


RESEARCH ARTICLE

# Judicial Independence Through Accountability: Why and How to Remove Judges in Zambia

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## Abstract

Zambia has recently witnessed the removal of four High Court judges within a period of less than two years, raising questions about the country's commitment to judicial independence. This article examines the extent to which the current legal framework governing the removal of judges in Zambia coheres with the principles of judicial accountability and independence. Drawing upon insights from relevant international standards and scholarly literature, the article posits that the removal of judges is not only a necessary mechanism for judicial accountability but should also be seen as an essential safeguard for judicial independence. Its analysis suggests that some of the grounds for removal and the lack of adequate procedural safeguards within the current legal framework pose threats to both judicial accountability and independence. The article concludes with a call for necessary legal reform, urging policymakers to bring the framework in line with relevant international standards.

**Keywords:** Constitution of Zambia; judicial accountability; judicial independence; removal of judges; rule of law

## Introduction

In a republic where the people are sovereign, those entrusted with public authority must be accountable to the people. This principle applies with equal force to those charged with the constitutional responsibility of adjudicating legal disputes in accordance with the rule of law. All judicial officers must be accountable to the sovereign people to whom they owe their ultimate allegiance.<sup>1</sup> In practice, judicial accountability manifests itself in a wide range of both formal and informal mechanisms.<sup>2</sup> It is nonetheless generally accepted that one of the formal mechanisms for judicial accountability, namely dismissal or removal from office, should be used sparingly. This position is premised on the assumption that the power to remove judicial officers, particularly judges, affects judicial independence, including the independence of individual judges and the collective independence of the judiciary as an institution.<sup>3</sup>

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1 M Kirby "Judicial accountability in Australia" (2003) 6/1 *Legal Ethics* 41 at 42.

2 S Shetreet "Judicial accountability: A comparative analysis of the models and the recent trends" (1986) 11/2 *International Legal Practitioner* 38; S Colbran "The limits of judicial accountability: The role of judicial performance evaluation" (2003) 6/1 *Legal Ethics* 55; Kirby, *ibid*; A Le Sueu "Developing mechanisms for judicial accountability in the UK" (2004) 24/1–2 *Legal Studies* 73; D Kosař *Perils of Judicial Self-Government in Transitional Societies* (2016, Cambridge University Press) at 73–120.

3 S Shetreet and S Turenne *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, 2013, Cambridge University Press) at 272; Kosař, *id* at 36.

To be clear, whether at an individual or institutional level, judicial independence demands more than just the protection of judicial tenure. It hinges upon a wide range of legal safeguards.<sup>4</sup> Security of judicial tenure nonetheless emerges as the keystone safeguard for the individual judicial independence of judges.<sup>5</sup> It is only natural that judges will generally fear making judicial decisions in accordance with the rule of law unless they are assured that their decisions will not imperil their position.<sup>6</sup> This explains why there is an international consensus that judges should enjoy security of tenure and be subject to removal only for clearly-defined reasons that render them unfit for judicial office.<sup>7</sup>

The recent turn of events in Zambia, however, suggests that the president of the Republic can relatively easily remove judges. Within a period of less than two years, from May 2022 to January 2024, the incumbent president, Hakainde Hichilema, removed four High Court judges. According to the respective official press statements announcing the four removals, all the judges concerned were removed upon the recommendation of the Judicial Complaints Commission (JCC) and in the exercise of the power vested in the president by the Constitution of Zambia 1991, as amended in 2016 (the Constitution).<sup>8</sup> But the specific grounds for these removals were not disclosed, leading to public speculation. Notably, one of the judges concerned, Joshua Banda, was arrested and charged with corruption following his removal.<sup>9</sup> Also, Banda attempted to challenge his removal in the Constitutional Court but to no avail. The court upheld Banda's removal on the ground of "gross misconduct" predating his appointment.<sup>10</sup>

Apart from the judgment in the *Banda* case, the specifics of all the four recent removals remain confidential and cannot be discussed in this article due to extant legal restrictions prohibiting the disclosure of details related to cases of removal.<sup>11</sup> Suffice to say that the frequency of these removals is unprecedented and begs the question of whether the applicable legal framework provides adequate safeguards against arbitrary removal. This question is particularly important in the Zambian context not only because of the recent turn of events but also because historical experience suggests that attempts at removing judges are likely to recur under the banner of "judicial reforms" when the presidency changes hands. The four recent removals themselves occurred not long after Hichilema of the United Party for National Development (UPND) assumed the presidency, following the 2021 general election.

Similarly, shortly after taking office in 2011, President Michael Sata of the Patriotic Front (PF) party appointed a tribunal to investigate the alleged misconduct of three judges and to recommend on whether those judges should be removed from office pursuant to the provisions of the 1996

4 See generally IR Kaufman "The essence of judicial independence" (1980) 80/4 *Columbia Law Review* 671; S Shetreet "Judicial independence and accountability in Israel" (1984) 33/4 *International and Comparative Law Quarterly* 979.

5 LJ King "Removal of judges" (2003) 6/2 *Flinders Journal of Law Reform* 169 at 170 and 173.

6 MB Ndulo "Attorney General v Mutuna and Others (Appeal no. 088/2012) [2013] ZMSC 38" (2018) 1/2 *SAIPAR Case Review* 21 at 23.

7 IBA Minimum Standards of Judicial Independence (1982, International Bar Association); Basic Principles on the Independence of the Judiciary (1985), UN doc ST/HR/1/Rev.6(Vol.I/Part1); Commonwealth (Latimer House) Principles on the Three Branches of Government (2003, Law Ministers and Commonwealth Heads of Government).

8 The Constitution of Zambia 1991, as amended by Act No 2 of 2016 (the Constitution). See "President Hichilema removes judge Joshua Ndipoyala Banda from office and suspends judge Sunday Bwalya Nkonde SC" (Presidential spokesperson press release, 6 May 2022); "President Hakainde Hichilema removes judge Sunday Bwalya Nkonde SC from office" (Presidential spokesperson press release, 3 June 2022); "President Hakainde Hichilema removes judge Wilfred Copa Muma from office" (State House chief communications specialist press release, 30 June 2023); "President Hakainde Hichilema removes judge Timothy Katanekwa from office" (State House chief communications specialist press release, 27 January 2024).

9 "Former High Court judge arrested for corruption" (Anti-Corruption Commission spokesperson press release, 19 May 2022).

10 *Banda v Attorney General* 2022/CCZ/0010 (26 October 2023).

11 See notes 74 and 75 below and accompanying text.

edition of the Constitution.<sup>12</sup> The president also suspended the three judges pending the tribunal's recommendations. This engendered a protracted legal dispute which outlived President Sata, who died in October 2014. The judges concerned challenged not only the presidential decisions but also the jurisdiction of the tribunal. The decisions to appoint the tribunal and suspend the judges were ultimately upheld by the Supreme Court. The court held that the president had *unfettered* discretion and was "*the overall authority on everything*" as regards those decisions.<sup>13</sup> As regards the jurisdiction of the tribunal, the High Court subsequently held that the tribunal could not discharge its mandate because the president did not provide guidance on the rules of procedure under which it would operate. The High Court also took the view that it would be "grossly unfair and unjust to the applicants if the suspensions were allowed to remain in force when the tribunal to which the question of their removal [had] been referred [had] no capacity to inquire into the matter".<sup>14</sup> It thus lifted the suspensions and allowed the judges to resume office. But the matter was only fully settled in March 2015 when Sata's successor, President Edgar Lungu, also of the PF, dissolved the tribunal.<sup>15</sup>

The current (2016) edition of the Constitution thus represents a radical departure not only from the previous two (original 1991 and 1996) editions of the same constitution but also the previous two constitutions since Zambia became an independent state: the 1964 and 1973 constitutions. Most notably, all previous frameworks empowered the president to remove judges upon the recommendation of an ad hoc tribunal and did not impose any confidentiality requirements regarding the tribunal's operations or decisions.<sup>16</sup> The current framework by contrast requires the president to act exclusively upon the recommendation of the JCC, a permanent body whose operations are cloaked in secrecy. Hichilema of the UPND, who assumed the presidency after defeating Lungu in the 2021 election, has therefore become the first president to remove judges under the current framework. This emerging trend may continue beyond the Hichilema administration not least because of the continued concentration of powers in the presidency under the new framework, although this has always been a prominent characteristic of Zambia's constitutional system.<sup>17</sup> It could thus be particularly difficult to maintain judicial independence in Zambia unless the law provides adequate safeguards against arbitrary removal.

