1993, Mung'omba 2003, and the Technical Committee 2012 all flagged the mischief that the High Court was inadequate in handling constitutional matters, recommended a specialised Court- the Constitutional Court. The most profound reasons advanced were to encourage specialisation and expertise and reduce the delays experienced in the administration of justice in determining cases involving constitutional matters, including human rights and election petitions. On 17 April 2003, Mung'omba Constitutional Commission was given the mandate by government to come up with a people driven Constitution. Following years of information gathering, consultations, and deliberations, it presented a report that recommended establishment of a Constitutional Court- its setting up was based on the Technical Committee's on the Drafting of the Zambian Constitution. In 2016, an amendment was made to the Constitution of 1991, introducing the Constitutional Court whose objective is ensure the full protection of constitutionally guaranteed rights and address breaches constitutional provisions. In this manner, the Court is a vanguard for human rights protection.

The advent of the Court has brought in a new legal dispensation. With about 8 years in operation, the Court faces an arduous challenge in developing jurisprudence regarding constitutional breaches. It also faces an uphill battle to earn people' respect, acceptance, and to prove sceptics wrong, something it can only do by bringing out well-reasoned judgments. John Sangwa posits:

Respect cannot be won through the imposition of severe punishment against anyone who demeans the judiciary. It's the quality of the decisions or judgments that will win the judiciary respect, reverence and acceptance among the people^[7].

It can also be added that to attain this milestone may not be easy given the existence of inadequacies in some legal provisions that impinge on the on the court' jurisdiction. Whereas the establishment of the Court has been long overdue and lauded by a large section of society, it has not been short of criticisms.

Appointment of constitutional court judges

Judges, in common-law systems like Zambia, tend to be appointed from among senior lawyers in private practice. They are appointed in recognition of their achievements in the law, but chiefly by means of peer recognition, never by competitive examination^[8]. The selection of constitutional

⁷ J Sangwa "The Role of the Judiciary in a Multiparty Democracy' *Joint Workshop of Judges and Magistrates of Zambia and Malawi*" Siavonga, 18 February 1997.

⁸ E Bulmer "Judicial Appointments" (2017) *International Institute for Democracy and Electoral Assistance*.

judges is a highly problematic and potentially a controversial area. Given the political importance of the Constitutional Court, there is much interest in who is selected, what the qualifications for selection are, and who has the power to select^[9]. The appointment of judges in Zambia is done by the President on the recommendation of the Judicial Service Commission (JSC)^[10]. An applicant to the office of Judge must show that he/she has the intellectual capacity to contend with the claims and arguments presented by the parties and make reasoned and intellectually sound decisions based on his/her own logic. They must also demonstrate confidence and intellectual capacity to reason with counsel on both sides of the case. The fact that someone has been a legal practitioner for the requisite number of years should not be enough to merit their appointment to the office of Judge of a superior court. John Sangwa posits that this prevents:

...those who seek the office as part of the retirement plan having failed to make the grade in private practice or public sector....appointment to the office of Judge should be seen as a service to the country and not be as a fall-back position when everything else in one's professional life has failed^[11].

For this purpose, the Constitution has laid down the requirements that a person must meet in order for them to qualify for appointment. Article 141(1) (b)^[12] provides that: A Person qualifies for appointment as a judge if that person is of proven integrity and has been a legal practitioner... in the case of the Constitutional Court, for at least fifteen years and has specialised training or experience in human rights or constitutional law.

The above provision sets an appropriately high standard for appointment of constitutional court judges. Proven integrity is necessary for public trust and impartiality. However, the term is subjective and undefined, leaving room for political interpretation. The requirement of specialised training or experience in human rights or constitutional law is consistent with courts mandate of being the guardian of the constitution and fundamental rights. There is some ambiguity around the requirement of specialised training or experience as this begs the question whether one requires additional professional training or judicial cases in the relevant field. There is need to have a standardised benchmark to avoid political manipulation of what amounts to a qualification of being appointed as a judge. The problem is how to ensure that no person or group controls areas of uncertainty in constitutional interpretation by dominating or orchestrating the selection process in their favour^[13]. The problem could perhaps be resolved by not placing the appointment of the constitutional court judges in the hands of a sitting President. It would also be better to make the appointment of constitutional court judges different from that of ordinary court judges like the system is in other jurisdictions. This view is accepted by Harding

who posits that one obvious point unique to constitutional judges is that the system for their selection does not resemble that for ordinary judges. The latter are career judges normally appointed until retirement and enjoying independence in terms of protection of their tenure, salaries and pensions^[14].

