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**“South Africa Look What You Have *Done* to Us”: Exploring the Reasons for the Likely Failure of the South African Constitutional Court Model in Zambia**

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By

O’Brien Kaaba

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O’Brien Kaaba[[1]](#footnote-1)

**1. Introduction**

Constitutional Courts had come to characterize the entrenchment of rule of law and liberal democracy following their spread around the world, from the time they appeared in Europe in the early 20th century, and are now dotted all over Asia, Latin America and Africa. They have been hailed as enforcers of democratic norms and mediators of democratic allocation of constitutional power in a manner that thwarts excessive accumulation of power in one individual or entity, thereby maintaining a reasonable balance between the key branches of government. Constitutional Courts have been seen as symbols of constitutionalism and rule of law.

This positive outlook about Constitution Courts is, however, beginning to wane as the Courts are facing a severe backlash across the globe. The development is not just specific to Constitutional Courts but is part of the larger backlash against liberal democracy or constitutionalism, leading to fears and suggestions by some scholars that liberal constitutionalism may not survive.

This article discusses the transplant of the South African Constitutional Court model to Zambia. It uses the recent South African Constitutional Court decision in the case of *United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17)[2017] ZACC 21* (hereinafter *UDM* case) as a point of departure to demonstrate how the South African Court is withstanding political backlashes and continues to hold government accountable. The case leads into discussing the nascent Zambian Constitutional Court. On the other hand, Zambia established a designated Constitutional Court in 2016. An analysis of its jurisprudence suggests that it is not making any meaningful contribution to constitutionalism. This article explores possible reasons why the Zambian Court is failing to emulate its South African counterpart.

The article is arranged in five parts. The first part is this introduction. The second part discusses the UDM case, while the third part discusses the transplant and establishment of the Constitutional Court in Zambia. This includes analyses two cases decided by the Zambian Constitutional Court, to determine the effectiveness of the new Court in enforcing constitutional values and further explores possible reasons why the Zambian Court is failing to emulate its South African Constitutional Court model while the fifth part is the conclusion.

**2. United Democratic Movement v Speaker of the National Assembly and Others[[2]](#footnote-2)**

To fully appreciate the case, before discussing it and its import, it is important to provide two relevant contexts. The first relates to the international context in which Constitutional Courts operate. The second relates to the South African context within which the case arose, was heard and determined.

In terms of the international context, there has been a strong backlash against Constitutional Courts across the globe. Constitutional Courts had come to characterize the entrenchment of rule of law and liberal democracy following their spread around the world, from the tie they appeared in Europe in the early 20th century, and are now dotted all over Asia, Latin America and Africa.[[3]](#footnote-3) They have been hailed as enforcers of democratic norms and mediators of democratic allocation of constitutional power in a manner that thwarts excessive accumulation of power in one individual or entity, thereby maintaining a reasonable balance between the key branches of government.[[4]](#footnote-4) They have been celebrated as “ultimate symbols of the permanence and legitimacy of the state.”[[5]](#footnote-5) Samuel Issachoff considers that the greatest contribution of Constitutional Courts has been to maintain “electoral uncertainty”, that is, checking on the excessive exercise of powers by the ruling regime to ensure that all competitors in the electoral process have an equal opportunity and those aggrieved are capable of challenging excessive consolidation of power.[[6]](#footnote-6)

This positive outlook about Constitution Courts is, however, beginning to wane as the Courts are facing a severe backlash across the globe. The development is not just specific to Constitutional Courts but is part of the larger backlash against liberal democracy or constitutionalism, leading to fears and suggestions by some scholars that liberal constitutionalism may not survive.[[7]](#footnote-7) In the case of Constitutional Courts, the backlash can be seen in developments in countries such as Hungary, Egypt, Poland and Romania. In the case of Hungary, a new Constitution that came into effect in 2012 restricted its jurisdiction, made it easy to pack the court with pliant judges and made the court less autonomous,[[8]](#footnote-8) while in Egypt the 2012 Constitution led to the limiting of the power of the Supreme Constitutional Court and the removal of several judges considered independent.[[9]](#footnote-9) In Poland, the government in 2015 made changes to the law to allow it to tamper with the composition and quorum of the Constitutional Court. The government further refused to swear in judges appointed by the predecessor regime, ultimately leading to the packing of the court with government supporters.[[10]](#footnote-10) In the case of Romania, the President of the Constitutional Court in 2012 complained to the Council of Europe of attacks against some judges of the Constitutional Court and government attacks against the independence of the Court.[[11]](#footnote-11)

Against this international context, it would appear the South African Constitutional Court, as demonstrated in the *UDM* case discussed below, is still able to maintain its reputation and capacity to hold other arms of government accountable. This is not, however, to argue that the South African Court faces no challenges, as it has been a victim of several rhetorical attacks.

In terms of local context, the South African Constitutional Court has faced victimization and rhetorical attacks largely from the government. In 2012 President Zuma threatened to “review the powers of the Constitutional Court,” while Gwede Mantashe, the ruling ANC secretary general, called the judges “counter revolutionaries.”[[12]](#footnote-12) Further accusations alleged that judges in certain cases were prompted to arrive at a predetermined outcome and that some judges took bribes.[[13]](#footnote-13) These attacks on the judiciary compelled the Chief Justice, Mogoeng Mogoeng, to seek audience with President Zuma in 2015 to ease the tension and harmonize relations.

It is further worthy noting that the UDM case was determined at a time when there was heightened demand to hold the Zuma regime accountable following numerous serious allegations of corruption and abuse of public resources, and subordination of public institutions to private interests, a phenomena aptly christened state capture.[[14]](#footnote-14) Under such a predatory regime, some state institutions were co-opted into serving the short term interests of the regime. At the same time, civil society and opposition parties had begun mobilizing to force Zuma out office. It is in this context that the UDM case was heard and determined.

The *UDM* case was triggered by what opposition political parties considered inappropriate use of executive power to serve narrow private interests. On 31 March 2017, President Jacob Zuma, invoking his constitutional powers, dismissed Pravin Gordan as Finance Minister and his deputy, Mcebisi Jonas.[[15]](#footnote-15) As a result of this development the country’s economy was downgraded to a sub-investment grade or “junk status.”

In response to the economic downgrade, three of the political parties represented in the legislature, that is, the United Democratic Movement (UDM), the Democratic Alliance (DA), and the Economic Freedom Fighters (EFF) requested the Speaker of the National Assembly to schedule a motion of no confidence in President Zuma. The Speaker agreed and the motion was duly scheduled for 18 April 2017.[[16]](#footnote-16)

However, before the scheduled date for the motion, the UDM wrote the Speaker asking her to prescribe a secret ballot as the voting procedure for the motion of no confidence. UDM argued that considering the importance of the matter, the public interest that a truly democratic outcome should be guaranteed and the high possibility that the vote might be tainted by fear of adverse consequences, it was imperative to have a secret vote.[[17]](#footnote-17)

UDM admitted that the Rules of the National Assembly did not expressly provide for secret ballot in such a motion, but took the view that guidance could be found in sections 57 and 86(2) of the Constitution, as read with item 6(a), Part A of Schedule 3 of the Constitution as well as rule 2 of the Rules of the National Assembly.[[18]](#footnote-18) As such, the relevant legal provisions did not prohibit a secret vote.

