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Judicial Review in Zambia: A Remedy or Subversion of Justice?

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Abstract
Judicial review is a public law remedy which allows citizens to institute court proceedings to challenge a decision made by public bodies or authorities. It is a necessary tool for ensuring checks and balances, accountability, and adherence to the rule of law. Judicial review, if properly employed and tenable, protects the citizenry from abusive use of power reposed in public decision-makers. Unfortunately, the remedy of judicial review in Zambia has often not achieved the desired goal due to its discretionary nature, inconsistencies in the decisions by the court and the nonchalant approach of the court in cases that are smeared with political clutter. This has led to questions on its effectiveness as a tool for ameliorating wrongful actions by public bodies or persons. The narrative perpetrated also is that judicial review militates against the rendering of justice to persons that seek the intervention of the courts as vanguards of violations by public bodies or persons.
The article argues that the remedy of judicial review in Zambia is ineffective and a subversion of justice.

Keywords: Judicial Review, Remedies, Justice, Political, Leave

1. Introduction

Judicial review is a mechanism that allows the court to inquire into the decision-making process of a public body and person entrusted with statutory powers in the exercise of those powers.[1] It is, therefore, not concerned with reviewing the merits of the decision but rather a challenge to how a decision has been arrived at.[2] Accordingly, the task of the judges is to ensure that the exercise of any power delegated to a public body or person is lawful according to the power given to that body or person by an Act of Parliament.[3]

Before an action for judicial review can be commenced, some preconditions must be satisfied: *first*, the decision maker must be a public person or body and this includes "private tribunals and institutions which have made orders...[not] in accordance with such power and...rules of natural justice".[4] *Second*, the decision maker must have been exercising "public law" powers or performing public functions.[5]; *third*, the decision will, if validly made, lead to administrative action by an authority endowed by law with executive powers; and *fourth*, it must establish exceptional grounds that without reviewing the decision, he/she would suffer a fundamental failure of justice[6].

Judicial review proceedings have a two-tier approach: leave and merit stages. At the leave stage, the court considers whether the applicant has a sufficient interest in the matter and whether the claim raises arguable grounds for review. The rationale is to eliminate frivolous, vexatious or hopeless applications without the need for a substantive hearing and to ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further

[1] It also includes "private tribunals and institutions which have made orders...[not] in accordance with such power and...rules of natural justice"- *Sondashi v Miyanda, MP* [1995] ZMSC 3.
[2] *Nyampala Safaris (Z) Limited & Others v Zambia Wildlife Authority & Others* [2004] ZR 49.
[3] 562.
[4] *Sondashi v Miyanda, MP* [1995] ZMSC 3.
[5] *Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General* [1995] ZMSC 51.
[6] *Attorney General v Mutembo Nchito* [2016] ZMSC 19.

investigation.[7] If leave is granted, the application proceeds to the merit stage where the matter is considered on the merits of the claim. The court will review the decision-making process and determine whether any of the grounds have been satisfied.[8]

The purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected. [9] It is an essential tool for ensuring good governance, upholding the rule of law, and a great weapon in the hands of the judges who must observe the constitutional limits set and exercise careful consideration of the public interest in each case. [10] Notwithstanding the positive effects of judicial review, these proceedings may subvert justice thereby eroding their essence. Also, the discretionary nature of the remedy sought offers little guarantee to the applicant that the successful proof of their case will yield the desired results. Further, there are concerns about the possible bias by the court regarding cases that are smeared with political clutter thus leading to inconsistent and unpredictable outcomes. The latter is the most concerning and worrisome as the court, which is the vanguard of justice, must be robust, independent, and apply the law impartially and fairly without bias or political influence.

In view of the foregoing, the article argues that the remedy of judicial review in Zambia is ineffective and a subversion of justice. It posits that judicial review proceedings, as currently conducted, *(a)* are not an effective remedy to wrongful actions by public bodies or persons; and *(b)* militate against the rendering of justice to persons that seek the intervention of the courts who are expected to be vanguards against violations by public bodies or persons.

2. Nature of Judicial Review

Judicial review has been regarded as unconcerned with the merits of a particular case or with the justice or injustice of the rules which are being applied, but rather as being concerned with how a decision was made. Thus, decision-makers must not only correctly exercise their powers as prescribed by the statute, but, must also comply with the rules of reasonableness, natural justice and fairness. [11] In essence, a court faced with an action for judicial review, strives to ensure adherence to some of these objectives: *(a)* that Acts of Parliament have been correctly interpreted; *(b)* that discretion conferred by statute has been lawfully exercised; *(c)* that the decision maker has acted fairly; and *(d)* that the exercise of power by a public body does not violate human rights.[12]

A person or body seeking judicial review can commence an action on several different grounds. In ***Council of Civil Service Unions v Minister for the Civil Service***, Lord Diplock reclassified the existing grounds of review as: "illegality"; "irrationality"; "procedural impropriety" and the 'possible adoption in the future of the principle of "proportionality".' [13] By "illegality", it entails that the decision-maker must understand correctly the law that regulates his or her decision-making power and must give effect to it. In other words, they must act within their legal parameters failing which their decision would be ultra vires. The doctrine of ultra vires has two facets to it; *(a)* where the administrative authority acts contrary to the powers given under a statute or *(b)* where the administrative authority fails to comply with the procedures as required of them. [14] "Irrationality" is succinctly referred to as "Wednesbury unreasonableness" applies to a decision which is so outrageous in its defiance of logic or acceptable moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it. [15] "Procedural impropriety" refers to failure to observe basic rules of natural justice, failure to act with procedural fairness, failure by an administrative tribunal to observe procedural rules even if such failure does not involve any denial of natural justice.[16] "Proportionality" entails that the limitation imposed by a law must not be more than is reasonably necessary to achieve the legitimate object. The law must not be drafted too widely so as to net everyone including even the untargeted members of society.[17]

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[7] *Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General* [1995] ZMSC 51.