Constitutional judges are selected for the task appropriate to a specialized court, normally for a fixed term (amounting to 3, 6, 9 or sometimes 12 years), with shorter terms being renewable only once. This is the position in South Africa where constitutional court judges are appointed for a fixed term of 12 years which ensures renewal despite posing a risk of loss of experienced judges. Contrary to the foregoing, the Zambian constitution under Article 140^[15] provides as follows:

The President shall, on the recommendation of the Judicial Service Commission and subject to ratification by the National Assembly, appoint the:

- a. Chief Justice;
- b. Deputy Chief Justice;
- c. President of the Constitutional Court;
- d. Deputy President of the Constitutional Court; and
- e. Other judges.

This Article mandates the President to appoint judges of the Constitutional Court albeit on the 'recommendation' of the JSC. The meaning of the word 'recommendation' has been subject of debate resulting in its narrow definition by the Supreme Court in the case of *Minister of Information and Broadcasting v. Chembo and others*. According to the court, to recommend 'implies discretion in the person to whom it is made to accept or reject the recommendation'^[16]. The use of discretion in appointment potentially erodes the need to appoint persons in a transparent and fair manner. Considering the the mandate given to the court, the procedure of appointment should have been different. Allowing the president to have the final say on who is to be appointed ties the judiciary to the executive thus consequently affecting their tenure of office and their independence. According to the United Nations Basic Principles on the Independence of the Judiciary, "any method of judicial selection shall safeguard against judicial appointments for improper motives."^[17] This implies that the method of appointment of judges more especially those of the constitutional court must not be used to the selfish advantage of politicians or be used as a playing field for politics. The United Nations Human Rights Committee and the Special Rapporteur on the independence of judges and lawyers have repeatedly recommended the use of bodies that are independent from the executive, plural and are composed mainly (if not solely) of judges and members of the legal profession, they should apply transparent procedures^[18].

The Zambian system has clearly turned a deaf ear to this recommendation leading to criticism on the basis of absence

⁹ A Harding, The Fundamentals of Constitutional Courts (International IDEA Constitution Brief No 1, April 2017) <https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf> accessed 1 July 2025.

¹⁰ Article 140.

¹¹ J Sangwa "Brief to the Chief Justice on the need for a conversation on writing of court judgments after the *Savenda Management Services Limited v Stanbic Bank Zambia Limited* case" 12 April 2018, 15.

¹² Constitution of Zambia Act No. 2 of 2016.

¹³ E Bulmer "Judicial Appointments" (2017) *International Institute for Democracy and Electoral Assistance*.

¹⁴ A Harding, The Fundamentals of Constitutional Courts (International IDEA Constitution Brief No 1, April 2017). Available: <https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf>. (Accessed 1 July 2025).

¹⁵ Constitution of Zambia Act No. 2 of 2016.

¹⁶ SCZ Judgment no. 11 of 2007

¹⁷ Article 10.

¹⁸ <https://www.icj.org/cijlcountryprofiles/myanmar-introduction/judges/appointment-and-promotion-of-judges-security-of-tenure> (accessed 18 February 2025).

of transparency. Kaaba argues that vacancies are never advertised and the whole recruitment and appointment process is shrouded in secrecy thereby rendering it impossible to know what qualified one candidate above another. The Judicial Service Commission (JSC), though empowered to “make recommendations to the president on the appointment of judges”^[19], the discretionary nature of the term “recommendations” has raised concerns as it gives excessive leeway to the President and may undermine the independence of the judiciary^[20]. One of the key criticisms of judges’ appointment lies in the legislative framework governing the composition of the JSC. Section 5 of the Service Commissions Act No. 10 of 2016 sets out the current composition, which includes a chairperson appointed by the President, the Attorney General, a Permanent Secretary, a judge and a magistrate nominated by the Chief Justice, a representative of the Law Association of Zambia, the Dean of a public law school nominated by the Minister, and another member appointed by the President. An argument is raised here that the majority of these members either hold office at the pleasure of the President or are connected to the Executive, directly or indirectly. This raises concerns about the extent to which the JSC can act independently and impartially in the judicial appointment process^[21]. John Sangwa reiterates thus:

