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ISSN 1727-3781



2014 VOLUME 17 No 1

<http://dx.doi.org/10.4314/pelj.v17i1.09>

TOWARDS THE PROTECTION OF HUMAN RIGHTS: DO THE NEW ZIMBABWEAN CONSTITUTIONAL PROVISIONS ON JUDICIAL INDEPENDENCE SUFFICE?

L Chiduza*

1 Introduction

In a country founded on constitutional democracy, the independence of the courts is pivotal to the protection of human rights.¹ Constant interferences with judicial independence² in Zimbabwe have consequently contributed to the infringement of human rights, as the citizenry cannot rely on the courts for their protection.³ Cognisant of the significant role of the judiciary in the protection of human rights in most democracies, Zimbabwe's new *Constitution* (hereafter *Constitution of Zimbabwe*) should ideally be aimed at bolstering the independence of the judiciary through a number of judicial reforms.⁴ The purpose of this paper is to analyse the judicial reforms introduced by the new *Constitution* with a view to establishing if they will suffice to improve judicial independence and in turn to protect human rights. To this end the discussion below will commence with an elucidation of the concept of judicial independence". The typical features of an independent judiciary will be discussed next. This discussion will then be followed by an analysis of the

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¹ Dumbutshena 1989 *SAJHR* 313.

² "Judicial independence", in brief, entails that the judiciary be separated from the other branches of government so as to ensure that the courts are not subject to improper influences from the other branches of government. The concept will be discussed in greater detail later in the paper.

³ One of the examples of the Zimbabwean government's interference with the judiciary was when Gubbay CJ (as he then was) was forced to retire prematurely after he delivered a judgment in the case of *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2000 2 ZLR 469 (SC). *In casu* he had granted an interdict barring further land acquisitions by the government, as such acquisition were unconstitutional and had been carried out in a violent manner.

⁴ The constitutional reforms have culminated in the adoption of a new *Constitution*. The *Constitution of Zimbabwe* (2013) replaced the *Lancaster House Constitution*, 1980. The need for the adoption of a new Constitution was highlighted in the Preamble of the *Global Political Agreement* (GPA) of September 2008.

guarantees relating to the independence of the judiciary in the *Constitution of Zimbabwe*.

2 Judicial Independence

Separation of powers

The notion of judicial independence" is founded on Montesquieu's doctrine of the separation of powers. This doctrine seeks to avoid the concentration of powers in a single organ of state as this is viewed to be detrimental to the freedoms of citizens.⁵ Montesquieu asserts that the judiciary should be separated from the legislature and the executive to guarantee freedom. Thus, the doctrine demands that the law-making task be vested in the legislature, the application and interpretation of the law in the judiciary, and the overall administration of government in the executive.⁶ The judiciary is the custodian of the law and ensures that government activities are executed in line with the rule of law. Importantly, the doctrine of the separation of powers contributes to the guarantee of judicial impartiality in the adjudication of alleged human rights violations. Conversely, the absence of the separation of powers compromises judicial impartiality and therefore precludes assurances of the application of effective legal remedies to victims of human rights violations.

Features of an independent judiciary

A number of features determine the extent of the independence of the judiciary. According to Madhuku these include: the method of the appointment of judges; the method of the removal of judges from office; whether or not the judiciary has exclusive jurisdiction over judicial matters; and the question of the salaries payable to judges.⁷ Brazier too contends that:

⁵ Wade and Bradley *Constitutional and Administrative Law* 51.

⁶ McQuoid-Mason, O'Brien and Green *Human Rights for All* 33.

⁷ Madhuku 2002 *J Afr L* 232.

In general the public must feel confident in the integrity and impartiality of the judiciary: judges must therefore be secure from undue influence and be autonomous in their own field. That possibility implies that neither the government nor Parliament should have any role in the appointment or removal of judges. More precisely, judicial independence may be said to require: (a) that appointments to the judicial office, renewal of part-time appointments, and promotions should not depend on uncontrolled ministerial patronage; (b) that judges should be free from improper attempts by Ministers, Members of Parliament, or peers to influence the result of cases still under adjudication; (c) that judicial salaries should not be reduced; and (d) that judges should not be removed from office unfairly or without reason.⁸

Rautenbach and Malherbe furthermore note that the independence of the courts is an incidence of the separation of powers.⁹ Hence the constitutions¹⁰ of a number of countries contain provisions that protect the independence of the courts. Such provisions typically include amongst others, specific guarantees regarding the terms of office of judges, their salaries and pensions, disciplinary actions and appointments and dismissals. The guarantees relating to the independence of the judiciary in the new *Constitution of Zimbabwe* will be discussed below:

2.1 A clear statement providing for an independent judiciary

Madhuku contends that a clear statement on judicial independence is needed in a constitution.¹¹ Such a statement is important for two reasons. First, it allows that redress can be sought in the courts if a law undermines the independence of the judiciary. Second, such a statement enables the public to criticise the executive's interference with the work of the judiciary.¹²

⁸ Brazier *Constitutional Reform* 172.

⁹ Rautenbach and Malherbe *Constitutional Law* 165. See also *De Lange v Smuts* 1998 3 SA 785 (CC) paras 60, 70-72; *South Africa Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) paras 25-26.

¹⁰ See s 165(2) of the *Constitution of the Republic of South Africa*, 1996, which states that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear or favour". See also s 128(1) of the *Constitution of the Republic of Uganda*, 1995, which states that "(1) in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority".

¹¹ Madhuku 2002 *J Afr L* 233.

¹² Madhuku 2002 *J Afr L* 233. It should also be noted that the author is aware that the inclusion of these statements in the *Constitution* does not necessarily guarantee their application in practice. An example that can be used in this instance is that of s 104(4) of the *Constitution of Zimbabwe*, which stipulates that in appointing Ministers and Deputy Ministers, the President must be guided

Previously section 79B of the *Lancaster House Constitution* provided a clear statement for the protection of the independence of the judiciary.¹³ Currently section 164(1) of the *Constitution of Zimbabwe* expressly guarantees the independence of the judiciary and places obligations on government to respect the independence of the judiciary and its judgments.¹⁴ This provision places a positive duty on government to respect the independence of the judiciary and also serves as a constant reminder to all of the importance of abiding by the decisions of the courts.

This section provides the general constitutional guarantee with regards to the protection of the independence of the judiciary. It is drafted in line with international law principles which demand that the independence of the judiciary be guaranteed by States and enshrined in the Constitutions or laws of the country.¹⁵ To further strengthen the independence of the judiciary, the *Constitution of Zimbabwe* obliges the State to enact ordinary legislation that will further supplement this constitutional provision.¹⁶ As a result, legislation will have to be informed and guided by the provisions in the new *Constitution*.¹⁷

The *Constitution of Zimbabwe* stipulates, in line with international norms, that no person or organ of state may interfere with the functioning of the court.¹⁸ In addition it provides that judges should decide cases impartially based on the facts of the case and their understanding of the law and without any direct or indirect

by considerations of regional and gender balance. Despite the existence of such a provision for gender equality in official appointments, the President in his 2013 cabinet selection appointed only four female Ministers out of twenty-nine, two provincial female Ministers out of ten, and five deputy Ministers out of twenty-five. See Staff Reporter *The Zimbabwean*.

¹³ See s 79B of the *Lancaster House Constitution*.

¹⁴ S 164(3) of the *Constitution of Zimbabwe*

¹⁵ See Principle 1 of the *United Nations Basic Principles on Judicial Independence* (1985).

¹⁶ S 164(2)(b) of the *Constitution of Zimbabwe*.

¹⁷ No specific provision is provided for in the *Constitution* for complaints to be lodged to any forum if this provision is not complied with. However, we have seen in jurisdictions like South Africa that there are specific interest groups that would perhaps attempt to litigate where there is non-compliance with constitutional guarantees.

¹⁸ S 164(2)(a) of the *Constitution of Zimbabwe*.

influence on their decisions.¹⁹ Although the *Constitution* states that a member of the judiciary may be vested with other functions apart from adjudicating powers, it does recognise that such functions should not interfere with the independence of the judiciary.²⁰ To give effect to the provision, however, the granting of non-judicial functions to judicial officers should be closely guarded by the newly established Constitutional Court. This is to ensure that there is no excessive interference by other branches of government with judicial duties²¹ and to prevent the inappropriate assignment of such powers to judicial officers.²²

2.2 **Judicial authority**

Section 79 of the *Lancaster House Constitution* vested the judicial authority in courts.²³ Section 162 of the *Constitution of Zimbabwe* states that:

The judicial authority ... is vested in the courts, which comprise- (a) the Constitutional Court²⁴; (b) the Supreme Court²⁵; (c) the High Court²⁶; (d) the

¹⁹ This provision closely resembles Principle 2 of the *United Nations Basic Principles*, which also provides that the judiciary should decide matters before them impartially, on the basis of facts and in accordance with the law.

²⁰ S 164(4) of the *Constitution of Zimbabwe*.

²¹ See *Van Rooyen v The State* 2002 5 SA 246 (CC) where the Constitutional Court declared invalid provisions of the *Magistrates Act* 90 of 1993, *Magistrates' Courts Act* 32 of 1944 and regulations made under the *Magistrates Court Act* dealing with the powers of the Minister *inter alia* to determine the salary of a suspended magistrate, vesting in Parliament the power to impeach a magistrate without investigation by the Magistrates' Commission, and allowing the appointment of a non-judicial officer to hear the complaints against a magistrate.

²² See *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) paras 29-35, where Chaskalson P accepted that the exercise of some non-judicial functions may be in order and expressly left open the possibility for judges to serve on commissions of enquiry, observing: "performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions-independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of consideration of relevant information". In *Van Rooyen v The State* 2002 5 SA 246 (CC) paras 231-233 it is stated that magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers because to do so may make them answerable to the executive. However, Chaskalson CJ also noted that "there may be reasons why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, and is not at present inconsistent with the evolving process of securing institutional independence at all levels of the court system".

²³ The courts consisted of the Supreme Court, the High Court and such other courts subordinate to the Supreme Court and the High Court established by or under an Act of Parliament.

²⁴ S 166 of the *Constitution of Zimbabwe*.

²⁵ S 168 of the *Constitution of Zimbabwe*.

²⁶ S 170 of the *Constitution of Zimbabwe*.