[8] There are essentially four grounds upon which judicial review proceedings may be brought: *(a) illegality* which occurs when a decision is made outside the legal bounds, exceeding statutory powers or failing to follow proper procedures; *(b) irrationality* where a decision is so unreasonable that no reasonable person could have reached the same conclusion; *(c) procedural impropriety* where the decision made is devoid of observance of the rules of natural justice; and *(d) proportionality* where the decision is beyond the intention of the empowering legislation thus defying its legitimate object.

[9] *FTJ Chiluba v Attorney General* [2003] ZR 153.

[10] *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 1 AC 240, per Lord Scarman.

[11] H Barnett *Constitutional and Administrative Law* 10th ed. (Routledge: London and New York, 2013), 563-564.

[12] H Barnett *Constitutional and Administrative Law* 10th ed. (Routledge: London and New York, 2013), 563-564.

[13] *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374.

[14] AK Chewe *Administrative Law in Zambia: Cases and Materials* (JUTA: Cape Town, 2020) 243. The doctrine of ultra vires can fall into any of the following: *(a)* substantive ultra vires; *(b)* procedural ultra vires; *(c)* abuse of power; and *(d)* failure to exercise power. See the cases of: *Mushambatwa v Livingstone Municipal Council and Another* [1992] ZMHC 6; *Attorney General v Local Government Election Commission* [1990-1992] ZR 182 (HC); *William Harrington v Dora Siliya & Attorney General* [2011] 2 ZR 253; *Musonda v Attorney General* [2014] ZMSC 23; *Mooto (SG Zambia Association of Timber and Forestry Based Industries) v Director of Forestry and Another* [2017] HP 1016; *Attorney General v William Muzala Chipango* [1971] ZR 1 (CA); *Zambia Democratic Congress v Attorney General* [2002] ZMSC 6.

[15] *Council for Civil Service Union v Minister for Civil Service Union* [1985] 1 AC 374 at 410. In *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, Lord Greene MR said "A person entrusted with a decision must so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider, he must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting unreasonably."

[16] *Council for Civil Service Union v Minister for Civil Service Union* [1985] 1 AC 374 at 411.

[17] *Christine Mulundika & 7 Others v The People* [1996] ZMSC 26. The principle was applied in *Attorney General v Clarke* [2008] ZMSC 4 where Sakala CJ said, "the deportation of the Respondent was disproportionate and it is for this reason that we dismissed the appeal. And on the facts of this case, we do not see any reason why

These grounds are not rigid categories which are mutually exclusive from each other; an applicant can rely on more than one of them. If an action for judicial review is brought before the court, the applicant must specify the remedy sought. If the court decides that the body or person whose decision is being challenged is private, then the remedy of the aggrieved individual will lie in private law. The court will look at the functions of the body or institution, whose decision is being challenged, to determine if it's a public one. The test is not whether or not the authority is a government body as such but, rather, whether it is a body exercising powers analogous to those of government bodies.[18]

3. Control of Administrative Actions

In Zambia, the control of administrative acts or omissions is governed by the Rules of the Supreme Court (RSC) 1999 (commonly referred to as the White Book) and the High Court Act, Chapter 27 of the Laws of Zambia which lays the foundation. According to s 10 of the High Court Act, where there is a vacuum in matters of practice and procedure, the court shall apply the law and practice as observed in England. This position was reiterated in **Rodgers Chibwe v Kasempa District Council** where the supreme court said 'the White Book applies in Zambia by way of default procedure to fill in the gap where there is no specific provision in our own local statutes and rules on a particular subject matter.'[19] Suffice it state that Order 53 RSC provides a comprehensive procedural framework outlining the grounds for judicial review, the parties involved, the process for seeking remedies, and the nature of available remedies. It clarifies who may initiate judicial review proceedings, the circumstances under which third parties may join the proceedings, and the evidence which may be presented during the hearing.

Order 53 allows the High Court to exercise supervisory jurisdiction over the decisions and proceedings of inferior courts, tribunals, and public bodies performing administrative functions. It allows a person to challenge an administrative action or omission by seeking a prerogative order such as mandamus (compelling an authority to perform a duty), certiorari (quashing an unlawful decision), or prohibition (preventing an unlawful action from taking place). In appropriate cases, remedies such as declarations, injunctions, or damages may also be sought.

Order 53 also provides guidance on who may bring an application for judicial review, which is, any person affected by an administrative act or omission. If an individual is not an original party to the case but believes they have sufficient interest in the matter, they too may apply for leave to join the proceedings. The burden of demonstrating sufficient interest, however, rests with the applicant (it is not for other parties to confer or generate such interest on their behalf). Under Order 53, Rule 9, an interested party, who was not originally involved in the proceedings, may apply to be heard at the hearing of the motion or summons. Such a party is not permitted to join another party whom they believe would be affected by the outcome of the proceedings.

In a nutshell, it is accepted that Order 53 of the Rules of the Supreme Court (RSC) provides a comprehensive framework for judicial review proceedings in Zambia. As was observed in ***Dean Namulya Mung'omba & ors v Peter Machungwa & ors,*** 'our Rules for the purposes of judicial review are completely discarded and there is strict following of the procedure and practice in Order 53 of RSC.'[20] Order 53, adopted by the Zambian courts, creates a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other persons or bodies which perform public duties or functions.