...that institution is weak and there is a control of the executive. He stated that how you are selected ensures the independence of the institution. Nobody knows how these judges are selected. Let there be a transparent system where you advertised, people are openly interviewed and you have score sheet. Some body can say I was appointed on merit. Right now there is no single judge in this country that can claim to have been appointed on merit. That undermines the independence of the institution and the independence of the individual judges^[22].

The Constitution may have satisfactory requirements for being appointed as a constitutional court judge by placing emphasis on expertise and integrity but the lack of clarity on what amounts to integrity and lack of procedural transparency, erodes the intended purpose of Article 141. It follows, therefore, that it is prudent to have a public vetting process in the appointment of judges otherwise it would be difficult to know what amounts to proven integrity. This would require advertising for the positions or placing the list of judges to be appointed in public domain to give the public an opportunity to review those to be considered for the position

Lessons from south Africa and Kenya

To have an independent judiciary, it is important to have a transparent and a credible based appointment process and removal. South Africa and Kenya have shown constitutional commitment to judicial independence and have established legal frameworks that are comprehensive in managing the appointment and removal procedures. Before the advent of

democracy in South Africa, the judiciary was almost exclusively made up of white males. Black people, who constituted the vast majority of the populace, were excluded. The judicial appointment process was shrouded in secrecy and subject to pervasive political influence. The process of judicial appointment has changed dramatically following South Africa’s transition from apartheid to constitutional democracy.

Regarding Kenya, the 2010 Constitution introduced far-reaching reforms to judicial appointments. The JSC was expanded and given more powers, and the appointment process became more open and transparent. Today, the Kenyan judicial appointments process is one of the most advanced in Africa^[23].

South Africa

In South Africa, the Constitutional Court is the apex court as opposed to our system in Zambia where the court is at par with the Supreme Court. The constitutional court judges in South Africa are appointed by the president from a list drawn up by the JSC. The judges serve for a term of twelve years. Sections 174 to 178 of the Constitution deal with the appointment of judicial officers. The Commission does this after calling for nominations and holding public interviews. Then the President, after consultation with the Chief Justice and the leaders of political parties represented in the National Assembly, chooses the judges from this list. Section 174(1) of the Constitution provides that “Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.” This provision is too broad in how it has been couched, however guidelines have been given. *Appropriately qualified* refers to the candidate’s academic and professional qualifications, technical competence, skill and experience. It is not a reference to academic qualifications only, but also covers legal knowledge and experience. *Fit and proper* entails a holistic assessment of a candidate’s suitability for appointment to the bench, with reference to a broad and cumulative reading of multiple factors, which will include integrity, knowledge, scholarship, experience, dignity, humility, judgment, wisdom, independence, character, courage, forensic skill, capacity for articulation, diligence, energy and industry. Character includes considerations such as whether a candidate is honest, truthful, and trustworthy and whether they keep their word^[24].

The absence of such guidelines in Zambia, has created a gap and subject to different interpretations by those in power and rendering the appointment process subject to all forms of manipulation leading to an institution with judges who may not have the required qualifications. Arising from this, scholars like Sishuwa called for the removal of all Constitutional Court judges for gross misconduct and incompetence. Commenting on constitutional lawyer, John

¹⁹ Article 220(2)(b).

²⁰ O Kaaba “‘South Africa Look What You Have Done to Us’: Exploring the Reasons for the Likely Failure of the South African Constitutional Court Model in Zambia’ Paper presented at the Constitutional Court Review Conference IX, Johannesburg, 2–3 August 2018.

²¹ Ibid.

²² <https://diggers.news/local/2024/09/20/hh-has-rigged-the-system-to-win-2026-elections-sangwa/> (accessed 16 June 2022).

