Nationalism, the travelling Irishman and judicial independence in Zambia

A lecture delivered by Mumba Malila, Chief Justice of Zambia at Trinity College, Dublin Ireland, 24 November 2023

Let me start by saying how deeply I appreciate the altogether surprising honour of being accorded the opportunity to deliver a lecture on a general theme chosen by myself, namely the independence of the judiciary in Zambia and the contribution of Ireland to that ideal. I am fully conscious that speaking today to a distinguished audience at this world-famed university - Trinity College, Dublin, is a rare honour that I cannot take for granted.

I thank most profusely the Irish Rule of Law International, working alongside the Embassy of Ireland in Zambia, for the excellent arrangements that have seen my delegation and I undertake our technical visit to this beautiful country and to Belfast, Northern Ireland, which visit has, on all accounts, been massively successful.

Let me state, for good measure, that Ireland and Zambia have a unique bond of friendly cooperation straddling many decades. In point of fact, the links between the two countries stretch back over a millennium, which explains a significant presence of clergymen and judicial officers, among others, who settled in the territory known as Northern Rhodesia long before it got independence to become Zambia nearly sixty years ago.

Since the establishment of their diplomatic relations in 1965, Zambia and Ireland have forged close partnerships across political and economic development issues within their foreign policy priorities which have seen cooperation and technical assistance in areas such as the justice sector, stressing the rule of law, gender equality, climate change and capacity building in the sphere of economic and financial crimes, among others.

In grateful acknowledgement of the significant contribution which the Irish people have made and continue to make in supporting the rule of law and the independence of the judiciary in Zambia, I have quite advisedly chosen, as the title for my lecture, ***Nationalism, the travelling Irishman and judicial independence in Zambia***. I thought it pertinent to use a story involving an Irishman who braved it out in the formative years of Zambia's nationhood to contribute to the country's judicial independence, and by necessary implication, the rule of law, to remind us all of just what the point about judicial independence is, how durable an idea it has proven to be, and what we might do, if we would wish for it to endure; to shore it up. As the Irishman in the story famously declared:

> **Confidence in the judiciary is a delicate bloom in Africa, and I am not going to risk destroying it in Zambia.**

I must mention that although it is not a contemporary story, it is an instructive one. It is a story as much about a deep commitment to principle as it is about popular nationalism and betrayal. It is a story that reminds us of the famous title authored in 1970 by Richard Seymour Hall, '*The High Price of Principles: Kaunda and the White South'*, because indeed the Irishman in the story paid a high price for his principled stance in the vindication of the virtues of judicial independence.

Yet, the story also offers a useful framework for reflection on professional ethics and individual independence of judges on one hand, and their collective independence and quality judicial leadership on the other hand. It is a cynical but reasonably truthful account of the political vicissitudes that Zambia, as a fairly new State in 1969, went through as it struggled to entrench popular nationalistic patriotism and respect for the rule of law at the same time.

I am mindful of the fact that as a topic for a lecture judicial independence, sounds rather commonplace and exhausted because it has been repeatedly articulated and widely documented in international instruments, statutes and court decisions. Various meanings and definitions of this concept have been espoused[1]. Indeed, it is a subject around which there has been extensive discourse at various fora by eminent jurists, legal scholars and political scientists alike. This is probably why Mr. Justice Sydney L Robin once, unsurprisingly, remarked that:

> **everything which can be said [on the topic of judicial independence] has already been said and repeated on so many occasions and in so many learned articles that any further observations are inevitably redundant.[2]**

I think, to the contrary, however, that judicial independence, like human rights, is always an attractive subject for a judge to talk about for at least two reasons. First, one does not have to think deeply about whether one likes the topic or not to discuss it, because judicial independence is an ideal that is profound in any nation's understanding of itself, so much so that it is hard to imagine a properly functioning constitutional democracy without picturing adjudicators—independent ones — being just as foundational to it as members of the executive or the legislative branches.

Judicial independence is, in other words, foundational to any understanding of what democracy entails in practice. It cannot be denied that there will always be questions of great consequence that must properly be decided in a forum that

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[1] See the 1985 UN Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of offenders held at Milan from 26 August to 6 September, 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December, 1985. See also The 2002 Bangalore Principles of Judicial Conduct.