4. Judicial Authority and Justice

Judicial review attempts to answer the age-old question of "who guards the guards" by ensuring that public authorities responsible for ensuring accountability of government do so within the boundaries of their lawful purposes. In a constitutional democracy, the role of judicial review is to guard the rights of the individual against the abuse of official power.[21] The judiciary is charged with dealing with the settlement of disputes, upholding the rule of law, and interpreting and applying the law. As an institution, it is constitutionally designed to be objective, fair and just in applying the law when controversial issues are brought before it.[22]

Justice in the broadest sense consists in the ordering of human relations by general principles impartially applied.[23] As a moral concept, it is construed in many different ways that assess social institutions and their structures including their actions and character traits. In terms of definition, the word "justice" is bereft of singular meaning. It is sometimes understood to mean *(a)* moral permissibility as applied in legal systems; or *(b)* what individuals morally owe each other; or *(c)* limits of legitimate enforceable duties; or *(d)* according to each person's want is due to them; or *(e)* fairness.[24] Its full understanding can be construed in light of judicial authority which is the power and right given to the courts to perform the functions set out in the Constitution.[25] This power derives from the people of Zambia and shall be exercised in a just manner that promotes accountability.

In exercising judicial power, the courts must be guided by, among other principles, non-discrimination, no delay, and no undue regard to procedural technicalities. [26] It also follows, therefore, that the court's role in rendering justice is to provide an impartial and authoritative judgment which

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the government, by deportation, should make the Respondent a martyr, when he has no greater cause or principle, which he is pursuing and entitling him to martyrdom."

[18] H Barnett *Constitutional and Administrative Law* 10th ed. (Routledge: London and New York, 2013), 566.

[19] *Rodgers Chibwe v Kasempa District Council* SJ 15 of 2015, J32.

[20] *Dean Namulya Mung'omba, Bwalya Kanyanta Ng'andu & Anti-Corruption Commission v Peter Machungwa, Golden Mandandi & Attorney General* [2003] ZMSC 10.

[21] H Woolf, J Jowell & A Le Sueur *De Smith's Judicial Review* (Sweet and Maxwell: London, 2007) 6, 8.

[22] JK Bosek 'Implementing Environmental Rights in Kenya's new Constitutional Order: Prospects and Potential Challenges' (2014) *14 AHRLJ* 500.

[23] M Ginsberg "The Concept of Justice" (1963) *38 Philosophy 144*, pp. 99-116 at 104.

[24] P Vallentyne "Justice in General: An Introduction" in P Vallentyne (ed.) *Equality and Justice: Justice in General* (Routledge: London and New York, 2003) 2-4.

[25] Article 266.

[26] Article 118(1)(2).

must not be characterised by sympathy or other suasion but by observance and application of the law as a foundation for its decision-making. [27] Similarly, in the dispensation of justice, the court must 'be alive to the realities of the society in which they operate' and 'discharge their functions in accordance with certain explicit and implicit limitations' without relying on idiosyncratic opinions.[28] This is achieved by balancing the scales of justice between the individual whose fundamental rights are violated and the State or its agents being accused of such violations.[29]

The authority given to judges by law to determine matters does not, however, entitle them to liberty to do as they please. Thus, the dispensation of justice may well be considered in light of guidance offered by the law and also the perception of the public who, more often than not, scrutinise the decisions made by the court.[30] Also, where a court is expected to determine a matter within a specified time, it must comply unless there are exceptions within the law. It also implies that, where cases are brought before the courts, a duty is placed on it to render a decision based on the law, facts, and evidence presented. The decision, irrespective of the winning or losing party, will be said to be 'just'. This notwithstanding, some decisions of the courts seem to render injustice rather than the desired justice purportedly meted out as demonstrated in the circumstances below:

4.1 Political cases

The courts are reposed with the unenviable task of assessing whether the decision-making process of the executive and legislative comply with the given law. The enormity of the task, however, has raised concerns of possible interference in the adjudication process. These concerns mostly centre on *(a)* the seemingly politicised appointment of judges; *(b)* the use of political pressure to influence judicial decisions; and *(c)* public criticism of judges who rule against the government or threats to their security. It also appears that, where judicial review cases are smeared with political clutter, the courts are reluctant to entertain the matter and/or grant the relief sought. For instance, in ***The People v The Secretary to the Cabinet ex parte Kaweche Kaunda***, the government decided to bury the deceased former first president at Embassy Park. Dissatisfied with this decision, the applicant sought leave of court to commence judicial review proceedings against the government. In the application, the applicant exhibited letters revealing that the Secretary to Cabinet had been written to earlier conveying the deceased's wish to be buried next to his late wife, Betty, at their home. In response, the Secretary to Cabinet proposed, as a compromise, that the body first be buried at Embassy Park and then later exhumed and reburied at the deceased's place of choice, which the applicant found unacceptable. In his ruling, Muma J said:

> Judicial review is a discretionary remedy and access to it is not a matter of right…I refuse to grant leave for judicial review as there is no clear arguable case fit for consideration at the substantive hearing.[31]

It is a stretch to argue that there was 'no clear arguable case fit for consideration' when the events that preceded the case indicated that the government was determined to bury the deceased former first president at Embassy Park, where other former presidents are buried. A plausible argument is also raised that, being aware of the circumstances, the court could not rule otherwise. This is manifest from the court's view that the personal wish of the deceased could not override public interest and the acknowledgement of the declaration of the state funeral by the government was an acquiescence to its decision.[32]

In ***Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General***, the appellant sought leave in the High Court to bring judicial proceedings against the government for its decision on the mode of adoption of the constitution which was contrary to the recommendation of the Constitutional Review Commission that was appointed by the President. Following the refusal to grant leave, the appellant unsuccessfully appealed to the Supreme Court. In dismissing the appeal, Ngulube CJ stated that:

> …although the application was neither frivolous nor vexatious, it was legally an untenable application on the face of it such that it was not wrong for the judge below to refuse leave summarily.[33]