The Speaker responded by stating that the procedures in the National Assembly were determined by the Constitution and the Rules of the National Assembly, none of which provided for a vote of no confidence to be conducted by secret ballot. The Speaker concluded that these laws did not vest her with power to prescribe a secret ballot for the no confidence motion, and, therefore, she was bound to strictly follow the Constitution and the Rules and Orders of the National Assembly.[[19]](#footnote-19) UDM’s request could not, therefore, be entertained.

It was at this stage that the UDM, supported by some other political parties with representation in in the National Assembly, sought the aid of the Constitutional Court to determine whether or not the Constitution and the Rules of the National Assembly prohibited the Speaker to permit a secret ballot for a motion f no confidence.[[20]](#footnote-20)

Before determining the legality of a secret ballot in a no confidence motion, the court took time to restate the proper role of the executive (president) and the legislature in a constitutional democracy. With regard to the executive, the court acknowledged that the President is indispensable to the proper governance of the state and is entrusted with cardinal constitutional responsibilities. To enable the president to effectively discharge those duties, he or she has discretion in appointing key public servants, including the deputy president and ministers, to work with him or her.[[21]](#footnote-21)

The exercise of these responsibilities comes with lots of power. The court reminded those in power that this power does not belong to office holders, lest they use it for advancement of personal interests.[[22]](#footnote-22) This power belongs to the people as a collective and should be exercised in the interest of the people in order to secure the common good. This calls for accountability from those entrusted with public office and in this regard, the executive is required to report fully to the legislature as the elected representative of the people. When accountability mechanisms fail, the court indicated that the people’s interests could only be safeguarded by resort to ultimate accountability mechanisms. These ultimate accountability mechanisms include voting out recalcitrant leaders during elections, removal of office bearers by parliament through a no confidence vote and through impeachment.[[23]](#footnote-23) In the words of the court, these are: “…crucial accountability-enhancing instruments that forever remind the President and Cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of people’s interests.”[[24]](#footnote-24)

The importance of this position cannot be underestimated in the African context where many courts are still churning out executive-deference jurisprudence that insulates leaders from accountability and effectively places them above the law. For example, in a Zambian case challenging the propriety of the President suspending three judges who were accused of misconduct by allies of the President who had lost a case handed by these judges, the Supreme Court was not prepared to entertain the possibility that the President acted on wrong information. It made the following sweeping assumption, in the process deferring to the executive its adjudicative role:

…we are satisfied that bearing in mind the authoritative position of His Excellency [the president], 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. His sources are exclusive to the public domain and must be impeccable.[[25]](#footnote-25)

Turning to Parliament, the South African Constitutional Court stated that it is the duty of Parliament to hold the President and the rest of cabinet accountable for the use of power and public resources entrusted to them. Parliament had the duty to not only oversee the performance of public responsibilities but had to ensure that constitutional responsibilities were performed diligently and without delay.[[26]](#footnote-26) The court reminded parliamentarians that it was not an accident or an anomaly why the law did not require them to swear allegiance to their political parties. This was in order for them to uphold constitutional values in case of conflict with party loyalty.[[27]](#footnote-27) Parliament thus had an overriding duty to ensure that the voting procedure adopted in a no confidence motion was not a sham but one that allowed effective enforcement of accountability mechanisms. This was so in order to ensure that the possibility of removal from office would serve its purpose of ensuring that public servants are accountable and fulfill their constitutional duties.[[28]](#footnote-28)

The core issue for the Constitutional Court to determine in the *UDM* case was whether a secret ballot was allowable in a no confidence motion and if the court could order the Speaker to prescribe one. With regard to the secret ballot the court took the view that the Constitution and the Rules of the National Assembly did not prohibit a secret ballot in a no confidence motion. The Speaker, therefore, had the power to allow a secret ballot a she saw fit, depending on the circumstances. The Court guided that the exercise of that power by the Speaker must be informed by the need to allow for effective accountability, the best interest of the people and obedience to the Constitution.[[29]](#footnote-29) The court further held that the power by the Speaker to allow or not allow the secret ballot could not be exercised in a manner that paid no regard to surrounding circumstances, as that power was not for the personal benefit of the Speaker nor her party. That power had to be applied in a manner that would lead to the accomplishment of the purpose for which such accountability mechanisms were put in place.[[30]](#footnote-30)

However, when addressing the issue of ordering the Speaker to prescribe a secret ballot, the court divested itself of jurisdiction to do so, holding that it was up to the Speaker to determine. Since the Speaker had indicated that she was not averse to a secret ballot but only doubted its legality, the Constitutional Court was happy to leave it to her to decide on the propriety of the secret ballot as the court had made it clear that it was within her powers.[[31]](#footnote-31) The Court further considered it inappropriate to order the Speaker to prescribe a secret ballot as doing so would have been overstepping its limit and playing a role reserved for the legislature, or as the court put it, “to order a secret ballot would trench separation of powers.”[[32]](#footnote-32) Thus the court declined to order the Speaker to prescribe a secret ballot as that power was in her hands, but indicated that the power had to be exercised within the bounds of rationality.[[33]](#footnote-33)

The *UDM* case is very important as the Court demonstrated its ability to hold both the legislature and the executive accountable, while at the same time tactfully mindful not to cross the line and play the role of the legislature. in doing so, the court proved that despite the backlashes against constitutional courts globally, the South African Constitutional Court can still be trusted to provide a trustworthy forum for citizens to validate their rights and hold government accountable, or in the words of Professor Issacharoff, the South African Constitutional Court provides “the most intriguing and compelling example of constitutional hope in the transition to democracy.”[[34]](#footnote-34) Tinenenji Banda has succinctly summarized the import of the UDM case:

In UDM v the Speaker, the court displayed the full force and with expert precision, the important oversight functions that the judiciary plays in a Constitutional democracy. While the primary recipient of this case was parliament, the Executive was both cautioned and reminded, that when exercised on behalf of the people, public power must be exercised in a judicious, controlled and justifiable manner.[[35]](#footnote-35)

**3. The Zambian Constitutional Court: Not Yet Uhuru**

This section discusses the performance of the nascent Zambian Constitutional Court. It is organized in three parts. The first part discusses the importation or transplant of the South African Constitutional Court model and its establishment in Zambia, while the second part analyses two case examples rendered by the Zambian Constitutional Court in order to assess the capability of the Zambian Court to hold the government accountable. The third and final part explores the reasons for the likely failure of the Zambian Court to hold the government accountable.

**3.1. Transplantation of the South African Constitutional Court Model to Zambia**

In 2016 the Zambian Constitution was extensively amended with a goal towards making a Constitution that fosters democracy, accountability and inclusiveness. One of the new institutions introduced by the amended Constitution is the Constitutional Court. The establishment of the Constitutional Court is Zambia was largely inspired by perceptions in Zambia about the success and reputation of the South African court to hold government accountable.

Legal systems do not exist in isolation. They learn from each other. Part of this learning process involves the transfer or transplantation and assimilation of materials from other jurisdictions. This transplantation can be imposed, as was the case during colonialism, or it can be voluntary. Zambia’s borrowing of the Constitutional Court model is completely voluntary. Perju has suggested at least three major motivations for voluntary transplants of law.[[36]](#footnote-36) The first motivation is known as “cost-saving”, by which the host nation ‘borrows’ a law or legal institution that it considers to be working well in another jurisdiction. This saves the host state time and resources as it does not need to reinvent the wheel.