²³ O Bethuel *et al.* “Appointment of Judges and the Threat to Judicial Independence: Case Studies from Botswana, Swaziland, South Africa, and Kenya”. Available: https://law.siu.edu/_common/documents/law-journal/articles-2020/spring-2020/4-dingake-final.pdf (accessed on 16 June 2025).

²⁴ Judicial Service Commission “Summary and Explanation of the Criteria and Guidelines Used by the Judicial Service Commission When Considering Candidates for Judicial Appointment” (2017). Available: https://www.concourt.org.za/images/Criteria_and_Guidelines_Used_By_The_JSC_For_Judicial_Appointment.pdf (accessed 5 June 2025).

Sangwa's observation that former President Edgar Lungu "dribbled" Zambians when he appointed unqualified individuals as Constitutional Court judges, Sishuwa agreed and observed as follows.

The Constitutional Court has the final say on all matters relating to the interpretation of the Constitution including the election of the President, so those serving on it should be qualified, competent and impartial individuals with an intimate knowledge and understanding of the Constitution. The fact is that if a sitting president is able to both rig an election and control the Constitutional Court, it is hard to see how he or she can ever be voted out of office. In appointing unqualified individuals to the court, Lungu may have reasoned that it represented the best way of preparing for any possible legal challenge to his election and the constitutional battles over his eligibility or qualification to stand again ^[25].

In the case *Mwanza and Another v The Attorney General* ^[26] regarding the appointment of the Deputy President of the Constitutional Court (Judge Arnold Shilimi), the petitioners submitted that he has no judicial history, experience in adjudication or competence in managing judicial affairs, lacks specialized training in human rights or constitutional law and therefore his appointment is without merit. It was also alleged that the appointment of Justice Greenwell Malumani as High Court Judge is untenable as he had not attained the requisite ten years post bar admission as required by Article 141(1)(d) of the Constitution. As regards Justice Kenneth Mulife, the petitioners argued that his elevation to the Constitutional Court was untenable as there was an action before the Courts of law questioning his competence and impartiality. Assailing the appointment of Justice Mwiinde Siavwapa as Judge President of the Court of Appeal, the petitioners had two main contentions. Firstly, that the Constitution does not specifically prescribe that the Judge President of the Court of Appeal is to be appointed by the President as this appointment ought to be administratively done by the Chief Justice in accordance with section 21 of the Judiciary Administration Act No.23 of 2016. In view of the foregoing, Counsel referred to the principle that 'express mention of one thing, is the exclusion of another' to highlight the omission by the Constitution to expressly include the appointment of the two stated judge positions on the list of Judges to be appointed by the President under Article 140 of the Constitution. He emphasised that the President has no power to appoint the Judge President and the Deputy Judge President of the Court of Appeal.

In comparison to South Africa, section 176(1) provides that "A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge" ^[27]. The above provision promotes independence because the judges can make decisions without fearing since this entails job security. They can pass decisions without fear of any political powers or appointing authorities. Further, the provisions provides for an exception when an Act of parliament extends the term of office. This is important because it brings in an institutional check since

parliament extends it and not the executive and further prevents any extension due to political favours. The South African system also ensures the system is not static as fresh minds can be appointed bringing in diversity in judicial thinking.

The composition of the JSC of South Africa is one that strikes a balance. Section 178 provides that "*Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly.*" The requirement of three members coming from the opposition prevents the JSC being dominated by the ruling party. This protects the judiciary from partisan control and consequently strengthening public confidence in the appointment process. In comparison, the Zambian JSC is entirely composed of members appointed by the President and this undermines the impartiality of the judiciary and more specific those of the constitution court that have to make decisions in relation to election results and those in the ruling and opposition parties. South African inclusion of the members of an opposition political party entails the promotion of pluralism, checks and balances and judicial independence. Freedom of judges has a close relationship with judicial appointment because the appointment system has a direct bearing on the impartiality, integrity and independence of judges ^[28].