This position was equally erroneous as the Supreme Court was concerned with the political nature of the case rather than the nature of the application made and the legal issues thereof. In its reasoning, 'it would be wholly improper for the court to make any such political comment or to try and substitute its own view for that of the Government under the guise of judicial review.'[34] To pacify the applicant, the court opined that 'it is apparent that the Government has neither slammed the door nor taken the position that the people's views will not find a place in the final product….'[35]

Similarly, in ***Attorney General v Nigel Kalonde Mutuna, Charles Kajimanga & Phillip Musonda***, the appellant applied to discharge leave which was granted to the respondents for judicial review of the decision by the President to appoint a tribunal to investigate their conduct in the performance of their duties. Chibesakunda ACJ considered the authoritative position of the President and opined that 'it would be illogical and unreasonable to hold that he did not receive credible information as President for him to act as he did. He is the overall authority on everything.'[36] Though the court agreed that the President had

[27] *Zambia Revenue Authority v Post Newspaper* SCJ No. 18 of 2016, 627.

[28] GOO Ochich 'The Changing Paradigm of Human Rights Litigation in East Africa in Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives' (2007) *5 Judicial Watch Series* 65.

[29] JB Sakala *The Role of the Judiciary in the Enforcement of Human Rights in Zambia* (2013) 85.

[30] M Malila 'The Zambian Judiciary on Trial: Politicisation of the Judiciary or Judicialisation of Politics' (2011) *42 Zambia Law Journal* 117.

[31] *The People v the Secretary to the Cabinet ex parte Kaweche Kaunda* [2021] HP 768, R9.

[32] *The People v the Secretary to the Cabinet ex parte Kaweche Kaunda* [2021] HP 768, R8-9.

[33] *Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General* [1995] ZMSC 51 at J13.

[34] *Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General* [1995] ZMSC 51 at J9.

[35] *Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General* [1995] ZMSC 51 at J13.

[36] *Attorney General v Nigel Kalonde Mutuna, Charles Kajimanga & Phillip Musonda* SCZ/8/185/2012, J94-J95.

unfettered discretion to act as he did, it concluded that 'it would be advisable, considering circumstances of this matter, for the tribunal not to proceed.[37]

Most recently, in the case of ***Justice Anne Mwewa Sitali & Ors v Attorney General***, the applicants, who were Constitutional Court judges, sought leave before the high court to commence judicial review proceedings against the decision of the JCC. The court was cognisant of the political interest generated by the case hence it stating that the 'determination of matters in controversy herein would inevitably involve an inquiry touching on interpretation of the constitutional mandate reposed in the JCC, dealing with processes of the JCC leading to the removal of the judge from office or otherwise.'[38] In its view, 'the inquiry would also extend to validate or invalidate the exercise of power by the President to suspend a judge on the recommendation of the JCC as provided by Article 144(3) of the Constitution.'[39] Rather than resolve the matter, the court decided to divest itself of the authority by stating that the matter was '*prima facie* within the exclusive jurisdiction of the Constitutional Court and not the High Court.'[40] It is noteworthy that the court, referring to the Zimbabwean case of *Erica Fungai Ndewere.*[41], appreciated the fact that mere reference to a provision of the Constitution does not imbue a matter with constitutional character.[42] It is argued here that the court should not have divested itself of jurisdiction in judicial review merely because the body involved draws its powers from the Constitution.

In a similar case, ***The People v Judicial Complaints Commission, Vincent Blackskin Malambo, Chad H Muleza, Dean A. Mwansa Mumba & Attorney General ex parte Timothy Katenekwa,*** the High Court observed the following:

> It would seem to be a rather strange proposition that a person applying for judicial review in the High Court may now be required to approach instead, the Constitutional Court. It is strange because at no point hitherto the 2016 constitutional amendment had the High Court's jurisdiction in judicial review proceedings ever been doubted.[43]

It went on to state that the constitutional amendments that have taken place in the Zambian legal order have had the effect of somewhat limiting the High Court's power in judicial review proceedings in cases which require interpreting non-Bill of Rights constitutional provisions.[44] The court concluded that it had 'no jurisdiction to further treat of this matter by reason of want of jurisdiction, it cannot lie in my power to refer this matter, as the law requires that the action to be referred must itself have been properly commenced in the first place.'[45] Its decision was fortified by the supreme court decision in ***Felix Chipota Mutati & Others v Winnie Zaloumis*** where it stated that 'the mandate of the High Court is limited to referring constitutional issues on matters that are properly commenced in that court and over which it substantially has jurisdiction to hear and determine.'[46]

One may plausibly argue that the effect of the High Court decisions in *Justice Anne Sitali* and *Justice Katanekwa* cases is that, in Zambia, judicial review is no longer available against any public body or public office created by the Constitution. The High Court appears to have favoured a view that once provisions of the Constitution are referred to, judicial review should not be available. This effectively means that public bodies would not be amenable to judicial review at all. It is argued here that the two decisions of the High Court fail to appreciate the distinction between cases which may be brought to the Court by judicial review and those which may be brought by petition to the Constitutional Court requiring interpretation of constitutional provisions. Also, there is no appreciation that reliefs that are only available under judicial review are not obtainable under a petition. Further, the cases do not resolve the question of the matters that should fall squarely within the realm of constitutional law (and not administrative law) and thus should be reserved for the Constitutional Court. This flux situation has divested the High Court of constitutional jurisdiction, especially in matters where the state has a kin political interest. It is argued here that it is wrong to have an apex court exclusively dealing with constitutional matters especially since these are often intertwined with other issues.