It is worth underlining that the crux of the matter does not lie in the removal of unfit judges, which is a social necessity in the name of judicial accountability.<sup>18</sup> Rather, it lies in the potential compromise of judicial independence under the guise of judicial accountability. While conventional wisdom suggests that "the liberal principle of judicial independence runs up against the democratic principle of accountability",<sup>19</sup> judicial accountability need not threaten judicial independence.<sup>20</sup> The independence of judges cannot be guaranteed unless judges are accountable to the people.<sup>21</sup> Even in cases of removal, therefore, judicial accountability and independence should be seen not as

12 For details, see "Zambia mission report: May 16-19, 2012" (International Commission of Jurists press release, 23 May 2012).

13 *Attorney General v Mutuna and Others* SCZ/8/185/2012 (9 May 2013) at J124 (emphasis added).

14 *Mutuna and Kajimanga v Attorney General* 2013/HP/0674 (23 December 2014) at J28.

15 "President Lungu dissolves moribund Justice Chikopa tribunal, reinstates Justices Mutuna, Kajimanga" (27 March 2015) *Lusaka Times*, available at: <<https://www.lusakatimes.com/2015/03/27/president-lungu-dissolves-moribund-justice-chikopa-tribunal-reinstates-justices-mutuna-kajimanga/>> (last accessed 4 June 2024).

16 See the Constitution of Zambia 1964, sec 100; the Constitution of Zambia Act 1973, art 113; the Constitution of Zambia (Amendment) Act No 1 of 1991, art 98; the Constitution of Zambia (Amendment) Act No 18 of 1996, art 98.

17 C Phiri "Limitation of presidential terms in Zambia: Annotating the judicial interpretation" (2019) 45/4 *Commonwealth Law Bulletin* 752 at 755.

18 King "Removal of judges", above at note 5 at 170.

19 PH Russell "Toward a general theory of judicial independence" in PH Russell and DM O'Brien (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (2001, University Press of Virginia) at 2.

20 SD O'Connor "Judicial accountability must safeguard, not threaten, judicial independence: an introduction" (2008) 86/1 *Denver Law Review* 1.

21 Shetreet "Judicial independence and accountability", above at note 4 at 997-98; O'Connor, *id.* at 4.

conflicting but rather as mutually reinforcing principles. Nor should judicial accountability, or indeed judicial independence, be regarded as an end in itself. Both judicial accountability and independence should be seen as means to an end: the protection of individual rights through the rule of law.<sup>22</sup>

Against this backdrop, this article examines the extent to which the current legal framework governing the removal of judges in Zambia coheres with the principles of judicial accountability and independence. The article begins by providing an overview of the current legal framework. It then proceeds to examine in turn the coherence of the framework with the principles of judicial accountability and independence, drawing upon insights from relevant international standards and scholarly literature. The analysis suggests that some of the grounds for removal and the lack of adequate procedural safeguards within the current legal framework pose threats to both judicial accountability and independence. Thus, the article concludes with a call for necessary legal reform.

### Legal framework for the removal of judges in Zambia

Two preliminary points are worth recalling when considering the legal framework governing the removal of judges in Zambia. Firstly, it should be noted that the Constitution takes precedence over all other sources of the law constituting the relevant framework. The Constitution itself declares that it “is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency”.<sup>23</sup> Secondly, the legal provisions governing the removal of judges apply only to individuals appointed as judges of superior courts. The Constitution establishes three categories of inferior courts and four distinct superior courts.<sup>24</sup> It defines the term “judge” as “a person appointed as a judge of a superior court”;<sup>25</sup> that is, the Supreme Court, the Constitutional Court, the Court of Appeal or the High Court.<sup>26</sup>

All judges as thus defined, including the chief justice, are appointed by the president upon the recommendation of the Judicial Service Commission (JSC), subject to ratification by the National Assembly.<sup>27</sup> A duly appointed judge is generally entitled to security of tenure until the mandatory retirement age of 70 years.<sup>28</sup> An early retirement with full benefits is permissible upon attaining the age of 65 years.<sup>29</sup> In any case, a retired judge is ineligible for reappointment to the office of judge.<sup>30</sup> A judge may also voluntarily vacate office before attaining the mandatory age of retirement by way of resignation and, in the event of a judge accepting an appointment outside the judiciary, resignation becomes mandatory.<sup>31</sup> The effectiveness of any resignation is contingent upon the judge informing the president of the resignation through a written notice.<sup>32</sup>

Article 143 of the Constitution prescribes four possible grounds upon which a judge may be removed from office before attaining the mandatory retirement age: mental or physical incapacity, incompetence, gross misconduct and bankruptcy. The removal of a judge on any of these grounds may be initiated either by the JCC acting on its own motion or through a complaint lodged with the

22 *Report of the Venice Commission on the Independence of the Judicial System Part I: The Independence of Judges* (2010, European Commission for Democracy through Law), para 6.

23 The Constitution, art 1(1). See *Mulubisha v Attorney General* 2018/CCZ/0013 (27 November 2019).

24 The Constitution, part VIII.

25 *Id.*, art 266.

26 The Supreme Court and the Constitutional Court rank equivalently in the judicial hierarchy (see the Constitution, art 121).

27 The Constitution, arts 140 and 220(2)(b).

28 *Id.*, art 142(1).

29 *Id.*, art 142(2).

30 *Id.*, art 142(4).

31 *Id.*, art 142(6).

32 *Id.*, art 142(5).

JCC by an interested party.<sup>33</sup> In either case, the JCC is the only body that the Constitution empowers to determine whether or not a particular judge should be investigated for potential removal and, where applicable, to recommend to the president the removal or retention of the judge in question. The Constitution itself uses the term “recommend” but, as is evident from the discussion that follows, the findings made by the JCC regarding both the suspension and removal of judges are in fact *binding* decisions in the sense that the Constitution demands their implementation without leaving room for the president to exercise independent judgement. Understanding the institutional framework of the JCC is thus crucial for an adequate appreciation of the legal intricacies surrounding the removal of judges in Zambia.

### Overview of the Judicial Complaints Commission

The JCC is established by article 236 of the Constitution. Its specific constitutional functions are to enforce the code of conduct for judges and other judicial officers, to ensure that judges and other judicial officers are accountable to the people for the performance of their functions, to receive and hear complaints lodged against judges and other judicial officers and to make recommendations to the appropriate institution or authority, including the president, for necessary action.<sup>34</sup> The code of conduct referred to in article 236 takes the form of an Act of Parliament, currently the Judicial (Code of Conduct) Act (JCCA) 1999, as amended in 2006.<sup>35</sup> Therefore, detailed provisions on how judges should conduct themselves, both on and off the bench, are contained in the JCCA rather than in the Constitution itself. The JCCA also contains details regarding the composition and operational modalities of the JCC.

The JCC is to be composed of five commissioners.<sup>36</sup> To be eligible for appointment as a commissioner, an individual must have previously held or be qualified to hold a “high judicial office” (ie the office of judge).<sup>37</sup> The appointment of commissioners is a presidential prerogative, albeit subject to ratification by the National Assembly.<sup>38</sup> A commissioner’s tenure is limited to a maximum of four years, renewable at the discretion of the president.<sup>39</sup> In the event of a casual vacancy, the president may appoint a replacement to serve the remainder of the term left by the vacating commissioner.<sup>40</sup> The JCCA further grants the president the authority to remove a commissioner before the expiry of the commissioner’s tenure for certain reasons, such as unexcused absence from three consecutive meetings of the JCC, conviction of an offence involving dishonesty or failure to fulfil the duties of the office.<sup>41</sup>

For its daily operations, the JCC must employ a full-time secretary, who is also appointed by the president for a renewable term of five years.<sup>42</sup> The JCCA, however, empowers the JCC itself to appoint other necessary staff to aid in the performance of its functions.<sup>43</sup> It also requires the commissioners to elect a chairperson from among themselves.<sup>44</sup> The main responsibilities of the chairperson are to determine the venues and times for the JCC’s meetings and to preside over those

33 Id, arts 144(1) and 236.

34 Id, art 236(2).

35 Judicial (Code of Conduct) Act (JCCA) 1999, as amended by Act No 13 of 2006.

36 Id, sec 20(1).

37 Ibid.

38 Id, sec 20(2).

39 Id, sec 20(4).

40 Id, sec 20(7).

41 Id, sec 20(6).

42 Id, sec 21.

43 Id, sec 21(5).

44 Id, sec 20(3).

meetings.<sup>45</sup> In instances where the chairperson is absent, the JCCA requires the commissioners present to elect an interim presiding commissioner.<sup>46</sup>