The second motivation for voluntary borrowing is reputational. One legal system may borrow laws or institutions that are reputable in other jurisdictions in order to send the message that the country is doing away with an undemocratic past. This has the likely effect of increasing legitimacy of the government or regime that does that. Finally, transplantation may be motivated by what Perju calls “normative universalist” motivations. This motivation sees the transplantation or spread of universal principles regulating the organization of political power in a manner that protects and enhances individual liberties in a state.[[37]](#footnote-37)

In borrowing the South African Constitutional Court model,, Zambia appears to have been motivated largely by the reputation of the South African court. Several submissions during various constitution making process and academic support for establishment of a Constitutional Court were based on the admiration of the South African Court’s reputation in terms of its expertise and ability to effectively hold government accountable.[[38]](#footnote-38)

Although the idea of establishing a Constitutional Court goes back to the 1991 Constitution making process in Zambia, and therefore predates the establishment of the South African Constitutional Court, initial suggestions did not conceive of a Constitutional Court as a separate or dedicated court. What was proposed instead was simply the designation of specialized judges in the High Court, as a special division, to be responsible for expert and efficient determination of human rights and constitutional matters.[[39]](#footnote-39) But once the South African Court was established, its success and reputation had a major influence towards establishing a similar, separate and dedicated Court in Zambia.[[40]](#footnote-40)

As already noted, the Constitutional Court in Zambia was finally established following an extensive amendment of the constitution.[[41]](#footnote-41) The Court has an establishment of 13 judges (including the president and deputy president of the Court).[[42]](#footnote-42) the Court has original and final jurisdiction to hear any matter relating to the interpretation of the constitution; violation or contravention of the constitution; the election of the president and vice president; appeals relating to the election of members of parliament; and any matter about the court’s jurisdiction.[[43]](#footnote-43) The Constitutional court, however, does not have jurisdiction to enforce the Bill of Rights in the constitution. This is because the Bill of Rights was not amended in 2016 and, the provision on the enforcement of the Bill of Rights, Article 28, still vests jurisdiction over the enforcement of the Bill of Rights in the High Court and the Supreme Court.

When a Constitutional matter, within the jurisdiction of the Constitutional Court, arises in any other court, that court is required to refer such matter to the Constitutional Court.[[44]](#footnote-44) A decision of the Constitutional Court is final and not appealable to the Supreme Court.[[45]](#footnote-45)

Confusingly, however, Article 121 of the Constitution ranks the Constitutional Court and Supreme Court equivalently. Article 121 seems to have been based on a complete misunderstanding of the structuring of Constitutional Courts within the existing hierarchy of existing courts. Perju has remarked that constitutional borrowing is “fraught with dangers of misunderstanding” and that foreign law can still be influential even when it is completely misunderstood in the host nation.[[46]](#footnote-46) This seems to have been the case in Zambia.

The ranking of the Supreme Court and the Constitutional Court equivalently raises the risk of contradictory jurisprudence being issued by the two courts. Considering that the two courts are ranked at the same level, should that happen, it would become impossible to for lower courts to know which decision to follow. This is a major problem for a country like Zambia which follows and strictly applies the common law doctrine of precedents and sees such precedents as having the force of law. Supreme Court Judge, Mumba Malila warned of this danger:

There is also the additional risk of the Constitutional Court overruling the Supreme Court on matters that it decides on the basis that a constitutional issue was ignored, or misapprehended by the twin apex court. This has the potential of undermining the twin apex status of the Supreme Court, and, in fact, relegating it to an inferior status relative to the Constitutional Court.[[47]](#footnote-47)

Recent jurisprudence from the Supreme Court and the Constitutional Court demonstrates the materiality of contradictory precedents. Article 118(2)(e) of the Constitution requires Courts to administer justice without undue regard to procedural technicalities. In the case of *Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm) SCZ/8/52/2014*, the Supreme Court in interpreting Article 118(2)(e) held that it is the dispassionate application of technical rules through which courts can give an assurance that there is a clear method by which outcomes are determined and that courts cannot under the guise of doing justice through hearing matters on merit aid in bending or circumventing procedural rules. In the view of the Supreme Court, the Article “never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts.”[[48]](#footnote-48) The Constitutional Court has, however, interpreted the same Article differently. In the case of *Henry Kapoko v The People 2016/CC/0023*, the Constitutional Court held that the Article is mandatory and of general application in the administration of justice and all courts are bound by it.

**3.2. Evaluating the Performance of the Zambian Constitutional Court: A Review of Case Examples**

The Zambian Constitutional Court has only been operational for about two years. As such it may be felt that it is too early to pass judgment over its performance. While this view could be understandable, the Zambian Court has already handled significant disputes that are a good test of where its loyalty and commitment lies. Moreover, the first cases the court handles establish the jurisprudence the court will follow in future. Therefore, the decisions already made by the Court, however few, mark a direction the Court will continue to take and analyzing those decisions can already give a fair sense of where the Court stands. Such cases give an indication that the court is prepared or not prepared to assert its power in favour of the rule of law, hold the government accountable and entrench constitutionalism. Two cases are chosen for analysis here. The choice is informed by the fact that these were cases of significant political implications. Such political cases are important in judging court’s commitment to the rule of law and holding government accountable as they involve high stakes which could lead to loss of power or significant privileges.[[49]](#footnote-49)

1. **Milford Maambo and Others v The People 2016/CC/R001 [2017]**

To appreciate the significance of this court, it is important to point out that the office of the Director of Public Prosecutions (DPP) in Zambia has been used by various regimes as a tool for harassing opposition leaders and other critics of government, usually prosecuted on trumped up charges. Although the office of DPP is established as an independent institution, in practice it’s an office completely beholden to the President.

The three applicants in this case stood charged before the Livingstone Subordinate Court with twenty-five counts relating to corrupt practices under the Anti-Corruption Act No. 3 of 2012. When the matter came up for trial, the prosecutor presented a *nolle prosequi* to discontinue the criminal proceedings. The defense objected to the discontinuance of the proceedings in such a manner, arguing that the entry of the *nolle prosequi* did not meet the conditions set out in Article 180(4)(c) and (7) of the Constitution as amended, since no reasons were given to the Court for the discontinuation of proceedings. Consequently, the defense requested an interpretation of the impugned provisions by the Constitutional Court.

The issue for determination was whether the Director of Public Prosecutions (DPP) still has unfettered powers to discontinue criminal proceedings pursuant to Articles 180(4)(c) and (7) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016.

By a majority of four to one (Munalula JC dissenting), the Constitutional Court held that once the DPP informs the Court of his intention to discontinue proceedings pursuant to Article 180(4)(c), the Court cannot object to that exercise of power nor can it ask the DPP to furnish it with reasons for the discontinuation. Therefore, the DPP had unfettered discretion to discontinue criminal proceedings.

The judgment is significant in that it was the first application of Article 128 (2) of the amended constitution: “where a question relating to this Constitution arises in a court, the person presiding in that court shall refer the question to the Constitutional Court.” That notwithstanding, it is dumbfounding for its defiance of the basic approaches in constitutional adjudication, and for its dearth in legal analysis, leaving one with the sense that a critical opportunity to develop progressive jurisprudence on the proper use of the DPP’s powers was lost.