4.2 Non-questioning of executive powers

The philosophical foundation of judicial review has been aptly stated by Scott Gordon and James Madison. According to Gordon, "In all government, there is a perpetual intestine struggle, open or secret, between authority and liberty, and neither of them can ever absolutely prevail in the contest."[47] A balance between the perfection of civil society and acknowledgement is government authority is, therefore, needed. Madison adds that in framing a government "…the great difficulty is this: you must enable the government to control the governed and in the next place oblige it to control itself"[48] It remains a duty of the court, as the vanguard for the protection of the rights of those who suffer

[37] *Attorney General v Nigel Kalonde Mutuna, Charles Kajimanga & Phillip Musonda* SCZ/8/185/2012, J95-J96.
[38] *Justice Anne Mwewa Sitali, Mungeli Siwale Mulenga and Palan Mulonda v Attorney General* [2024] HP 1373, par. 8.38.
[39] *Justice Anne Mwewa Sitali, Mungeli Siwale Mulenga and Palan Mulonda v Attorney General* [2024] HP 1373, par. 8.38.
[40] *Justice Anne Mwewa Sitali, Mungeli Siwale Mulenga and Palan Mulonda v Attorney General* [2024] HP 1373, par. 8.38.
[41] *Erica Fungai Ndewere v President of the Republic of Zimbabwe, Simbi Veke Mubako & Yvonne Masvora* (CCZ-4-21).
[42] *Justice Anne Mwewa Sitali, Mungeli Siwale Mulenga and Palan Mulonda v Attorney General* [2024] HP 1373, par. 8.30.
[43] *The People v Judicial Complaints Commission, Vincent Blackskin Malambo, Chad H Muleza, Dean A. Mwansa Mumba & Attorney General ex parte Timothy Katenekwa* [2024] HP 262, para 5.16.
[44] *The People v Judicial Complaints Commission, Vincent Blackskin Malambo, Chad H Muleza, Dean A. Mwansa Mumba & Attorney General ex parte Timothy Katenekwa* [2024] HP 262, para 5.19.
[45] *The People v Judicial Complaints Commission, Vincent Blackskin Malambo, Chad H Muleza, Dean A. Mwansa Mumba & Attorney General ex parte Timothy Katenekwa* [2024] HP 262, para 5.26.
[46] *Felix Chipota Mutati & Others v Winnie Zaloumis* SCJ No. 31 of 2018.
[47] S Gordon *Controlling the State, Constitutionalism from Ancient Athens today* (Harvard University Press: Massachusetts, 1999) 5.
[48] J Madison "Federalist No. 51", 6 February 1788.

injustice from the executive, to ensure reparation. Rather than carry out this noble duty, there are instances where the court has seemingly shied away from questioning the decision of the executive based on a technicality.

Such acts by the court can be seen in cases such as ***Sondashi v Attorney-General***, where the applicant challenged the decision of the Minister to reject his application to operate a firearms dealer business. The respondent argued that the decision of the Minister cannot be challenged due to s 12(7) of the Firearms Act which states that "The decision of the Minister on an appeal in terms of this section shall be final and shall not be questioned in any proceedings." Chibesakunda J stated that "where the legislature has decided that certain matters should be solely placed in the jurisdiction of the executive, the court has no role to play as such issues contain no legal issues to be resolved."[49] This reasoning by the court was flawed, restrictive and an abdication of their constitutional role. Section 12(7) did not allow questioning of the decision of the Minister; the provision, however, did not insulate the Minister from judicial review of the decision-making process. In other words, an ouster clause prevents an appeal against the decision of the Minister but does not prevent judicial review. It is argued herein that the decision of the court could have been precipitated by the statement previously made by the applicant in Parliament (where he stated that coups could be necessary to foster democracy). Otherwise, there was no proper reason for the court to adopt such a restrictive and narrow approach to the matter.

In ***Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General***, the appellants sought a declaration that the President acted unconstitutionally by appointing Mr Vernon Mwanga as a Minister and Mrs. Mirriam Wina as a Deputy Minister allegedly because a detainees' tribunal appointed by the former head of state in 1985 had found that they were implicated in dealing in mandrax, a dangerous drug. On the question of locus standi, the court said:

> …we have to balance two aspects of public interest, namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome private "Attorney Generals" to move the courts in matters that do not concern them. For the present purposes, we are prepared to proceed without coming to any firm conclusion on the point on the footing that the appellants have a legitimate interest in the national leaders and the governance of this country.[50]

In a dissenting opinion, Musumali J refused to agree with his learned brethren on this point stating that:

> My firm view is that a citizen has a right to sue on constitutional issues unless the constitution itself explicitly or by necessary implication has taken away that liberty…a citizen has the liberty to…seek redress… This freedom is particularly important in democratic countries as it is one way of enabling a citizen to have a say in the governance of his country. So the citizen needs to know that he enjoys this right, whether or not s/he is a meddlesome type."[51]

It is argued here that the court, by a majority decision, shied away from determining the issue of locus presumably because it involved questioning the President's exercise of his power. In buttressing this point and commenting on the reasoning of the court, Malila opines that 'what is beyond peradventure is that in the exercise of a proper judicial function, there is no licence for a court to act in an arbitrary way or to give effect to the court's own idiosyncratic ideas and attitudes.'[52] Suffice it to state that judicial value lies in the display of diversity of perspectives aimed at rendering untainted justice.

4.3 Remedies

A remedy is a means by which a right is given effect. It allows a person to assert their right which has been violated by an act done by another person or authority. In most instances, remedies give a prescription of what the court ought to do to atone for what is being claimed as having been a wrongful act of another. Judicial review is, in essence, a procedural remedy whereby the courts have historically confined themselves to questioning the decision–making process rather than the decision itself. The established grounds upon which proceedings can be brought ensure that decisions comply with the set standards. The available remedies under public law are the 'prerogative remedies': quashing orders, prohibiting orders and mandatory orders. In addition, under private law, there are the remedies of declaration and injunction, which may also be granted under judicial review proceedings.[53]

The granting of a remedy in judicial review proceedings is at the discretion of the court. Even where the applicant establishes his or her case, the court may refuse a remedy if there has been a delay in commencing proceedings, or if the applicant has acted unreasonably, or where the public interest in efficient administration could be damaged by the granting of a remedy.[54] In such an instance, it is argued that the remedies are a rather pyrrhic victory. For instance, although the court may quash the offending decision of a public body, it will not replace it with another one, but instead, require the body to take the decision again.[55] In other words, these cannot rectify the root causes of errors made by public bodies in their purported functioning. This inevitably results in a lack of accountability which potentially leads to recurring mistakes, inefficiencies, and miscarriage of justice.

