



REPUBLIC OF ZAMBIA

REPORT

OF THE

COMMITTEE ON LEGAL AFFAIRS, HUMAN RIGHTS AND GOVERNANCE

ON THE

JUDGES (CONDITIONS OF SERVICE) AMENDMENT BILL, N.A.B NO. 6 OF 2022

FOR THE

FIRST SESSION OF THE THIRTEENTH NATIONAL ASSEMBLY

Published by the National Assembly of Zambia

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REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, HUMAN RIGHTS AND GOVERNANCE ON THE JUDGES (CONDITIONS OF SERVICE) AMENDMENT BILL, N.A.B NO. 6 OF 2022 FOR THE FIRST SESSION OF THE THIRTEENTH NATIONAL ASSEMBLY.

1.0 MEMBERSHIP OF THE COMMITTEE

The Committee consisted of Dr Clement Andeleki, MP (Chairperson); Ms Tasila E Lungu, MP (Vice Chairperson); Mr Chinga Miyutu, MP; Mr Edgar Sing'ombe, MP; Mr George K Chisanga, MP; Mr Anthony Kasandwe, MP; Mr Francis M Fube, MP; Mr Lameck Hamwaata, MP; Mr Monty Chinkuli, MP; and Mr Jay E Banda, MP.

The Honourable Madam Speaker
National Assembly
Parliament Buildings
LUSAKA

Madam,

The Committee has the honour to present its Report on the Judges (Conditions of Service) Amendment Bill, N.A.B No. 6 of 2022 for the First Session of the Thirteenth National Assembly referred to it by the House on Wednesday, 30th March, 2022.

2.0 FUNCTIONS OF THE COMMITTEE

The functions of the Committee are set out in Standing Orders No. 197(f) and 198 of the National Assembly of Zambia Standing Orders, 2021. Among other functions, the Committee is mandated to consider Bills that may be referred to it by the House.

3.0 MEETINGS OF THE COMMITTEE

The Committee held seven meetings to consider the Judges (Conditions of Service) Amendment Bill, N.A.B No. 6 of 2022.

4.0 PROCEDURE ADOPTED BY THE COMMITTEE

In order to acquaint itself with the ramifications of the Bill, the Committee sought both written and oral submissions from the stakeholders listed at Appendix II.

5.0 OBJECT OF THE BILL

The object of the Bill was to amend the *Judges (Conditions of Service) Act, Chapter 277 of the Laws of Zambia* so as to provide for the determination of emoluments of judges by the Emoluments Commission.

6.0 BACKGROUND

The *Constitution of Zambia, Chapter 1 of the Laws of Zambia*, as amended by Act No. 2 of 2016 established the Emoluments Commission with the mandate to determine, on recommendation by a relevant authority or commission, the emoluments of public officers, chiefs and members of the House of Chiefs. Article 264(2) of the Constitution provides that the emoluments of a state officer, councillor, constitutional office holder and a judge shall be determined by the Emoluments Commission.

In order to harmonise the provisions of the *Judges (Conditions of Service) Act, Chapter 277 of the Laws of Zambia* (herein referred to as the principal Act) and the *Emoluments Commission Act, No. 1 of 2022*, the Government introduced the Judges (Conditions of Service) Bill, N.A.B No. 6 of 2022 to provide for the determination of emoluments of judges by the Emoluments Commission.

7.0 SALIENT PROVISIONS OF THE BILL

The salient features of the Bill are set out below.

7.1 Clause 1 – Short title

Clause 1 provided for the short title of the Act which was to be read as one with the principal Act.

7.2 Clause 2 – Amendment of section 2

Clause 2 sought to amend section 2 of the principal Act by revising the definition of “emoluments” so as to harmonise it with the definition that was contained in the Constitution.

Further, the clause sought to make provision for the insertion of “Emoluments Commission” in the appropriate place in alphabetical order in the *Judges (Conditions of Service) Act, Chapter 277 of the Laws of Zambia*, and defined it in accordance with the Constitution.