### *Procedure for removal*

The JCCA expands upon the constitutional provisions governing the procedure to be followed by the JCC in the performance of its functions. This includes the procedure relating to removal proceedings initiated on any of the four grounds prescribed in article 143 of the Constitution. Notably, while the Constitution merely states that removal proceedings may be initiated by the JCC on its own motion or through a complaint filed with the JCC without specifying the eligible complainant, the JCCA provides some clarity in this connection. It specifies that “any” member of the public or judicial officer who has a complaint against a judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened the JCCA “shall” bring the matter to the attention of the JCC,<sup>47</sup> either by lodging a formal complaint or by merely informing the JCC of the allegation to enable it to initiate its own investigation. Here, the term “judicial officer” includes judges, registrars, magistrates and any “other person having power to hold or exercise the judicial powers of a court”.<sup>48</sup>

A person who has a complaint or an allegation against a judicial officer, whether they are a member of the public or another judicial officer, may lodge it either directly with the secretary or indirectly with the clerk of court or the district commissioner in the area where the incident or circumstances giving rise to the complaint or allegation occurred.<sup>49</sup> In either case, a complaint (as opposed to a mere allegation) may be made orally or in writing.<sup>50</sup> However, if made orally, the recipient of the complaint must reduce it to writing.<sup>51</sup> The JCCA prescribes minimum details that the written version of a complaint must contain. These include the name, the physical and postal address and the age of the complainant, as well as a detailed statement of the facts giving rise to the complaint.<sup>52</sup> Furthermore, the written version of a complaint must bear the signature or thumbprint of the complainant.<sup>53</sup>

When a complaint is received by a clerk of court or a district commissioner, they are required to submit it to the secretary within 14 days.<sup>54</sup> Subsequently, within 21 days of receiving the complaint, the secretary must present it to the JCC and, where applicable, send a written acknowledgment of receipt to the complainant.<sup>55</sup> The JCC is then tasked with investigating the complaint. For this purpose, the JCC wields statutory power to issue summons or orders compelling the attendance of relevant individuals and the production of pertinent documents or records.<sup>56</sup> Individuals summoned by the JCC may be examined under oath or affirmation administered by the chairperson or another presiding commissioner.<sup>57</sup> The JCCA grants the JCC the authority to regulate its own procedure, except where the JCCA itself or the Constitution prescribes specific procedural requirements.<sup>58</sup> Notably, the JCCA specifically requires the presence of at least three commissioners for any meeting

45 *Id.*, sec 28(2) and (4).

46 *Id.*, sec 28(5).

47 *Id.*, sec 25(1) and (2).

48 *Id.*, sec 2.

49 *Id.*, sec 25(3).

50 *Id.*, sec 25(4).

51 *Id.*, sec 25(6).

52 *Id.*, sec 25(5).

53 *Id.*, sec 25(7).

54 *Id.*, sec 26(1).

55 *Id.*, sec 26(2).

56 *Id.*, sec 27(2).

57 *Id.*, sec 27(3).

58 *Id.*, sec 28(1).

of the JCC to be quorate.<sup>59</sup> The JCCA also explicitly requires the JCC to make its decisions by a majority of the commissioners present and voting at a meeting.<sup>60</sup>

Before commencing a full investigation for the potential removal of a judge, the JCC must assess whether a complaint or allegation against the judge discloses a prima facie case for removal. Where the JCC determines that a complaint does not disclose such a case, it may dismiss the complaint without undertaking a full investigation.<sup>61</sup> Conversely, where the JCC concludes that a prima facie case exists, it is constitutionally obligated to submit a report to the president to that effect.<sup>62</sup> This obligation applies whether the JCC has initiated the investigation in question on its own motion or in response to a complaint. In either case, the Constitution provides that, within seven days from the date of receiving the JCC's report affirming a prima facie case for removal, the president "shall" suspend the judge in question pending a full investigation and simultaneously inform the JCC of the suspension.<sup>63</sup> This step is crucial because the JCC cannot commence a full investigation until the president has confirmed the suspension of the judge under investigation.<sup>64</sup>

The procedure for conducting a full investigation varies depending upon the grounds cited in support of the case for removal. In cases where removal is sought based on allegations of mental or physical incapacity, the JCC, in consultation with the body responsible for regulating health practitioners, must, within 30 days of the judge being suspended by the president, establish a medical board to examine the judge and report to the JCC on the judge's capacity to perform judicial functions.<sup>65</sup> The medical board must consist of no less than three registered health practitioners.<sup>66</sup> If the judge under investigation refuses to undergo a medical examination, the JCC must notify the president of the refusal and the president "shall immediately" remove the judge in question.<sup>67</sup>

In cases where a judge under investigation submits to a medical examination, the medical board is required to complete the examination and submit a report to the JCC within 30 days of its formation.<sup>68</sup> The JCC must then adopt the findings of the board regarding the judge's physical or mental capability to perform judicial functions.<sup>69</sup> Where the medical board reports that the judge is physically or mentally capable of performing judicial functions, the JCC "shall recommend to the President the revocation of the judge's suspension and the President shall immediately revoke the suspension".<sup>70</sup> Conversely, where the medical board reports that the judge is not physically or mentally capable of performing judicial functions, the JCC "shall recommend to the President the removal of the judge from office and the President shall immediately remove the judge from office".<sup>71</sup>

On the other hand, the constitutional mandate to investigate any allegations of incompetence, gross misconduct or bankruptcy against a judge lies exclusively with the JCC.<sup>72</sup> In cases where a judge is suspended by the president based on any of these allegations, the JCC is required to conduct its investigation and render a decision within 30 days of the judge's suspension.<sup>73</sup> According to the Constitution, removal proceedings before the JCC "shall be held in camera" and a judge under

59 *Id.*, sec 28(3).

60 *Id.*, sec 28(6).

61 *Id.*, sec 24(1)(a).

62 The Constitution, art 144 (2).

63 *Id.*, art 144 (3).

64 *Banda v Attorney General*, above at note 10.

65 The Constitution, art 144(4)(b) and (8).

66 *Id.*, art 144(7).

67 *Id.*, art 144(10).

68 *Id.*, art 144(8).

69 *Id.*, art 144(9).

70 *Id.*, art 144(9)(a).

71 *Id.*, art 144(9)(b).

72 *Id.*, art 144(4)(a).

73 *Ibid.*

investigation “is entitled to appear, be heard and be represented by a legal practitioner or other person chosen by the judge”.<sup>74</sup> The JCCA further underscores the confidential nature of all judicial disciplinary proceedings before the JCC, specifying that any complaint lodged against a judge or any other judicial officer and any investigation into the complaint carried out by the JCC “shall be treated as confidential, and shall not be open for public inspection except for the judicial officer concerned and the complainant”.<sup>75</sup>

Notably, neither the JCCA nor the Constitution provides explicit guidance on the type of evidence the JCC may consider when determining a judge’s incompetence. The Constitution does, however, offer a general definition of “gross misconduct”. According to article 266 of the Constitution, gross misconduct refers to any behaviour that “brings a public office into disrepute, ridicule or contempt”, “is prejudicial or inimical to the economy or the security of the State”, involves “an act of corruption” or entails “using or lending the prestige of an office to advance the private interests of that person, members of that person’s family or another person”.<sup>76</sup> As concerns bankruptcy, both the JCCA and the Constitution are also silent on the criteria that the JCC must use to establish a judge’s bankruptcy.

The Bankruptcy Act 1967 does, however, provide a detailed list of acts constituting bankruptcy.<sup>77</sup> These acts include a wide range of transactions by a debtor that may serve as reasons for a creditor to petition the High Court for a declaration of bankruptcy; that is, a declaration to the effect that the debtor is incapable of satisfying a debt, either immediately or at a specified future time. Although neither the JCCA nor the Constitution specifies the timing for determining a judge’s bankruptcy, it is reasonable to assume that such a determination would generally follow a High Court order under the Bankruptcy Act confirming the judge’s bankruptcy.<sup>78</sup> The only conceivable exception, albeit remote, is where the JCC makes a finding of bankruptcy before a court order because the judge in question has filed a bankruptcy petition against themselves. Any premature findings by the JCC in the absence of a relevant court order could be speculative, as the judge under investigation might subsequently be exonerated by the High Court.