Labour Court²⁷; (e) the Administrative Court²⁸; (f) Magistrates Courts²⁹; (g) the Customary law courts³⁰; and (h) other courts established by or under an Act of Parliament.

A distinct change brought about by the *Constitution* is the introduction of a Constitutional Court.³¹ The Constitutional Court will deal only with cases of alleged violations of constitutional rights relating to the *Constitution*.³² Taking into consideration that the human rights situation in the country has been in turmoil over the past decade, the establishment of the Constitutional Court as the highest court in all constitutional matters may³³ lead to an improvement in the judicial protection of human rights in the country.

The jurisdiction of the Constitutional Court is dealt with under section 167 of the *Constitution*. The Constitutional Court now has the exclusive jurisdiction to advise on the constitutionality of any proposed legislation³⁴ and also makes the final decision as to whether an Act of Parliament or conduct of the President or Parliament is constitutional or not, and must confirm any order of invalidity made by another court before that order has any force.³⁵ While there was previously power of judicial review, the Constitutional Court is expressly given the powers to conduct checks and balances. This is a positive development as the courts are now expressly given the powers to conduct checks and balances on Parliament and the executive branches of

²⁷ S 172 of the *Constitution of Zimbabwe*.

²⁸ S 173 of the *Constitution of Zimbabwe*.

²⁹ S 174 of the *Constitution of Zimbabwe*.

³⁰ S 174(b) of the *Constitution of Zimbabwe* states that the Customary Law Court's jurisdiction consists primarily in the application of customary law.

³¹ See Motala and Ramaphosa *Constitutional Law* 55, which states that the establishment of constitutional courts can be traced back to after the Second World War, when many European countries introduced court structures that deviated from the Anglo-American model, which entrusted a court with specific jurisdiction. Hence the establishment of a special constitutional court to adjudicate on constitutional disputes and to prevent tyranny. This perhaps could be the rationale for the introduction of such a court in Zimbabwe.

³² See s 167 of the *Constitution of Zimbabwe*.

³³ It should be noted that in this instance emphasis is on the existence of the institution rather than personalities. Admittedly those who occupy seats on the bench should be willing to uphold the law. Historically there has been a lack of independence and as such the constant retention of the same judicial officers from the Supreme Court might defeat the purpose and intentions of the Constitutional Court.

³⁴ S 167(2)(a) of the *Constitution of Zimbabwe*.

³⁵ S 167(3) of the *Constitution of Zimbabwe*.

government. This marks a major departure from the *Lancaster House Constitution*, which did not include such a provision. If these powers are exercised by an independent and impartial judiciary, it will bode well for the protection of human rights in the country. It will also prohibit the abuse of power by other branches of government.

The powers to test the constitutionality of legislation are aimed at ensuring that no legislation that is in conflict with the *Constitution* is passed. Previously there was no express provision to this effect, which lack created the risk that legislation could be passed with a view to limiting rights and freedoms. It is also encouraging to note that the Constitutional Court has managed to set aside a number of provisions in pieces of legislation that are in direct conflict with the *Constitution*.³⁶ The powers conferred upon the Constitutional Court will furthermore ensure that checks and balances are applied on Parliament and the executive branch of government.

2.3 The appointment of judges under the Constitution of Zimbabwe

International law requires that States appoint judges through a strict selection process and in a transparent manner.³⁷ Although international law does not provide a specific method with regards to the appointment of judges, it is crucial that judges should be appointed and promoted on the basis of their legal skills, professional qualifications and integrity.³⁸ Clear selection criteria based on merit should be

³⁶ For example in October 2013, the Constitutional Court declared that s 31(a) of the *Criminal Law (Codification and Reform) Act* Chapter 9:23 which prohibited the publication of falsehoods, was in contravention of the fundamental right to freedom of expression enshrined in the *Constitution of Zimbabwe*. For more see Voice of America 2013 <http://www.voazimbabwe.com/content/constitutional-court-freedom-of-expression-criminal-codification-act/1780175.html>.

³⁷ See Principle 10 of *United Nations Basic Principles on the Independence of the Judiciary* (1985). See also A 9 of the *Universal Charter of the Judge* (1999); Principle A, para 4(i) and (k) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003).

³⁸ The Human Rights Committee has over the years repeatedly referred to the criteria under which judges are appointed and has established that judges should be appointed for their professional skills. See the *Concluding Observations of the Human Rights Committee on Bolivia* UN Doc CCPR/C/79/Add.74 para 34. See also the *Concluding Observations on the Human Rights Committee on Lebanon* UN Doc CCPR/C/79/Add.78 para 15; *Concluding Observations of the Human Rights Committee on Azerbaijan* UN Doc CCPR/CO/73/AZE para 14; *Concluding Observations of the Human Rights Committee on Sudan* UN Doc CCPR/C/79/Add.85 para 21;

provided in a state's constitution. This is essential to protecting the independence of the judiciary. Although international law does not give a specific procedure with regards to the appointment of judges, a number of international instruments contain certain common requirements that should be taken into account with regards to such appointments. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, for example, recommend that an independent body be entrusted with the selection of judicial officers. It also allows other bodies, including other branches of government, to perform the function of appointing judges as long as they safeguard the independence and impartiality of the judiciary.³⁹

2.3.1 Minimum qualifications

As in the *Lancaster House Constitution*,⁴⁰ the *Constitution of Zimbabwe* contains a number of requirements regarding the qualifications that a judge should have in order to be appointed to any of the courts established under the *Constitution*. The express codification of the minimum qualifications for appointment contributes to the independence of the judiciary as it limits the possibility of manipulation by those empowered to make judicial appointments.⁴¹ This is confirmed by the Latimer House Principles, which identify the appointment of judges on merit as one of the key ways of preserving judicial independence.⁴² As a result a number of African countries have adopted the same measures in order to preserve the independence of the judiciary.⁴³

Concluding Observations of the Human Rights Committee on Slovakia UN Doc CCPR/C/79/Add.79 para 18.

³⁹ Principle A, para 4(h) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003). See also Principles 13-17 of the *Beijing Principles on the Independence of the Judiciary in the LAWASIA Region* (1995).

⁴⁰ See s 82 of the *Lancaster House Constitution*.

⁴¹ Madhuku 2002 *J Afr L* 241.

⁴² Principle IV(a) of the *Latimer House Principles on the Three Branches of Government* (2003).

⁴³ S 143(1)(a) of the *Constitution of Uganda* states that a person may be appointed Chief Justice only if he or she has served as a judge of the Supreme Court of Uganda or a court with similar jurisdiction, or he or she has practised law as an advocate for a minimum period of 20 years. S 143(1)(e) of the *Constitution of Uganda* provides that for one to qualify as a judge of the High Court in Uganda, one must have practised for a minimum of 10 years as an advocate. S 112(1) of the *Constitution of the Republic of Malawi*, 1994 requires that a candidate must have practised as a lawyer for at least ten years to qualify for judicial appointment. S 139(4) of the *Constitution*

Thus, the *Constitution* establishes the minimum qualification requirements for judges of the Constitutional Court,⁴⁴ the Supreme Court,⁴⁵ the High Court, the Labour Court and the Administrative Court.⁴⁶ These requirements for the appointment of judges for the different courts are necessary to ensure that individuals who are appointed to the bench are best qualified for the job and are fit and proper to hold judicial office. This resonates with a number of international instruments⁴⁷ and standards in foreign jurisdictions⁴⁸ that seek to ensure that fit and proper individuals are appointed as members of the judiciary. Other imperatives stated in the *Constitution*, such as the gender and racial representativeness of members of the judiciary,⁴⁹ may require the establishment of strategic policies to ensure the effective implementation of such imperatives.

2.3.2 *The appointment process of judges under the Constitution of Zimbabwe*

The involvement of politicians in the appointment process is required for the purposes of legitimacy. The appointment process should, however, not be entirely in the hands of politicians as this may pose the risk of appointments being made on the basis of political allegiance. It is important that the judicial authority must be derived from the people and such appointments should therefore be done by an elected organ of state. As a result, in a number of jurisdictions the head of the executive (the President or Prime Minister) has a critical say in the appointment of judges. The

of the Republic of Ghana, 1992 also requires a minimum of ten years' experience as a lawyer. In South Africa and Namibia, there are no prescribed minimum requirements. This may be attributed to the focus in both countries on promoting the advancement of formerly disadvantaged groups. However, s 174(1) of the *Constitution of South Africa* does require that individuals must be appropriately qualified.

⁴⁴ S 177 of the *Constitution of Zimbabwe*.

⁴⁵ S 178 of the *Constitution of Zimbabwe*.

⁴⁶ S 179 of the *Constitution of Zimbabwe*.

⁴⁷ See Principle 10 of the *United Nations Basic Principles on the Independence of the Judiciary* (1985), which state that a person selected for judicial office should be appropriately trained, and have integrity and demonstrable ability.

⁴⁸ See s 174(1) of the *Constitution of South Africa*, which states that "Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen". See also s 143 of the *Constitution of Uganda*.

⁴⁹ S 184 of the *Constitution of Zimbabwe* which states that "appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe".

degree of involvement and the extent to which the decision of the head of state is subject to confirmation by the legislature or another body may vary from country to country.⁵⁰

The *Lancaster House Constitution* contained weak provisions with regards to the composition of the Judicial Services Commission (JSC). The JSC was thus mainly made up of presidential appointees.⁵¹ Naturally, the JSC was perceived to lack independence. This perception in turn cast doubt on the independence and impartiality of the appointment of judges. This was further compounded by the fact that the President was entitled to proceed with the appointment of a member of the judiciary regardless of the advice received from the JSC.⁵² Thus, in an effort to improve the appointment process of judges in the country, section 180 of the *Constitution of Zimbabwe* states that:

- (1) The Chief justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section.
- (2) Whenever it is necessary to appoint a judge, the Judicial Service Commission must- (a) advertise the position; (b) invite the President and the public to make nominations; (c) conduct public interviews of prospective candidates; (d) prepare a list of three qualified persons as nominees for the office; and submit the list to the President; whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned.
- (3) If the President considers that none of the persons on the list submitted to him in terms of subsection (2) are [sic] suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.
- (4) The

⁵⁰ Madhuku 2002 *J Afr L* 234.