7.3 Clause 3 – Repeal and replacement of section 3

Clause 3 sought to repeal section 3 of the principal Act so as to provide for the determination of the emoluments of a judge by the Emoluments Commission, on the recommendation of the President.

7.4 Clause 4 – Amendment of section 12

Clause 4 sought to amend section 12 of the principal Act by the insertion of the words “in consultation with the Emoluments Commission,” immediately after the word “may.”

8.0 STAKEHOLDERS’ SUBMISSIONS AND CONCERNS

8.1 Clause 2 – Amendment of section 2

All stakeholders welcomed the widened definition of “emoluments” which would have the same meaning assigned to the definition contained in the Constitution. Under Article 266 of the Constitution, “emoluments” included salaries, allowances, benefits and rights that form an individual’s remuneration for services rendered, including pension benefits or other benefits on

retirement. They submitted that the term “emoluments” in section 2 of the *Judges (Conditions of Service) Act, Chapter 277 of the Laws of Zambia* only referred to salary and allowances, which was too narrow.

Stakeholders submitted that the proposed amendment which made provision for the insertion of the “Emoluments Commission” was also welcome as it imported the relevance of the Emoluments Commission, as established under Article 232(1) of the Constitution of Zambia. This was good for the harmonisation of laws.

Some stakeholders were, however, concerned that Clause 2 of the Bill did not propose to amend the definition of “judge.” They submitted that on the one hand, Article 266 of the Constitution defined a judge as a person appointed as a judge of a superior court, which court was defined to mean the Supreme Court, Constitutional Court, Court of Appeal and High Court established in accordance with the Constitution. On the other hand, the *Judges (Conditions of Service) Act, Chapter 277 of the Laws of Zambia* defined “judge” as a judge of the Supreme Court, a puisne judge and the Chairman and Deputy Chairman of the Industrial Relations Court. Stakeholders were of the view that amending the definition of “judge” would harmonise the definition with the Constitution.

8.2 Clause 3 – Repeal and replacement of section 3

Some stakeholders submitted that the proposed amendments to have the Emoluments Commission determine the conditions of service of judges, on the recommendation of the President, was anomalous. They wondered whether the Commission would ever reject a presidential recommendation.

The stakeholders informed the Committee that the interplay between Presidents and commissions was that either the President exercised power in consultation with particular commissions or the President acted on the recommendation of commissions, which recommendation was usually accepted. In that regard, if there was a need to get the President’s input in the emoluments of judges, it would be better to have the Commission, “in consultation” with the President, set the emoluments of judges.

Stakeholders were of the view that the proposed amendment should instead read that “*There are paid to a judge emoluments that the Emoluments Commission, in consultation with the President, shall determine in accordance with the provisions of the Emoluments Commission Act.*”

Other stakeholders submitted that the Constitution of Zambia, as amended by Act No. 2 of 2016 contained provisions that sought to secure or guarantee both the functional and financial independence and autonomy of the Judiciary. Specifically, Article 122(4) made it mandatory for “[Every] person and a person holding public office [to] protect the independence, dignity and effectiveness of the Judiciary.”

In terms of Article 123(1) the Constitution stated that:

“The Judiciary shall be a self-accounting institution and shall deal directly with the Ministry responsible for Finance in matters relating to its finances.”

Article 123(2), provided that:

“The Judiciary shall be adequately funded in a financial year to enable it effectively carry out its functions.”

The stakeholders submitted that in view of the foregoing, there was a clear inconsistency or conflict between the letter and spirit of the Constitution and both the principal Act and clause 3 of the Bill. Therefore, it did follow, according to Article 1 of the Constitution, that both the proposed amendment and the principal Act were void to the extent of their provisions.

The Committee heard that it was widely accepted throughout the Commonwealth that there was a close nexus or relationship between the Conditions of Service enjoyed by judges or judicial officers and the independence of the Judiciary. In his article entitled “***Who Should Prescribe the Emoluments of a Judge?***” which was published in volume 10 of the Law Association of Zambia Journal of 1998, a private practitioner, Dr. Ludwig Sondashi, the once-upon-a-time Minister of Legal Affairs (now Ministry of Justice) and Member of Parliament for Solwezi Central, stated the following:

“Zambia’s public opinion favours a very strong, independent, autonomous and free Judiciary which is not capable of being swayed by the powers that be; A Judiciary which is fearless and which cannot favour an individual or the Executive in its exercise of the judicial function, but one which adjudicates in accordance with the Constitution and the rule of law”.

