THE IMPACT OF THE PROCESS OF APPOINTING JUDGES ON JUDICIAL INDEPENDENCE: A COMPARATIVE STUDY OF ZIMBABWE AND SOUTH AFRICA

By

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Submitted in accordance with the requirements for the degree of

MASTER OF LAWS

at the

University of South Africa

SUPERVISOR:

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NOVEMBER 2020

DECLARATION

I, Jabulani Mberesi, registration number 57615292, hereby declare that the thesis entitled **'The impact of the process of appointing judges on judicial independence: A comparative study of Zimbabwe and South Africa'** is my own work and that all sources that have been used or quoted were acknowledged accordingly.

Signature…….

DEDICATION

This thesis is dedicated to my parents and my wife, Loveness and our children Miranda, Michelle and Jabulani Junior.

Date:……..02……/……MAY……/……2022…

ACKNOWLEDGEMENTS

Foremost, I would like to thank the Almighty God for the gift of life. My deep appreciation also goes to my supervisor Advocate Saul Makama for his unwavering support during the arduous study of this thesis. His patience and tolerance gave me the impetus to push on during those dark days when the exercise seemed futile. I am eternally grateful to you, Sir. This was more apparent when you were appointed my supervisor after Dr. Maseko's departure. You seamlessly stepped into the breach and cured all the anxieties that had threatened to derail my studies. Through your expert guidance we reconfigured the study and started everything afresh. At one stage I almost gave up but you cajoled and reassured me that we would accomplish our goal. You were right and here we are! Once again, thank you, Sir.

I would also like to extend my gratitude to the following people: Shelton and Nyasha Gumepi, Godwill Chimombe who helped type the manuscript and helped with desktop research and my learned friend Ray Mungoshi who edited the thesis.

Lastly but by no means least, my gratitude goes to my dear wife Loveness Njovana, Honourable Lisa Singo and my brother Christopher Mberesi for their unwavering encouragement throughout my studies.

Mwari ave nemi! Ndatenda hangu.

ABSTRACT

Judicial independence is a critical component of democracy especially in Africa's emerging democracies. Democratic governance can only be attained if the judiciary functions independently. The selection and appointment of judges is of paramount importance to the quality and independence of the judiciary. This dissertation examines the process of appointing judges based on the premise that this fundamentally impacts judicial independence in Zimbabwe and South Africa.

South Africa and Zimbabwe adopted new constitutions after their respective independence albeit in different years and in response to myriad exigencies. The comparative examination of these two jurisdictions seeks to explore and assess judicial independence and how this concept can be encouraged and secured in order to foster democracy and the rule of law. The dissertation examines judicial independence from a South African perspective and also when viewed through a Zimbabwean prism. Components of judicial independence which are institutional independence and personal independence and their characteristics will be discussed. The study also examines the weaknesses or challenges threatening judicial independence in these countries. The aim of this paper is to analyse how judicial independence can be strengthened in South Africa and Zimbabwe with a view to nurturing democracy given the concept's centrality to the smooth functioning of any modern state.

The process of appointing judicial officers sits at the core of promoting judicial independence. To help unpack this notion, the study further examines the constitutional and legislative frameworks governing judicial appointments in these two jurisdictions. Further, the dissertation also discusses the appointment processes in the two jurisdictions and exposes gaps or

weaknesses in their appointment processes. The study reveals that although the executive is critical in the appointment of judicial officers there must be a boundary prohibiting political influence permeating the appointment process in order to enhance judicial independence. The dissertation concludes by giving recommendations to address identified weaknesses or gaps in the appointment processes and how each jurisdiction may learn from another in its quest for an independent judiciary which as stated herein is fundamental in endorsing constitutionalism and the rule of law.

Key terms

Constitutionalism, democracy, the rule of law, separation of powers and judicial independence.

ABBREVIATIONS

ACHPR - African Charter on Human and Peoples' Rights

ANC - African National Congress

CC - Constitutional Court

CSVR - Centre for the Study of Violence and Reconciliation

DA - Democratic Alliance

DGRU – Democratic Governance and Rights Unit

EU - European Union

FUL - Freedom Under Law

GCB - General Council of the Bar

HC - High Court

IBA - International Bar Association

ICCPR - International Covenant on Civil and Political Rights

IDASA- Institute for Democratic Alternatives in South Africa

JSC - Judicial Service Commission

LAWASIA - Law Association of Asia and the Pacific

LSSA - Law Society of South Africa

MDC - Movement for Democratic Change

NA - National Assembly

NCOP - National Council of Provinces

NPA - National Prosecuting Authority

PAC - Pan Africanist Congress

RAU - Research and Advisory Unit

SA - South Africa

SADC - Southern Africa Development Community

SAIFAC - South African Institute for Advanced Constitutional, Public, Human Rights and International Law