⁵¹ The JSC under s 90 of the *Lancaster House Constitution* comprised of the Chief Justice or Acting Chief Justice or the most senior judge of the Supreme Court, the Chairman of the Public Service Commission, the Attorney-General, and not less than three other members appointed by the President, of whom one must be a person who is or has been a Supreme Court or High Court judge, a person who has been qualified as a legal practitioner in Zimbabwe for not less than five years, or a person who is possessed of such legal qualifications or experience as the President considers suitable and adequate for his appointment to the JSC; and the remaining Presidential appointees must be chosen for their ability and experience in administration, for their personal qualifications, or for their suitability otherwise for appointment. It is crucial to note that of the six possible members of the JSC under the *Lancaster House Constitution*, three members were directly appointed to the Commission by the President, two appointed by virtue of being the holders of offices to which they were appointed by the President after consultation with the JSC, and one was directly appointed by the President to an office by virtue of which he was a member of the Commission.

⁵² S 84(1) of the *Lancaster House Constitution*.

President must cause notice of every appointment under this section to be published.

The question of whether or not this section truly contributes to the independence of the judiciary will be discussed in greater detail below. It is crucial, though, that the role of and composition of the JSC under the *Constitution* is briefly discussed first.

2.3.2.1 The Judicial Service Commission (JSC)

The extent to which the appointment of judges is free from political manipulation is largely reliant on the independence of the JSC.⁵³ The *Constitution of Zimbabwe* creates a JSC⁵⁴ which plays a role in the appointment of judges.⁵⁵ The composition of the JSC is as follows in accordance with section 189(1) of the *Constitution*:

(a) the Chief Justice; (b) the Deputy Chief Justice; (c) the Judge President of the High Court; (d) one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court; (e) the Attorney-General; (f) the Chief Magistrate; (g) the chairperson of the Civil Service Commission; (h) three practising legal practitioners of at least seven years' experience designated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe; (i) one professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such association, appointed by the President; (j) one person who for at least seven years has practiced in Zimbabwe as a public accountant or auditor, and who is designated by an association, constituted under an Act of Parliament, which represents such persons; and (k) one person with at least seven years' experience in human resources management, appointed by the President.⁵⁶

⁵³ Madhuku 2002 *J Afr L* 238.

⁵⁴ S 190 of the *Constitution of Zimbabwe* deals with the functions of the JSC which are: "(1) The Judicial Service Commission may tender advice to the Government on any matter relating to the judiciary or the administration of justice, and the Government must pay due regard to any such advice. (2) The Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose. (3) The Judicial Service Commission with the approval of the Minister responsible for justice may make regulations for any purpose set out in this section. (4) An Act of Parliament may confer on the Judicial Service Commission functions in connection with the employment, discipline and conditions of service of persons employed in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court and other courts".

⁵⁵ S 189 of the *Constitution of Zimbabwe*.

⁵⁶ S 189 of the *Constitution of Zimbabwe*.

Under the *Constitution* the JSC is made up of thirteen members, which is a significant improvement on the one established under the *Lancaster House Constitution*. It is clear from the composition of the JSC that the President's influence over the appointment of members of the JSC has been reduced compared to situation under the *Lancaster House Constitution*. Although some members sit on the Commission by virtue of being appointed to office by the President, considerable efforts have been made to ensure that there is independent representation in the Commission. Such independent representation will therefore ensure that appointments to the judiciary are made impartially and without any political considerations. Perhaps to further strengthen the independent representation in the JSC, the inclusion of members of the civil society and members of the different political parties in Parliament would also have enhanced the independence of the Commission and helped to ensure it functions effectively without any external political influences.⁵⁷

Section 191 of the *Constitution* mandates the JSC to conduct its business in a just and transparent manner. This provision seeks to ensure that the JSC maintains fairness and transparency in its work so as to avoid any political manipulation. Given the efforts made to secure the independence of the JSC, the body will thus act as a watchdog to conduct checks and balances over the President and ensure that judicial appointments are made on merit without any undue political influence. The *Constitution* has thus made a significant contribution to realising the importance of an independent Commission in judicial appointments. The maintenance of an independent JSC will bode well in seeking to address past problems about the lack of impartiality in the appointment process.

⁵⁷ The South African example in this case could have been followed, as provided in s 178(1)(h) of the *Constitution of South Africa*, which states that "There is a Judicial Service Commission consisting of six persons designated by the National Assembly from among its members, at least three of whom must be members of the opposition parties represented in the Assembly". See also s 153 of the *Constitution of Ghana*, which provides for a Commission of 18 members, which includes amongst others four non-lawyers appointed by the President, a Chief and the editor of the Ghana Law Reports. The influence of the President is severely curtailed as the majority of the members of the Commission gain membership independent of his or her influence.

2.3.2.2 Analysis of section 180 of the *Constitution of Zimbabwe*

In accordance with section 180 of the *Constitution*, the President is mandated to appoint judges, but is bound by the advice of the JSC.⁵⁸ In order to ensure impartiality and fairness in the appointment process, the *Constitution* lays down a number of guidelines that need to be followed before an individual may be appointed as a judge. The requirements that are laid down in the *Constitution* are as follows:

2.3.2.2.1 Advertisement of judicial vacancies⁵⁹

In seeking to improve judicial appointments, the *Constitution* stipulates that the JSC must advertise any vacancy within the judiciary, invite applications for the post, and also invite the President and the public to make nominations.⁶⁰ The advertisement of vacancies is a commendable inclusion in the appointment process and seeks to ensure that suitably qualified individuals are appointed to the bench.⁶¹ It is also a welcome change from the past, as previously there was never any public advertisement of judicial vacancies.⁶² Over the years judicial appointments have been made without any such advertisements, resulting in questions being asked about the credibility of the appointment process.⁶³ Advertisements will therefore aid in the appointment of well qualified and fit individuals to the judiciary and increase openness, transparency and the scrutiny of potential choices. It is submitted that such advertisements will therefore increase the professionalism of the judiciary.

⁵⁸ S 180(1) of the *Constitution of Zimbabwe*.

⁵⁹ It should be noted that the *Lancaster House Constitution* did not contain any provision requiring the advertisement of judicial vacancies.

⁶⁰ S 180(2 (a) of the *Constitution of Zimbabwe*.

⁶¹ Such advertisement is in line with international law. See Principle II.I of Annex of the *Latimer House Principles on the Three Branches of Government* (2003), which requires judicial vacancies to be advertised. See also Principle 12.3 of the *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010).

⁶² Simbisai *Zimbabwe Independent*.

⁶³ Simbisai *Zimbabwe Independent*.

2.3.2.2.2 President and public nominations

The *Constitution* gives the president and members of the public the opportunity to nominate potential candidates to be appointed as judges.⁶⁴ Such nominations are made after the advertisement of judicial vacancies. It is submitted that the public's involvement in the nomination process marks an improvement from the *Lancaster House Constitution*, as it did not provide for the involvement of the public in the appointment process. The public's involvement in the judicial appointment process is crucial for the legitimacy and professionalisation of the appointment process. However, despite such positive changes being introduced, the *Constitution* contains a more alarming provision that allows the President to make nominations for any judicial vacancy in the country.⁶⁵ Since the *Constitution* gives the President the final authority in the appointment of judges, it is alarming that the President should also be given the powers to nominate any individual for judicial appointment.

It is submitted that this provision grants the president enormous powers in the appointment process. The President as a result might simply refuse to make an appointment if any of his or her nominations to the bench are not presented to him for appointment by the JSC. This provision is dangerous for the independence of the judiciary and is subject to abuse by the President in the case where his preferred choices are not forwarded for appointment. It also defeats the whole purpose of calling for members of the public to make nominations, as their views might not make any significant contribution in the appointment process. It is therefore difficult to dispel the suspicion that this provision was included to give the President indirect supreme powers over the JSC.

⁶⁴ S 180(2)(b) of the *Constitution of Zimbabwe*.

⁶⁵ S 180(2)(b) of the *Constitution of Zimbabwe*.

2.3.2.2.3 Public interviews

The *Constitution* also provides that the JSC must conduct public interviews⁶⁶ of prospective candidates, from whom a list of three qualified and recommended persons must be prepared and submitted to the President⁶⁷, from which list appointments have to be made.⁶⁸ However, the President is not obliged to appoint any of the three nominees on the initial list submitted by the JSC and in such cases the President must require the JSC to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees.⁶⁹ However, this provision does not state the process through which the second list is to be obtained (in comparison to the first list) or provide that such individuals are also subject to public interviews. This therefore raises great suspicion that the appointment process might be subjected to manipulation. This is so because the people on the second list could therefore be handpicked, which could result in the appointment of pliant judges to the bench. This provision also alarmingly gives the President considerable power in the appointment of judges and there is great danger that the selection of judges might be further politicised. There is a need to review this provision to ensure that impartiality in the appointment process is observed.

Despite these concerns about the appointment process, the efforts made to ensure that there is transparency in the appointment process must be commended. They mark a departure from the past, and the cumbersome appointment process procedures seek to ensure that there are a series of quality control mechanisms which will review the proposed appointees' suitability, qualifications and skill to ensure the delivery of progressive jurisprudence.⁷⁰ In order to further strengthen the impartiality of the appointment process, it is recommended that the JSC adopts clear standards for assessing the suitability and competence of candidates. Such standards must be published so that the public is aware of the standards used to

⁶⁶ S 180(2)(c) of the *Constitution of Zimbabwe*.

⁶⁷ S 180(2)(d) of the *Constitution of Zimbabwe*.

⁶⁸ S 180(2)(d) of the *Constitution of Zimbabwe*.

⁶⁹ S 180(3) of the *Constitution of Zimbabwe*.

⁷⁰ Simbisai *Zimbabwe Independent*.

assess judges. Public awareness will no doubt lead to confidence in the justice system as members of the public would be aware that fit, proper and well qualified individuals are appointed as judges.

2.3.3 Appointments of acting judicial officials under the Constitution

The practice of appointing acting judges has over the years raised international controversy. This is so because such appointments have been deemed to be contrary to sound legal policy and the independence of the judiciary as a result of their insecure tenure.⁷¹ Security of tenure is key to the independence of the judiciary, and if judges are appointed for a fixed term only there is a danger that they will be seen as attempting to please the individuals that have appointed them in order to obtain reappointment for another term. Another bone of contention about such appointments lies in the fact that the duration of the appointment is a matter within the gift of the executive.⁷² In order to secure the independence of acting judges, the *Mount Scopus Revised International Standards of Judicial Independence*⁷³ stipulate that the appointment of temporary judges should be avoided as far as possible, except where there exists a long historical democratic tradition,⁷⁴ and stipulates that acting judges should be appointed only with proper safeguards secured by law.⁷⁵

The controversy associated with the appointment of acting judges were well articulated in the case of *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)*,⁷⁶ where objections were raised with regards to the

⁷¹ General Council of the Bar 2008 *The Advocate* 12.