Dr. Sondashi suggested in that article that in order to enhance judicial independence in Zambia, the country’s President should not be determining the emoluments for judges and that this role should be performed by Parliament.

The Committee heard that the former Chief Justice of Zimbabwe, Mr Justice Anthony Gubbay, once observed that Judges should not endure *a feeling of dependence... it is embarrassing to place the Judiciary at the mercy of Ministers or departments to plead for increases in salaries and allowances [because] this tends to undermine [the Judiciary’s] dignity.*

According to Mr Justice Gubbay:

“The dependence of the Judiciary on the Executive branch for resources is another factor which impairs its independence. The Judiciary has no power of the purse. At best, it has to act within the allocation of funds made to it in the annual budget. The absence of financial autonomy has an adverse impact on the independence of the Judiciary as an institution”.

In Chief Justice Gubbay’s view:

“To secure financial autonomy, the Judiciary must have budgetary independence, that is to say, the ability of the Judiciary to exercise control over its own funds and apply these funds in accordance with its own priorities for the better administration of justice”.

The Committee was informed that the former Chief Justice of Australia, Hon. Sir Gerard Brennan, quoted in *Parliamentary Supremacy and Judicial Independence*, made the following observations at the Australian Judicial Conference held on 2nd November, 1996:

“The twin Constitutional pillars of [judicial] independence namely, security of tenure and Conditions of Service that the Executive cannot touch – except to say this: if either of these pillars is eroded in time, society will pay an awful price”.

The stakeholders submitted that it was demeaning and patently awkward that the Republican President should, as the Bill envisages, be making recommendations to the Emoluments Commission which, in terms of section 6(1) of the *Emoluments Commission Act*, he constituted. In addition, stakeholders submitted that section 36 of the *Emoluments Commission Act, No. 1 of 2022* provided that a state organ, state institution or any other authority concerned with the determination of emoluments of a chief or an officer in a state organ or state institution before the commencement of the Act, shall cease to be responsible for the determination of emoluments after the commencement of the Act.

Stakeholders also submitted that under Article 264(2), which related to state officers, councillors, Constitutional office holders and judges, only the Emoluments Commission had the constitutional mandate to determine emoluments for judges. Stakeholders submitted that a contrast could be made with Article 232(2) of the Constitution, which related to emoluments for public officers, chiefs and members of the House of Chiefs where the power to determine emoluments lay with the Emoluments Commission on the recommendation of the relevant authority or commission. Stakeholders suggested that it should then follow that if judges' emoluments were to be subjected to the President's recommendation, the same should apply to the President, who was a state officer, as defined in Article 266 of the Constitution. The result would be that the President would have to recommend to the Emoluments Commission his own Conditions of Service and perquisites, which was not reasonable.

Stakeholders submitted that the drafters of the Constitution felt it imperative not to include an authority or commission in Article 264(2), in order to secure or guarantee both the functional and financial independence and autonomy of the Judiciary. On that score, the stakeholders were of the view that both the proposed amendments and the principal Act were not only retrogressive but blatantly offended both the letter and spirit of the Republican Constitution. Consequently, they were both objectionable.

Other stakeholders submitted that the Judiciary was a peculiar organ of Government in that judges and magistrates were expected to conduct their affairs, both public and private, in a manner that was different from all other members of the public service on account of the service they rendered. For instance, they could not undertake private businesses to raise additional income like Ministers and other public service workers. Therefore, giving the mandate to determine the conditions of service of judges to a body composed of individuals who were non-judges would certainly result in injustice to the judges. Through this insensitivity and lack of appreciation of the peculiar circumstances and unique role played by judges, the Emoluments Commission would, in the long run, downplay the unique role of the Judiciary by wrongly comparing adjudicators with other members of the public service in determining their conditions

of service. The end result may well be a de-motivated Judiciary with grave consequences to the rule of law and protection of fundamental freedoms.