In determining how to interpret the constitution, the Constitutional Court claimed to be restating the principles applicable in constitutional interpretation in Zambia as well as in other jurisdictions. According to the court, the correct approach is the literal rule of interpretation, which should only be vacated when it leads to an absurdity. This approach is, however, problematic. Judges are required to justify their decisions. As Post argues, “judges must be able to explain why they have decided to interpret the Constitution through one set of inquiries rather than another.”[[50]](#footnote-50) The reasons advanced by the Constitutional Court for choosing the literal rule have no merit and in fact, it is respectfully submitted, the use of the literal approach in constitutional adjudication is unconstitutional.

The Zambian constitution guides on how it should be interpreted. Article 1 of the Constitution declares the Constitution supreme. Therefore, any law or practice contradicting it is, to the extent of the inconsistency, invalid. Article 267(1) of the Constitution provides in mandatory terms, how the constitution shall be interpreted, stating that:

This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that-

1. Promotes its purpose, values and principles;
2. Permits the development of the law; and
3. Contributes to good governance.

Further, Article 8 of the Constitution provides for national values, which include democracy and constitutionalism, social justice, good governance and integrity. Article 9 makes it mandatory for a court to apply these values in interpreting the Constitution and other laws. It must be noted that these provisions were borrowed from the 2010 Kenyan Constitution, word for word. The significance of these provisions, as the then Kenyan Chief Justice Willy Mutunga stated, is that “the Constitution is complete with its mode of its interpretation.”[[51]](#footnote-51) The constitution being self-contained with tools for its interpretation, and these provisions being mandatory, there was no legal basis for the Constitutional Court’s reversion to the common law in order to circumvent the theory of interpretation required by the very constitution. Surprisingly, the Constitutional Court seemed to be unaware of these provisions as nowhere in the judgment by the majority did the court make reference to them. South African Constitutional Court Judge, Kentridge J, rightly stated that when a court ignores the language of the law giver, what results “is not interpretation but divination.”[[52]](#footnote-52)

Articles 8, 9 and 267 which provide for construction of the constitution are value laden, entailing that constitutional interpretation is teleological and not mechanical. It should be geared towards realization of those constitutional values, standards and collective aspirations of the people. Invariably, only a purposive interpretation is consistent with this standard the constitution has set for its interpretation. Contrary to the assertion of the Constitutional Court that the literal rule is the approach taken in many jurisdictions, the purposive approach is actually what is standard approach to constitution interpretation in countries with written constitutions.[[53]](#footnote-53) Mahomed J considers a purposive and generous interpretation of the constitution as an “international culture of constitutional jurisprudence.”[[54]](#footnote-54) This, as stated in a Namibian case, is the standard way of interpreting the constitution:

A constitution is an organic document. Although it is enacted in the form of a statute it is *sui generis*. It must be broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legislation and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.[[55]](#footnote-55)

In holding that the DPP enjoys absolute discretion in discontinuing criminal proceedings, the Court also relied on the legislative history of the provision. It noted that the first draft Constitution of 2012 had provisions that trammelled the discretion of the DPP, but that these provisions were removed in the final draft, and therefore, the framers of the Constitution never intended the DPP’s discretion to be constrained. Again, this approach is by itself an impoverished approach to the determination of a constitutional matter. While understanding the decisions and choice of words used by framers of the constitution is important in order to understand the larger context and meaning of specific words, that in itself should not be determinative of a constitutional issue. This is because, logically, the Constitution is not the product of the few individuals who framed it, but is, in the words of Mahomed AJ, “a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people.”[[56]](#footnote-56) A Constitution, therefore, should not be interpreted simply to reflect its drafting history but to reflect the collective values and ideals of the people. Interpretation should be forward and not backwards looking. Chaskalson P, the former President of the South African Constitutional Court, once stated that a constitution should be interpreted as the product of a “multiplicity of persons” and therefore “caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played.”[[57]](#footnote-57) The views of the Technical Committee that drafted the 2016 constitution should, therefore, not have been determinative of the outcome of the Court’s decision.

Taking a literal approach, the Court considered Article 180(4) (c) as giving the DPP unfettered discretion to discontinue criminal proceedings at any stage before judgment is delivered. In light of this approach, the Court has no oversight role to play in the manner the DPP exercises his discretion. In the view of the majority, this position is consistent with Article 180(7) which states that the DPP shall not be subject to the direction or control of a person or an authority in the discharge of his/her office.

However, a careful reading of the Constitution shows no merit in this position. First of all, Article 180(7) has a qualification to the effect that in the discharge of his/her duty, the DPP “shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to avoid abuse of the legal process.” It is obvious that this qualification is a fetter on the manner in which the DPP exercises his discretion. If he/she contravenes these standards, he/she would be acting unconstitutionally. But not so for the Constitutional Court. The Constitutional Court simply considered this qualification as a mere guide to the Director of Public Prosecutions “in the performance of the functions of that office.” The court, however, gave no reasons for making that conclusion.

The decision of the Constitutional court is further contradicted by Article 267(4) which clearly states:

A provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or authority in the performance of a function, does not preclude a Court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws.

The net effect of Article 267(4) is that as long as the DPP derives his authority from the Constitution, the manner in which he/she exercises that power cannot escape the scrutiny of the Court as the guardian of the Constitution and the rule of law. The exercise of any power that issues under the Constitution is subject to constitutional control and judicial oversight. This is the standard approach in a constitutional democracy. Power is never arbitrary. As the South African Constitutional Court stated, where power derives from the constitution, its exercise must be “rationally related to the purpose for which power was given.”[[58]](#footnote-58)

Recent jurisprudence from the South African Supreme Court of Appeal is squarely in line with this view. On the powers of the DPP, the South African Constitution has comparable provisions to the Zambian Constitution. The South African National Prosecution Authority had in 2009, dropped charges against President Zuma, and it was argued by the prosecution that this was within its discretion. The court rejected this argument and held:

It is incumbent on prosecutors to disclose to a court any fact which, in their view, may impact negatively on the prosecution and in favour of the accused. This is in line with constitutional values….[[59]](#footnote-59)

The majority of the Constitutional Court held that the DPP has unfettered discretion to discontinue proceedings at any stage before judgment is delivered. But is “unfettered discretion” tenable in law? What exactly is discretion? Ronald Dworkin, addressed the concept of discretion in his theory of adjudication.[[60]](#footnote-60) The word discretion is appropriately used in one context only, that is, when a person is in general charged with making decisions which are subject to standards set by a particular authority. As Dworkin states, “discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.” Discretion therefore, at least in law, is always relative to the power under which it is given. Otherwise it does not exist. According to Dworkin, it is always legitimate to ask: “discretion under which standards?” or, “discretion as to which authority?” If, therefore, someone can do as they please, that is not discretion. It is simply lawlessness.

The effect of the decision of the Constitutional Court is to effectively place the DPP above the law as he or she is not accountable in any way in the manner he or she utilizes prosecutorial powers.