After completing a full investigation into an allegation of incompetence, gross misconduct or bankruptcy, the JCC must prepare a report of its findings. Where the JCC concludes that an allegation against a judge has not been substantiated, the Constitution provides that the JCC “shall recommend, to the President, the revocation of the judge’s suspension and the President shall immediately revoke the suspension”.<sup>79</sup> Conversely, where the JCC finds that the allegations have been substantiated, the Constitution provides that the JCC “shall recommend, to the President, the removal of the judge from office and the President shall immediately remove the judge from office”.<sup>80</sup>

### Coherence with judicial accountability

The Constitution explicitly mentions accountability in relation to the exercise of judicial authority. Article 118 of the Constitution states that the “judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability”.<sup>81</sup> The Constitution does not, however, define the term “accountability”. Indeed, the meaning of accountability can vary depending upon context.<sup>82</sup> It would nonetheless appear that

74 *Id.*, art 144(6).

75 JCCA, sec 25(8).

76 The Constitution, art 266.

77 Bankruptcy Act, sec 3.

78 *Id.*, sec 5.

79 The Constitution, art 144(5)(a).

80 *Id.*, art 144(5)(b).

81 *Id.*, art 118(1).

82 Kosař *Perils of Judicial Self-Government*, above at note 2 at 25–72.



accountability generally implies the possibility or obligation to answer for one's actions or omissions.<sup>83</sup>

A distinction can be drawn between two forms of accountability, as thus understood, in relation to the exercise of judicial authority: collective or institutional accountability and individual accountability.<sup>84</sup> Collective or institutional accountability relates to the accountability of the judiciary as an institution. Individual accountability on the other hand refers to the accountability of individual judges (and other judicial officers). The power to remove and discipline judges affects both individual judges and the judiciary as an institution.<sup>85</sup> As a mechanism for judicial accountability, however, the remedy of removal primarily targets individual judges rather than the judiciary as a whole.

The discussion that follows therefore focuses on individual accountability as opposed to institutional accountability. It is nonetheless important to note from the outset that individual judicial accountability can also manifest itself in two distinct forms: decisional accountability and behavioural accountability.<sup>86</sup> Decisional accountability refers to individual accountability for judicial decisions, whereas behavioural accountability refers to individual accountability for "personal" conduct, whether on or off the bench.<sup>87</sup>

Another point worth underlining is that no judge is infallible. All judges are liable to make mistakes from time to time. The purpose of any procedure for the removal of judges is only to establish an effective system for remedial action in cases where a judge, due to fault or disability, is unfit to retain office.<sup>88</sup> Instances of less serious shortcomings that do not render a judge unfit for office warrant alternative sanctions short of removal.<sup>89</sup> For example, a judge may exhibit laziness or engage in other forms of misconduct that would get another public servant fired but may still continue in office.<sup>90</sup> In such cases, the judge concerned may be held accountable not through removal but through other formal and / or informal mechanisms, including public scrutiny, media surveillance, appellate review, professional evaluation, academic commentary and similar avenues.<sup>91</sup>

### Judicial accountability and grounds for removal

The grounds for the removal of judges enumerated in article 143 of the Constitution establish the foundation for individual accountability through the process of removal. All the four grounds implicate both decisional and behavioural accountability. However, a distinction can be made between removal on the ground of incapacity on the one hand and removal based on incompetence, gross misconduct and bankruptcy on the other hand. Removal on the ground of incapacity is akin to termination of employment through retirement, resignation or death in that it does not require proof of fault on the part of the judge being removed. Rather, it requires evidence showing that the judge concerned suffers from a mental or physical disability that renders them incapable of performing judicial functions.<sup>92</sup> Notwithstanding any observable manifestations of disability in judicial behaviour or performance lapses, therefore, removal on the ground of incapacity should not be confused with dismissal. It should be more accurately characterized and treated as a form

83 See G Canivet "The responsibility of judges in France" in G Canivet, M Andenas and D Fairgrieve (eds) *Independence, Accountability, and the Judiciary* (2006, British Institute of International and Comparative Law) at 30.

84 See D Kosař "The least accountable branch" (2013) 11/1 *International Journal of Constitutional Law* 234 at 243.

85 Shetreet and Turenne *Judges on Trial*, above at note 3 at 272.

86 Id at 246. See also D Brody "The use of judicial performance evaluation to enhance judicial accountability, judicial independence, and public trust" (2008) 86 *Denver University Law Review* 115 at 123–24.

87 Kosař "The least accountable branch", above at note 84 at 246.

88 JE Frankel "Judicial discipline and removal" (1966) 44 *Texas Law Review* 1117 at 1117.

89 Ibid.

90 RA Posner "What do judges and justices maximize? (The same thing everybody else does)" (1993) 3 *Supreme Court Economic Review* 1 at 4–5.

91 See note 2 above and accompanying text.

92 The Constitution, art 143(a).

of compulsory early retirement.<sup>93</sup> Removal on the ground of incompetence, gross misconduct or bankruptcy, by contrast, signifies dismissal. A judge removed on any of these grounds forfeits their position due to some fault of their own, whether in the form of actions or omissions.

From the standpoint of judicial accountability, the justification for the removal of judges on the ground of incapacity is self-evident. The Constitution itself provides for such removal only in cases where a judge is so mentally or physically disabled that they are “incapable of performing judicial functions”.<sup>94</sup> It is obvious that retaining a judge who is unable to discharge the duties of their high office is not in the public interest. This should explain why the Constitution does not grant any discretion to the JCC and the president in their respective roles once a board of medical experts conclusively determines a judge’s incapacity, or when a judge reasonably suspected of incapacity refuses to undergo a medical examination.<sup>95</sup> The removal of such a judge is imperative to protect the public interest in the administration of justice, thus ensuring judicial accountability.

The removal of judges on the ground of incompetence could similarly help ensure that only judges capable of fulfilling their judicial duties remain in office. This is especially relevant in Zambia, where allegations of judicial incompetence are rather common.<sup>96</sup> It should be acknowledged that the lack of a definition of incompetence within the current legal framework creates legal uncertainty regarding what exactly constitutes judicial incompetence. In a more general sense, however, incompetence in this context refers to a lack of ability or qualifications to be a judge. Judicial incompetence can thus manifest itself not only in decisional errors but also in other observable behaviour amounting to neglect of judicial duties – for example, failure to apply rules of procedure, rule on applications, set cases for trial and / or deliver judgments.<sup>97</sup> The social need to guard the judiciary against incompetent judges cannot therefore be overstated. Indeed, even the International Covenant on Civil and Political Rights (ICCPR) 1966 explicitly recognizes competence, together with independence and impartiality, as indispensable attributes of judicial office.<sup>98</sup> This perhaps explains why the UN Human Rights Committee (HRC) also sees judicial incompetence as an acceptable ground for removal.<sup>99</sup>

Even so, we must recall that the Constitution prescribes the formal qualifications for judicial appointments,<sup>100</sup> thereby establishing a legal presumption that individuals appointed as judges possess the requisite competence. In the unlikely event that the president appoints a person who does not possess the prescribed qualifications, the appointment would be illegal.<sup>101</sup> Such an appointment can be challenged for being unconstitutional rather than on the ground of incompetence. Any allegations of incompetence must be substantiated by proof of poor judicial performance rather than through proof of a lack of adequate training or formal qualifications. Thus, given that all validly appointed judges are presumed to be competent by virtue of their formal qualifications, judges exhibiting incompetence can be more *objectively* removed on the ground of gross misconduct rather than on the overly vague ground of incompetence. The constitutional definition of gross

93 Shetreet “Judicial independence and accountability”, above at note 4 at 993.

94 The Constitution, art 143(a).

95 Id, art 144(9)(b) and (10).

96 See eg “Judicial Complaints Commission said ConCourt Judges erred on 14 days interpretation-Green Party” (15 October 2017) *Lusaka Times*, available at: <<https://www.lusakatimes.com/2017/10/15/judicial-complaints-commission-said-concourt-judges-erred-14-days-interpretation-green-party/>> (last accessed 4 June 2024); MF Njenga “Remove ConCourt judges; they are an incompetent bunch – Sishuwa” (13 March 2020) *News Diggers!*, available at: <<https://diggers.news/local/2020/03/13/remove-concourt-judges-they-are-an-incompetent-bunch-sishuwa/>> (last accessed 4 June 2024).