Stakeholders noted that the Emoluments Commission, as provided in section 6 of the *Emoluments Commission Act*, only comprised one member of the Judiciary. Allowing a body of persons composed of a majority of outsiders from the Judiciary to determine the conditions of service of judges would inevitably result in the undermining of the independence of the Judiciary that was guaranteed under the Constitution of Zambia. The stakeholders were of the view that judges should not be subject to a body of non-adjudicators where determination of their conditions of service was concerned. Such a body may be subject to political influence or some other unwarranted influence in its operations that may be used to undermine the Judiciary. The fact that a member of the Judiciary sat on the Commission was of no comfort as the view of the majority was bound to carry the day and legitimise the decision.

The Committee was informed that most commonwealth jurisdictions were leaning towards judicial bodies determining conditions of service of judges as set out below.

a) The Commonwealth Latimer House Guidelines

The Commonwealth Latimer House Guidelines were drawn from the Commonwealth Latimer House Principles published by the Commonwealth in 2017. The guidelines advised that judicial salaries and benefits should be set by an independent body and that their value should be maintained.

b) Kenya

The Constitution of Kenya provided for conditions of service for judges; salaries and remuneration of judges. With regard to conditions of service of judges, the Kenyan Constitution empowered the Judicial Service Commission of Kenya to review and make recommendations on the conditions of service of judges and judicial officers, other than their remuneration. On the other hand, salaries and remuneration of judges were set and regularly reviewed by the Salaries and Remuneration Committee, which was also responsible for setting and regularly reviewing the remuneration and benefits of all State officers, which state officers included judges.

The Constitution of Kenya further created a distinction between conditions of service of judges and salaries and remuneration. The former was the mandate of the Judicial Service Commission, which was better positioned to deal with rights and conditions of service of judges, while the latter was the responsibility of an independent Committee, which set and regularly reviewed the remuneration and benefits of all state officers.

c) Malawi

The Committee was informed that in Malawi, the power to determine the terms and conditions of service in the Judiciary resided with the National Assembly. The Constitution of Malawi in Article 118 provided that:

“The Chief Justice and all other holders of judicial office shall receive a salary for their services and, on retirement, such pension, gratuity or other allowance as may, from time to time, be determined by the National Assembly.”

d) Canada

The Committee took note that the practice in Canada was that the Executive was not responsible for determining the conditions of service for judges. Article 100 of the Constitution Acts of Canada 1967 – 1982 was instructive and provided that the salaries, allowances, and pensions of the judges of the Superior, District, and County Courts, except the Courts of Probate in Nova Scotia and New Brunswick, and of the Admiralty Courts in cases where the judges, were for the time being paid by salary, shall be fixed and provided by the Parliament of Canada, which in a way insulated judges from Executive influence and promoted judicial independence.

Furthermore, every four years, the Judicial Compensation and Benefits Commission submitted a report to the Minister of Justice regarding the adequacy of judicial remuneration. The Minister of Justice then tabled the Commission’s report in the House of Commons.

The stakeholders observed that in Canada and Malawi, the National Assembly was considered the body, as one of the three arms of Government, to provide checks and balances. Having the terms and conditions of service of judges determined by the National Assembly provided for an independent and impartial Judiciary on one hand and served to create an accountable system of governance on the other because the National Assembly was representative of the people and was comprised of members from different political parties hence being a neutral body to determine emoluments for judges in an impartial manner.

e) India

In India, the conditions of service of Supreme Court judges were governed by the *Supreme Court Judges (Salaries and Conditions of Service) Act, 1958* while those of High Court Judges were governed by *High Court Judges (Salaries and Conditions of Service) Act, 1954*. The conditions of service were so entrenched and protected that an amendment in the Acts was required whenever there was any proposal for revision. Prior to any revision, a special commission was set up to make recommendations. The Chief Justice of India constituted a Committee of three sitting Judges to make recommendations. The report of the Judges’ Committee was handed to the Government and examined by the Ministry of Finance, which made its comments. The proposal was then sent to the Cabinet Secretary who sought the approval of the Union Cabinet, which was chaired by the Prime Minister who approved the proposal for revision of the conditions of service and a Bill was then introduced in Parliament for amendment.