1. *Hakainde Hichilema and Another V Edgar Lungu and others.*[[61]](#footnote-61)

This case followed the Zambian general elections of 2016. The country held its general elections on 11 August, 2016 and on 15 August, 2016, the Electoral Commission of Zambia (ECZ) declared the incumbent, Edgar Lungu of the ruling Patriotic Front (PF) party, as the winner, beating his closest rival, Hakainde Hichilema, of the main opposition United Party for National Development (UPND). Official figures indicate that Lungu garnered 1,847,855 (50.35%) of the votes while Hichilema got 1,760,347 (47.6%) votes.[[62]](#footnote-62) By getting more than 50 per cent, Lungu secured an outright victory, narrowly avoiding a runoff by a paltry 13,022 votes.[[63]](#footnote-63) The opposition UPND disputed the results, alleging, inter alia, that the ECZ colluded with the ruling PF to manipulate the results in favour of the incumbent.

On 24 August 2016, the Constitutional Court gave directions that the hearing of the petition would commence on 2 September 2016 and end on 8 September 2016.[[64]](#footnote-64) However, after representations from respondents, the Court on 1 September 2016 informed the parties that the hearing would commence and end the following day, 2 September 2016.

On 2 September 2016, the Court informed the parties that the hearing will commence and conclude the same day at 23:45 hours. However, most of the time was consumed in hearing and determining preliminary motions, which were only concluded around 19:00hours, leaving just about four hours to hear the petition. The Court allocated each side two hours to present their case. At this time, lawyers for the petitioners walked out of the court, protesting that the manner the proceedings were had made it impossible to defend the constitution and effectively represent their clients.[[65]](#footnote-65) The petitioners were, therefore, left to address the Court by themselves. After hearing the petitioners, the full bench of the Court capitulated and unanimously ordered trial to commence the following Monday on 5 September 2016 and that each party will be given two days to present its case.[[66]](#footnote-66)

However, on 5 September 2016, instead of hearing the petition as ordered on 2 September 2016, the Court, by a majority of 3 to 2 judges, unmoved and without any representations from the petitioners, decided not to proceed with the petition. The majority were of the view that the time frame within which to hear the petition was rigid and allowed for no discretion to extend it. This was in view of Articles 101(5) and 103(2) of the Constitution which placed a duty on the Court to hear the petition within 14 days of the filing of the petition.[[67]](#footnote-67) They opined that the time limit was put in place to overcome the mischief where election petitions in the past took several years to be determined.[[68]](#footnote-68) But since under Article 104 the president-elect could not assume office until the matter was determined, the set time limit was unchangeable and therefore the Court could not hear the petition outside that period.[[69]](#footnote-69) According to the majority, once the time limit set for the petition lapsed, then the petition stood dismissed on that technicality.[[70]](#footnote-70)

In reaching that decision, the Court only cited one judicial precedent as authority for its construction of the time limit within which to hear the petition. This is the Judgment of the Kenyan Supreme Court in the 2013 presidential election petition.[[71]](#footnote-71) The judges passed the buck and vehemently placed blame on the petitioners’ lawyers for raising several preliminary motions that consumed the Court’s time and ensured there was no time left for hearing the petition within the set period.

It is contended that the construction of the constitutional provisions preferred by the majority is unconscionable and invariably leads to unsolvable absurdities. The court took a simplistic approach by simply isolating Articles 101(5) and 103(2), which prescribe the time limit within which to hear the petition, from other related provisions within the Constitution. But even then, a careful reading of the two provisions in an isolated manner still shows that the approach taken by the Court was wrong. Article 101(5) provides that, ‘The Constitutional Court shall hear an election petition filed in accordance with clause (4) within fourteen days of the filing of the petition,’ while Article 103(2) reads: ‘The Constitutional Court shall hear an election petition relating to the president-elect within fourteen days of the filing of the petition.’[[72]](#footnote-72) Isolated as they are, these provisions place a responsibility on the Court to hear the petition. It is the Court which ‘shall hear’ the petition. The behavior of lawyers is immaterial. The Court has a Constitutional and inescapable duty to ensure the petition is heard.

The provisions do not clothe the Court with power to vacate a validly filed petition without hearing it. The Constitution in fact contemplates no other way of concluding an election petition apart from hearing it and determining it on merits. It cannot even be withdrawn by a petitioner once filed. This is well illustrated by the decision of the Zimbabwean Constitutional Court in 2013 where opposition leader Morgan Tsvangirai sought to withdraw the petition. The Court held that:

…once such an application or petition is launched it can only be finalized by determination of the Constitutional Court by either declaring the election valid, in which case the president is inaugurated within forty-eight hours of such determination, or alternatively by declaring the election invalid, in which case a fresh election must be held within sixty days. Without the said determination there can be neither an inauguration of the president nor the holding of a fresh election.[[73]](#footnote-73)

 It is submitted that the decision by the majority to ‘dismiss’ the petition without it being heard was an abdication of their Constitutional duty as provided under the same provisions they relied on to abandon the petition. The majority decision, as pointed out in Justice Munalula’s dissenting judgment, not to hear the petition ostensibly due to the set time limit led to the absurdity of complying with a deadline but without the purpose or intended event having taken place.[[74]](#footnote-74) A judgment that purports to comply with a legal technique, dissociated from the intended substance of the law, to borrow Professor Ben Nwabueze’s words, ‘is like a person embarked upon a journey and yet with no clear direction as to which way to go and no idea where he is going…it is like a boat adrift in the sea.’[[75]](#footnote-75)

It is a well-established principle that a Constitution should be read as a whole and no provision should be read in isolation. The Nigerian Supreme Court has stressed this point as follows:

It is settled law, that the court in interpreting the provisions of a statute or constitution, must read together related provisions of the constitution in order to discover the meaning of the provisions. The court ought not to interpret related provisions of a statute or constitution in isolation and destroy in the process the true meaning and effect of particular provisions.[[76]](#footnote-76)

The Constitutional Court ignored this approach and decided to abandon the petition on the basis of isolated provisions, without regard to other related provisions which might have cast more light on those provisions. Article 8 of the Constitution lists national values and principles, which include democracy and constitutionalism as well as good governance and integrity. Article 9(1)(a) provides that the national values and principles shall apply to the interpretation of the Constitution. The majority decision never referred to this provision. Its decision certainly does not advance the constitutional values as required by the Constitution. Not hearing a validly filed petition does not advance democracy, constitutionalism, good governance and integrity.

The Constitution further requires that it shall be interpreted in accordance with the Bill of Rights and in a manner that, inter alia, promotes its purposes, values and principles, and contributes to good governance.[[77]](#footnote-77) The majority judgment, for example, nowhere relates its decision to the right to be heard and to fair trial as contained in the Bill of Rights. It goes without saying that the approach taken by the Court does not advance these values but negates them.