[2] See 'Judicial Independence,' Remarks of Right Honourable Beverly Mclachlin, PC Chief Justice of Canada during the 300th Anniversary of Settlement Conference, Vancouver, British Columbia also marking the retirement of Chief Justice Alan McEachern of Canada, May, 2001.

is detached from direct political control. Legitimacy in resolving such questions is derived in large part from a sense that the independence of the forum permits it to exhibit a degree of neutrality, expressed in the grammar of the law, and subject to its demands, which the contentious politics of the moment cannot determine.

Second, judicial independence is one topic that any judge can comfortably talk about publicly without the risk of having someone, especially mischievous journalists and politicians, put a spin to it. It is hard to go wrong—especially if one defends judicial independence, as I plan to do in this lecture.

But, beyond self-interest, judicial independence is an important topic in its own right, now more than ever.

I think that an additional reason to continue discussing judicial independence is appropriately articulated in a quotation expressing concern over executive interference in the work of the judiciary. It was made by Aniagolu JSC in the case of *Oba Lamidi Adeyemi (Alafin of Oyo) and Others v Attorney General, Oyo State and Others* in the Supreme Court of Nigeria when he proclaimed:

> **It cannot be too often repeated . . . that the jurisdiction of the courts must be jealously guarded if only for the reason that the beginnings of dictatorships in many parts of the world had often commenced with the usurpation of the authority of courts and many dictators were often known to become restive under the procedural and structural safeguards employed by the courts for purposes of enhancing the rule of law and protecting the personal and proprietary rights of individuals. It is in this vein that the courts must insist, wherever possible, on a rigid adherence to the Constitution of the land and curb the tendency of those who would like to**

establish what virtually are Kangaroo courts, under different guises and smoke-screens of judicial regularity…[3]

That the judiciary as an institution in any system of democratic governance plays a central role in the protection, promotion and enforcement of human rights is beyond debate. If we accept, as we must, that the judiciary is the custodian of the rule of law and justice in any country we should have no difficulty in accepting also that respecting the separation of powers of the three arms of government as far as practically and humanly possible is a significant precondition for the independence of the judiciary.

In Zambia, the country of my birth, the significant benefits of judicial independence were anticipated from the very start of Zambia's nationhood in 1964. However, a sense of nationalism tempered by populist politics proved in the early years of the country statehood to be an obstacle in the country's attempts to practically implement this ideal in its own constitutional system. Some of the challenges that were met in the first decade of Zambia's nationhood are exemplified by the story of the Irishman.

Here is the story. It should begin with a note that 24 July this year would have marked the hundredth birthday of a man who was born in Clonmel, Irish Free State to a legal family with strong nationalist views. His grandfather was a solicitor; and his father the County Registrar for Tipperary. He was educated at a Jesuit school, Clongowes Wood College, where he first developed his skill at debating. He later read law at this very institution - Trinity College Dublin - where he was a member of the debating and historical societies. He was then called to the King's Inn in 1946. He practiced in the Leinster Circuit from 1946

[3] (1984) 1SCNLR 525, at 602 as quoted in HB Jallow, The Law of the African (Banjul) Charter on Human and Peoples' Rights (Trafford Publishing, Canada, 2007) p.235.

before he was called to the English Bar at Gray's Inn in 1950. His name was James John Skinner.

Some of you may already be familiar with the James Skinner story. It has been told by some writers, notably by the renowned Zambian political historian, Sishuwa Sishuwa, in his most compelling piece entitled: 'A White Man Will Never Be a Zambian': Racialised Nationalism, the Rule of Law, and Competing Visions of Independent Zambia in the Case of Justice James Skinner, 1964–1969.' It appears in the *Journal of Southern African Studies* (2019) 503-523.