SAIIR - South African Institute of International Relations

SALJ - South African Law Journal

SC - Supreme Court

SIU - Special Investigating Unit

UDHR - Universal Declaration of Human Rights

UN - United Nations

US - United States

USAID - United States Agency for International Development

ZACC - Zimbabwe Anti-Corruption Commission

ZANU PF - Zimbabwe African National Union-Patriotic Front

ZEC - Zimbabwe Election Commission

ZESN - Zimbabwe Election Support Network

ZLR - Zimbabwe Law Report

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CHAPTER 1

GENERAL INTRODUCTION AND OVERVIEW

1.1 Introduction

Methods used to appoint judges are critical to any discourse on the independence of judiciaries globally. South Africa and Zimbabwe have a lot in common. These similarities are accentuated by the fact that both adopted new constitutions recently, in 1996 and 2013 respectively. Although their constitutions have, in the main, been lauded as progressive, it is critical that we highlight the imperfections that hamper the smooth delivery of justice in the two jurisdictions. Several issues have over the years emerged due to innate inefficiencies in the two systems, which include but are not limited to weak and compromised judicial independence, weak jurisdictional protection, political interference and questionable appointment systems. In this vein, this study unpacks how methods of choosing judges affect the workings of Zimbabwean and South African courts.

The study reviews the neighbouring countries' appointing processes and how these methods affect the independence and proper functioning of their respective judiciaries. The study also looks at judges who are charged with applying and protecting the rule of law in the most candid and transparent way, while shining the spotlight on the rule of law. The study defines many key elements namely constitutionalism, democracy, the rule of law, separation of powers and judicial independence. It also looks at the judicial independence of South Africa and Zimbabwe, focusing on several areas like institutional independence and personal independence amongst others.

There is also a great deal of attention given to other pertinent issues like security of tenure, removal of judges, financial security, judicial appointment, and judicial accountability, as well as weaknesses and positive development in the country. The study examines both countries'

constitutional reforms. It pays attention to several matters namely the characteristics of independence of an independent judiciary, membership of the Judicial Service Commission (JSC), components of judicial independence as well as the removal of judges. It also, inter alia, focuses on the tenure of judges, remuneration, judicial conduct, integrity of the judiciary and judicial interference. The study then moves on to analyse the process of judicial appointments in South Africa and Zimbabwe and critically examines their new constitutions focusing on several key factors like the process of appointing judges, the Chief Justice and Deputy Chief Justice, the appointment of judges of lower courts, the Judge Presidents and Deputy Judge Presidents amongst others. It also pays attention to the various issues surrounding the qualifications of judges, as well as JSC procedures on judicial appointments in both countries. The study will conclude by giving recommendations to the best appointment practice and will also address gaps and weaknesses in both jurisdictions in order to promote best appointment procedures.

1.2 Background

In African legal systems, judicial independence is still a novel concept.[1] This is despite the fact that this principle is central to the freedom of judges to execute their duties vis-à-vis administration of justice without fear, favour or prejudice.[2]As a result, the method of appointing judges becomes a crucial aspect of judicial independence.[3] However, the selection process is onerous and situates the appointing authorities,[4] christened the Judicial Service Commission (JSC) in both countries, at the heart of the discussion.

[1] M. Hansungule in "*Independence of the judiciary and human rights protection in Southern Africa*" page 2 available at https://www.icj.org/wp-content/uploads/2012/06/Lesotho-independence-judiciary-protection-Hansungule-event-2010.pdf. accessed on 14 November 2020.
[2] P.H Russell and D.M O'Brien in "*Judicial independence in the Age of Democracy: Critical perspective from Around the World"* University Press of Virginia page 1. ; R.A Mcdonald, "*Judicial independence As a Constitutional Virtue*" in "*The Oxford Handbook Of Comparative Constitutional Law*"2012.Oxford University Press, page 832.
[3] Ibid page 163.
[4] S. Cowen commissioned by the DGRU, University of Cape Town at www.dgru.uct.ac.za/usr/dgru/downloads/Judicial Selection October 2010 accessed on 4 May 2012.

Historically, colonial powers in both South Africa and Zimbabwe built judicial systems that were geared towards serving settler powers' parochial interests. As such, they ensured the brand of justice on offer-maintained law and order but did not advance the interests of justice. Under this system, judicial independence and human rights were relegated to the fringes of the justice system. The judiciary was thus overtly tuned to implement the law in a way that maintained the colonialists' hegemony, removing any semblance of credibility and respect it ought to command among citizens who viewed it as a control tool for the minority.[5] Attainment of political independence and promises of egalitarianism changed the prism through which the judiciary was now viewed. It was suddenly seen as a transformative vehicle with which to achieve democracy and good governance.[6] Fulfillment of these lofty ideals however could only be attained by appointing quality and independent judges armed with the singular vision of promoting human rights and narrowly adhering to the dictates of the rule of law.[7]

In South Africa, in the period between Dutch domination and the British Charter of Justice of 1827,[8] judges were appointed by Dutch authorities. The British Charter, which established a Supreme Court staffed by legally competent judges, marked a watershed moment in the legal system,[9] thus mirroring the British set up that existed in the nineteenth century, a fact captured in section 10 (1) (a) of the Supreme Court Act, which states:

> *"The Chief Justice, the judges of appeal, the judge president, the deputy judges president and all other judges of the Supreme Court shall be fit and proper persons appointed by*

[5]Y. P Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (1970) Oxford University page 164.; M.P Jain , *Outlines of Indian Legal history 7th Edition (*1966) Lexis Nexis pages 744-745, Y.Vyas 'The Independence of the Judiciary: A Third World Perspective' Third World Legal Studies*, Volume 11,Article* 6 (1992) page 131.
[6] See www.sabar.co.zw/law-journals/2010/december volume 023 no 3,43 accessed on 10 April 2012.
[7] C. Fombad, *"The Constitution as a Source of Accountability: The Role of Constitutionalism* 2010, Speculum Juris, pages 2 and 41.
[8] See also the Cape Ordinance 33 of 1827.
[9]Ibid Cape Ordinance 33 of 1827.

the state President."[10]

The only legal requirement was that an aspiring judicial candidate had to be "a fit and proper person" to hold office. This meant that executive discretion determined the appointment process. The actual practice was that the Minister of Justice would determine or influence the judicial appointment process. Judicial selection during the apartheid period was premised on race which saw white candidates being exclusively appointed.[11] The selection process was conducted in private and was persuaded by political dominance. Judicial candidates were drawn from senior advocates from the bar.[12] During this period most appointments to the Appellate division were supportive of the Nationalist party. On this Sir Sidney Kentridge noted:

> *"...over the past thirty years political factors have been placed above merit – not only in appointments to the bench but in promotions to the Appeal Court ... a number of appointments to the Supreme Court and a number of judicial promotions have been made which are explicable solely on the ground of the political views and connections of the appointments and on no other conceivable ground."*[13]

The new democratic order launched in 1994 in South Africa resulted in seismic changes to judicial selection mechanisms. The new dispensation's modus operandi sharply contrasted apartheid methods. As early as 1996 there was a discernible shift from apartheid era appointment processes which were based on race and political affiliation to a classless method

[10] See Supreme Court Act of 1959.
[11] M. Van Heerden and C.L.Corbett "The Legal System in South Africa"(1960-1994' 1998 *South Africa Law Journa*l *Volume (11.2*)page 32.
[12] M. Wesson and M. Du Plessis, The legal system in South Africa (1960-1994*)*, 1998 *South Africa Law Journal Volume 24*, page 115.
[13] S. Kentridge, 'Telling The Truth About Law'(1982) 99 *South African Law Journal*, page 652.

predicated on merit.[14]

In Zimbabwe, a new Constitution was promulgated in 2013 marking a complete departure from the 1980 Lancaster House Constitution, the country's first post-independence Constitution. In the now repealed Lancaster House Constitution the State President would appoint judges after consultation with the JSC. It is however important to note that under the Lancaster House Constitution judicial appointment was secretive.[15] The Ministry of Justice identified and referred candidates to the JSC for recommendation to the President.

The executive had an unfettered discretion in the process with the JSC rubberstamping the appointment of carefully identified judges favoured by the executive.[16] According to Saller,[17]provisions of the Lancaster House Constitution opened the selection process to political interference. The appointment of the former Chief Justice Godfrey Chidyausiku in 2001 is a classic example of executive overreach. His appointment was politically manipulated.

The process of appointing the Chief Justice, as codified in Section 180 of the constitution, which entails publication of the position, nominations from the president and members of the public, and interviews in front of public audiences, was not properly followed in this case. There was no publication of the vacancy in this instance. Chidyausiku was appointed Chief Justice from the High Court bench leapfrogging more senior judges who were already at the Supreme Court such as Justice Wilson Sandura.[18] This underlines the involvement and supremacy of the political

[14] D.Bruce "*Transformation and the independence of the judiciary in South Africa"* (2002)[online] Academia.edu. Availableat:<https://www.academia.edu/6037112/Transformation_and_the_independence_of_the_judiciary_in_South_Africa>[aaccessed 1 January 2022.

[15] L .Madhuku , 'The Appointment process of Judges in Zimbabwe and its implications for the administration of justice'*, South Africa Publiekreg- South Africa Public Law, Volume 21, Issue 2*, January 2006, page 345.

[16] D. Matyszak," Creating *a Compliant Judiciary in Zimbabwe"* as cited in Malleson,"*Appointing judges in an age of judicial power*: *Critical perspectives from around the world*" 2006, University of Toronto Press page 334.

[17] K. Saller, "*The Judicial Institution in Zimbabwe*" 2004, Siber Ink page 18.

[18] See IBA Zimbabwe mission report in 2001 available at: www.ibanet.org./Documents/Default.aspx?DocumentUid=3be5f2ee accessed on 4 August 2015.

elites in the appointment process. In contrast, the 2013 Constitution in section 180[19]outlines the procedure for appointing judges which is open and transparent and marks a complete retreat from the Lancaster House Constitution.