Article 118(1) makes it clear that judicial authority derives from the Zambian people and should be exercised in a just manner that shall promote accountability. The judiciary, in exercising its authority, is enjoined to ensure that ‘justice shall be administered without undue regard to procedural technicalities.’[[78]](#footnote-78) The significance of this provision is undoubtedly that no one who approaches the Curt should be prevented from stating their case and having the case determined on its merits. Justice must be dispensed without being inhibited by procedural technicalities, or as Justice Niki Tobi of Nigeria stated, ‘the court must pursue the substance and not the shadow.’[[79]](#footnote-79) The Nigerian Supreme Court forcefully stated this point when it reversed a decision of the Court of Appeal that declined petitioners in an election from administering interrogatories on the basis of the need for speedy trial:

Gone are the days when courts of law were only concerned with doing technical and abstract justice based on arid legalism. We are now in days when courts of law do substantial justice in light of prevailing circumstances of the case. It is my hope that the days of the courts doing technical justice will not surface again.[[80]](#footnote-80)

The Kenyan judgment cited by the majority recognized this and stated clearly that ‘a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties.’[[81]](#footnote-81) As the Kenyan Supreme Court demonstrated, this can be achieved without ousting the provisions setting the time limits by judiciously managing the case and ‘making orders that shape the course of the proceedings’ to ensure that the hearing takes place.[[82]](#footnote-82) The Kenyan Supreme Court correctly emphasized that it is the Court’s duty to adhere to the constitutional provisions and ensure that the proceedings achieve all of the following values: ‘efficiency, expedition, fairness and finality.’[[83]](#footnote-83) This responsibility falls on the Court and not the lawyers. The attempt by the Zambian Court to shift the blame to lawyers is without any Constitutional basis. The Zambian Court simply went for ‘finality’ without endeavoring to hear the petition efficiently, expeditiously and fairly. In the end, they failed to heed the compelling advice of Lord Atkin: ‘Finality is good, but justice is better.’[[84]](#footnote-84)

The decision not to hear the petition has generated some legal absurdities which are worth pointing out here. Articles 101(6) and 103(3) indicate the outcomes of a validly filed petition. Article 101(6) states:

The Constitutional Court may, after hearing an election petition-

1. Declare the election of the presidential candidate valid;
2. Nullify the election of the presidential candidate; or
3. Disqualify the presidential candidate from being a candidate in the second ballot.

Article 103(3), in almost similar terms, states:

The Constitutional Court may, after hearing an election petition-

1. Declare the election of the president-elect valid; or
2. Nullify the election of the president-elect and vice president-elect.

These are the only outcomes of a validly filed petition contemplated under the Constitution. The Constitution has no provision entitling the Court to abandon a validly filed petition without coming to any of the above outcomes. This view is augmented by article 105(2)(b) which regulates the assumption of office by the president-elect where there has been a presidential election petition. It states: ‘(2)The President-elect shall be sworn into office on Tuesday following- (b)the seventh day after the date on which the Constitutional Court declares the election to be valid.’[[85]](#footnote-85)

It is clear from this provision that a president-elect, whose election was challenged, cannot assume office without the court hearing the petition and making a finding that his/her election was valid. The Constitutional Court in this case did not do that. It simply abandoned the petition. The president-elect who has since been sworn in, it is submitted, was sworn into office in violation of the Constitution. The constitutional basis for inaugurating a president whose election was challenged through a petition was not met.

Finally, questions may be raised about the validity of the majority judgment. On September 2, 2016, the five judges of the Court made a unanimous decision to allow the petition to be heard starting from 5 September, 2016 and allocated each side two days to present its case. On 5 September, however, three of the five judges capitulated without any new representations made to them, and issued a judgment to the effect that they had no jurisdiction to hear the case further. There was no Court sitting between 2 and 5 September 2016 as it was a weekend. At what stage did the judges reverse their unanimous decision to allow the petition? What were the circumstances? Were there external factors that led to the Judges reneging on their unanimous decision? Did the judges curve-in to threats? Some senior government officials made open threats on the Court. One official condemned the 2 September decision to hear the petition, accused the Court of taking the ruling PF for granted and stated that their patience was running out.[[86]](#footnote-86) The dissenting judgment of the Court President, Justice Chibomba, is very revealing: ‘I must also say from the outset that I have had very little time to read through the majority judgment which I was given this morning after 08:00hrs together with the judgment of Justice Munalula.’[[87]](#footnote-87)

How could the Court president and presiding judge be unaware that her colleagues had written their judgments while she was herself coming to hear the petition? What transpired in the background? Only the judges themselves can answer these questions. But if the Court President was herself not even aware of the judgment of the majority until the morning of its rendering, this suggests the three (majority) judges separately conferred and contrived to subvert the unanimous decision of the Constitutional Court to allow the petition to be heard. It is an established practice in the common law tradition that the minority cannot subvert the decision of the full court. Otherwise where a case is heard by more than one judge and the court is not unanimous, there could be no definitive determination of disputes. In this case the three judges could not legally reverse the unanimous decision of the whole Court ordering trial to proceed on 5 September, 2016. The majority decision suggests judicial arbitrariness and complete disregard of the rule of law. Judges are considered the guardians of the rule of law. When they act inconsistently with established laws, practices and principles, that negates the rule of law. Justice Michael Kirby was correct in observing that: ‘It would be corrosive of the rule of law, if judges did not themselves conform to and uphold, clearly settled rules of law.’[[88]](#footnote-88) The decision by the majority had no basis in law. Professor Ndulo has argued forcefully that the majority judgment is invalid as it was a subversion of the judicial process and therefore the unanimous decision of the Court made on 2 September 2016 to hear the petition is still the valid decision of the Court.[[89]](#footnote-89) The three judges cannot legally undo the collective decision of five judges. In any case, the decision by the majority was rendered out of the 14 days and therefore, applying the same logic by the Court, would be a nullity.

**4. Exploring Possible Reasons for the Likely Failure of the Zambian Constitutional Court to Develop Progressive Jurisprudence: The Appointment and Removal of Judges**

When asked why the South African Constitutional Court had made a major contribution towards the development of progressive and democracy enhancing jurisprudence, former Constitutional Court Judge, Albie Sachs stated that it was because the Court from start was staffed by judges who were “in total sympathy with the values of the Constitution.”[[90]](#footnote-90) The deployment of judges committed to constitutional values ensures that Judges will carry out their role in fidelity to those values and not see themselves as an extension of the executive. The commitment of a court to the constitutional values therefore depends in large measure on the disposition of the judges staffing that court.

It therefore follows that the mechanism of procedure adopted for appointment of judges is as important as the court itself. As Sujit Choudhry has argued, if that process is politicized, “institutional independence, no matter how well designed will be meaningless.”[[91]](#footnote-91) It is cardinal that the appointment system of judges is insulated from being based mainly on partisan political considerations, as former Chief Justice of Zimbabwe, PT Georges stated, “no one should be appointed a judge for purely political reasons when he [or she] is not otherwise fitted for office.”[[92]](#footnote-92) Judges appointed for purely political reasons are more likely to see themselves as agents of the ruling regime and not enforcers of constitutional values.

A look at the mechanism for appointment of judges in Zambia demonstrates that the process leaves a lot of room for appointment of executive-minded judges. The President has a free hand at the appointment of judges. Article 140 of the Constitution governs the appointment of judges. The President appoints judges “on the recommendation” of the JSC. The use of the word “recommendation” has been defined by the Supreme Court in the case of *Minister of Information and Broadcasting v. Chembo and others SCZ Judgment no. 11 of 2007* narrowly. According to the court, to recommend “implies discretion in the person to whom it is made to accept or reject the recommendation.” Thus understood, it means the President has a free hand, untrammelled by any requirements of integrity, impartiality, commitment to constitutional values and competence in constituting the judicial bench. This can be contrasted the situation under the South African Constitution where, in appointing judges of the Constitutional Court (except the Chief Justice and his/her deputy), the President is limited to the candidates listed by the JSC.[[93]](#footnote-93)