As the title of that article suggests, the writer was concerned with the nationalism and racial undertones of what befell James John Skinner while serving as an expatriate judge in Zambia. My preoccupation here is with a rule of law principle which Skinner so bravely vindicated—judicial independence. My objective is to stress that Justice James John Skinner, at least in the severe eye of judicial history, though perhaps not in the view of the nationalistic Zambian crowd that made very assuming demands on him in 1969, had everything to be commended for. In the end, this may be the single most important legacy of Justice Skinner that should serve as a reminder of the obligation entrusted to every good judge – not merely to do his or her work well, but to do justice while stoutly defending the independence of the judiciary.

For the sake of those of you in the audience who place a high premium on full disclosure, let me state that I did not personally know Justice James Skinner, nor did I ever see him. I am aware, however, that his story not only appears in the archival record, but he and I share, in a largely unusual way, a rare but most significant professional progression coincidence. Although our respective career paths are not identical, and we are clearly asynchronous in time, there is between us a noteworthy commonality of a unique and great significance. Thus far, we are two of the only three individuals in Zambia's history who have served

in the two high offices of Attorney General and Chief Justice, the third person being his Lordship Mr. Justice Annel Musenga Silungwe, now in retirement.

In 1951, in response to a newspaper advertisement, James Skinner, together with his wife, took a brave but somewhat risky decision. He emigrated to Africa into a country then known as Northern Rhodesia, later rechristened Zambia. From all indications, he seemed to have liked what he found there and easily bonded with the local people.

He was called to the Bar of Northern Rhodesia and joined a law practice firm which became known as Wasserberger, Flemming and Skinner. He was later to be appointed Queen's Counsel in Northern Rhodesia.[4]

Around that time the Nationalist movement had begun to gather momentum and, as a radical with an Irish Nationalist background, he found himself defending the militant locals who were being prosecuted by the British mainly for activities related to disobedience and defiance of unjust laws which perpetuated British rule. In his words:

> **I did not like the social or racial atmosphere at that time and I reacted against it.**

For his sins, he was despised a great deal by most White settlers in the territory, but he did not care one bit. Soon he determined that he could be a lot more useful to the people of Northern Rhodesia than merely practicing as a lawyer. He joined main stream local politics; in fact, he was the first white man to join Dr. Kenneth Kaunda's United National Independence Party (UNIP) when it was formed in 1960 and fought for independence alongside the indigenous people.

[4] This was to happen on 9 September 1964.

Subsequently he became the party's legal advisor and deputy director of elections. In 1962, he became a Northern Rhodesian citizen by registration. He drafted UNIP's judicial policy, the cornerstone, of which was that Zambia would have an independent judiciary. He also played a major role in drawing up what was to be Zambia's constitution.

What James Skinner next did with his political life beggars belief. He stood for parliament in the complex 1962 electoral system carried out under the "15-15-15" system, with 15 seats elected by an upper roll, 15 seats by a lower roll and 15 seats by the national roll; the national roll seats themselves consisting of four 'reserved' two-seat constituencies returning an African and a European member; three two-member 'open' constituencies that would return two members of any race, and one nationwide constituency for Asians.

He, not unexpectedly, lost the election for lack of European support. Did he give up? Not at all. Undeterred by all the setbacks that stared him in his face, he continued to campaign for UNIP and to sow the good seed. Two years later, he stood for parliamentary elections again, and this time around won the Lusaka East parliamentary seat, beating his African opponent by a huge margin. He was the only white man to be voted for by electors who were all African.

At Zambia's independence in 1964, he became Zambia's first Minister of Justice; the only white member of Zambia's inaugural Cabinet. He remained minister of justice from October 1964 to January 1965 and also became Attorney General from January 1965 to March 1969.

In March 1969, he was appointed as the Chief Justice of Zambia. He declared upon his appointment that:

The people must know that when they go to court they will receive justice, and that all citizens are equal before the Courts regardless of their tribe, race or political opinions.[5]

Apparently, some serving justices in the country, all of whom were white, opposed Skinner's appointment for principally two reasons. First many thought he was an alien to judgeship and did not have sufficient experience for the job. Second, he was viewed as being too close to Kenneth Kaunda and to local politics and, therefore, as likely to be politically compromised thus risking the integrity the judiciary vis a vis the interests of his political colleagues in the executive branch.[6]

Although Chief Justice Skinner served in that position for six months only, he proved his sceptics totally wrong. He was not a sell-out as anticipated. Although he was hounded out of office in September 1969 leading to his subsequent resignation, he manifested robustness of character and principled judicial leadership.