97 CBS “Limiting judicial incompetence: the due process right to a legally learned judge in state minor court criminal proceedings” (1975) 61/7 *Virginia Law Review* 1454; GP Miller “Bad judges” (2004) 83/2 *Texas Law Review* 431 at 439–40.

98 International Covenant on Civil and Political Rights (1966), UN Treaty Series vol 999, art 14(1).

99 General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial (2007), UN doc CCPR/C/GC/32, para 20.

100 The Constitution, art 141.

101 Id, art 1(2).

misconduct captures at least incompetence that is so serious as to warrant removal, understood as incompetence that has the potential to tarnish the office of judge, bringing it “into disrepute, ridicule or contempt”.<sup>102</sup> This holds true whether judicial incompetence manifests itself in decisional errors or neglect of duties.

When a judge makes a wrong decision, whether due to incompetence or some other reason, the conventional legal remedy does not lie in the sanction of removal. The judicial appeal system is the ordinary mechanism by which judges are held accountable to society for decisional errors.<sup>103</sup> Admittedly, the right of appeal is only a partial and limited remedy for the problem of incompetence,<sup>104</sup> which goes to lack of qualifications to be a judge. It is also “overinclusive” in that it applies not only to decisions made by incompetent judges but also decisions made by competent judges who make occasional errors, as all judges do.<sup>105</sup> But the very fact that all judges are liable to err argues against removing judges on the ground of incompetence that manifests itself in decisional errors unless the incompetence is so serious as to constitute gross misconduct. This is perhaps what the UN HRC should be understood to mean insofar as it deems acceptable the dismissal of a judge “only on grounds of *serious* misconduct or incompetence”.<sup>106</sup> Even neglect of judicial duties should be objectively seen as a form of judicial misconduct rather than incompetence, since both incompetent and competent judges can neglect their duties. It is thus questionable whether there is a need to recognize incompetence as a distinct ground for removal. A more effective solution to the problem of judicial incompetence is to prevent it through a rigorous and transparent judicial appointment process rather than to attempt to fix it after an appointment has been made.

Gross misconduct appears to be a more readily justifiable ground for removal from the standpoint of both decisional and behavioural judicial accountability. This is so not only because the Constitution provides a definition of gross misconduct but also because the overall effectiveness of the judiciary in fulfilling its societal role depends upon public confidence in judicial decisions and conduct. The concept of “judicial authority” recognized in article 118 of the Constitution presupposes public acceptance of the judiciary as the rightful forum for legal dispute resolution, which is contingent upon public confidence in the ability of judges and their commitment to carrying out this function.<sup>107</sup> Judges deviating from this commitment risk eroding public trust and confidence in the justice system and should thus be held accountable, including through removal for actions or omissions constituting gross misconduct. Although opinions may differ on the evidential threshold for proving gross misconduct, there should be little objection to the removal of a judge who has clearly proven themselves unfit for judicial office. Judicial accountability demands as much.

In appropriate cases, evidence of a judge’s involvement in acts of bankruptcy could serve as proof of gross misconduct. There should particularly be no serious protestations against the removal of a bankrupt judge whose observable off-the-bench behaviour clearly amounts to criminal fraud.<sup>108</sup> Off-the-bench criminal activities are a distinct form of gross misconduct as they risk bringing the office of judge into disrepute, ridicule or contempt, thereby undermining public confidence in the judiciary as a whole. It is, however, worth recalling that the bankruptcy envisaged by the Bankruptcy Act does not inherently imply criminality or fraud. Rather, it is a financial status signifying an inability to pay debts. The specific reasons for bankruptcy can vary from one bankrupt to another. Some become bankrupt due to their own fraudulent or dishonest dealings, while others become bankrupt due to unforeseen financial disruptions beyond their control. It is therefore

102 Id, art 266.

103 Shetreet and Turenne *Judges on Trial*, above at note 3 at 273.

104 Miller “Bad judges”, above at note 97 at 462–63.

105 Ibid.

106 General Comment No 32, above at note 99, para 20 (emphasis added).

107 See *Morice v France* Appln 29369/10 (European Court of Human Rights (ECtHR), 23 April 2015), para 129.

108 DJ Hall “Judicial removal for off-bench behavior” (1972) 21/1 *Journal of Public Law* 127.

necessary to distinguish fraudulent bankrupts from those facing financial challenges through no “legal” fault of their own.<sup>109</sup>

Bankruptcy as such does not call for judicial accountability unless there is a clear link between conduct related to bankruptcy and the judge’s fitness for office. For example, evidence should be adduced to show that the act of bankruptcy in question constitutes fraudulent conduct or that the judge’s indebtedness has led to favouritism or discrimination amounting to misconduct involving moral turpitude.<sup>110</sup> Such evidence may warrant removal because it tends to prove gross misconduct as defined in the Constitution, specifically because it involves behaviour that may bring the office of judge “into disrepute, ridicule or contempt” or entails “using or lending the prestige of [the] office to advance the private interests of [the judge concerned], members of that [judge’s] family or another person”.<sup>111</sup>

It would therefore appear that there is no need to recognize bankruptcy as a separate ground for removal. Any removal on account of bankruptcy that does not stem from fraudulent or dishonest conduct amounting to gross misconduct would lack a meaningful purpose, not least from the standpoint of judicial accountability. Such removal would perhaps serve only to punish and belittle the bankrupt judge solely because of their financial status at a particular point in time, which is obviously unwarranted.<sup>112</sup>

### *Procedural safeguards for judicial accountability in cases of removal*

The initiation of removal proceedings in and of itself does not guarantee the effective use of the process of removal as a mechanism for judicial accountability. This holds true irrespective of the specific ground upon which removal is being sought. Those who control the machinery of removal may have a vested interest in either retaining a judge who should be removed or removing a judge who should be retained. Any such manipulation would be inconsistent with judicial accountability.

To ensure the effective application of the remedy of removal as a mechanism for judicial accountability, judges facing removal must be afforded a fair hearing.<sup>113</sup> Procedural safeguards for a fair hearing include full rights of defence, such as the right to receive advance notice of charges, the right to legal representation and the right to a public and expeditious hearing before an independent authority.<sup>114</sup> Judges facing removal must also have the right to obtain an independent review of decisions made in removal proceedings.<sup>115</sup>

The current legal framework in Zambia recognizes some of these rights, both implicitly and explicitly. For example, although the Constitution does not explicitly provide for the right to receive advance notice of charges in cases of removal, it can be argued that this right is implicit in the JCC’s authority to issue summons requiring the attendance of a judge before it and the constitutional entitlement to be heard.<sup>116</sup> Similarly, while the Constitution does not explicitly provide for the right to obtain an independent review of decisions made in removal proceedings,<sup>117</sup> a judge

109 E Kadens “The last bankrupt hanged: balancing incentives in the development of bankruptcy law” (2010) 59/7 *Duke Law Journal* 1229.

110 *McMillen v Diehl*, *Judge* 128 Ohio St 212, 190 NE 567 (Ohio 1934).

111 The Constitution, art 266.

112 *Albanese v Italy* Appln 77924/01 (ECtHR, 23 March 2006), paras 48 and 49.

113 IBA Minimum Standards of Judicial Independence, above at note 7, paras 4 and 27; Basic Principles on the Independence of the Judiciary, above at note 7, paras 17 and 20; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003, African Commission on Human and Peoples’ Rights), para 4(q) and (r); Commonwealth (Latimer House) Principles, above at note 7, annex, para VI, 1(a)(i).

114 *Ibid.*

115 *Ibid.*

116 The Constitution, art 144(6); JCCA, sec 27(2)(a).

117 Compare the Constitution, art 220(2)(c), providing that the JSC shall hear appeals from “judicial officers” other than judges (art 266).

dissatisfied with a JCC's decision may challenge it through an appropriate legal action. The *Banda* case mentioned earlier is illustrative in this regard.<sup>118</sup>

In cases of alleged incapacity, the Constitution contains some notable explicit safeguards. Not only does it explicitly prescribe reasonably short timeframes for each stage of the removal procedure; it also entitles a judge facing removal on the ground of incapacity to undergo a medical examination by a board of experts to determine their ability to perform judicial functions.<sup>119</sup> It is, however, somewhat unfortunate that the Constitution does not explicitly require this board to consist of *independent* medical experts. This omission could prove to be a significant legislative oversight as those tasked with constituting the board may, intentionally or unintentionally, appoint medical experts with a vested interest in the removal or retention of a judge under investigation.