Further, the appointment process lacks transparency. Vacancies are never advertised and the whole recruitment and appointment process is shrouded in secrecy. As a result, it is impossible to know what qualified one candidate above another for office of a judge. The reported response of one judge to a parliamentary committee question about his suitability for office is telling. *Africa Confidential* reported that when Judge Martin Musaluke was asked about his suitability for office he answered as follows: “I did not apply for the position I am being considered for…The fact that I have been recognized by the Appointing Authority [President Edgar Lungu] is evidence of my competence and suitability.”[[94]](#footnote-94)

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

Further, the provisions leave the composition and structure of the JSC to be prescribed in subordinate legislation. This is dangerous as it allows for circumventing the constitution through subordinate legislation. Section 5 of the Service Commissions Act Number 10 of 2016 provides for the composition of the JSC in its current form. The members include the chairperson who is appointed by the President, a judge nominated by the Chief Justice, the Attorney General, the Permanent Secretary responsible for public service management, a magistrate nominated by the Chief Justice, a representative of the Law Association nominated by the Association, the Dean of a Public law school nominated by the minister, and another person appointed by the President. As can be seen, the JSC is mainly made up of persons who either directly or indirectly owe their office to the President and, therefore, does not give the impression of a truly independent JSC. This can be contrasted with the South African JSC which seems to have wider representation.[[95]](#footnote-95)

Although the mechanism through which judges are appointed is the principal too that a regime would use to pack the court, the life of the court can also be affected by the kind of mechanism is in place for the removal of judges. Sujit Choudhry argues that the power of removal is directly related to the power of appointment for at least two reasons.[[96]](#footnote-96) First, the power of removal allows the appointing regime to remove individuals who may have been appointed on a non-partisan basis or have behaved independently in order to pave way for a partisan appointment. Second, the power to remove judges may serve as a tool to enforce the “the principal-agent relationship” between the appointing regime and the appointed judge.

In the case of Zambia the power to remove judges is shared between the President and the Judicial Complaints Commission (JCC). Previously, the President could of his/her own motion initiate the process of removal of a judge but this was departed from under the 2016 constitutional amendment. Currently Article 144 governs the removal of judges from office. A judge is removable for mental or physical disability that impedes their performance of their work, gross misconduct, incompetence, and bankruptcy.[[97]](#footnote-97) The removal process can be embarked upon by the JCC acting on its own initiative or by being seized of a complaint made to it.[[98]](#footnote-98) Where the JCC investigates and finds against the concerned judge, the JCC recommends the removal of the judge to the President who shall remove such judge immediately.[[99]](#footnote-99) Although on the face of it, it appears the President only plays a peripheral role, it is actually the President who has a free hand in constituting the Judicial Complaints Commission. Its members are not appointed by the Judicial Service Commission but are directly appointed by the President.[[100]](#footnote-100) As Hatchard et al argued, leaving such power in the hands of the President “provides a potential weapon through which to intimidate judges and thus help create or maintain a pliant judiciary.”[[101]](#footnote-101) By simply wielding that power, even when not invoked, it sends a clear message to judges that the President has the levers of power over them.

The emerging picture is that of a court that is failing to make a difference to the growth of democracy by developing progressive jurisprudence that ensures constitutional values are upheld, especially against narrow political interests of ruling politicians, because the mechanisms for constituting the court and removal of judges do not ensure that only the best and most committed judges are appointed. The situation is further compounded by the fact that the Constitutional Court is completely new, created through the 2016 constitution making process, and therefore, does not have judges who may have been appointed under former regimes. Constitution making and creation of new institutions may not necessarily lead to further deepening of democracy. To the contrary, constitution making and creation of new institutions may provide regimes not committed to constitutionalism a further opportunity to “wipe away existing institutional order and consolidate power in a particularly rapid and durable way.”[[102]](#footnote-102) In the Zambian case, the 2016 constitution mechanism and the creation of a new Constitutional Court, arguably provided the ruling party an opportunity to control the appointment of all judges without the slightest effective accountability mechanisms to ensure judges are not appointed for partisan reasons.

It should also be noted that although the Constitution provides for a 13-member Constitutional Court, so far only seven judges have been appointed. When and how many judges should be appointed is in the hands of the President. Appointing only a small number of judges to the Court arguably makes it easy to predetermine the judges who will sit on a case as the full bench of the Court (needed to preside over a case) is set at five. Ultimately, the Constitutional Court in Zambia gives the regime an appearance of legitimacy because of the reputation of Constitutional Courts and the symbolism of what a Constitutional Court ought to stand for but at the same time, the weak framework for constituting the Court gives the regime an opportunity to control the Court, giving a ring of truth to the words of David Landau that authoritarian constitutions “do not abandon the trappings of key liberal institutions, such as constitutional courts.”[[103]](#footnote-103)

**5. Conclusion**

The article has used the UDM case determined by the South African Constitutional Court to illustrate the continuing ability of the Constitutional Court in South African to hold the government accountable. The success and the reputation of the South African Court has made it well known across the globe. In 2016 Zambia established a Constitutional Court akin to the South African court. The Zambian Court, although has only been in office for two years, has had an opportunity to handle important constitutional matters. A review of decisions of the Zambian court, however, shows a court that has completely failed to render progressive jurisprudence that enforces constitutional values.

The article explored possible reasons for this failure and has argued that the appointment and removal of judges is not insulated from political interference. The mechanisms give the President unchecked discretion in appointing and removing judges. Under such a situation, it is very unlikely that the Court will not be staffed by executive-minded judges. Further, the creation of a new court, instead of enhancing constitutionalism, actually provides a rare opportunity for the ruling party to pack the whole court with pliant judges who may sympathize with the executive and view themselves primarily as agents of the ruling regime.