⁷² General Council of the Bar 2008 *The Advocate* 12.

⁷³ *Mount Scopus Approved Revised International Standards of Judicial Independence* (2008).

⁷⁴ Principle 4.7 of the *Mount Scopus Approved Revised International Standards of Judicial Independence* (2008).

⁷⁵ Principle 4.8 of the *Mount Scopus Approved Revised International Standards of Judicial Independence* (2008).

⁷⁶ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)* 1996 4 SA 744 (CC).

appointment of acting judges in the country.⁷⁷ The objections to the provision were to the effect that the Minister of Justice effectively had a sole discretion to make the appointments of all acting judges save for the appointment of acting judges to the Constitutional Court. Such discretion, therefore, was said to compromise the principle of the separation of powers. In its ruling the Constitutional Court acknowledged the merit of the objections but stated that there were sufficient safeguards to ensure that section 175(2) did not become the vehicle for an abuse of power. The Constitutional Court stated that the majority of the temporary positions needed to be filled urgently and unexpectedly" and it would therefore not be practicable to convene the large body of the JSC.⁷⁸ The Court also noted that the Minister was precluded by section 165 of the *Constitution* from interfering in any way with the discharge by the acting judge of his or her duties.⁷⁹ In line with international law, the appointment of acting judges should be performed only with proper safeguards secured by law, so as not to compromise the independence of the judiciary.⁸⁰

The *Constitution of Zimbabwe* provides for acting judicial appointments in section 181(1). It states that:

if the office of the Chief Justice is vacant or if the office-holder is unable to perform the functions of the office, the Deputy Chief Justice acts in his or her place, but if both offices are vacant or both office-holders are unable to perform their functions, the next most senior judge of the Constitutional Court acts as Chief Justice. (2) (a) If the office of President of the High Court; (b) Judge President of the Labour Court; or (c) Judge President of the Administrative Court; is vacant or if the office-

⁷⁷ S 175 of the *Constitution of South Africa* states that "(1) the President may appoint a woman or man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice. (2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve".

⁷⁸ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)* 1996 4 SA 744 (CC) para 129.

⁷⁹ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)* 1996 4 SA 744 (CC) para 130.

⁸⁰ See Principle II.1 of the Annex to the *Latimer House Guidelines on the Three Branches of Government* (2003), which states that "judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure".

holder is unable to perform the functions of that office, the next most senior judge of the court concerned acts as Judge President. (3) If the services of an additional judge of the High Court, the Labour Court or the Administrative Court are required for a limited period the President, acting on the advice of the Judicial Service Commission, may appoint a former judge to act in that office for not more than twelve months, which period may be renewed for one further period of twelve months. (4) Persons appointed to act under subsection (3) may continue to sit as judges after their appointments have expired, for the purpose of dealing with any proceedings commenced before them while they were so acting.

The above section clearly provides the procedure to be followed when acting judicial appointments are made. With regards to the appointment of acting judges in the High Court, the Labour Court and the Administrative Court, the President is bound by the advice of the JSC in order to ensure that there are no unilateral appointments. This section also marks an improvement on the *Lancaster House Constitution*, where the President was not bound by the advice of the JSC in the appointment of acting judges.⁸¹

With regards to the appointment of acting judges in the Constitutional Court⁸² and the Supreme Court⁸³, the *Constitution* provides that such appointments should be performed by the Chief Justice. The *Constitution* is silent, however, on whether or

⁸¹ S 85 of the *Lancaster House Constitution* stated that "(1) if the offices of the Chief Justice and Deputy Chief Justice are vacant or the Chief Justice and the Deputy Chief Justice are for any reason unable to perform the functions of their offices, the President may after consulting the Judicial Service Commission, appoint some person holding the office of judge of the Supreme Court or Judge President of the High Court to act as Chief Justice. (2) If the office of a judge of the Supreme Court or the High Court other than the Chief Justice is vacant or such judge is appointed to act in some other judicial capacity or is for any reason unable to perform the functions of his office, or if the services of an additional judge of the High Court are required for a limited period, the President may, as the case requires and after consultation with the Judicial Services Commission, appoint some person qualified for appointment as a judge of the Supreme Court or the High Court to act in that office. (3) A person appointed to act under subsection (2)-(a) shall, subject to the provisions of section 87, continue to act for that period of his appointment or, if no such period is specified, until his appointment is revoked by the President, after consultation with the Judicial Services Commission; and (b) may, notwithstanding that the period of his appointment has expired or that his appointment has been revoked, sit as a judge for the purpose of giving judgment or otherwise in relation to any proceedings commenced before or heard by him while he was so acting".

⁸² S 166(2) of the *Constitution of Zimbabwe* states that "If the services of an acting judge are required on the Constitutional Court for a limited period, the Chief Justice may appoint a judge or a former judge to act as a judge of the Constitutional Court for that period".

⁸³ S 168(2) of the *Constitution of Zimbabwe* states that "If the services of an acting judge are required on the Supreme Court for a limited period, the Chief Justice may appoint a judge of the High Court, or a former judge to act as a judge of the Supreme Court for that period".

not the Chief Justice has to consult the JSC in appointing acting judges of the Constitutional Court and the Supreme Court. It should be noted that as head of the judiciary it is appropriate that the Chief Justice should make such appointments. However, the unilateral appointment of acting judges of the Constitutional Court and Supreme Court by the Chief Justice is of great concern and raises serious questions about the impartiality of such appointments. The *Constitution* in this instance therefore also provides for a weak constitutional protection of the appointment of acting judges. As a result of the existence of this loophole there is a possibility that the Chief Justice might be tempted to make appointments recommended by the executive.

In order to ensure that acting judges of the Constitutional Court and the Supreme Court are appointed impartially without any hint of political interference it would be ideal if the JSC were able to deal with the appointments of acting judges.⁸⁴ It would have also been plausible for the JSC to make all acting judicial appointments. This is the system adopted in Uganda, where the JSC appoints acting judges.⁸⁵ This would ensure that impartiality is observed in the appointment of acting judges. The inclusion of the above measures in the *Constitution* would have gone a long way towards securing the independence of the judiciary.

2.4 The removal of judges from office

It should be noted that the conditions for the removal of judges are important in securing the independence of the judiciary. Madhuku notes that if a judge can be easily removed from office, it matters very little that the appointment process is rigorous and free from political manipulation.⁸⁶ International standards have been put into place to preserve the independence of the judiciary, which standards place

⁸⁴ See the example of Uganda in s 148 of the *Constitution of Uganda* states that "subject to the provisions of this Constitution, the Judicial Service Commission may appoint persons to hold or act in any judicial office other than the offices specified in article 147 (3) of this Constitution and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices and remove such persons from office".

⁸⁵ S 148 of the *Constitution of Uganda*.

⁸⁶ Madhuku *Introduction to Zimbabwean Law* 96.

emphasis on preventing the improper removal of judges from office.⁸⁷ It is crucial that a judge in the case of his or her inability to perform judicial duties or in a case of serious misconduct must be removed from office by an independent and impartial tribunal.

The *Lancaster House Constitution* provided for the removal of a judge only for an inability to discharge the functions of his or her office and for misbehaviour.⁸⁸ However, the *Constitution of Zimbabwe*, unlike the *Lancaster House Constitution*, provides broad and clear reasons that may result in a judge's removal from office. These include the inability to perform judicial functions, gross incompetence, and gross misconduct.⁸⁹ The *Constitution* also stipulates the procedure that must be followed if the question of the removal of a judge is raised. Section 187 of the *Constitution* states that:

(2) If the President considers that the question of removing the Chief Justice from office ought to be investigated, the President must appoint a tribunal to inquire into the matter; (3) If the Judicial Service Commission advises the President that the question of removing any judge, including the Chief Justice, from office ought to be investigated, the President must appoint a tribunal to inquire into the matter. (4) A tribunal appointed under this section must consist of at least three members appointed by the President, of whom- (a) at least one must be a person who (i) has served as a judge of the Supreme Court or High Court in Zimbabwe; or (ii) holds or has held office as a judge of a court with unlimited jurisdiction in civil or criminal matters in a country whose common law is Roman-Dutch or English, and English is an officially recognised language ...

The *Constitution* retains the removal conditions of the Chief Justice stipulated under the *Lancaster House Constitution*.⁹⁰ Like the *Lancaster House Constitution*, section 187(2) of the *Constitution* empowers the President to initiate removal proceedings against the Chief Justice. If the President contemplates such an act, the President is

⁸⁷ See Principle IV of the *Latimer House Principles on the Three Branches of Government* (2003).

⁸⁸ S 87(1) of the *Lancaster House Constitution*. It should also be noted that misbehaviour was not defined under the *Lancaster House Constitution* but could be taken to mean misbehaviour in matters concerning the office of judge and would include a conviction for an offence that would render the person unfit to carry out judicial functions.

⁸⁹ S 187(1) of the *Constitution of Zimbabwe*.

⁹⁰ See s 87(2) of the *Lancaster House Constitution*, which stated that "If the President considers that the question of the removal from office of the Chief Justice ought to be investigated, the President shall appoint a tribunal to inquire into the matter".

mandated to appoint a tribunal⁹¹ to enquire into the removal from office of the Chief Justice. Further, section 187(3) of the *Constitution* gives the JSC the power to advise the President on the question of the removal of any judges, including the Chief Justice. If such a question is raised by the JSC, the President is mandated to appoint a tribunal to look into the matter.

Although the *Constitution* does render some authority to the JSC with regards to the removal process of judges in the country, it makes the President powerful with regards to the removal process of judges. The President has the power to appoint a tribunal if a question arises with regards to the removal of the Chief Justice and also if the JSC advises the President that the question of removing a judge, including the Chief Justice, ought to be investigated. The involvement of the President in the removal process of judges is unacceptable, as it is possible that a judge may be removed from office purely on political grounds. The fact that the President has the powers to unilaterally appoint members of the tribunal raises suspicion about the independence of such a tribunal. Since the President is bound by the tribunal's findings,⁹² it is possible that a tribunal might be appointed with a specific motive to remove a judge who might be viewed as "independent" by the executive. This is likely to have a direct impact on the independence of the judiciary and violates the doctrine of the separation of powers.