Stakeholders were of the view that judicial officers including magistrates of the Subordinate Courts and Local Courts, research advocates, be included in the *Judges (Conditions of Service) Act*, and further that their conditions of service be exclusively determined by the Judicial Service Commission. This would address the prevailing anomaly whereby the conditions of service of these judicial officers were determined based on the collective agreements negotiated between the Public Service unions and the Executive. The stakeholders submitted that judicial officers had no legal framework governing their conditions of service when compared to judges of

Superior Courts, and as such, there was need to have their conditions of service protected in view of the peculiar nature of their work.

9.0 COMMITTEE’S OBSERVATIONS AND RECOMMENDATIONS

The Committee notes that three witnesses who appeared before it were not in support of the Bill. The Committee also does not support the Bill in its totality. The Committee makes the observations and recommendations set out below.

- (i) The Committee observes that the definition of “Emoluments” in the principal Act is restricted to salary and allowances. In this regard, the Committee welcomes the widened definition of “Emoluments” in the proposed amendment. The Committee is of the considered view that deleting the definition of “Emoluments” under the principal Act and substituting it with the definition of “Emoluments” under Article 266 of the Constitution is a Constitutional imperative. In any case, the definition contained in the Constitution was more expansive, and there is no debate at all in aligning the definition of “Emoluments” under the principal Act to the Constitution.

In the same vein, the Committee is of the view that insertion of “Emoluments Commission” in section 2 will provide a contextual understanding of what the Emoluments Commission is. In that regard, there is no controversy in inserting the definition of “Emoluments Commission” in the principal Act. The Committee, therefore, welcomes the two proposed amendments.

- (ii) The Committee is very concerned with the proposed amendment in clause 3 of the Bill. The Committee is of the view that the President ought not to have a role to play in the determination of conditions of service and associated perquisites of judges. This should be left solely to the Emoluments Commission as provided for under Article 264(2) of the Republican Constitution, which relates to emoluments for a State officer, councillor, Constitutional office holder and a judge. The Article provides that the emoluments shall be determined by the Emoluments Commission, as prescribed, which prescription is provided under sections 15, 16, 17 and 18 of the *Emoluments Commission Act, No. 1 of 2022*.

The Committee asserts that not having the Republican President play a role in determining the emoluments of judges will guarantee both the functional and financial independence and autonomy of the Judiciary. In this regard, the Committee recommends that the proposed amendment in clause 3 of the Bill should be deleted.

- (iii) The Committee observes that the conditions of service of magistrates of the subordinate courts and local courts, research advocates, and other judicial officers, are determined based on the collective agreements negotiated between the Public Service unions and the Executive. The Committee is of the view that due to the peculiar nature of their work; the conditions of service of judicial officers should be included in the *Judges (Conditions of Service) Act*. The Committee, therefore, recommends that conditions of service of judicial officers should be included in the *Judges (Conditions of Service) Act* to address the prevailing anomaly where by the conditions of service of the judicial officers were

determined based on the collective agreements negotiated between the public service unions and the Executive.

10.0 CONCLUSION

The Committee supports the Judges (Conditions of Service) Amendment Bill, N.A.B No. 6 of 2022 in so far as it sought to harmonise the provisions of the principal Act with Article 264(2) of the Constitution of Zambia, which provided that the conditions of service for judges shall be set by the Emoluments Commission. With regard to the Emoluments Commission determining emoluments of judges, on the recommendation of the President, the Committee agrees with the majority of the stakeholders who did not support the proposed amendment. The Committee was of the considered view that to enhance the independence of the Judiciary, as was meant by the letter and spirit of the Constitution, determination of the emoluments of judges should be done by the Emoluments Commission as prescribed by the *Emoluments Commission Act, No. 1 of 2022*, without recommendation by any authority or commission. In this regard, the Committee did not support the proposed amendment in clause 3 of the Bill.