1. LLB Hons (University of London), LLM (University of Zambia), LLD (University of South Africa); lecturer in law at the University of Zambia; and senior research fellow at SAIPAR. [↑](#footnote-ref-1)
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3. T Ginsburg and Z Elkins “Ancillary Powers of Constitutional Courts” (2009) 87 Texas Law Review 1431 [↑](#footnote-ref-3)
4. S Isacharoff “Constitutional Courts and Consolidation of Power” (2014) New York University Public Law and Legal Theory Working Paper No. 459, 13. [↑](#footnote-ref-4)
5. NJ Brown and JG Walker “Constitutional Courts and Political Uncertainty: Constitutional Raptures and the Rule of Judges” (2016) 14 I.Con 818 [↑](#footnote-ref-5)
6. Issacharoff (2014) 8 [↑](#footnote-ref-6)
7. T Ginsburg, AZ Huq and M Verteeg “The Coming Demise of Liberal Constitutionalism?” (2018) 85 The University of Chicago Law Review 239-255 [↑](#footnote-ref-7)
8. S Gardbaum “Are Strong Constitutional Court Always a Good Thing for New Democracies?” (2015) 53 Columbia Journal of Transnational Law 287 [↑](#footnote-ref-8)
9. Ibid [↑](#footnote-ref-9)
10. AS Chilton and M Versteeg “Court’s Limited Ability to Protect Constitutional Rights” (2018) 85 The University of Chicago Law Review 293 [↑](#footnote-ref-10)
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12. R Calland “Are Judges in South Africa Under threat or Do They Complain Too Much?” <http://www.theconversation.com/are-judges-in-south-africa-under-threat-or-do-they-complain-too-much-45459> (accessed 22 July 2018). See also Barbara Whittle “Profession Stands Behind Chief Justice and the Judiciary in Raising Concern Attacks on the Judiciary and Rule of Law” <http://www.derebus.org.za/profession-stands-behind-chief-justice-judidiary-raising-concern-attacks-judiciary-rule-law/> (accessed 22 July 2018) [↑](#footnote-ref-12)
13. “Chief Justice to Approach Zuma About Attacks on judges” <http://ewn.co.za/2015/07/08/Zuma-and-chief-justice-to-discuss-attacks-on-the-judiciary> (accessed 22 July 2018) [↑](#footnote-ref-13)
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15. UDM, para 23 [↑](#footnote-ref-15)
16. Ibid, para 14 [↑](#footnote-ref-16)
17. Ibid, para 15. [↑](#footnote-ref-17)
18. Ibid [↑](#footnote-ref-18)
19. Ibid, para 17 and 18 [↑](#footnote-ref-19)
20. Ibid, para 19 [↑](#footnote-ref-20)
21. Ibid, para 6 [↑](#footnote-ref-21)
22. Ibid, para 7 [↑](#footnote-ref-22)
23. Ibid, para 10 [↑](#footnote-ref-23)
24. Ibid, para 10 [↑](#footnote-ref-24)
25. Attorney General v Nigel Kalonde Mutuna and Others Appeal No.008/2012/SC/8/185/2012, p.124 [↑](#footnote-ref-25)
26. UDM, para 10. [↑](#footnote-ref-26)
27. Ibid, para 79 [↑](#footnote-ref-27)
28. Ibid, para 82 [↑](#footnote-ref-28)
29. Ibid, para 90 [↑](#footnote-ref-29)
30. Ibid, para 85 [↑](#footnote-ref-30)
31. Ibid, para 92 [↑](#footnote-ref-31)
32. Ibid, para 92 [↑](#footnote-ref-32)
33. Ibid, para 95 [↑](#footnote-ref-33)
34. S Issacharoff “The Democratic Risk to Democratic Transition” (2014) Constitutional Court Review 1 [↑](#footnote-ref-34)
35. Tinenenji Banda “United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17)[2017] ZACC21” (2018) 1 *SAIPAR Case Review*, 16 [↑](#footnote-ref-35)
36. V Perju “Constitutional Transplants, Borrowings and Migrations” in M Rosenfeld and A Sojo *Oxford Handbook of Comparative Constitutional Law* (2012) Oxford: Oxford University Press, 1304-1327 [↑](#footnote-ref-36)
37. Ibid [↑](#footnote-ref-37)
38. J Sakala *The Role of the Judiciary in the Enforcement of Human Rights in Zambia* (2015) Lusaka: Image publishers, 173-175 [↑](#footnote-ref-38)
39. Ibid [↑](#footnote-ref-39)
40. In fact the team that drafted the rules of the Zambian Constitutional Court first visited the South African Constitutional court in 2016 to learn from that Court. [↑](#footnote-ref-40)
41. Constitution of Zambia (Amendment) Act No. 2 of 2016 [↑](#footnote-ref-41)
42. Ibid, Article 127 [↑](#footnote-ref-42)
43. Ibid, Article 128 [↑](#footnote-ref-43)
44. Ibid, Article 128(2) [↑](#footnote-ref-44)
45. Ibid, Article 128(4) [↑](#footnote-ref-45)
46. V Perju, 34 [↑](#footnote-ref-46)
47. Mumba Malila “The Constitutional Court Act and the Draft rules of Procedure: Some Critical Reflections” Paper Delivered at the Orientation Workshop for Constitutional Court Judges at Twangale, Lusaka, 13 May 2016 [↑](#footnote-ref-47)
48. *Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm) SCZ/8/52/2014, p.33* [↑](#footnote-ref-48)
49. P VonDoepp “The Judiciary: Courts, Judges and the Rule of Law” in Nic Cheeseman (ed) Institutions and Democracy in Africa: How Rules of the Game Shape Political Developments (2018) Cambridge: Cambridge University Press, 311 [↑](#footnote-ref-49)
50. Robert Post, “Theories of Constitutional Interpretation” (1990) Yale Law Faculty Scholarship Series Paper 209. [↑](#footnote-ref-50)
51. In the Matter of the Principles of Gender Representation in the National Assembly and Senate Advisory Opinion No. 2 of 2012. [↑](#footnote-ref-51)
52. Zuma and Two Others v The State Case No. CCT/5/94. [↑](#footnote-ref-52)
53. See the following case examples: Affordable Medicines Trust and Others v The Minister of Health of the Republic of South Africa and Another Case No. CCT/27/03; In the Matter of the Principle of Gender Representation in the National Assembly and Senate Advisory Opinion No. 2 of 2012; Democratic Alliance v Speaker of the National Assembly and Others (2016) ZACC 8; Economic Freedom Fighters v Speakers of the National Assembly and Others (2016) ZACC 11; State v Makwanyane and Mchunu Case No. CCT/3/94; Mhlungu and Four Others v State Case No. CCT/25/94; Republic of Namibia and Another v Cultura 2000 and Another 1994 (1) SA 407; ZUMA and [↑](#footnote-ref-53)
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55. Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994(1) SA 407. [↑](#footnote-ref-55)
56. The State v Achesou 1991(2) SA 805 (NM). [↑](#footnote-ref-56)
57. The State v Makwanyane and Mchunu Case No. CCT/3/94, para 18. [↑](#footnote-ref-57)
58. Affordable Medicines Trust and Others v Te Minister of Health of the Republic of South Africa and Another Case CCT/27/04. [↑](#footnote-ref-58)
59. Zuma v DA and Others (2017) ZASC 146 (13 October 2017) para 91. [↑](#footnote-ref-59)
60. Ronald Dworkin, Taking Rights Seriously (London: Gerald Duckworth and Co, 1986) 14-34. [↑](#footnote-ref-60)
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64. *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016*, [9]. See also ‘Presidential election petition to start on Friday and conclude on Thursday next week’ <<https://www.lusakatimes.com/2016/08/30/presidential-election-trial-to-start-on-friday-and-conclude-on-thursday-next-week/>> accessed 30 July 2017 [↑](#footnote-ref-64)
65. ‘Live petition updates: proceedings and discussions’ <<http://postzambia.com/news.php?id=19946>> accessed 3 July 2017 [↑](#footnote-ref-65)
66. *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016, Dissenting Judgment of Justice Chibomba*, [4 and 5] [↑](#footnote-ref-66)
67. *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016*, [15] [↑](#footnote-ref-67)
68. The case of *Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others (2005) Z.R 138, for example* took four years to conclude. [↑](#footnote-ref-68)
69. Ibid, [15] [↑](#footnote-ref-69)
70. Ibid, [16] [↑](#footnote-ref-70)
71. *Raila Odinga V The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013* [↑](#footnote-ref-71)
72. Emphasis the author’s [↑](#footnote-ref-72)
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76. *Amaechi V Independent National Electoral Commission and others Supreme Court of Nigeria S.C.252/2007 (Judgement of 18 January 2008),* [21] [↑](#footnote-ref-76)
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78. Constitution of the Republic of Zambia 2016, article 118(2)(e) [↑](#footnote-ref-78)
79. *Atiku Abubakar and Others v Umaru Musa Yar’adua and Others SC 288/2007 Judgment of 25 January 2008* [↑](#footnote-ref-79)
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81. *Raila Odinga V The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013* [218] [↑](#footnote-ref-81)
82. Ibid, [214] [↑](#footnote-ref-82)
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