It is therefore crucial that in order to secure the independence of the judiciary, the JSC should have a central role in the removal of judges. The JSC must be given the sole power to initiate the process of the removal of a judge and also to establish a tribunal if a question arises with regards to the removal of judge. Such a process would ensure that the tribunal appointed is independent and hence that the tribunal will be impartial in its findings. The *Constitution* could have been well informed by a

⁹¹ See s 187(4) of the *Constitution of Zimbabwe* for the composition of the tribunal.

⁹² S 187 of the *Constitution* states that "(7) A Tribunal appointed under subsection (2) or (3) must inquire into the question of removing the judge concerned from office and, having done so, must report its findings to the President and recommend whether or not the judge should be removed from office. (8) The President must act in accordance with the tribunal's recommendations in terms of subsection (7)".

number of jurisdictions around Africa, where the JSC is given the sole power to initiate the investigation if a question arises as whether or not a judge ought to be removed from office, and also to recommend action to the President.

Article 84 of the *Constitution of Namibia* restricts the grounds for the removal of a judge to mental incapacity and gross misconduct.⁹³ Only the JSC is empowered to initiate the investigation with regards to the removal of a judge and to recommend such removal to the President. The President as a result can act only on the recommendations of the JSC, and even win the case of the office of the Chief Justice the President cannot initiate removal proceedings.⁹⁴ In South Africa two stages have been established for the removal of a judge. The Judicial Service Commission must make a finding that a judge suffers from incapacity, is grossly incompetent, or is guilty of gross misconduct.⁹⁵ The National Assembly can also call for a judge to be removed by a resolution that is adopted by a supporting vote of at least two thirds of its members.⁹⁶ The powers of the President in the removal process are therefore limited in that the President must remove a judge upon the adoption of a resolution calling for the judge to be removed.⁹⁷ Therefore, in order to secure the independence of the judiciary the *Constitution of Zimbabwe* should have limited the powers of the President in the matter of the removal of judges.

2.5 The tenure of judges

The security of tenure of judges is also key to securing the independence of the judiciary. Although the *Constitution* provides that judges cannot be removed from office unnecessarily, it does provide for a compulsory retirement age so that judges

⁹³ S 84(2) of the *Constitution of the Republic of Namibia*, 1990 states that "judges may only be removed from office on the ground of mental incapacity or gross misconduct, and in accordance with provisions of Sub-Article (3) hereof".

⁹⁴ S 84 of the *Constitution of Namibia* states that "(1) A judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission... (3) The Judicial Service Commission shall investigate whether or not a judge should be removed from office on such grounds, and if it decides that the judge should be removed, it shall inform the President of its recommendation".

⁹⁵ S 177(1)(a) of the *Constitution of South Africa*.

⁹⁶ S 177(1)(b) of the *Constitution of South Africa*.

⁹⁷ S 17 (2) of the *Constitution of South Africa*.

can be replaced. Madhuku notes that given the fact that judges wield enormous powers but are not politically accountable to the people, it would be inappropriate for a judge to occupy the judicial seat forever.⁹⁸ Madhuku also notes that the compulsory retirement age of judges takes away from the executive the power to grant a favourable judge the privilege of remaining in office longer than others, as this would undermine the independence of the judiciary.⁹⁹

Section 186(1) of the *Constitution* states that:

Judges of the Constitutional Court are appointed for a non-renewable term of not more than fifteen years, but- (a) they must retire earlier if they reach the age of seventy years; and (b) after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment. (2) Judges of the Supreme Court and the High Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire. (3) A person may be appointed as a judge of the Supreme Court or the High Court for a fixed term, but if the person is so appointed, other than in an acting capacity, he or she ceases to be a judge on reaching the age of seventy years even if the term of his or her appointment has not expired; (4) Even though a judge has resigned or reached the age of seventy years or, in the case of a judge of the Constitutional Court or a judge referred to in subsection (3), reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge. (5) A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission. (6) The office of a judge must not be abolished during his or her tenure of office.

The protection of the tenure of judges under the *Constitution* is remarkably different from that provided under the *Lancaster House Constitution*. The *Lancaster House Constitution* allowed the President to extend the retirement age of judges.¹⁰⁰ The President was given the power to either accept or reject a medical report as to the

⁹⁸ Madhuku 2002 *J Afr L* 243.

⁹⁹ Madhuku 2002 *J Afr L* 243.

¹⁰⁰ S 86 of the *Lancaster House Constitution* stated that "(1) Subject to the provisions of section 87, a judge of the Supreme Court or the High Court shall retire when he attains the age of sixty-five years unless before he attains that age, he has elected to retire on attaining the age of seventy years: Provided that (a) an election under this subsection shall be subject to the submission to, and acceptance by, the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office; (b) the provisions of this subsection shall not apply to an acting judge or a judge who has been appointed for a fixed period of office".

mental and physical fitness of a judge to continue in office. The provision allowing the President the powers to extend the retirement age of a judge provided an avenue through which the executive could seek to influence judicial behaviour.¹⁰¹ This might have resulted in only pliant judges having their terms of office extended, which would have undermined the independence of the judiciary.

The *Constitution of Zimbabwe*, unlike the *Lancaster House Constitution*, has taken away the powers of the President to grant a judge the privilege of remaining in office.¹⁰² In an effort to enhance the independence of the judiciary, the *Constitution* now provides that judges of the Supreme Court and High Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire.¹⁰³ Judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years and have a compulsory retirement age of 70.¹⁰⁴ The *Constitution* therefore does not allow the executive the discretionary power to extend the term of office of a judge. However, a judge of the Constitutional Court upon completion of a term may be appointed as a judge of the Supreme Court or the High Court if so qualified.¹⁰⁵ One can imply that the idea behind the non-renewable term of not more than 15 years for Constitutional Court judges is to provide a regular rotation of judges in the Constitutional Court, so that constitutional interpretation can reflect the changing attitudes of society. An inference can also be drawn as to why judges of the Constitutional Court can still be appointed as judges of the Supreme Court and the High Court before they reach the age of 70. Due to their experience it would be a huge loss to the legal field if they were not to be appointed to the judiciary in this context. Hence, the *Constitution* envisages that if they so qualify they can still be retained as judges of the Supreme Court and the High Court. Section 186(6) of the *Constitution* also protects the tenure

¹⁰¹ Madhuku 2002 *J Afr L* 243.

¹⁰² See for example the *Constitution of South Africa* which also uses the same method. S 17 (1) of the *Constitution of South Africa* states that a judge of the Constitutional Court is appointed for a non-renewable term of 12 years and must retire at the age of 70 years, whichever occurs first, except where an Act of Parliament extends the term of office of the Constitutional Court judge.

¹⁰³ S 186(2) of the *Constitution of Zimbabwe*.

¹⁰⁴ S 186(1)(a) of the *Constitution of Zimbabwe*.

¹⁰⁵ S 186(1)(b) of the *Constitution of Zimbabwe*.

of judges and stipulates that the office of a judge must not be abolished during his or her tenure.

Although the *Constitution* states that a judge who has resigned or reached the age of seventy years may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge,¹⁰⁶ it is silent on the specific length of time for which the judge may remain in office. This silence makes abuse possible, as no specific time is mentioned in the *Constitution* as to the period that a judge will be allowed to sit in that regard. Perhaps the example set by Uganda¹⁰⁷ and Ghana¹⁰⁸ could have been followed in order to ensure that a stipulated time is allocated for any further period to enable a judge to finish proceedings that would have commenced before the attainment of the retirement age so as to create consistency and certainty within the judicial system.

2.6 Remuneration

In order to maintain the independence of the judiciary, it is vital that the salary that is payable to a judge is not reduced during his or her tenure of office and that such

¹⁰⁶ S 186(4) of the *Constitution of Zimbabwe*.

¹⁰⁷ S 144 of the *Constitution of Uganda* states that "(1) A judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office- (a) in the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years; and (b) in the case of the Principal Judge and a judge of the High Court, on attaining the age of sixty-five years; or (c) in each case, subject to article 128 (7) this Constitution, on attaining such other age as may be prescribed by Parliament by law; but a judicial officer may continue in office after attaining the age at which he or she is required by this clause to vacate office, for a period not exceeding three months necessary to enable him or her to complete any work pending before him or her".

¹⁰⁸ S 145 of the *Constitution of Ghana* states that "(1) A Justice of a Superior Court or a Chairman of a Regional Tribunal may retire at anytime after attaining the age of sixty years. (2) A Justice of a Superior Court or a Chairman of a Regional Tribunal shall vacate his office- (a) in the case of a Justice of the Supreme Court or the Court of Appeal, on attaining the age of seventy years; or in the case of a Justice of the High Court or a Chairman of a Regional Tribunal, on attaining the age of sixty years; or (c) upon his removal from office in accordance with article 146 of this Constitution... (4) Notwithstanding that he has attained the age at which he is required by this article to vacate his office, a person holding office as a Justice of the Superior Court or Chairman of a Regional Tribunal may continue in office for a period not exceeding six months after attaining that age, as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him previous to his attaining that age".

salaries payable to judges must be charged on the Consolidated Revenue Fund so that Parliament cannot seek to exert influence on judges via the annual discussion of the state budget.¹⁰⁹ Principle 11 of the *United Nations Basic Principles of Judicial Independence* recognises that for the judiciary to be independent, sufficient and sustainable funding should be provided to enable it to perform its functions to the highest standards. The *Latimer House Principles* also stipulate that appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary and that the salaries and benefits of judges should be set by an independent body.¹¹⁰

With regards to the conditions of service and tenure of members of the judiciary, section 188(1) of the *Constitution* provides that:

Judges are entitled to salaries, allowances and other benefits fixed from time to time by the Judicial Service Commission with the approval of the President given after consultation with the Minister responsible for justice and on the recommendation of the Minister responsible for finance. (2) An Act of Parliament must provide for the conditions of service of judicial officers other than judges and must ensure that their promotion, transfer and dismissal, and any disciplinary steps taken against them, take place- (a) with the approval of the Judicial Service Commission; and (b) in a fair and transparent manner and without fear, favour or prejudice. (3) The salaries, allowances and other benefits of members of the judiciary are charged on the Consolidated Revenue Fund. (4) The salaries, allowances and other benefits of members of the judiciary must not be reduced while they hold or act in the office concerned.