The inadequacy of the remedies is also observable under section 16 of the *State Proceedings Act* which forbids an injunction (but a stay) against the State. It is argued that such a provision protects the State from being restrained in its functions especially considering that it cannot be bankrupt or prevented from operating. This 'immunity'

[49] *Sondashi v Attorney General* [2000] ZMSC 35.

[50] *Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General* [1993] ZMSC 76, 5-6.

[51] *Maxwell Mwamba and Stora Solomon Mbuzi v Attorney General* [1993] ZMSC 76, 10-11.

[52] M Malila "Righting the wrongs: Justice Clever Mule Musumali's legacy of judicial activism revisited" (2020) *4 IJRISS 12*, 17.

[53] H Barnett *Constitutional and Administrative Law* 10th ed. (Routledge: London and New York, 2013), 589.

[54] H Barnett *Constitutional and Administrative Law* 10th ed. (Routledge: London and New York, 2013), 589.

[55] M Ryan *Unlocking Constitutional and Administrative Law* 3rd ed. (Routledge: London and New York, 2014) 565.

renders decisions against a State unenforceable resulting in the affected individuals not obtaining meaningful relief as there is no accountability by those whose actions were complained of.[56] It also undermines the fundamental rights of individuals and institutions who are unable to enforce court judgments against the State. In cases where only an injunction would provide meaningful relief, the absence of such remedies leaves successful applicants with less effective solutions. This may lead to a growing sense of frustration and loss of confidence in the ability of the legal system to provide justice in cases involving the State or public bodies.[57]

Also, damages are typically not awarded in judicial review cases unless they are sought in a parallel cause of action. This further reduces the effectiveness of judicial review as successful applicants may not receive adequate compensation for harm caused by administrative errors.

The limited ability of remedies is compounded by their discretionary nature in which the court has to consider the particular circumstances of each case before arriving at a decision. Considerations of fairness, reasonableness, and rationality can be applied and the judge cannot be faulted for having responded to a grave situation.[58] The discretionary nature of the remedies available would imply that these may be denied even where it has been proved that a public body acted unlawfully.

4.4 Procedure

As discussed earlier, Order 53 RSC provides practice and procedure for judicial review applications in Zambia. It is arguably a comprehensive code of procedure on judicial review which, unfortunately, renders other rules otiose. The Supreme Court in ***Dean Namulya Mung'omba & Ors v Peter Machungwa & Ors***, while affirming this comprehensiveness, lamented that 'our Orders 14 and 18 High Courts are inapplicable…[and]…only relevant to process begun under our rules and when applicable.'[59] This position highlights the absence of domestically tailored legislation that can address the specific challenges faced. It is opined that domestic legislation could streamline procedures, make judicial review more accessible, and enhance access to justice.

In the recent case of ***Justice Anne Mwewa Sitali & Ors v Attorney General***, the court had to consider whether the matter before could be determined under Order 53 RSC given Article 128(1) of the Constitution 2016.[60] The court noted that the process of judicial review is operationalised under Order 53 RSC which is applicable under the doctrine of default rule, section 10 of the High Court Act.[61] It observed that:

> The applicability of judicial review as provided under Order 53 RSC, measured against the provisions of Article 128(1) of the Constitution cannot be applied *carte blanche* in our jurisdiction, especially where the case is commingled with constitutional interpretation and enforcement of constitutional provisions, outside the Bill of rights.[62]

In its conclusion, the court stated that the 'Applicant's application for judicial review under Order 53 RSC, is constitutionally encumbered, and cannot proceed to the substantive inquiry, for want of jurisdiction.'[63] This conclusion is flawed as the court was preoccupied with the effect of deciding that it had jurisdiction to consider the matter. By deciding that it did not, it avoided (and wrongly so) questioning the decision-making process of the JCC and the President, a path which it seemingly dreaded not to walk on. The court should not have used Article 128(1)(a) of the Constitution to divest itself of judicial review jurisdiction. This is because that provision reserves original and final jurisdiction for the Constitutional Court where the matter relates to the interpretation of the Constitution. The judicial review before it did not require the Court to interpret the Constitution but to review the decision-making process.

It is again observed that the court in ***Justice Anne Mwewa Sitali & Ors*** started with an erroneous conception of the essence and nature of judicial review. In paragraph 8.34, the court proceeded under the misconception that it would be required to review the decision of the JCC. To this extent, it stated that "… we reason that for the decision of the JCC to be reviewed…." This view is a serious misconception of the role of the court in a judicial review application which, in turn, affected the holding. The court should have appreciated that the judicial review application did not call upon it to review the merits of the decision of the JCC but to review the decision-making process.

As an aversion to similar approaches by the courts (in matters of political interest), the statute books must create a judicial review procedure akin to South Africa's Constitution[64] and the Promotion of Administration of Justice Act 2000 (amended by Act 66 of 2008).[65] Similarly, Kenya's Constitution[66] and the Fair Administrative Action

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[56] J Sangwa 'The Making and Remaking of Constitutions in Zambia: The Need for a New Perspective' Unpublished LLM dissertation, University of Zambia, 1996.

[57] M Ryan *Unlocking Constitutional and Administrative Law* 2nd ed. Hodder Education: London, 2010.