1.3 Problem Statement

The appointment of judges must be made on merit,[20] which is a critical tool in the promotion of judicial independence. The development of constitutionalism and the appointment of judges in Africa have to a large extent been driven by politics [21]and the desire by those in power to not observe human rights. The process through which judges are appointed must be transparent, effective and in all instances made on merit. It is apparent that there is controversy surrounding judicial appointments in both South Africa and Zimbabwe and there are perceptions that judicial appointments are influenced by the executive. This dissertation will go through these two jurisdictions' judicial selection mechanisms to evaluate if ever, judicial appointments are made on these sinister motives. A comparative analysis of these jurisdictions will be made with the intention to see which jurisdiction offers the best judicial selection mechanism and what lessons either can learn from the other's constitution, lessons which ensure transparency in appointment processes.

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[19] (1) The Chief Justice, 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 (e)submit the list to the President;
Whereupon, subject to subsection (3), the President must appoint one of nominees to the office concerned.
(3). If the President considers that none of the persons on the list submitted him/her in terms of section (2)(e) are 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 President must cause notice of every appointment under this section to be published in the Gazette.
[20] The Commonwealth: Latimer Principles on the Three Branches of Government (November 2003) page 17.
[21] The appointment of Chief Justice Luke Malaba in Zimbabwe has been linked to factional fights in ZANU-PF see A. Magaisa (2017). Comment on the Supreme Court decision on judicial appointments. [online] Big Saturday Read. Available at: https://bigsr.africa/comment-on-the-supreme-court-decision-on-judicial-appointments-d10/ accessed on 19 January 2022.

1.4 Aim of Study

This dissertation will examine legal mechanisms in Zimbabwe and South Africa which are intended to protect judicial independence. It will also critically look at the adequacy of judicial independence in both jurisdictions. The principle of judicial independence will be examined to expose what constitutes judges' independence and will attempt to draw distinctions between institutional and individual independence. This research will also examine the weaknesses and gaps in both jurisdictions in relation to the appointment of judges which is the pedestal upon which judicial independence is mounted. Furthermore, the thesis will comparatively analyze how these two jurisdictions cross pollinate ideas to protect and promote judicial independence.

Judges must be independent of both parliament and administration in a mature democracy because judicial independence is commonly regarded as the cornerstone of the rule of law. In South Africa, section 165 of the Constitution establishes judicial independence by outlining the notion and prohibiting other state organs from interfering with it. The Constitution of Zimbabwe affirms judicial independence in section 162, which declares that judicial authority is vested in the courts.[22]

1.5 Research Questions

i. Do existing legal instruments adequately protect judicial independence in South Africa and Zimbabwe?
ii. What are the inherent threats to judicial independence in South Africa and Zimbabwe?
iii. What are the best practices that these countries learn from one another on judicial independence?

[22]Which comprise the Constitutional Court, the Supreme Court, the High Court, Labour Court, the Administrative Court, the Magistrates Court, the Customary Law Courts and other courts established by or under an Act of Parliament.

iv. What measures can be taken to strengthen judicial independence in Zimbabwe and South Africa?

1.6 Justification for the Study

Judges should be qualified for their positions. They have the vital responsibility of preserving the rule of law, which necessitates a wide range of qualities. In the case of *De Lange v Smuts*[23]The South African Constitutional Court stated that public trust in the judiciary is essential for effective justice delivery, hence judges must be independent; stating that:

> *"Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effectiveness. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."*[24]

The major characteristics of an independent judiciary are impartiality, honesty, professionalism and competence; which qualities help judges uphold the rule of law and to dispense justice.[25] It is however essential that the selection process be reliable and effective in order to identify competent candidates whose characteristics tick all the boxes listed above.[26] The appointing procedure must be sincere in the eyes of the public, as the absence of which can erode public confidence. Concomitantly, a legitimate system promotes openness and transparency in the judiciary.

[23]*De Lange v Smuts NO and Others* 1998(7) BCLR 779 paragraph 71.
[24] Ibid.
[25]The Bangalore Principles of Judicial Conduct 2002,Preamble page 2 available at http://www.constitutionnet.org/vl/bangalore-principles-judicial-conduct-2002 accessed on 7 June 2019.
[26]The Commonwealth:Latimer House principles recognizes the importance of judicial tenure in principle iv (b) independence of the judiciary.

1.7 Limitation of Study

The study focuses on how the modalities used to appoint judges impact independence of the judiciary in Zimbabwe and South Africa. To gauge the level of judicial independence in these countries, focus will be on the strength, tenure and security of judges. The spotlight will also be shone on the way in which these two countries appoint judges and whether such appointment promotes judicial independence. A comparative analysis of both constitutions will be conducted. Similar studies which compare constitutions have met challenges associated with "time and resources, limitations of language and contextual understanding".[27]

1.8 Literature Review

Judicial independence as a principle is an important constituent of democracy. This is a fundamental principle that ought to be guarded jealously. Judicial independence is only achievable if there is openness in the selection process. Although the president has ultimate authority to appoint judges, the JSC is in charge of the first selection process, which includes short listing candidates for interviews. The JSC's composition and functions are outlined in both the South African and Zimbabwean constitutions.[28] The JSC selects candidates and sets the process in motion. The body is expected to be transparent and independent. The JSC is thus regarded as a valuable political organ of the state and serves as an example of constitutional democracy. It endeavors to ensure judicial independence and that only qualified people are appointed to the bench thereby defusing executive interference in the appointment process.