The President approves judges' salaries after consulting with the Minister responsible for justice, which means that the President is not bound by the advice of the Minister responsible for justice. However, the President is bound by the recommendations of the Minister responsible for Finance with regards to the setting of salaries and allowances for judges.

Although the Judicial Service Commission is given the role of fixing the salaries and allowances of judges from time to time, the *Constitution* gives a key role to the

¹⁰⁹ Such clauses are included in various Constitutions around Africa. See s 128 of the *Constitution of Uganda* and s 127 of the *Constitution of Ghana*.

¹¹⁰ Principle IV of the *Latimer House Principles on the Three Branches of Government* (2003).

President to approve such salaries. The *Constitution* thus leaves the determination of such salaries in the hands of the executive, a fact which does not bode well for the independence of the judiciary.¹¹¹ Magaisa notes that in order to confer financial autonomy on the judiciary, the judiciary must be given the power to determine its budget.¹¹² Magaisa notes that this can be done through clear constitutional provisions that guarantee the judicial budget as a percentage of the national budget.¹¹³ This idea is also supported by Dakolias and Thachuk, who suggest that the financial influence of the political branches of the state over the judiciary could be reduced by making judicial budgets some fixed percentage of the national budget.¹¹⁴ As a result if the funds of the judiciary are constitutionally guaranteed, they would be removed from the direct control of politicians. Magaisa is of the view that this would ensure that the judiciary has access to funds to meet its basic needs.

Another example that could also have informed the remuneration of judges in Zimbabwe is the example of South Africa. In South Africa the President is given the power to set the remuneration of judges. In doing so the President is guided under the *Judges Remuneration and Conditions of Employment Act*¹¹⁵ by an independent commission established under the *Independent Commission for the Remuneration of Public Bearers Act*.¹¹⁶ The establishment of an independent commission whose recommendations would bind the President in Zimbabwe would have gone a long way towards securing the independence of the judiciary.

¹¹¹ It should be noted that during the opening of the 2014 legal year, Chidyausiku CJ, criticised government for unilaterally reducing the conditions of service for serving judges and other judicial officers. Such a reduction in the conditions of services had been done in direct violation of the *Constitution*, and highlights the dangers of giving politicians the power to determine the conditions of service of judges. Such actions pose a great danger to the independence of the judiciary. For more see Staff Reporter *New Zimbabwe*.

¹¹² Magaisa 2009 <http://blog.newzimbabwe.com/2009/05/amagaisa/judiciary-must-be-financially-independent/comment-page-13/>.

¹¹³ Magaisa 2009 <http://blog.newzimbabwe.com/2009/05/amagaisa/judiciary-must-be-financially-independent/comment-page-13/>.

¹¹⁴ Dakolias and Thachuk 2000 *Wis Int'l LJ* 363.

¹¹⁵ *Judges Remuneration and Conditions of Employment Act* 47 of 2001.

¹¹⁶ *Independent Commission for the Remuneration of Public Bearers Act* 92 of 1997.

2.7 Principles guiding the judiciary

The *Constitution of Zimbabwe*, unlike the *Lancaster House Constitution*, makes provision for a number of principles that seek to guide members of the judiciary in exercising their judicial authority. These principles have been included in the *Constitution* so as to further strengthen the independence of the judiciary in the country.

2.7.1 Speedy resolution of cases

Since the *Constitution* has extended the rule of standing in order to allow individuals the right of access to courts for the speedy resolution of their cases, the *Constitution* now obliges judges to ensure that in the exercise of their duties they should ensure that justice is done to all, irrespective of status, and that justice must not be delayed. Thus section 165(1) states that:

[I]n exercising judicial authority, members of the judiciary must be guided by the following principles- (a) justice must be done to all, irrespective of status; (b) justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness; (c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.

The key importance of the role of the courts in human rights protection is explicitly recognised by the *Constitution*. This is so because the courts play a crucial role in the protection of fundamental human rights and freedoms. In the handling of cases, courts should therefore ensure that justice is provided in a timely manner. As the old adage says, "justice delayed is justice denied". This approach was also stipulated in the case of *Mandirwhe v Minister of State and Security*,¹¹⁷ where Baron J stated that:

...a favourable judgment obtained at the conclusion of a normal and lengthy judicial process is of little value to the litigant [and] there are obvious advantages to litigants and the public to have important constitutional issues decided... without protracted litigation.

¹¹⁷ *Mandirwhe v Minister of State and Security* 1981 1 SA 59 (ZA) 61.

It should be noted that the old adage of "justice delayed is justice denied" has now become a principle of customary international law that seeks to ensure the realisation of fundamental rights and freedoms.¹¹⁸ Since the commencement of the Land Reform Programme, the current bench has shown an indifference towards the speedy resolution of human rights cases, especially those dealing with sensitive political issues. An example is that of *Tsvangirai v Registrar General of Elections*,¹¹⁹ where in an urgent application the applicant sought to have his electoral rights protected in the election, which was a day away, but the court reserved judgment until more than a month after the election had been conducted.¹²⁰ Another example of the delay in justice in Zimbabwe is provided by the manner in which the 2000 election petition cases were handled. After the 2000 Parliamentary elections, the MDC filed 37 electoral petitions that averred widespread violence, intimidation and other electoral irregularities. Only some of these cases had been finalised at the time when the next Parliamentary elections were held in 2005.¹²¹ These facts indicate the indifferent attitude that the courts in Zimbabwe have had over the years with regards to human rights cases, and the delays have resulted in the courts abrogating their duty to protect and promote fundamental rights and freedoms.¹²² Therefore, the *Constitution*, in a positive development, seeks to address the indifferent attitude that the judiciary has been showing over the years with regards to sensitive political and human rights cases and seeks to ensure that justice is delivered timeously irrespective of status.¹²³ The speedy resolution of cases will result in the

¹¹⁸ Francioni 2009 *EJIL* 729-730.

¹¹⁹ *Tsvangirai v Registrar General of Elections* 2002 ZWSC 20.

¹²⁰ Legal Resources Foundation 2002 http://www.humanrightsfirst.org/defenders/hrd_zimbabwe/LRReport30-09.pdf 73.

¹²¹ *Sandu The Standard*.

¹²² Although the *Constitution* empowers the courts to hear election disputes, it does not provide a time limit for handling such cases. In contrast the *Constitution of Uganda* places great emphasis on the speedy resolution of cases. S 140 states that "(1) Where any question is before the High Court for determination under article 86 (1), the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it. (2) This article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of this Article".

¹²³ S 165(1)(a) of the *Constitution of Zimbabwe*.

improvement of the judicial protection of human rights, and therefore raise public confidence in the justice system.¹²⁴

2.7.2 *Respect for judicial office*

Section 165(2) of the *Constitution* stipulates that members of the judiciary must individually and collectively respect and honour their judicial office and must therefore enhance their independence in order to maintain public confidence in the judicial system. Section 165(2) of the *Constitution* further enforces the preamble of the *Bangalore Principles of Judicial Conduct* of 2002, which lay emphasis on the importance that judges, individually and collectively, honour and respect the judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.¹²⁵ It is therefore imperative that a judge must always bear in mind that it is his or her duty to observe high standards of conduct and should also participate in collectively establishing and maintaining high standards of conduct.¹²⁶ In emphasising the importance of maintaining high standards of conduct Brennan CJ stated that:

Your office requires you to serve, and that is a duty. No doubt there were a number of other reasons, personal and professional, for accepting appointment, but the judge will not succeed and will not find satisfaction in his or her duties unless there is continual realisation of the importance of the community service that is rendered. Freedom, peace, order and good government- the essentials of the society we treasure- depend in the ultimate analysis on the faithful performance of judicial duty...Knowing this, you must have a high conceit of your office... What you say and what you do, in public and some extent, in private, will affect the public appreciation of your office and the respect which it commands ...¹²⁷

¹²⁴ See *Baker v Carr* 1962 369 US 186 where Frankfurter J states that "The Court's authority... possessed of neither the purpose nor the sword.... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements".

¹²⁵ Preamble of the *Bangalore Principles of Judicial Conduct* (2002).

¹²⁶ Principle 1.6 of the *Bangalore Principles of Judicial Conduct* (2002).

¹²⁷ Brennan 1996 http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

Since the judiciary plays a central role in preserving the principles of justice and the rule of the law, the *Constitution* seeks to ensure that judges individually and collectively respect and honour their judicial office. This will ensure that the judiciary earns its rightful place in society and will also enhance public confidence in the justice system. It is important that judges in Zimbabwe should uphold this provision and desist from any activity that will bring shame to the profession. The responsibility for promoting and maintaining high standards of judicial conduct lies with the judiciary. In line with the principles of judicial independence and the separation of powers, it is important that a code of conduct formulated by the judiciary itself should be adopted in each jurisdiction.¹²⁸ Although a new code might need to be adopted to encapsulate the principles in the *Constitution*, it should be noted that Zimbabwe currently has *Judicial Service (Code of Ethics) Regulations*¹²⁹ that support the view that judges should individually and collectively uphold and maintain certain values attached to the judicial office. The *Judicial Service (Code of Ethics) Regulations* state that:

Every judicial officer shall, individually and collectively, uphold, maintain and promote the following values attaching to judicial office, as further elaborated in this Part- (a) personal and institutional independence; and (b) integrity; and (c) propriety, and the appearance of propriety; and (d) equality, that is, equal treatment of all before the courts; and (e) impartiality, not only in respect of particular decisions but in respect of the process by which any decision is made; and (f) competence and diligence.¹³⁰

The *Zimbabwe Judicial Service (Code of Ethics) Regulations* seek to enforce the expectation of judges with regards to how they are supposed to behave in and out of court, as such standards of conduct are designed to maintain confidence in the justice system.¹³¹

¹²⁸ Preamble of the *Bangalore Principles of Judicial Conduct* (2002).

¹²⁹ *Judicial Service (Code of Ethics) Regulations* Statutory Instrument 107 of 2012.

¹³⁰ Reg 4 of the *Judicial Service (Code of Ethics) Regulations*.