[58] *Amanda Muzyamba Chaala (Administrator of the Estate of the late Florence Mwiya Siyunyi Chaala) v Attorney General Mukelabai Muyakwa* SCJ 6 of 2012 at 324.

[59] *Dean Namulya Mung'omba, Bwalya Kanyanta Ng'andu & Anti-Corruption Commission v Peter Machungwa, Golden Mandandi & Attorney General* [2003] ZMSC 10.

[60] Article 128(1): Subject to Article 28 of the Constitution, the Court in the exercise of its original and final jurisdiction may determine– *(a)* a matter relating to the interpretation of the Constitution; *(b)* a matter relating to a violation or contravention of the Constitution; *(c)* a matter relating to the President, Vice President or election of a President; *(d)* appeals relating to the election of Members of Parliament and councillors; and (e) whether or not a matter falls within the jurisdiction of the Court.

[61] *Justice Anne Mwewa Sitali, Mungeli Siwale Mulenga and Palan Mulonda v Attorney General* [2024] HP 1373, par. 8.14.

[62] *Justice Anne Mwewa Sitali, Mungeli Siwale Mulenga and Palan Mulonda v Attorney General* [2024] HP 1373, par. 8.15.

[63] *Justice Anne Mwewa Sitali, Mungeli Siwale Mulenga and Palan Mulonda v Attorney General* [2024] HP 1373, par. 9.1.

[64] Section 33(3) requires enactment of the national legislation to provide for review of administrative action by a court or tribunal, imposition of a duty to enforce those rights and promote an efficient administration.

[65] Section 6(1) allows any person to institute judicial review proceedings in a court or tribunal. Section 6(2) provides for the grounds upon which proceedings may be brought. The remedies that may be sought are stated in section 8.

[66] Chapter 1 of the Laws of Kenya, 2010.

Act[67] provide for the right to fair administrative action. The argument being made is that the lack of a constitutional guarantee for judicial review limits an individual's ability to challenge administrative decisions thus subjecting them to rely on common law principles. This potentially weakens judicial oversight and accountability reducing the effectiveness of administrative justice. Suffice it to state that adopting South Africa or Kenya's approach to judicial review would enable a clear path and eliminate the tedious and unpredictable process capable of robbing applicants of the justice sought especially given the discretionary nature of the process and the remedies thereof. It is worth noting that the Parliamentary Committee has noted the 'need for Zambia to increasingly utilise homegrown law' and expressed serious concern that 'despite being independent and sovereign for well over forty-five years…[we]…continue to be dependent on foreign law.'[68] Despite this, there is yet to be a genuine desire to change the narrative.

4.5 Locus

The terms 'locus standi' and 'sufficient interest' are usually used interchangeably in judicial review proceedings and the test is the same involving a mixture of law and fact.[69] Locus standi is concerned with whether the applicant is entitled to invoke the jurisdiction of the court. It is an overriding rule in judicial review which requires the court to consider whether the applicant "has sufficient interest" in the matter to which the application relates.[70] It is thus not for the court to speculate or second guess what a party must squarely and appropriately lay on record for the court to make an informed decision.[71] The applicant must, therefore, in demonstrating sufficient interest, show how they would be affected by the court's decision in a concrete sense and not an abstract one.

In ***Dean Namulya Mung'omba & Ors v Peter Machungwa & Ors***, the court stated that the 'party must himself show sufficient interest in the matter to which the application relates; it is not for other people to show or generate interest for the party.'[72] A similar decision was reached in ***African Banking Corporation Zambia Limited T/A Atlas Mara v Inspector General of Police & Others*** in which Makungu J said 'we cannot fault the lower court for finding that the interested party is a proper person to be heard because…he would be adversely affected if judicial review proceedings succeed.'[73] Further, the affected party must be legally aggrieved. The term "legally aggrieved" was described in ***Chiluba & Others v Attorney General*** to mean 'a person must be not merely be dissatisfied with or even prejudiced by an action or decision' but must also 'have been deprived of or refused something to which he was legally entitled.'[74] In recent times, the court has adopted a more flexible approach to locus standi especially when it comes to fundamental rights. There seems to be a departure from the common law jurisprudence which has seen a reiteration by the court that matters falling within the realm of Article 28 do not require a person to demonstrate how the matter complained directly affects him.[75]

The complexities of locus standi in the realm of judicial review are quite pronounced. The question of locus standi is one of discretion and depends upon weighing all the circumstances of the case.[76] Although considered to be one of simple objective determination, some decisions by the court seem to prove otherwise. As Vining, once said, 'without coming away with a sense of intellectual crisis. Judicial behaviour is erratic, even bizarre. The opinions and justifications do not illuminate.'[77] It is argued here that the decisions of the court have not created a balance between granting leave to persons who truly have a genuine interest in the matter and denying leave to those who may be ill-intentioned to abuse the process.[78] This leaves the 'test of sufficiency' to the whims and caprices of the court which may widely or narrowly determine the matter depending on the subject or persons involved.[79]

4.6 Leave

There is no unfettered right to judicial review, therefore, the aggrieved person must seek leave from the court to apply for judicial review.[80] This is crucial as it enables the court to prevent the impediment of the smooth functioning of government institutions and also stop the influx into the court system of unmeritorious cases that would consume its resources only to be dismissed later on the ground that they are frivolous or vexatious.[81] In other words, it filters out the applications of cranks and busybodies who might otherwise impose an excessive burden on the process of legitimate administration.[82]

The court does not require extensive argument on an application for leave but simply needs to be satisfied that the applicant has a prima facie arguable point.[83] Unfortunately,

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[67] Act No 4 of 2015.

[68] Committee on Legal Affairs, Governance, Human Rights and Gender Matters "The High Court (Amendment) Bill Report (N.A.B No 8 of 2011)" 24 February 2011.