[27] M. Rosenfeld and A. Sajo, "*The Handbook of Comparative Constitutional Law*" 2012, Oxford University Press, page 71.

[28] Section 178 of the Constitution of the Republic of South Africa, 1996 and Section 189 of the Constitution of the Republic of Zimbabwe, 2013.

The goal of a competent and independent JSC is to empower the judiciary by looking for individuals who are suitable and not executive loyalists through the constitution's selection procedure. The Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1976) (ICCPR), and the African Charter on Human and Peoples' Rights (1981) all contain clauses affirming the importance of judicial independence. Article 14 of the ICCPR, for example, reads that:

> *"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

Article 26 of the African Charter enjoins state parties to ensure that courts have the freedom to promote and protect the rights enshrined in the charter.

Separation of powers and checks and balances concepts, which are generally regarded pillars of democracy, are inextricably linked with judicial independence. The concept of separation of powers dates back to the writings of the French philosopher Montesquieu and is based on the conviction that "the best way to control government power is to divide it among various branches of government – the legislator, executive and the judiciary. The three branches of government must be functionally separate and refrain from interfering with the functions of one another".[29]The judiciary performs a critical function in the checks and balances system, one that necessitates independence from the government and legislative. Courts routinely examine the legality of legislation, and members of the executive branch frequently appear as litigants in court. To carry out their tasks and fairly decide the legitimacy of governmental action, courts must be free of any actual or perceived intervention by other arms of government.

[29]B. Montesquieu, *The spirit of Laws, Constitutionalism and separation of power* (1949) Hafner Publishing Company, page 150.

South Africa and Zimbabwe conform to the principle of judicial independence; their constitutions clearly lay out provisions which promote judicial independence. The courts are vested with judicial authority, under section 165 (1) and (2) of the South African Constitution. The courts "are independent and subject only to the constitution and the law which they must apply impartially and without fear, favour, or prejudice".[30] Further, "no person or organ of state may interfere with the functioning of the courts."[31]Furthermore, its Constitution imposes a duty on the state's organs to help and defend the courts, as well as to preserve their independence, impartiality, dignity, accessibility, and effectiveness, by legislative and other means.[32]

Section 162 of the Zimbabwean Constitution identifies Zimbabweans as the originators and custodians of judicial independence. In section 164 it further underlines the independence of the courts when it states that "the courts are subject to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice".

In terms of section 164 (2) (a) and (b):

> *"Neither the state nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts."*

This means that the state must ensure that courts are independent, unbiased, dignified, accessible, and effective through legislation and other ways.

It is however posited that besides this principle being clearly underlined in both the South African and the Zimbabwean Constitutions, the principle is constantly under siege from the executive. It has been argued that judicial independence is susceptible to abuse by the executive. In the researcher's analysis this may be due to the fact that judges are appointed and financed by

[30]www.judiciary.org.za. (n.d.). The Judicial authority. [online] Available at: https://www.judiciary.org.za/index.php/about-us/96-the-judicial-authority#:~:text=The%20courts%20are%20independent%20and%20subject%20only%20to [Accessed 26 Mar. 2022].

31Section 165 (3), Constitution of the Republic of South Africa, 1996.

[32]Section 165 (4), Constitution of the Republic of South Africa, 1996.

political elites. To put it another way, the judiciary relies on the goodwill and cooperation of the legislative, executive, state administration, and the general public to carry out its decisions.[33]The judiciary's fragility has previously been addressed eloquently by classical thinkers of modern constitutionalism. For example, Alexander Hamilton,[34] contrasting the weak courts with the powerful legislative and executive in the 78th Federalist writings, stated:

> *"The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment, and must ultimately depend upon the aid of the executive arm for the efficacy of its judgments."*[35]

Also, Baron de Montesquieu admitted the judiciary's shortcomings on several occasions. Montesquieu[36] stated: "the judiciary is in some measure next to nothing". Hamilton's description of the courts' fragility and independence was mirrored by former South African Chief Justice Ibrahim Mohammed.[37] The dependence of the courts on other organs of the state is also acknowledged in both the South African and the Zimbabwean Constitutions.[38]Without its aid, the judicial system would collapse, and court orders would become unmet judicial desires. When politicians refuse to follow the constitution or disregard court decisions, the judiciary is rendered

[33]Section 180, Constitution of the Republic of Zimbabwe, 2013 and section 174 (3) Constitution of the Republic of South Africa, 1996.
[34] A. Hamilton, J. Madison and J. Jay*: Primary Documents in American History (Federalist papers)* University of Pennsylvania Press 2008 page 465.
[35] Ibid.
[36] B. Montesquieu, *The spirit of Laws, Constitutionalism and separation of power* (1949) Hafner Publishing Company, page 152.
[37] I.Mohammed "Address by Mr Justice I. Mahommed , former Chief Justice of the Supreme Court of Appeal on Accepting the Honorary Degree of Doctor of Laws at the University of Cape Town on 25 June 1999" *South African Law Journal* 1999 pages 853-857.
[38]Section 165 (4) Constitution of the Republic of South Africa and Section 164 (b) Constitution of the Republic of Zimbabwe.