¹³¹ Thomas *Judicial Ethics* 7. See also Principle 2.2 of the *Bangalore Principles of Judicial Conduct* (2002).

2.7.3 External interference

Section 165(3) of the *Constitution* also demands that judges must make judicial decisions freely and without interference or undue influence. The *Constitution* makes a significant change as compared to the *Lancaster House Constitution* as it does not make provision for a member of the judiciary to be placed under the direction or control of another member of the judiciary, as was the case under the *Lancaster House Constitution*.¹³² The placement of a member of the judiciary under the direction of another member is not acceptable, as a judge must be independent from his or her colleagues on the bench except in cases of judicial supervision.¹³³ Section 165(3) of the *Constitution* is also in line with international norms with regards to the protection of the independence of the judiciary. International law demands that judges should be free to perform their judicial functions independently.¹³⁴ This means that in performing their functions, judges should be free from direct or indirect influence or improper influence or pressures. Judges should therefore be in a position to make decisions based on the facts at hand and through the proper application of the law, and should render judgments without fear or favour.¹³⁵

The inclusion of the above provision in the *Constitution* will auger well for the protection of human rights as, since the Land Reform Programme, suspicion has been raised that judges have been subject to external influences, and this has influenced the perception that there is a lack of protection of human rights in the

¹³² See s 79B of the *Lancaster House Constitution*, which stated that "in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary".

¹³³ Madhuku *Introduction to Zimbabwean Law* 104. He argues that the country should adopt formulations used by other countries that stipulate that the courts are subject "only to the Constitution and the law". For example, see s 128 of the *Constitution of Uganda* and s 165(2) of the *Constitution of South Africa*. See also Principle 1.4 of the *Bangalore Principles of Judicial Conduct* (2002).

¹³⁴ Principle 2 of the *United Nations Basic Principles on the Independence of the Judiciary* (1985). See also Principle 8.

¹³⁵ Geyh and Tassel 1998 *Chi-Kent L Rev* 34.

country, especially in high profile cases dealing with political issues.¹³⁶ The confidence of the public in the current judiciary has been eroded as the judicial decision-making has been perceived to be subject to inappropriate outside influence. The government has managed to control the judiciary by packing the bench with pliant judges who have in various decisions endorsed executive lawlessness, thus abrogating their role to promote and protect human rights.

It is imperative that under the new constitutional order all three branches of government recognise and respect the independence of the judiciary. Judges must be aware that they are not beholden to the government of the day.¹³⁷ It is essential to judicial independence and to maintaining public confidence in the judicial system that the executive and the legislature and the judiciary do not create the perception that a judge's decision could be coloured by external influence. Judges have a duty to apply the law as they understand it, on the basis of their understanding of the facts, without fear of favour and without regard to whether or not the final decision is likely to be popular. This point was articulated by the South African Constitutional Court in the *S v Makwanyane* case in the following terms:

The question before us, however, is not what the majority of South Africans believe a proper sentence should be. It is whether the Constitution allows the sentence. Opinion may have some relevance to the inquiry, but itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication... The Court cannot allow itself to be diverted from its duty to act as the independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.¹³⁸

¹³⁶ *Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union* 2001 2 ZLR 457 (S) where the judiciary under the leadership of Chidyausiku CJ validated the land reform in the country, overturning the decision delivered in the *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2000 2 ZLR 469 (SC), in which the court had ordered a stop to farm invasions as they were unlawful and in violation of property provisions in the *Constitution*. See also *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development* (Harare High Court) unreported case number 2467/05 and *Batsirai Children's Care v the Minister of Local Government, Public Works and Urban Development* (Harare High Court) unreported case number 2566/05, where in a bid to dilute the urban support of the MDC the government embarked on unlawful demolition of informal settlements and such action was justified by the courts although it was taken in violation of national and international law.

¹³⁷ *Griffith Politics of the Judiciary* 199.

¹³⁸ *S v Makwanyane* 1995 3 SA 391 (CC) paras 87-88.

It is important that in the exercise of their duties judges must have no regard for whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, media, or government officials. In order to maintain and protect the independence of the judiciary, a judge should not be swayed by partisan interests or fear of criticism. Adherence to this basic principle will contribute positively to the improvement of the judicial protection of human rights in Zimbabwe.

In order to ensure that there is no external influence on the functioning of the courts, section 165(4) of the *Constitution* provides that:

Members of the judiciary must not- (a) engage in political activities;¹³⁹ (b) hold office in or be members of any political organisation; (c) solicit funds for or contribute towards any political organisation;¹⁴⁰ or (d) attend political meetings.

Section 165(5) of the *Constitution* further provides that members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety." It should be noted that propriety and the appearance of propriety, both professional and personal, are essential elements of a judge's life. The test for impropriety is therefore whether the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence and competence, or whether it is likely to create, in the mind of a reasonable observer, a perception that the judge's ability to carry out judicial responsibilities in that manner is impaired.¹⁴¹ It is therefore essential that a judge should desist from any conduct that will cause his or her impartiality to be questioned.¹⁴²

The barring of judges from participating in political activities is a positive step in securing the independence of the judiciary in Zimbabwe. This follows years of

¹³⁹ Further enforced by Reg 15 of the *Judicial Service (Code of Ethics) Regulations*.

¹⁴⁰ Further enforced by Reg 8(1) of the *Judicial Service (Code of Ethics) Regulations*. See also Principle 4.14 and 4.15 of the *Bangalore Principles of Judicial Conduct* (2002).

¹⁴¹ UNODC 2007 http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

¹⁴² Reg 7(1) of the *Judicial Service (Code of Ethics) Regulations*.

accusations that the judiciary in the country has been heavily politicised and partisan. In order to uphold the doctrine of the separation of powers, judges should therefore not engage in any political activities and should stay out of reach of such activities that will lead to their impartiality being questioned. With regards to political activity, although members of a judge's family have every right to be politically active, a judge should be able to recognise that such activities of close family members may, even if erroneously, adversely affect public perception of a judge's impartiality.¹⁴³ In cases before the court where such perception is raised, a judge should be able to recuse himself or herself from such a case.¹⁴⁴

Most of the members of the present judiciary have meddled in the realm of politics, thus compromising their judicial duties. Due to the naivety shown by some members of the judiciary, the executive has taken advantage of the situation to compromise the independence of the judiciary. For their loyalty to the ruling party, seductive gifts have been made to members of the judiciary, with the executive and the Reserve Bank splashing out lavish gifts ranging from computers to plasma televisions and satellite dishes, in order to ensure that judges remain loyal to the ruling party.¹⁴⁵ In order to ensure the loyalty of the judiciary, judges have also been beneficiaries from the controversial Fast Track Land Reform Program, with the executive handing out farms to individual judges across the country.¹⁴⁶ The *Constitution* therefore seeks to remedy these past faults by clearly banishing such actions, and seeks to ensure that there will be no repeat in the future of such events in Zimbabwe. It thus entrenches the protection of the independence of the judiciary as being essential to the improvement of the protection and promotion of human rights.

¹⁴³ Canadian Judicial Council 1998 http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

¹⁴⁴ Canadian Judicial Council 1998 http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

¹⁴⁵ Human Rights Watch 2008 <http://www.hrw.org/reports/2008/11/08/our-hands-are-tied> 16.

¹⁴⁶ Gubbay 2009 <http://www.swradioafrica.com/pages/gubbay160210.htm> 2.

In line with Article 6.1 of the *Bangalore Principles of Judicial Conduct*,¹⁴⁷ section 165(6) of the *Constitution* seeks to ensure that members of the judiciary give their judicial duties precedence over all other activities, and do not engage in any activities which interfere with or compromise their judicial duties. This provision in the *Constitution* seeks to emphasise that the primary duty of a judge is to hear and determine cases requiring the interpretation and application of law, and other tasks relevant to the judicial office or the court's operation.¹⁴⁸ It is important that a member of the judiciary should not undertake any other duties unless such will not interfere with the doctrine of the separation of powers. The performance of extra-judicial duties should take place in such a manner that it will not reduce the capacity of a judge to discharge the judicial office.

2.7.4 *Judicial training*

Section 165(7) of the *Constitution* seeks to urge members of the judiciary to keep themselves abreast of developments in domestic and international law. The section states that:

Members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law.¹⁴⁹

This drafting of this provision was influenced by the *Bangalore Principles for Judicial Conduct*, which also demands that judges must take reasonable steps to maintain and enhance their knowledge.¹⁵⁰ Judges should be well versed in the relevant legislative provisions. This suggests the need for in-service training programmes.¹⁵¹ It should be noted that the duty to provide constant training for judges lies with the

¹⁴⁷ Principle 6.1 states that "the judicial duties of a judge take precedence over all other activities".

¹⁴⁸ Other judicial duties include administrative and out of court activities. Judges have important responsibilities such as case management and pre-trial conferences and such duties should also be undertaken with diligence.

¹⁴⁹ S 16 (7) of the *Constitution of Zimbabwe*.

¹⁵⁰ Principles 6.3 and 6.4 of the *Bangalore Principles for Judicial Conduct* (2002).

¹⁵¹ UNODC 2007 http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf 134.

judiciary itself, which should take responsibility for organising and supervising judicial training.¹⁵² With the increased relevance of international law, it has become imperative that judges should now keep abreast of international norms and exercise their judicial powers not only in accordance with domestic law but also in accordance with international law to the extent permitted by the domestic law.¹⁵³ It is imperative that constant in-house sessions should always be provided to judges in order for them to keep up to date with international human rights norms and how such laws can be applied domestically to ensure the adequate protection of human rights and fundamental freedoms.

Adequate knowledge of international law will bring about the realisation of the importance of the protection of human rights. It is submitted that the attendance of international conferences and seminars on human rights with other judges from around the world will also serve to promote the judicial protection of human rights in the country. Attendance at such conferences would ensure that judges share vital information on the steps that members of the judiciary must take in protecting human rights. Liaising with judges from different jurisdictions is also a step which should be taken by the Zimbabwean judiciary in its quest to protect human rights. The South African judiciary would be a good starting point for the establishment of close ties in which ideas and challenges relating to the protection of human rights can be shared. Such exposure is indeed urgently required in Zimbabwe.

2.8 Does the new Constitution of Zimbabwe adequately cater for the independence of the judiciary?

The *Constitution* has brought with it substantial changes that seek to promote and protect the independence of the judiciary. If the provisions of the *Constitution* are properly implemented there is no doubt that there would be a significant

¹⁵² UNODC 2007 http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf 134.