Kenya

The process of appointing judges in Kenya is merit based and transparent. This also stems from the constitutional reforms the country underwent in order to gain public confidence in the judiciary which faced a lot of negative criticism from the public after 2007 elections. The Constitution 2010 has brought changes in the judicial appointment and removal. The provisions for appointment and removal of judges is provided in chapter 10 of the constitutions whilst the procedural requirements are provided for in the first schedule of the Judicial Service Act 2011 which provides as follows:

Where a vacancy occurs or exists in the office of a judge, the Chief Justice shall within fourteen days place a notice thereof in the Gazette and the Commission shall thereafter

- a. Post a notice on its website;
- b. Send notice of the vacancy to the Law Society of Kenya and any
- c. Other lawyers' professional associations; and
- d. Circulate the notice in any other appropriate manner ^[29]

Following the above provision, the applicants have to fill in a form which can be obtained from the Commission and their website. Applicants are required to provide background information necessary and information necessary but not limited to among other things; academic qualifications, pro bono activity, employment, legal practice, judicial and financial discipline.... Further, the applicant is required to provide references who can confirm the applicants past and present employment; if in legal practice detailed information about the applicant's practice of law within the past five years; and if engaged elsewhere, detailed information on that engagement in the last five

²⁵ <https://www.lusakatimes.com/2020/03/14/265837/> (accessed on 19 June 2025).

²⁶ (2023) CCZ/005).

²⁷ Constitution of South Africa, 1996.

²⁸ A Sarkar "Appointment of Judges: A Key Issue of Judicial Independence" (2004) 16 *Bond Law Review* Issue 2.

²⁹ Rule 3(1).

years, a sample of the applicants writing a declaration of income and liabilities at the time of application; and a brief written summary of the applicant's bio-data including legal education, and legal experience^[30].

The fact that applicants can obtain forms from the Commission and their website ensures equality in that not only those that are privileged can obtain the forms. Also, the requirement of background information and academic, employment record ensures objectivity in assessing applications based on track record and not political decisions. From the procedure above, a candidate's integrity and reputation is assessed through the provision of references both professional and character. It is essential for judges to have clarity of thought, analytical skills and legal reasoning and therefore the requirement legal practice, writing sample or publications is cardinal. The process requires availing proof of income and liabilities which guards against judicial corruption. It can be said to be a procedure that is self-filtering as candidates that do not qualify will be deterred from applying. Another important aspect is the vetting process and publication of the names of applicants. Rule 9 provides as follows:

- a. Upon the expiry of the period set for applications, the Commission shall.
- b. Issue a press release announcing the names of the applicants; publicise and post on its website the place and approximate date of the Commission meeting for interviews;
- c. cause the names of the applicants to be published in the Kenya Gazette;
- d. Invite any member of the public to avail, in writing, any information of interest to the Commission in relation to any of the applicants; and
- e. Interview any member of the public who has submitted any information on any of the applicants, and such information shall be confidential.

Rule 9 reflects what amounts to transparency and appointment on merit. The public is involved in the appointment process of judges in Kenya, a process which promotes confidence in the judiciary. The procedure in Zambia is far from being similar to the Kenyan procedure of appointment. Suffice it to argue that the procedure is politically influenced and lacks transparency due to the absence of a provision on advertising to the public for any available vacancies. Despite the foregoing, an advert was done in April 2025 by the JSC calling for application for the vacant positions of judge in the High Court and Court of Appeal. The advert referred to Article 140 of the Constitution of Zambia which does not have express provision for advertising for the position for judges but only provides for appointment by the President. Further, the advert was inviting applications from suitably qualified candidates currently serving within the Judiciary to be recommended for appointment as Judges of the Court of Appeal or High Court. Though laudable, there is need to go beyond advertising, the candidates need to be interviewed and a background check should be done to assess their integrity and this can be achieved if our constitution makes provision for such procedure.

³⁰ Rule 4.

In the case of *Mwanza and Another v The Attorney General*^[31], the petitioners assail the transparency of the process adopted by the JSC in recommending suitable persons for appointment and allege that some of the Judges appointed did not meet the requisite criteria set by the Constitution. The petitioners' allegation impugned the appointment of the judges on the basis that the process that culminated in their appointments as judge did not include advertisements of the vacant positions and therefore, the appointments contravened the Constitution. The Constitutional Court held that the Constitution is silent on the procedure to employ when the JSC is identifying names for recommendation for appointment as judge to the President. The court stated, *inter alia*, that:

The upshot is that the process for the appointment of judges enshrined in the Constitution does not require advertisements to be made or interviews to be publicly broadcast. If the framers of the Constitution had intended for the appointment of judges to be advertised and interviews made public, they would have expressly provided for such advertisements and public interviews. Thus, an appointment to the office of judge cannot be unconstitutional on account of not being advertised because there is no mandatory requirement in the Constitution to advertise vacancies occurring within the superior courts or publicize the interviews for those shortlisted for judgeship. While advertising promotes transparency, it may also create setbacks. For instance, it could politicise applications or discourage qualified but modest candidates. Zambia would need to adapt the model carefully to avoid these risks. The literal interpretation of the reasoning of the court is that the Constitution not provide for advertising of positions for judges to be filled. A contrary argument can be raised that there is nothing wrong with advertising either. The latter is anchored on ensuring transparency, credibility and integrity of the process without which public confidence in the process stands eroded. To avoid the continued erosion of the process, safeguards must be in place such as amendment of the law to allow for advertisement and vetting of candidates. A constitutionally entrenched criteria acts as a vanguard against appointments motivated by political considerations. Also, openness and transparency allows principled public debate about the suitability of the judge which is manifested by publicly advertising vacancies, disseminating the criteria for selection, and conducting public interviews.³² Further, it prevents the executive from handpicking persons to hold the office of judge. As Guerra posits, a judge is only subject to the general and equalitarian mandates of the law if he/she does not owe obedience to any other particular will, not even his own. In the probably exaggerated view of Montesquieu, the judge is the mouth that pronounces the words of the law.³³ Ultimately, the process of appointment must minimize political influence^[34].

³¹ (2023) CCZ/005).

³² O Bethuel *et al.* "Appointment of Judges and the Threat to Judicial Independence: Case Studies from Botswana, Swaziland, South Africa, and Kenya" 2020. Available: https://law.siu.edu/_common/documents/law-journal/articles-2020/spring-2020/4-dingake-final.pdf (accessed on 16 June 2025).

³³ LL Guerra "The Judiciary and the Separation of Powers" Conference for Constitutional and Supreme Court Judges from the Southern African Region, 2000.

³⁴ M Ndulo "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System" (2011) 2 *Zambia Social Science Journal* 3.

Removal of judges

In Zambia, judges can be removed from office based on different ground which are provided for in the Constitution. The Constitution provides for the removal of judges under Article 143^[35] as follows:

A judge shall be removed from office on the following grounds:

- a. A mental or physical disability that makes the judge incapable of performing judicial functions;
- b. Incompetence;
- c. Gross misconduct; or
- d. Bankruptcy

The procedure for removal of a judge is provided for in Article 144 which provides, among others, that the process is initiated by the JCC or by a complaint made to it based on the grounds specified in Article 143. It is worth noting that Article 144 has a more thorough procedure for removal on mental or physical disability but nothing elaborate on incompetence, gross misconduct or bankruptcy. Article 20 of the United Nations Basic principles on the independence of the judiciary state that “*decisions in disciplinary, suspension or removal proceedings should be subject to an independent review...*” Flowing from this, it is argued that a disciplinary action concerning a judge should be referred for examination by a neutral third party, not directly involved in the initial investigation or decision-making process, who assesses whether the disciplinary action was fair, reasonable, and followed proper procedures, often used when an employee appeals a disciplinary outcome. This means that when a judge has been suspended or removed from office, an independent body should review such decision to ensure fairness and due process and protects judges from political retaliation

Unfortunately, the Constitution (Amendment Act No 2) 2016 is bereft of a fair procedure on the removal of judges. For instance, the recent removal of the constitutional court judges: Judge Anne Sitali, Judge Mungeni Mulenga, and Judge Palan Mulonda on the grounds of misconduct and incompetence due to the decision passed against the President when he was the opposition leader raises concerns. This decision to remove the judges puts a lot of fear in other judges in the constitutional court and other judges generally especially that their tenure of office is not secure due to the appointment process being porous. This affects their impartiality and independence in that their loyalty will be for the current ruling party. Furthermore the fate of the judges is unknown once the ruling party is out of power and therefore affects their job security. The forgoing proves the importance of an independent body without ill motives to be involved in the appointment of judges and an independent review to be done in their disciplinary process. The composition and appointment of the JCC is questionable. Although on the face of it, it appears the President only plays a peripheral role, it is actually the President who has a free hand in constituting the JCC. Its members are not appointed by the JSC but are directly appointed by the President^[36]. The composition is provided

for under Judicial (Code of Conduct) (Amendment) Act^[37] as follows:

1. There is hereby constituted a Judicial Complaints Authority which shall consist of five members who have held or are qualified to hold high judicial office.
2. The members of the Authority shall be appointed by the President subject to ratification by the National Assembly^[38].