powerless.[39]Large-scale non-compliance with court orders by government arms in both countries demonstrates the judiciary's reliance on the executive.[40]

The court must also avoid risking its own security and antagonizing the legislative and executive institutions. It cannot afford to lose their assistance and support, on which it is so reliant, particularly given Zimbabwe's political system, where the ruling party has been in power since 1980. Since 1994, the South African judiciary has not been reluctant to give rulings that go against the state's political or executive branches, albeit judges do not always take the risk of delivering judgments that are unpopular with the people.[41]The underlying issue is that the courts can't afford to irritate politicians by making rulings based only on sound legal reasoning, especially while the ruling party is so powerful. It would be unrealistic to regard the judiciary as a powerful and independent institution in these circumstances as "competing on an equal footing with the other two branches of the state when they largely depend upon the assistance, protection and support of the 'competitors'".

However, the Constitutional Court in South Africa has been complimented for being consistent and effective in its judgments,[42] unlike in Zimbabwe where the judiciary has failed to protect or promote citizens' rights. This malady came to the fore during the land invasions of the early 2000s which saw the destruction of the constitutional order and rule of law due to the arrogance or interference by the executive.[43] The ZANU-PF government in order to defend its actions

[39] D.Grimm "*Constitutions, Constitutional Courts and Constitutional Interpretation*" published by Oxford University, 2019, page 23.
[40]*State v Mark Chavhunduka and Raymond Choto v Ministry of Defence* 2000 ZLR(S) paragraph VI. See also *Nyathi v Member of the executive council for the department of Healthy Gauteng* 2008 9 BCLR 865 (CC) paragraph 26.
[41]*New National party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 paragraph 51.
[42] In *Hlophe v Constitutional Court of South Africa and Others* (08/22932)(2008) ZAGPHC 289 the Constitutional Court notes that "public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and may not be jeopardized" paragraph 4.4.
[43] T. Ian and W. Paul "The limits of engagement: British foreign policy and crisis in Zimbabwe "(2002)78/3 International Affairs (Royal Institute of International Affairs 1944-at 549-550 available at

during land reforms created a "compliant judiciary".[44] The appointment of former Chief Justice Chidyausiku was politically manipulated to serve parochial government interests as he presided over the judiciary during a tense political period surrounding land reforms. As Chief Justice and the head of the judiciary he was thrust into the heart of a controversial land revolution. His pivotal role in legalizing land occupations earned him praise from the ruling party though.[45] The Chidyausiku era was characterized by suborned judges supportive of violent government land seizures.[46]According to Alex Magaisa, Chidyausiku was "a judge of the revolution" because of his significant role in the fast track land reform programme.[47]

1.9 Definition of Key Concepts

1.9.1 Constitutionalism

There is no difference between a constitution and constitutionalism[48] as this is a question of semantics. Some Scholars argue that a constitution is a "power map"[49] while others term it a "job description".[50] John Locke viewed a constitution as a tool which limits governmental power and further pronounces that it creates a relationship between the government and the people.[51] A constitution therefore is a document showing how those in government should exercise their

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http://www.jstor.org/stable/3095890?seq=4. They discuss how former Zimbabwean president Mugabe raided white owned farms to save his dying political career, accessed 16 September 2011

[44] D.Matyszak,"*Creating a compliant judiciary in Zimbabwe* ,2000-2003"in Malleson and Russell *Appointing judges in an age of judicial power: Critical perspective from around the world* (2006) ,University of Toronto Press page 332.

[45] In December 2000, the Supreme Court headed by Chief Justice Gubbay made an important ruling on the legality of land occupations that had been taking place since February of that year. The Gubbay Court effectively ruled that the land occupations were illegal and unconstitutional.

[46]A.Magaisa(2017), "Cutting edge Analysis and Critical Insights into Zimbabwe Law and Politics "Chief Justice Chidyausiku a judge of the revolution*"* [online] Big Saturday Read available at: https://bigsr.africa accessed on 19 January 2022.

[47] Ibid.

[48] C. Fombad*"The Constitution as a source of Accountability: The role of constitutionalism* (2010) 2 speculum Juris 41 at 43 citing Currie et al Constitutional Government available at https://repository.up.ac.za/bitstream/handle/2263/17022/Fombad_Constitution%282010%29.pdf?sequence=1.

[49] H.W.O Okoth- Ogendo, *"Constitutions without constitutionalism "Reflections on an African Political Paradox*" in I Shivji (ed) State and Constitutionalism: *An African Debate on Democracy* (1991) pages 3 and 5.

[50] J. Boli "What is constitutionalism" available at http://www.oycf.org/pespectives/2/6, 063000/what is constitutionalism. htm, accessed on 20 July 2012.