The events leading to his vacation of office were violent, messy, chaotic, unfortunate, and their consequences were probably unintended or planned by any of the agitators and participants, but the principle which emerged from those events was dramatically clear.

The cruel fate that befell Justice Skinner had its innocent origins in a border incident that occurred on the Zambia/Angola border on 16 June 1969. Mention ought to be made that at that time Portuguese troops were engaged in fighting a

[5] 1 March 1969 on being appointed as Chief Justice of Zambia.

[6] See Sishuwa Sishuwa (2019) 'A White Man Will Never Be a Zambian': Racialised Nationalism, the Rule of Law, and Competing Visions of Independent Zambia in the Case of Justice James Skinner, 1964–1969, Journal of Southern African Studies, 45:3, 503-523, DOI: 10.1080/03057070.2019.1626190

vicious war against African nationalist forces in both Angola and Mozambique, both of which countries share borders with Zambia. Occasionally the fighting would spill over into Zambia with reported incidences of loss of life and property for the Zambian people along the border. This situation generally heightened a sense of security, nationalism and patriotism, especially in people living along the border areas.

On that day, two white Portuguese soldiers guarding the Angolan border were called by a Zambian immigration officer. In a naïve response to that call, the two soldiers divested themselves of their weapons and walked over a couple of yards across the border, entering Zambia to find out what the immigration official wanted them for. In an unexpected turn of events, the two soldiers were arrested and charged with illegally entering Zambia.

They were quite 'efficiently' tried by a Senior Resident Magistrates, Mr. William Bruce-Lyle, who later became a judge. In his judgment, he claimed that the offence with which the duo was charged, was 'a very serious one' that constituted '… a threat to the security of this country at … a time when the Government … is very much concerned with troops movement [sic!] along Zambia's border and this should be viewed by every citizen of Zambia with much concern'. He found them guilty, convicted them and ordered them to pay substantial fines or face two years imprisonment in default. As, in the circumstances they found themselves in, they were unable to pay the fines, they were sent to quod.

The government was quite elated by the 'satisfactory outcome' praising the judgment of the magistrate for there was a belief that the crossing over into Zambian territory by the two Portuguese soldiers, although they had laid their arms prior to their entry, was ill-motivated. Espionage was suspected.

Meanwhile, Ivor Evans, an experienced white, British High Court judge, who had served in the colonial administration, read a report of the case published in the

Times of Zambia some two weeks after the soldiers had been jailed. Using his revisionary jurisdiction, he called for the docket, and reviewed the case.

His finding was that the prison sentence imposed by the magistrate was way too 'excessive' and wrong in principle and that it induced in him a sense of shock as the offence committed by the soldiers was mere trivia. He admitted though that the action of the soldiers was indiscreet and stupid. He thus overturned the conviction, quashed the sentence and set the duo free, observing in the process that the 18 days they had spent in goal had constituted sufficient punishment.

According to political historian, Sishuwa Sishuwa, it was a rather inauspicious coincidence that on the day the two soldiers were set free, in the continued liberation fights between nationalists in Mozambique and the Portuguese, two planes launched a raid, bombing in the process villages in Katete, on the Zambian border with Mozambique, and killing two Zambians. This concatenation of events raised the nationalistic tempo. President Kaunda, who had been out of the country at the time of the incident, was livid. Immediately upon his return he called a press conference at State House on 14 July 1969. He condemned the judgment of Justice Ivor Evans as 'political'.