It is ironic that the members, who are lawyers, have to inquire into and pass a verdict on the judges before whom they supposedly appeared before. Suffice it to say that judges should be ‘tried’ by their peers as was the case prior to 2016. This notwithstanding, Sujit Choudhry^[39] argues that the power of removal is directly related to the power of appointment for at least two reasons. 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. Hatchard *et al.* argues that 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’^[40]. It follows, therefore, that the removal process in Zambia is one that also affects the independence of the judiciary for they have to act loyal to a sitting president for fear of losing their jobs and this would consequently affect the judgments passed.

South Africa

In South Africa, the removal of a judge by the JSC is provided for in Section 177 which provides as follows:

1. A judge may only be removed from office if:
 - a. The JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and;
 - b. The National Assembly calls for the judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members
2. The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
3. The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)^[41]

This provision incorporates the National Assembly in the removal process and this is done by the JSC which has a balanced composition of members by incorporating members of the opposition. This, therefore, means that the removal process of judges is not biased with its decisions based on political decisions. The involvement of the

³⁵ Constitution of Zambia (Act No 2 of 2016).

³⁶ Action aid Zambia “Parliamentary Submission on Challenges on Reforming Judiciary”. Available: https://zambia.actionaid.org/publications/2023/zambian-judiciary-reforms-needed-actionaid-tells-parliament#_ftn4 (accessed on 10 June 2025).

³⁷ Act No 13 of 2006.

³⁸ Section 20(1)(2).

³⁹ S Choudhry “He Had Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 57.

⁴⁰ J Hatchard, M Ndulo & P Slinn “Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective” (2009) 155.

⁴¹ Constitution of South Africa.

National Assembly which is a legislative body shows a system of transparency and accountability. Furthermore, the National Assembly comprises members from different parties who would also be part of the decision to remove judges, they would be given an opportunity to scrutinize the reason behind removal of such judge whether ill-founded or not without having any hidden motives. In Zambia, both JSC and JCC is not well structured due to the membership and their appointment. The two commissions are cardinal in shaping the independence of the judiciary and therefore who comprises of these commissions must be one who is not affiliated to any political power.

Conclusion

The procedure of appointing and removal of constitutional court judges in Zambia is one that is at the heart of achieving judicial independence and is provided for in the constitution under article 140 and 144 primarily. The article endeavored to analyse the adequacy of these provisions in upholding judicial independence and freedom from political interference. It has demonstrated that the Zambian system still places much authority in the executive branch particularly in the appointment process and removal process of judges which has raised concerns as to whether the procedure is transparent and meritorious and whether the concept of separation of powers and rules of law are being upheld. Drawing lessons from South Africa and Kenya has shown that there is need to improve both our legal and institutional frameworks. There is need to clearly codify criteria for appointment and removal of judges, reviewing the composition of institutional framework such as the JSC in order to have an unbiased removal procedure. For a democratic country like Zambia to have a constitutional court which promotes constitutionalism, impartiality and has public trust, there is need for fair and transparent procedures of appointment and removal of judges.

In view of the foregoing, we recommend the following: *firstly*, review the composition of the JSC and make it more balanced in order to make it independent of the executive. This can be done by involving stakeholders such as civil society groups, members of the National Assembly from both the ruling and opposition in order to minimize executive influence. *Secondly*, introduce a system of advertising to the public when there are vacancies and come up with a merit based criteria as well as conducting interviews for the candidates in order to improve public confidence in the judiciary. *Thirdly*, precision in the definition of grounds of removal in statutes in order to avoid abuse. *Fourthly*, align with international standard which encourage a fair and nondiscriminatory procedure in appointing judges.

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