[51] Ibid.

power. A Constitution may be written or unwritten and it depends on a particular government's choice. One example of a government without a written constitution is Britain.[52] It is possible for a government to have a "Constitution without constitutionalism".[53] A Constitution should adhere to the fundamental facets of constitutionalism in order to ensure democracy and the rule of law. The concepts of constitutionalism are intended to ensure limited power, openness, transparency and accountability which truly represent the will of the people. More so, constitutionalism ensures that government powers are limited in theory and in practice.[54]

1.9.2 Democracy

Democracy is a fundamental aspect of good governance. It is a very important concept which every government should embody. Mangu argued that democracy has become a value-laden concept that dominates political and social science discourse.[55]There is no clear definition of democracy. As Robert Dahl argues government's ability to respond to its citizens' preferences is a key ingredient of democracy.[56] This, he further notes, is predicated on a political order that includes "seven institutions" for the government to be recognized as a polyarchy or "rule by many".[57]His argument was that for a government to run democratically, elections must be free and fair, and there must be freedom of expression and political officials in government must be elected in an autonomous environment.[58] Democracy is attributed mostly to the will of the people or majority rule.

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[52] The British constitution is contained in a number of documents which have constitutional force, such as the Magna Carta (1215), Bill of Rights (1689) and the Act of Settlement (1701).
[53] H.W.O Okoth- Ogendo, *"Constitutions without constitutionalism "Reflections on an African Political Paradox*" in I Shivji (ed) State and Constitutionalism: *An African Debate on Democracy* (1991) pages 3 and 5.
[54] Ibid.
[55] A.M.B Mangu*The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo LLD Thesis, Pretoria: University of South Africa*, 2002 at 173.
[56] R.A Dahl *Polyarch: Participation and opposition* (1971) page 1.
[57] R.A Dahl *Democracy and its Critics* (1989) page 221.Polyarchy, is a concept coined by the American political scientist Robert Dahl to denote the acquisition of democratic institutions within a political system that leads to the participation of a plurality of actors. Polyarchy, which means "rule by many," describes the process of democratization, in contrast to democracy itself.
[58]Ibid.

1.9.3 The rule of law

The principle of rule of law requires that everyone is subject to or ruled by law.[59]No one, no matter what status he or she holds in society, is above the law. The rule of law premise prohibits the government or legislature from exercising broad, arbitrary powers.[60] Society is tasked to obey the law in order to attain an orderly society. Everyone has the task to preserve the rule of law and rulers have a similar obligation in order to avoid the rule of men.

1.9.4 Separation of powers

Lord Acton argued that:

"All power tends to corrupt, and absolute power corrupts absolutely."[61]

This principle stipulates that state powers and functions be allocated among the legislature, executive, and judiciary, with no one institution of the state or government having dominion over the others. Justice Chipeta has argued that no organ of government is more powerful than the other,[62] and that the three organs must work together.

In 1748, Montesquieu[63] in his book The Spirit of Laws argued that the three branches of government which is the legislature, the judiciary and the executive have separate functions which are independent of each other. He identified the judiciary's powers to resolve disputes as a separate state mandate and implied that this function must be seen as a power function equivalent to that of the executive and the legislature. He categorically puts it that if the judiciary's function

[59] G. O' Donnell "Why the rule of law matters" (2004) 15/14 *Journal of Democracy volume 15* page 35.
[60] J.D Sachs "Globalization and the Rule of Law" by Professor Jeffrey D. Sachs is the Galen L. Stone Professor of International Trade at Harvard University, Remarks delivered at Yale School, October 16, 1998.
[61] Lord Acton quotes available at http//www.acton.org/research/lord-acton-quote.achive accessed on 8 September 2019.
[62]Judicial Independence vis-à-vis the Executive and the Legislature", by Honorable Justice Chipeta, a seminar paper presented in 2005.
[63]G. Carpenter "Introduction to South African Constitutional Law (Butterworth, Durban1987) page 156.

is not independent of the two automatically there is no liberty. The separation of powers idea was created to prevent arbitrary sovereign power and to protect the governed. The judiciary resolves disputes, interprets and enforces the constitution, the legislature enacts laws, and the executive enforces them under this concept.

1.9.5 Judicial Independence

Judicial independence controls the wild excesses of executive power. The principle is premised on the basis that "the courts shall be subject only to the law and that no person, institution or organ of the state may interfere with"[64] the purpose and function of the courts. Judicial independence therefore is a valuable tool in a constitutional democracy.[65] The creation of a constitutional democracy where the constitution is the supreme law promotes judicial independence. Judicial independence is an internationally recognized principle.[66] Numerous international standards have been adopted to fortify the notion that judicial independence is indispensable.[67] Independence of the judiciary involves two essential elements namely independence of the judiciary as an organ and individual independence.