[69] *Dora Siliya & Others v Attorney General & Others* [2013] ZMHC 21, R16.

[70] *Lukonde Makungu v Attorney General* [2022] ZMHC 5, R6.

[71] *Dora Siliya & Others v Attorney General & Others* [2013] ZMHC 21, R18.

[72] *Dean Namulya Mung'omba, Bwalya Kanyanta Ng'andu & Anti-Corruption Commission v Peter Machungwa, Golden Mandandi & Attorney General* [2003] ZR 17 at 19.

[73] *African Banking Corporation Zambia Limited T/A Atlas Mara v Inspector General of Police, Attorney General & Rajan Lekhraj Mahtani* [2024] ZMCA 133, para. 10.21.

[74] *Chiluba & Others v Attorney General* [1990-1992] ZR 91 at 94.

[75] *Attorney General v Law Association of Zambia* [2008] ZMSC 3, P56.

[76] *Dora Siliya & Others v Attorney General & Others* [2013] ZMHC 21, R16.

[77] J Vining "**Legal Identity (1978)"** in E Chemerinsky ***Constitutional Law: Principles and Policies*** 3rd ed. (Aspen Publishers 2006, 60).

[78] Y Bande "The need to relax standing requirements in judicial review matters and the necessity for our very own Judicial Review Act" 12 April 2022.

[79] Refer to the discussion of *Maxwell Stora Mbuzi & Another v Attorney General* discussed above.

[80] H Barnett *Constitutional and Administrative Law* 10th ed. (Routledge: London and New York, 2013), 570.

[81] *The People v the Patents and Companies Registration Agency ex-partes Finsbury Investment Limited and Zambezi Portland Cement Limited* [2018] ZMCC 250 at J33.

[82] *Lieutenant Alick Bruce Makondo v Attorney General* [2018] ZMSC 355; *The People v Attorney General & Energy Regulation Board* [2020] ZMCA 86, para. 7.13.

[83] G Aldous & J Alder *Applications for Judicial Review Law and Practice of the Crown Office* 2nd ed. (Butterworths: London, 1993) 139.

the granting of leave allows the court to control applications by either refusing leave or permitting them to proceed only in such manner as it may direct. This implies that the leave process is subject to the discretion of the court, which may abuse it. For instance, in ***Derrick Derrick Chitala (Secretary of Zambia Democratic Congress) v Attorney General,*** the High Court determined the substantive application before leave was granted and without hearing the parties. The appellant appealed to the Supreme Court arguing that this was erroneous as the court ought not to have considered the merits but rather, whether there was an arguable case. The Supreme Court observed that there was 'reasonable apprehension in the appellant that the Government intended to massage the outcome of the review, to the disadvantage of the others in the country.' It held that the appeal was 'legally an untenable application on the face of it such that it was not wrong for the judge below to refuse leave summarily.' [84] The irony in this decision is the determination of the case on its merits and not what the applicant sought for— an appeal against refusal to grant leave.

It is apparent from the case above that the leave stage is subject to abuse under the guise of judicial discretion thus denying an applicant their access to justice. In ***The People v The Patents and Companies Registration Agency ex-partes Finsbury Investment Limited and Zambezi Portland Cement Limited,*** it was argued that the requirement for leave hinders access to justice because where leave is not granted, the substantive matter cannot be heard on the merits. In response, the Constitutional Court stated that:

> …the nature of judicial review proceedings, which are *sui generis*, is that at the leave stage, the applicant has the onus to ensure that he/she demonstrates to the court at that early stage that he has an arguable case that warrants a further investigation by the court. Where this is done, the court is duty-bound to grant leave and appoint a date to determine the case on the merits.[85]

The response by the court did not adequately address the issue of whether the requirement for leave hinders access to justice and if so, how? Rather, the court unfortunately gave an explanation of the rationale for leave in judicial review proceedings.

4.7 Accessibility

The *Constitution* 2016 requires that justice to be administered without undue regard to procedural technicalities. [86] This would imply, therefore, that the requirement for leave to commence an action disproportionately affects individuals. This is compounded by the discretion exercised by courts at the leave stage which militates against the principle of equal access to justice thus leaving some without recourse for challenging unlawful administrative decisions. This procedural technicality can also affect persons who may lack the necessary resources or knowledge to effectively challenge a decision. Undoubtedly, access to financial resources can be limited especially among marginalized groups which may not afford the associated legal costs. The gate-keeping mechanism can, therefore, deny persons in need of judicial redress the opportunity to have their cases heard. The result is a deterrence to individuals from challenging unlawful decisions which ultimately, leaves the administrative injustice unaddressed.

The cost of judicial review proceedings can also be for the courts which are already inundated with other burdens. The financial resources available to the judiciary remain limited and this may affect the timely disposal of cases before the courts. This situation may cause lengthy delays in the disposal of cases, militate against justice delivery, and undermine the effectiveness of the judicial review proceedings.

5 Conclusion

The article argued that judicial review proceedings, as currently conducted in Zambia, are not an effective remedy to wrongful actions by public bodies or persons but rather, a subversion of justice. It is observed that judicial review is a valuable tool for ensuring good governance and protecting individual rights. By addressing the potential risks and promoting a fair and impartial application of the law, judicial review can continue to play a positive role in Zambia's legal system. The analysis of cases on judicial review dealt with by the courts shows the inconsistency in decision-making resulting in the absence of a definite position. Also, the courts have been shy in dealing with cases where the President or executive have an interest in the matter. This problem is compounded by the discretionary nature of the remedy. It is concluded, therefore, that judicial review is not an effective tool for the amelioration of wrongful actions by public bodies or persons. Rather than affording a remedy to those affected by the actions of public bodies or persons, judicial review subverts justice.

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