The Committee wishes to express its gratitude to all stakeholders who appeared before it to render both oral and written submissions. The Committee also wishes to thank you, Madam Speaker, and the Office of the Clerk for the guidance and services rendered to it throughout its deliberations.

We have the Honour to be, Madam, the Committee on Legal Affairs, Human Rights and Governance, mandated to consider the Judges (Conditions of Service) Amendment Bill, N.A.B No. 6 of 2022 for the First Session of the Thirteenth National Assembly.

Dr Clement Andeleki, MP
(Chairperson)

Ms Tasila E Lungu, MP
(Vice Chairperson)

Mr Chinga Miyutu, MP
(Member)

Mr Edgar Sing'ombe, MP
(Member)

Mr George K Chisanga, MP
(Member)

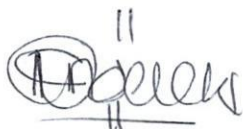
Mr Anthony M Kasandwe, MP
(Member)

Mr Mulenga F Fube, MP
(Member)

Mr Monty Chinkuli, MP
(Member)

Mr Lameck Hamwaata, MP
(Member)

Mr Jay E Banda, MP
(Member)

A handwritten signature in black ink, appearing to read 'C. Andeleki', with a horizontal line underneath. There are two vertical lines above the signature and two below it.

Dr Clement Andeleki, MP
CHAIRPERSON

June, 2022
LUSAKA

APPENDIX I - NATIONAL ASSEMBLY OFFICIALS

Mr Francis Nabulyato, Acting Principal Clerk of Committees (SC)
Mrs Chitalu K Mumba, Acting Deputy Principal Clerk of Committees (SC)
Mrs Angela M Banda, Senior Committee Clerk (SC)
Ms Betty P Zulu, Committee Clerk
Mrs Ruth N Mwiinga, Typist
Mr Danny Lupiya, Committee Assistant

APPENDIX II–LIST OF WITNESSES

MINISTRY OF JUSTICE

Mr J N S Choonga, (Parliamentary Counsel)

CHAPTER ONE FOUNDATION

Mr M Kapatiso, (Legal Officer)

PUBLIC SERVICE MANAGEMENT DIVISION

Mrs M N Miyoba, (Permanent Secretary)

Mr L Soko, Director (Human Resource and Information Planning)

Ms H Moonga, Assistant Director (Technical Services)

Mr M Malambo, Director (Recruitment and Placement)

Mr T C Mwewa, Director (Human Resource Development)

Mr M Chuunga, (Head Administration)

MWENYE AND MWITWA ADVOCATES

Mr Musa Mwenye, (State Counsel)

JUDICIARY

Mr E Zulu, (Acting Chief Registrar and Director of Court Operations)

Ms A N Chisanga, Registrar High Court (Commercial Division)

Mr I Eduma, Registrar (Constitutional Court)

MAGISTRATES’ AND JUDGES’ ASSOCIATION OF ZAMBIA

Justice M Siavwapa, (Vice President and Judge of the Court of Appeal)

Mr N Samaubi, (National Secretary and Senior Research Advocate)

HUMAN RIGHTS COMMISSION

Ms S Sichone, (Director)

Mr J Mulemwa, (Legal Counsel)

UNIVERSITY OF ZAMBIA

Dr E M Beele, Acting Dean (School of Law)

Dr M Lwahla, (Lecturer)

ZAMBIA LAW DEVELOPMENT COMMISSION

Mrs H N Chand, (Director)

Mr M Mwenda, (Research Coordinator)

Ms C Moyo, (Research Officer)

Ms M Chikwanda, (Research Officer)

ZAMBIAN OPEN UNIVERSITY

Dr M Hamalengwa, Dean (School of Law)

CABINET OFFICE – REMUNERATION DIVISION

Mr M Peni, (Permanent Secretary)

Ms R Hansaali, (Director)