¹⁵³ UNODC 2007 http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf 135.

improvement in the state of the judiciary. The individual, institutional and substantive independence of judges, in line with international law, are adequately protected in the *Constitution*. With regards to the personal independence of the judiciary, the *Constitution* has introduced fundamental changes with regards to the appointment of judges. Impartial and transparent appointment procedures have been put into place to ensure that fit and well qualified individuals are appointed. The appointment procedures seek to enhance transparency and impartiality in appointments, and also mark a huge departure from the procedure for appointments under the *Lancaster House Constitution*. The *Constitution* also establishes a widened JSC with independent representation. Although improvements could have been made to enhance the independent representation in the JSC, the *Constitution* does make changes to the dispensation that prevailed under the *Lancaster House Constitution*. Thus, the *Constitution* has provided for a widened JSC with independent representation and has put into place appointment procedures that seek to enhance impartiality in the appointment process. Despite some concerns about the appointment procedures in the *Constitution*, it cannot be denied that it has enhanced the transparency of the appointment process.

Although positive changes have been made there are concerns about certain provisions in the *Constitution* that are still a threat to the independence of the judiciary. These provisions relate to the role of the President in the appointment of judges, the removal of judges, and the setting of the remuneration of judges. The President still has the power to unilaterally appoint tribunals that look into the question of the removal of a judge. Such unfettered powers do not bode well for the independence of the judiciary. The same can also be said about the powers given to the President to fix the salaries of judges without being bound by the advice of the JSC. Such measures have a huge impact on the financial independence of the judiciary. As a result one wonders if the gaps identified in this paper will not be used by the executive to negatively impact on the independence of the judiciary. These gaps therefore need to be addressed.

A crucial question that needs to be asked is if the constitutional protection of the provisions relating to the independence of the judiciary will merely result in the improvement of the judiciary in the country. It should be noted that the respect for the independence of the judiciary goes deeper than constitutional guarantees as to appointments, security of tenure and salaries. The respect for the independence of the judiciary is therefore a product of the actual relationship between the judiciary, the executive and the legislature. Chidyausiku notes that the respect for the independence of the judiciary is not achieved solely by the presence of a neat structural balance (as theorised by the doctrine of the separation of powers).¹⁵⁴ He notes that additional factors are also required in order to ensure that there is respect for the independence of the judiciary.¹⁵⁵ Besides the attitude of the executive and the legislature to judicial independence and all it entails, these factors include the commitment of the judges themselves to guarding and defending their independence, and the readiness of the people to support the independence of judges as defenders of their liberties.¹⁵⁶ The judiciary should closely guard its independence. The establishment of a perfect working relationship between the three organs of state is therefore essential and will also go a long way towards boosting the confidence of the public with regards to the judicial system and the administration of justice in the country.

The administration of justice in the country has continued to suffer over the years as a result of severe economic difficulties and inadequate resources. The shrinking of the economy has resulted in insufficient funding of the judiciary and this has resulted in massive corruption within the judicial system. It is essential that sound economic policies are developed in order to improve and ensure that the judiciary is well funded. Judges' salaries also need to be improved. Better salaries are likely to motivate judges and make it more attractive for judges to resist corruption. The

¹⁵⁴ Chidyausiku 2010 http://www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimbabwe.pdf 5.

¹⁵⁵ Chidyausiku 2010 http://www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimbabwe.pdf 5.

¹⁵⁶ Chidyausiku 2010 http://www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimbabwe.pdf 5.

changes listed above are fundamental in seeking to protect the independence of the judiciary.

Crucial to cementing the independence of the judiciary is the attitude of the executive towards the judiciary. One important change that needs to accompany these judicial reforms is the change in attitude of the executive towards the judiciary. The major barrier to the respect for judicial independence in contemporary Zimbabwe has been the government's intolerance of control and accountability.¹⁵⁷ Over the years the government has adopted a policy that has mainly been informed and represented by popular interests, and the judiciary has been expected to support this policy and be accountable to the policies articulated by government.¹⁵⁸ Any disagreement with any government ideological, diplomatic or political policy has therefore resulted in the judiciary being deemed disloyal to the people and the government at large.¹⁵⁹ This is why since the attainment of independence the executive and parliament have expressed displeasure with the notion of a judiciary that is independent. As a result there have been constant clashes between the executive and the judiciary.¹⁶⁰

¹⁵⁷ See the speech by the ZANU-PF Member of Parliament Webster Shamhu which highlights the intolerant attitude that the executive has adopted towards the judiciary. He stated that "For, in a democracy like ours, power belongs ultimately to the people. Those who exercise power do so on behalf of the people to which they must always be accountable. No species of power is exempt from the universal tendency to corrupt those who wield it. Our judiciary is no exception. No person who wields power should therefore be exempt from the obligation to be accountable to us the people of God. In a democracy, there is need for vigilance so as to ensure that every institution or individual remains within the bounds of law. Our judiciary deserves the people's critical democratic attention regarding the manner in which it exercises the power entrusted to it. It is unfortunate that the propaganda of 'judicial imperialism' masquerading as 'judicial independence' has been so insidious that otherwise insightful people have failed to see the grave mistakes being perpetrated by some sections of the judiciary. As a result, the current scrutiny of the judicial independence must not be allowed to continue to be used to mask the reality of judicial despotism... It is therefore the democratic right and duty of the people of Zimbabwe, as free people, to monitor, and control the power of the judiciary". Quoted in Goredema "Whither Judicial Independence" 99.

¹⁵⁸ Goredema "Whither Judicial Independence" 102.

¹⁵⁹ Goredema "Whither Judicial Independence" 102.

¹⁶⁰ Goredema "Whither Judicial Independence" 102. The author describes how Gubbay CJ described the threat to judicial independence in Zimbabwe as emanating from two sources: legislative abuse and unlawful action.

There are already signs that the current ruling party will not cease its attempts to harass independent judges that seek to protect and promote human rights in the country. In 2013, Chidyausiku CJ reportedly opened an inquiry into the conduct of Hungwe J in the wake of allegations of misconduct and negligence levelled against him. The allegations against Hungwe J relate to conducting a hearing in the middle of the night and ordering the release of prominent human rights lawyer Beatrice Mtetwa. It is believed that Hungwe J has been under government scrutiny for also delivering a number of judgments that have irked the authorities.¹⁶¹ Such actions by the government in victimising independent-minded judges are clearly an augury of more things to come, especially as the ruling party won the July 2013 elections.

Accusations were levelled against the President for appointing judges to the Supreme Court and the High Courts before the July 2013 elections without following proper procedure.¹⁶² Accusations have been levelled against the Zimbabwe African National Union-Patriotic Front (ZANU-PF) for packing the courts with party loyalists in anticipation of electoral challenges by the Movement for Democratic Change-Tsvangirai (MDC-T). It is as a result of packing the courts with such judges and the courts' lack of independence that the MDC-T withdrew its presidential election petition with the Constitutional Court.¹⁶³ The executive seems therefore not to have relented in its efforts to undermine the independence of the judiciary through the violation of appointment procedures and the packing the courts with pliant judges.

3 Conclusion

Although the *Constitution* has tried to address the question of judicial independence in Zimbabwe, it has not done so fully. It has introduced crucial changes to the *Lancaster House Constitution*, and such changes should improve the state of the judiciary and the nature of the protection of human rights, if the constitutional

¹⁶¹ Tongogara *Zimbabwe Eye*.

¹⁶² Sibanda and Kwaramba 2013 <http://www.dailynews.co.zw/articles/2013/07/18/judges-appointments-mugabe-did-not-consult-tsvangirai>.

¹⁶³ Reuters 2013 <http://uk.reuters.com/article/2013/08/16/uk-zimbabwe-election-idUKBRE97F0Q820130816>.

provisions are properly implemented. However, it should be noted that there are loopholes that pose a threat to the independence of the judiciary. The loopholes identified throughout this paper need to be addressed as they pose a serious threat to the independence of the judiciary. Failure to address them will no doubt impact negatively on the independence of the judiciary in Zimbabwe. Measures to rectify these flaws must be accompanied by several factors discussed in this paper. Such factors together with the various constitutional guarantees are key in promoting the independence of the judiciary. This will no doubt lead to an improvement in the state of the judiciary.

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LIST OF ABBREVIATIONS

Chi-Kent L Rev	Chicago-Kent Law Review
EJIL	European Journal of International Law
GPA	Global Political Agreement
J Afr L	Journal of African Law
JSC	Judicial Services Commission
MDC	Movement for Democratic Change
MDC-T	Movement for Democratic Change-Tsvangirai
SAJHR	South African Journal on Human Rights
UNODC	United Nations Office on Drugs and Crime
Wis Int'l LJ	Wisconsin International Law Journal
ZANU-PF	Zimbabwe African National Union-Patriotic Front

TOWARDS THE PROTECTION OF HUMAN RIGHTS: DO THE NEW ZIMBABWEAN CONSTITUTIONAL PROVISIONS ON JUDICIAL INDEPENDENCE SUFFICE?

L Chiduza*

SUMMARY

If human rights are to be effectively protected in any country, the judiciary has to recognise that it also has a role to play in this regard. The rationale for this is that the judiciary has a duty to enhance and protect human rights. Across Africa and most notably in Zimbabwe political interference has been noted as a factor that limits judicial independence. In Zimbabwe the weak protection of judicial independence has contributed to gross human rights violations. Constitutional reforms have been conducted in order to improve the independence of the judiciary and consequently the judicial protection of human rights. These efforts have resulted in the adoption of a new Constitution in Zimbabwe which has replaced the Lancaster House Constitution. The Constitutional reforms have captured legal principles which will ensure an improvement in the human rights situation. Key to the reforms has been the independence of the judiciary. The Constitution guarantees the independence of the judiciary. Despite such guarantees there are a number of challenges with regards to this independence. The aim of this paper is therefore to analyse the judicial reforms introduced by the Constitution of Zimbabwe with a view to establishing whether or not such reforms are likely to improve judicial independence and in turn the protection of human rights in Zimbabwe.

KEYWORDS: Constitutional Reforms; Democracy; Executive; Human Rights; Independence; Interference; International Law; Judiciary; Legislature; Protection; Rule of Law; Separation of Powers; Zimbabwe

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