Judges facing removal based on allegations of incompetence, gross misconduct and bankruptcy are also entitled to notable explicit constitutional safeguards. These safeguards include the rights to appear before the JCC, to be heard within specific timeframes and to be represented by legal counsel or another chosen representative.<sup>120</sup> The JCC is also required to make its decisions within a specific timeframe of 30 days.<sup>121</sup> Importantly, unlike the medical board investigating judicial incapacity whose independence is not explicitly required by the Constitution, the Constitution makes provision for the independence of the JCC. Specifically, article 216 of the Constitution enumerates general principles, requiring every constitutional commission, including the JCC, to be subject only to the Constitution and the law, to "be independent and not be subject to the control of a person or an authority in the performance of its functions", to perform its functions "with dignity, professionalism, propriety and integrity" and to be non-partisan and "impartial in the exercise of its authority". Beyond these general principles, however, the Constitution does not provide concrete safeguards for a public hearing before an independent authority.

The provisions of the JCCA on the appointment and removal of commissioners raise particular concerns regarding the JCC's independence from the appointing authority. As noted above, the JCCA empowers the president not only to appoint commissioners of the JCC but also to make discretionary decisions regarding both the renewal of a commissioner's tenure and the removal of a commissioner from office before the expiration of their tenure.<sup>122</sup> The JCCA does not provide any meaningful safeguards against the potential abuse of these discretionary powers. It does not specify the factors that the president should consider when deciding whether or not to renew a commissioner's term of office.<sup>123</sup> It also allows the president to remove commissioners for various reasons, including alleged failure to fulfil the duties of the commissioner's office.<sup>124</sup> The determination of what constitutes "failure to perform the duties of the office of a commissioner" lies solely with the president. In effect, all the JCC's commissioners serve at the pleasure of the president. It would therefore be paradoxical to characterize the JCC as an independent authority in its current form.

One could even argue that the foregoing provisions of the JCCA are unconstitutional as they appear to be inconsistent with article 216 of the Constitution, which requires the JCC to "be independent and not be subject to the control of a person or an authority in the performance of its functions". If this argument holds, the provisions in question are legally invalid to the extent of the inconsistency in accordance with the supremacy clause of the Constitution.<sup>125</sup> Even those who may dismiss this argument should at least agree that the mere threat of losing office at the sole discretion of the president posed by those provisions would naturally induce commissioners to refrain

118 *Banda v Attorney General*, above at note 10. See also *Siyunyi v Attorney General* 2022/CCZ/0028 (28 September 2023).

119 The Constitution, art 144(3), (4)(b) and (8).

120 *Id.*, art 144(6). See also JCCA, sec 25.

121 The Constitution, art 144(4)(a).

122 JCCA, sec 20.

123 *Id.*, sec 20(4).

124 *Id.*, sec 20(6) and (7).

125 The Constitution, art 1(1).

from making decisions that may contradict the perceived or expressed wishes of the president, which is obviously inconsistent with judicial accountability. Judges who should be removed may remain in office if their failures or transgressions find favour with the incumbent president. Conversely, judicial accountability may be used as a pretext for the removal of judges who should be retained but are perceived as a threat to the realization of the incumbent president's wishes.

It is also surprising to note that, despite explicitly recognizing the need for the JCC to be independent and impartial, the Constitution itself appears to further compromise the JCC's independence by granting it the authority to initiate removal proceedings. This flouts international standards, according to which "[t]he bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them".<sup>126</sup> The Constitution essentially allows the JCC to act both as a complainant and a judge in cases of removal, a clear violation of fundamental principles of justice and constitutionalism, including the maxim that no one should be a judge in their own cause [*nemo iudex in sua causa*].<sup>127</sup> This dual role not only undermines the perceived independence of the JCC but also poses a threat to its actual independence. It would be a conspicuous absurdity to insist that the JCC acts as an independent and impartial adjudicator of cases of removal even when it initiates those cases itself.

The confidentiality of removal proceedings and decisions made therein only exacerbates the situation. According to international standards, "[t]ransparency shall be the rule for disciplinary hearings of judges"; "[s]uch hearings shall be open, unless the judge who is accused requests that they be closed"; "[t]he decisions regarding judicial discipline shall provide reasons" and "[f]inal decisions on disciplinary measures shall be published".<sup>128</sup> But we now know that both the Constitution and the JCCA require the JCC to conduct removal proceedings behind closed doors.<sup>129</sup> Furthermore, neither the Constitution nor the JCCA mandates the publication or disclosure of the reasons underlying the JCC's decisions regarding the removal or retention of judges. This lack of transparency is clearly inconsistent with the principle of judicial accountability enshrined in article 118 of the Constitution. The Constitution itself explicitly mandates the JCC to "ensure that judges and judicial officers are *accountable to the people* for the performance of their functions".<sup>130</sup> Therefore, the JCC serves only as an agent for holding judges accountable to the people. It is itself accountable to the people for the performance of its functions. The people to whom judges are ultimately accountable must be able to keep track of the JCC's operations and decisions to verify that it uses the power of removal in all appropriate cases, and only in appropriate cases, to ensure judicial accountability.

It should be acknowledged that the confidentiality of removal proceedings may be justified to a limited extent, particularly during the initial stages.<sup>131</sup> Within the legal framework under consideration, such confidentiality may be acceptable when the JCC is assessing whether there is a *prima facie* case for a judge's removal warranting further investigation.<sup>132</sup> Confidentiality at this stage may be justified because the mere initiation of disciplinary proceedings against a judge, regardless of the merits of the case, could compromise public confidence in the judiciary as a whole.<sup>133</sup>

126 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia - Judicial Administration, Selection and Accountability (2010, OSCE Office for Democratic Institutions and Human Rights and Max Planck Minerva Research Group on Judicial Independence), para 26.

127 C Phiri "A curious decision by Zambia's highest court: six years imprisonment for civil contempt?" (2019) 12/2 *African Journal of Legal Studies* 115 at 116.

128 Kyiv Recommendations on Judicial Independence, above at note 126, para 26.

129 The Constitution, art 144(6); JCCA, sec 25(8).

130 The Constitution, art 236(2) (emphasis added).

131 IBA Minimum Standards of Judicial Independence, above at note 7, para 28; Basic Principles on the Independence of the Judiciary, above at note 7, para 17.

132 The Constitution, art 144(2).

133 *Eminağaoğlu v Turkey* Appln 76521/12 (ECtHR, 9 March 2021), para 150; *Sarisu Pehlivan v Turkey* Appln 63029/19 (ECtHR, 6 June 2023), para 50.

However, once this preliminary stage is complete, public hearings should be the default practice unless the judge being investigated requests otherwise and the JCC or a superior court deems the request justified.<sup>134</sup> At a minimum, judges facing removal proceedings should have the option to request a public hearing.<sup>135</sup> The final decisions made in removal proceedings, regardless of whether they are conducted in camera or in public, should be published and made accessible to the people to whom all judges are ultimately accountable.<sup>136</sup>

### Coherence with judicial independence

The Constitution enshrines the principle of judicial independence in its articles 122 and 123. Article 122 states that, “[in] the exercise of the judicial authority, the Judiciary shall be subject only to [the] Constitution and the law and not be subject to the control or direction of a person or an authority”.<sup>137</sup> It also prohibits interference “with the performance of a judicial function by a judge or judicial office” and mandates the protection of “the independence, dignity and effectiveness of the Judiciary”.<sup>138</sup> Furthermore, article 122 prohibits the abolition of the “office of a judge or judicial officer ... while there is a substantive holder of the office”.<sup>139</sup> Article 123 addresses the financial independence of the judiciary, designating it as “a self-accounting institution” that must “deal directly with the Ministry responsible for finance in matters relating to its finances” and that must “be adequately funded ... to enable it [to] effectively carry out its functions”.<sup>140</sup> Additionally, article 123 states that “[the] Judiciary shall not, in the performance of its administrative functions and management of its financial affairs, be subject to the control or direction of a person or an authority”.<sup>141</sup>

While the precise contours of the concept of judicial independence remain debatable, these constitutional provisions reasonably capture the essence of what is commonly understood as judicial independence.<sup>142</sup> However conceptualized, judicial independence is the cornerstone of the fundamental right to a fair trial enshrined in article 18 of the Constitution, a right that also serves as a safeguard for all other legal rights through the application of the rule of law.<sup>143</sup> Like article 14 of the ICCPR, article 18 of the Constitution provides a range of procedural safeguards in both criminal and civil matters, underlining every individual’s entitlement to “a fair hearing within a reasonable time by an independent and impartial court established by law”. The notion of independence is thus inherent in the task of adjudication, involving an authority that acts as an impartial and neutral third party in relation to the parties to the dispute being adjudicated.<sup>144</sup>

Judicial independence entails both internal and external independence. Internally, judicial independence implies impartiality, ensuring “a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings”.<sup>145</sup> This requires the judiciary and its officers to act objectively, without “any interest in the outcome of the

134 Kyiv Recommendations on Judicial Independence, above at note 126, para 26.

135 IBA Minimum Standards of Judicial Independence, above at note 7, para 28; Basic Principles on the Independence of the Judiciary, above at note 7, para 17; Mount Scopus International Standards of Judicial Independence (2008/2015, International Association of Judicial Independence and World Peace), para 5.2.