> **To me, this is a political judgement. I make no apologies for saying so. The judiciary's independence still stands, but I am entitled to demand on whose behalf the Courts are making this type of judgement. Are they defending the interests of the people or foreign interests? I don't expect the judiciary to behave as if it was some sort of organisation from Heaven looking down upon us on earth here in Zambia. The judiciary is part and parcel of this society and I expect it to behave accordingly. Anything else is not acceptable in Zambia.**

No doubt, a sense of nationalism had taken the better of President Kaunda. He demanded for a full explanation from Chief Justice Skinner on what had happened and why. From his statement quoted above, Kaunda's understanding

of judicial independence was that of a conformist judiciary described in the words of George Otieno Ochich[7] that:

> **Judicial independence does not imply that judges should be entirely aloof from public sentiments and always disregard the strength of local feelings on an issue before them, neither does it mean that the courts may do entirely as they please. On the contrary the courts must ever be alive to the realities of the society in which they operate, and they must always discharge their functions in accordance with certain explicit and implicit limitations. When determining disputes, the courts are expected to have some regard to the general sense of the community and not to rely merely on idiosyncratic opinions.**

However, in response, Justice Skinner stated that he saw nothing untoward in what Justice Evans had done and added that he was satisfied that Justice Evans had acted in accord with the principles of justice, and that it was one of the functions of the judiciary to correct the action of the executive or its individual servants whenever the need arises. If that function and the independence to undertake it was denied then the courts would no longer effectively carry out their duties. He was quite emphatic on the dangers of allowing public opinion to guide judicial decisions. He stated:

> **I never regarded the judiciary as a caste apart; its members must share the hopes and aspirations of the nation. However, this does not mean that judges should decide cases or impose sentences in such a way as to please public opinion or the Government. They must decide them in accordance with the facts before them and the law. It is only in this manner that an**

[7] George O. Otieno Ochich 'The changing paradigm of human rights litigation in East Africa' in Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives, Vol. 5 judicial watch Series (ICJ Kenya section, Nairobi, 2007 p.65.

accused person can be guaranteed a fair and impartial trial before an unbiased judge free from the domination of public opinion....[8]

In the wake of that exchange between President Kaunda and Chief Justice Skinner there were chaotic, unfortunate, widespread scenes of demonstrations against the judiciary throughout Zambia. The demonstrations, effectively took the form of anti-white riots whose consequences were unplanned and probably unintended by any of the orchestrators and participants alike. A nasty attack was carried out at the High Court in Lusaka by the uniformed force called the Zambia Youth Service. The High Court building was broken into, in consequence of which members of the judiciary had to barricade themselves in chambers.

Other demonstrations held throughout the country led to several magistrate court buildings being broken into. Posters grossly abusive to members of the judiciary were carried by the demonstrators and highly offensive statements concerning Chief Justice Skinner and Mr. Justice Evans were made by officials of UNIP.

The scale of these developments somewhat shocked President Kaunda who was fairly close to Justice Skinner and who in many ways appreciated the significance of judicial independence, but he was equally concerned about the strong nationalistic sentiments and emotions which the case brought about in the wake of the insecurity on Zambia's eastern and South eastern borders.

Justice James Skinner could have none of this. He opted to resign September 1969. In his letter of resignation, he stated that the abuse to which he had been subjected by UNIP party functionaries had affected the confidence of "the common man" in him as chief justice and in a judiciary which he headed. He

[8] Reply to President Kaunda 15 July 1969. See Andrew Sardanis, *Africa: Another Side of the Coin. Northern Rhodesia's Final Years and Zambia's Nationhood*. London/New York: I.B. Taurus, 2003.

made the famous statement which I quoted earlier; 'Confidence in the judiciary is a delicate bloom in Africa, and I am not going to risk destroying it in Zambia'. He added that if the rule of law was to prosper in Zambia, ordinary citizen must have confidence in the judiciary, only then would full democracy be realised.

President Kaunda was places between a rock and a hard place. He was caught between his respect for an independent Judiciary and the nationalist outrage of Zambian citizens over the Portuguese who had been bombing Zambian villages in order to hit the anti-Portuguese guerrillas. Publicly Kaunda condemned the violence that had occurred. He later apologized for what had happened and invited Skinner to resume his duties, Skinner declined. He was unwilling to work in a system that had betrayed the fundamental principle of judicial independence. He however remained in good terms with President Kaunda after his resignation.