136 IBA Minimum Standards of Judicial Independence, above at note 7, para 28; Mount Scopus International Standards of Judicial Independence, above at note 135, para 5.2.

137 The Constitution, art 122(1).

138 Id, art 122(2) and (4).

139 Id, art 122(5).

140 Id, art 123(1) and (2).

141 Id, art 122(3).

142 See note 4 above and accompanying text.

143 See also *Eminağaoğlu v Turkey*, above at note 133, para 150; *Sarisu Pehlivan v Turkey*, above at note 133, para 50.

144 Case C-506/04 *Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8643, para 49.

145 Id, para 52.

proceedings apart from the strict application of the rule of law”.<sup>146</sup> Externally, judicial independence entails freedom from external interventions or pressures that could compromise the independent judgment of the judiciary or its officers in proceedings before them.<sup>147</sup> This means that the judiciary and its officers must be free from the fear of being penalized in any way, whether by members of the executive and legislative branches of government or indeed any other person, for applying the rule of law.<sup>148</sup>

Therefore, like judicial accountability, judicial independence has both institutional and individual dimensions. Institutional independence, as “embodied in the doctrine of separation of powers, which elevates the judiciary to the status of a co-equal branch” of government,<sup>149</sup> demands a judiciary that is free from arbitrary interference by the executive and the legislature alike.<sup>150</sup> Individual independence requires that judicial officers operate without external control from the executive, the legislature or even superiors within the judiciary as in-house hierarchical pressures could undermine the independence of junior judges.<sup>151</sup> The independence of individual judges, regardless of seniority, depends not only upon the procedure and qualifications for the appointment of judges but also guarantees relating to security of tenure until the mandatory retirement age or (where applicable) until the expiry of a term of office and the conditions governing promotion, transfer, suspension and cessation of functions.<sup>152</sup>

The power to remove judges has implications for both individual and institutional judicial independence.<sup>153</sup> In particular, arbitrary removals can affect not only the independence of individual judges but also the general public perception regarding the independence of the judiciary as an institution. The discussion that follows nonetheless focuses on the *decisional* independence of individual judges,<sup>154</sup> in particular their ability to make judicial decisions without fear of sanctions, as opposed to institutional independence, since removal proceedings are instituted against individual judges rather than the judiciary as a whole.

### *Judicial independence and grounds for removal*

Ensuring judicial accountability through the removal of unfit judges does not necessarily threaten judicial independence. In particular, the removal of judges who are genuinely incapable of performing their judicial functions, whether due to mental or physical disability, poses no threat to the independence of their mentally and physically fit counterparts. Likewise, the removal of judges who have conducted themselves in a manner that renders them unfit for office is not only a social necessity in the name of judicial accountability but could also serve to protect judicial independence. Judges who engage in gross misconduct could undermine their own judicial independence. In particular, judges who involve themselves in corruption or exploit their office for personal gain cannot be trusted to make independent or impartial judicial decisions in accordance with the law as required

146 Ibid.

147 Id, para 51.

148 Ibid.

149 Kaufman “The essence of judicial independence”, above at note 4 at 688.

150 General Comment No 32, above at note 99, para 19.

151 *Parlov-Tkalčić v Croatia* Appln 24810/06 (ECtHR, 22 December 2009), para 91. See Shetreet “Judicial independence and accountability”, above at note 4 at 999; J Sillen “The concept of ‘internal judicial independence’ in the case law of the European Court of Human Rights” (2019) 15/1 *European Constitutional Law Review* 104; S Huchhanavar “Judicial conduct regulation: do in-house mechanisms in India uphold judicial independence and effectively enforce judicial accountability?” (2022) 6/3 *Indian Law Review* 352.

152 General Comment No 32, above at note 99, para 19. See also Shetreet “Judicial independence and accountability”, above at note 4 at 999.

153 Shetreet and Turenne *Judges on Trial*, above at note 3 at 272.

154 VC Jackson “Packages of judicial independence: the selection and tenure of Article III judges” (2007) 95/4 *Georgetown Law Journal* 965 at 987.



by article 122 of the Constitution. Both judicial accountability and independence demand the removal of judges involved in such gross misconduct as defined by the Constitution.<sup>155</sup>

It would, however, appear that the threat of removal based on allegations of incompetence as a distinct ground is likely to undermine rather than safeguard judicial independence. As mentioned earlier, the mere possibility of invoking incompetence as a ground for removal implies that virtually all judges risk facing removal proceedings during their tenure. This could have a significant chilling effect on judicial independence, especially in Zambia, where the current legal framework allows practically anyone who is dissatisfied with a judicial decision, including busybodies, to allege incompetence and initiate removal proceedings against the decisionmaker.<sup>156</sup> Judges may fear that their nonconformist judicial opinions could be misconstrued as incompetence,<sup>157</sup> making it particularly difficult to maintain the independence of nonconformist judges.<sup>158</sup> Worse still, spurious accusations of incompetence might be used as a pretext for removing competent judges who do not find favour with those who control the machinery of removal.<sup>159</sup>

Judicial independence thus clearly argues against recognizing incompetence as a separate ground for removal. Allegations of incompetence should not be entertained in cases of removal unless for the purpose of proving gross misconduct.<sup>160</sup> Any incompetence falling short of gross misconduct should be tolerated to protect competent judges against both the chilling effect of the threat of removal on the overly vague ground of incompetence and the actual abuse of the power of removal based on this ground.<sup>161</sup> Tolerating such incompetence can thus be seen as “an inevitable price” society must pay to preserve judicial independence.<sup>162</sup> Fortunately, as noted earlier, even judicial accountability does not require the removal of a judge for any alleged incompetence that falls short of gross misconduct as alternative mechanisms exist for holding such judges accountable.

The importance of security of judicial tenure for the sake of judicial independence cannot be overstated. It is no wonder that, in certain jurisdictions, notably the USA, there is no prescribed mandatory retirement age for judges, allowing them to serve for life.<sup>163</sup> Security of tenure during good behaviour [*quamdiu se bene gesserint*] is the guiding principle in these jurisdictions, with removal being possible only in cases of gross misconduct. While life tenure has its own drawbacks, such as enabling ailing elderly judges to continue in office and limiting the creation of vacancies for some much-needed fresh blood, the point being underlined is that judges who are both mentally and physically fit should not be subject to removal unless their actions or omissions constitute gross misconduct. This position is also consistent with relevant international standards.

Existing international standards generally permit the suspension or removal of a judge only on the ground of incapacity or behaviour that renders the judge unfit for office.<sup>164</sup> A notable exception is that the UN HRC also recognizes “serious” incompetence as an acceptable ground.<sup>165</sup> However, as noted earlier, serious incompetence could reasonably be interpreted as incompetence amounting to gross misconduct. This interpretation is consistent with other relevant instruments, which suggest that there is an international consensus that only mental or physical incapacity and gross

155 The Constitution, art 266.

156 JCCA, sec 25(1) and (2).

157 Shetreet “Judicial independence and accountability”, above at note 4 at 999.

158 S Shetreet “The limits of judicial accountability: A hard look at the Judicial Officers Act 1986” (1987) 10 *University of New South Wales Law Journal* 4 at 16.

159 *Ibid.*

160 Colbran “The limits of judicial accountability”, above at note 2 at 60.

161 S Shetreet *Judges on Trial: A Study of The Appointment and Accountability of the English Judiciary* (1976, North-Holland Publishing) at 284–85.

162 *Ibid.*

163 See the Constitution of the United States 1787, art III.

164 J Kanapathy and NW Salman “Removal of judges in the Commonwealth – An explainer” (2022) 39/1 *INSAF - The Journal of the Malaysian Bar* 25 at 27.