The title of this lecture suggests that Justice Skinner was a man on the go. He travelled back to Ireland upon leaving Zambia and practiced at the Irish Bar but not for long before he moved again. He next travelled back to Africa in 1970. This time not to Zambia, but to Zambia's Eastern neighbour – Malawi. He was appointed Chief Justice of that country. He remained Chief Justice of Malawi for 15 years during the less than democratic regime of President Hasting Kamuzu Banda. He ensured all the while that judicial independence was respected.

He moved to England in 1985. In 1986 he took up a further high judicial office in the UK as a Social Security Commissioner, a post equivalent to that of a high court judge, where he heard appeals on points of law relating to social security. His health began to fail him. He underwent a triple heart bypass operation during this period. This did not, however, dissuade him from continuing his professional career until he was 72, the statutory retirement age for judges. He died on 21 October 2008 aged 85.

The Justice Skinner storyline shows that the political incorruptibility of a judge is the greatest asset to the independence of the judiciary. The judge, as guardian of the rule of law, must be completely principled.

Yet the story is also a reminder that attempts to exert executive supremacism is not exactly a new issue. But perhaps those who worry today about the problem – if in truth it is a problem – of persistent attempts by the executive to undermine the judicial branch of government should be worrying as much about the political penetration of justice today.

The daily practice of judges is, however, not a theoretical exercise. The didactics of professional ethics for judges should be linked with cases that illustrate the dilemmas that judges encounter in their work. And we cannot in this regard do any worse than recount a different story of another judge; a truly sad story of an indigenous judge of the High Court of Zambia who, in complete contrast to Justice Skinner, lacked the courage and the resolve resolve to stand his ground in the wake of what was clearly executive encroachment of his independence as a judge.

On 15 February 2003, Mr. Justice Anthony John Nyangulu of the High Court at Lusaka took the most unusual step of apologising to the then Republican President, Levy Patrick Mwanawasa SC and to the then Chief Justice, Ernest Sakala, for granting an injunction to the leader of the opposition Heritage Party Brig. Gen. Godfrey Miyanda. The induction was sought to blocked the President from appointing opposition members of parliament to executive positions as ministers and deputy ministers.

The interdict given by Justice Nyangulu against the State flew in the face of the provisions of the State Proceedings Act which directs that no such orders can be given against the government.

The Republican President, who had himself been a senor lawyer (SC) prior to his becoming president, was quite upset with the order given by Mr. Justice Nyangulu. The President, as did no doubt the Judge, well-knew that a court's accountability for wrong decisions lay in the system of appeals. Yet, like his predecessor Kenneth Kaunda, who was not a lawyer, President Mwanawasa SC made very unsavory public comments in which he called into question the motive of the judge in making an order which was both inimical to government interest and blatantly wrong in law.

Justice Nyangulu quickly apologized, claiming that his error in judgment was as the result of a bout of malaria which had afflicted him as he was about to give the order. The Catholic Commission for Justice and Peace (CCJP) called on the judge to resign, contending that for the judiciary to recover from this loss of respect in the eyes of the people and to save itself from continued embarrassment and ridicule, urgent remedial action needed to be instituted. The Law Association of Zambia, for its part, alleged that the events that followed the decision smacked of lack of independence on the part of the judge and had in any event set a bad precedent. The Judge did not, of course resign.

As for Justice James John Skinner, by the principled and brave position that he took in the wake of the events preceding his resignation, he became, in my view, one of the symbolic figures of judicial independence in Zambia. If written without mentioning his brave offering, Zambia's judicial history would indeed be inaccurate for that incongruous omission. His stance, which was without self-interest, may well embody the single most important legacy of Justice Skinner. That legacy will continue to serve as a reminder of the obligation entrusted to every adjudicator – not merely to do justice to the litigating public, but also to defend the right of the judiciary, not the executive, to interpret the law. And should we not all say Amen to that?

Yet, Justice Skinner's story, taken alongside that of Justice Nyangulu, also stands as a testament to the fact that the structures and mechanisms of our legal system, far from being etched in stone, remain works in progress. And the circumstances of his case are a powerful example of how – in this great country – the hands of the principled, not those of the weak, can help to bend the arc of history just a little further toward justice.

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