165 General Comment No 32, above at note 99, para 20.

misconduct, two of the four grounds enumerated in article 143 of the Constitution, should be recognized as valid reasons for removing a judge from office before attaining the mandatory retirement age. This consensus is reflected in various international instruments, including the International Bar Association Minimum Standards of Judicial Independence,<sup>166</sup> the UN Basic Principles on the Independence of the Judiciary,<sup>167</sup> UN Human Rights Council resolutions on the Independence and Impartiality of the Judiciary,<sup>168</sup> the Commonwealth (Latimer House) Principles,<sup>169</sup> the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa<sup>170</sup> and the Mount Scopus International Standards of Judicial Independence.<sup>171</sup>

It follows from the foregoing that judicial independence does not require the recognition of bankruptcy as a separate ground for removal. A bankrupt judge can still be independent. The removal of a bankrupt judge may be justified on account of judicial independence only where it can be shown that the judge concerned is guilty of gross misconduct. Thus, as noted above with respect to judicial accountability, removal should not be required based on bankruptcy, which is merely a financial status, unless there is a clear link between bankruptcy and the performance of judicial duties. This may be the case, for example, where it can be shown that, in the performance of judicial functions, the judge concerned compromised their own independence by knowingly discriminating in favour of those to whom they are financially indebted.<sup>172</sup>

### *Procedural safeguards for judicial independence in cases of removal*

The removal of judges without adequate procedural safeguards against arbitrariness “raises the objective doubt of the observer regarding the judges’ real possibilities of ruling on specific disputes without fear of reprisals”.<sup>173</sup> Safeguarding judicial independence in this context is contingent upon a range of legal protections against arbitrary removal. The procedural safeguards for judicial accountability discussed above also operate as safeguards for judicial independence in cases of removal.<sup>174</sup> These safeguards are essential not only for the protection of judges from the fear of arbitrary removal, particularly when making judicial decisions that contradict the perceived and expressed wishes of those who control the machinery of removal, but also for the preservation of public confidence in the judiciary as a whole.

It would appear that the constitutional provisions regarding the removal of judges for reasons of incapacity are consistent with the principle of judicial independence insofar as they require a judge facing removal on this ground to undergo a medical examination to ascertain whether or not the judge is physically or mentally capable of performing judicial functions. However, as earlier observed with respect to judicial accountability, a notable deficiency lies in the absence of an explicit requirement for judges facing removal on this ground to be certified mentally or physically unfit by an *independent* board of medical experts. Constituting an independent board is imperative because unfounded allegations of incapacity could be used as a pretext for removing capable judges who may not find favour with members of the board or those responsible for appointing the board.

166 IBA Minimum Standards of Judicial Independence, above at note 7, para 30.

167 Basic Principles on the Independence of the Judiciary, above at note 7.

168 “Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers” (2013), UN doc A/HRC/RES/23/6, para 3; “Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers” (2017), UN doc A/HRC/RES/35/12, para 3; “Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers” (2020), UN doc A/HRC/RES/44/9, para 3.

169 Commonwealth (Latimer House) Principles, above at note 7, annex, para VI.

170 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, above at note 113, para 4(p).

171 Mount Scopus International Standards of Judicial Independence, above at note 135, para 5.5.

172 *McMillen v Diehl*, above at note 110.

173 *Supreme Court of Justice (Quintana Coello et al) v Ecuador* Series C 266 (Inter-American Court of Human Rights, 23 August 2013), para 145.

174 See notes 113–15 above and accompanying text.

The mere possibility of a biased board, irrespective of the expertise of its members, poses a threat to judicial independence as this may induce judges to refrain from making decisions that could invite such allegations.

Judges facing removal based on allegations of misconduct must be afforded even more robust procedural rights to safeguard judicial independence.<sup>175</sup> The Constitution provides notable procedural safeguards for judicial independence in this regard, granting judges facing removal the rights to appear before the JCC, to be heard and to be represented by a legal practitioner or another chosen representative.<sup>176</sup> Even so, as noted earlier, the current legal framework in Zambia lacks transparency and the law falls short of securing the independence of the JCC, the authority responsible for deciding cases of removal. Addressing these deficiencies is a prerequisite for maintaining judicial independence.

It goes without saying that the independence of the authority that decides cases of removal is a cornerstone, if not the most important safeguard, for judicial independence in such cases. The hearing of a case of removal in and of itself, no matter how fair it may appear, cannot guarantee a decision that coheres with the dictates of judicial independence. It is pointless to afford a judge a hearing and an opportunity to defend themselves if the decisionmaker will ultimately decide the case not based on relevant facts and the law but based on other self-serving considerations.<sup>177</sup>

The current legal framework is thus clearly at odds with the principle of judicial independence insofar as it allows the JCC to initiate removal proceedings on its own motion.<sup>178</sup> Significantly, as noted above with respect to judicial accountability, the JCC lacks the necessary independence to be expected to make decisions that would go against the perceived or expressed wishes of the incumbent president, since all the commissioners of the JCC serve at the pleasure of the president. This holds true whether removal proceedings are initiated through a complaint or by the JCC on its own motion. Consequently, judges may be inclined to play it safe, refraining from making decisions that they know or believe would cost their position because they may not find favour with the incumbent president. Only judges with unwavering courage and moral fortitude would dare to do justice in cases where the perceived or actual interests of the president or the president's political party are at stake.<sup>179</sup>

The confidentiality of removal proceedings and decisions made therein further exacerbates the threat of arbitrary removal.<sup>180</sup> In effect, the JCC can surreptitiously require the removal of judges who make decisions that do not find favour with those who control the machinery of removal and get away with it. Even the possibility of challenging the JCC's decisions in court does not appear to have a significant countervailing effect in this regard. The JCC can capitalize on the lack of transparency to render arbitrary decisions, banking on the assumption that affected judges will be disinclined to challenge its decisions in court due to the costs and inconvenience involved. This risk would be minimized if the people were able to hold the JCC accountable for its decisions, which is impossible in the absence of transparency. In short, like judicial accountability, judicial independence demands as a default rule the public hearing of cases of removal and the publication of decisions made therein.

175 IBA Minimum Standards of Judicial Independence, above at note 7, paras 4 and 27; Basic Principles on the Independence of the Judiciary, above at note 7, paras 17 and 20; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, above at note 113, para 4(q) and (r); Commonwealth (Latimer House) Principles, above at note 7, annex, para VI, 1(a)(i). See also *Eminağaoğlu v Turkey*, above at note 133, para 150; *Sarıs Pehlivan v Turkey*, above at note 133, para 50.

176 See *Baka v Hungary* Appln 20261/12 (ECtHR, 23 June 2016), paras 72–84.

177 Phiri “A curious decision by Zambia's highest court”, above at note 127 at 124–25.

178 The Constitution, art 144(1).

179 Ndulo “Attorney General v Mutuna”, above at note 6 at 23.

180 The Constitution, art 144(6); JCCA, sec 25(8).

## Conclusion

The foregoing analysis highlights several shortcomings in the current legal framework governing the removal of judges in Zambia. More specifically, significant shortcomings exist in terms of the grounds for removal and the procedural safeguards afforded to judges facing removal. The recognition of incompetence and bankruptcy as distinct grounds for removal lacks a compelling justification. These grounds can be abolished without compromising judicial accountability or indeed judicial independence. Instances of judicial incompetence falling short of gross misconduct can be adequately addressed through alternative mechanisms for judicial accountability while maintaining judicial independence, in particular by ensuring that judges are protected from the threat of removal based on spurious accusations of incompetence. It also appears that the removal of judges solely on account of bankruptcy would not serve any meaningful purpose. Bankruptcy, as a financial status, does not inherently render a judge unfit for office unless it involves fraudulent or dishonest acts amounting to gross misconduct.

Furthermore, the JCC lacks the independence expected of a body tasked with adjudicating cases of removal. Existing procedural safeguards for judicial accountability and independence in such cases, too, generally appear to be inadequate. A comprehensive reform of the current legal framework as suggested in the preceding sections of this article is imperative to bring the framework in line with international standards on judicial accountability and independence. The reformed framework should not only maintain full rights of defence but also incorporate other relevant safeguards, ensuring the independence and impartiality of the body responsible for the removal of judges, ensuring transparency in cases of removal and mandating the publication of decisions made in cases of removal.<sup>181</sup> Only through these measures can Zambia ensure a judiciary that is truly accountable, independent and capable of upholding the rule of law.

**Competing interests.** None

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<sup>181</sup> See *Baka v Hungary*, above at note 176, paras 72–84.