Although several attempts have been made to describe this principle, no clear description exists. Simply expressed, judicial independence means that the judicial branch of government, as well as individual judges, must be free to carry out their responsibilities without excessive pressure or intervention from the administration and legislative branches. D. Harris argued that:

[64]www.judiciary.org.za. (n.d.). The Judicial authority. [online] Available at: https://www.judiciary.org.za/index.php/about-us/96-the-judicial-authority#:~:text=The%20courts%20are%20independent%20and%20subject%20only%20to.
65R.R Mzikamanda; "The place of the independence of the judiciary and the rule of law in democratic sub-Saharan Africa" at 2 accessed at http://www.saifac.org.za.docs.2007/mzikamanda_paper.pdf.accessed on 15 January 2019.
[66]Article 10 of the Universal Declaration of Human Rights, 1948, Article 14.1 of the International Covenant on Civil and Political Rights, and Article 7 (1) of the African Charter on Human and Peoples' Rights.
[67] United Nations Basic Principles on the independence of the judiciary, adopted by the seventh United Nations Congress on the prevention of crime and the Treatment of offenders in September 1985 and endorsed by General Assembly Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985, and the Bangalore Principles (The Bangalore Draft code of judicial contact 2001 adopted by the judicial group on strengthening judicial integrity, as revised at the round table meeting of chief justices held at Peace Palace, the Hague, November 25 to 26 2002).

"The primary meaning of 'independence' is independence of other organs of government in the sense of separation of powers; in particular a judge must not be subject to the control or influence of the executive or the legislature..."[68]

The judges must be impartial and free of personal biases and prejudices. Their decisions must not be in favour of the political party in power or to one side in litigation or to race, class, community or tribe.[69]As a result, judicial independence involves "independence" from political influence, whether exerted by political organs, citizens, or judges' involvement in politics.[70]

1.10 Methodology

The study compares two jurisdictions; Zimbabwe and South Africa with the purpose of examining the principle of judicial independence and their processes of appointing judges. The two countries have different political backgrounds and experiences. During this study, the researcher used the qualitative research method which is a scientific way of gathering non-numerical data.[71] Research of a qualitative approach is primarily explanatory and produces descriptive data.[72] The comparison of these two jurisdictions was inspired by recent developments inter alia political interference, threats to the judiciary by the ruling classes as reported by democracy watchdogs, independent institutions, opposition parties, analysts, commentators and the media.[73]

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[68]D. Harris, "The Right to fair trial in criminal proceedings as a human right" (1967) 16 INT'L & COMP.L.Q 352, 354.
[69]S.B.O Gutto "Judges and Lawyers in Africa Today "Their Powers, Competence and Social Role, *Zimbabwe Law Review Volume 6* page 134-146.
[70] Ibid.
[71]E.R. Babbie "*The Basics of Social Research* (6thedition)2014 Belmont, Carlifornia,Wadsworth Cengage page 303.
[72] C. Williams*" Research Methods"*, *Journal of Business and Economic Research,* Grand Canyon University, March 2007 *Volume 5*, Number 3 page 67.
[73] In respect of Zimbabwe refer to A. Magaisa "Constitutionality versus Constitutionalism: Lessons for Zimbabwe's Constitutional reform process 51,52 at http://kar.kent.ac.uk accessed on 10 May 2019 whereas "The D.A's judicial review: Threats to judicial independence in South Africa ' available at

The study relies on these two countries' respective constitutions, legislation and where necessary some reference will be sought from international instruments such as Covenants and Declarations, textbooks, case law and as well internet sources.

http://www.da.org.za/docs/621/judicial%20review –document .pdf discusses the South African position accessed on 8 June 2020.

CHAPTER 2

JUDICIAL INDEPENDENCE IN SOUTH AFRICA AND ZIMBABWE

2.1 Introduction

This chapter examines judicial independence in both South Africa and Zimbabwe as a fundamental aspect of democracy and constitutionalism. The chapter will analyse the characteristics of judicial independence as they are used in their respective jurisdictions which is followed by identification of mechanisms available in these jurisdictions to safeguard this aspect. The study will also address the interrelatedness of judicial independence with good governance and protection of human rights.

Judicial independence is regarded as an important mechanism to safeguard democracy and to give value to the principle of separation of powers. It also decisively contributes to the strengthening of democracy, constitutionalism and neutralizes any impediment by the state to the rule of law and good governance. Many constitutions contain specific provisions which guarantee judicial independence and matters concerning judges' appointments, salaries, pensions and their tenure of office.

A constitution which is based on democracy and the rule of law should theoretically promote judicial independence. Judicial independence is critical because it restrains executive power, supports human rights, and boosts public trust in the legal system.[74]The separation of powers principle assures that state power is shared among three pillars: the executive, legislative, and judiciary, and that neither branch should unduly interfere with the others.

[74] A. Cox, "The independence of the Judiciary: History and Purposes' *University of Dayton Law Review* 21(1996) page 565. S. Rose-Ackerman Professor of Law and Political Science at Yale Law School, New Haven Connecticut, United States 'Why corruption matters; understanding causes, effects and how to address them', Evidence paper on corruption January 2015 page 143.

Section 165 (1) and (2) of the Constitution of the Republic of South Africa vests judicial authority in the courts. The courts must be independent and be subject to the law. The Constitution also incorporates the Bill of Rights which is the bedrock of constitutional democracy. Further, an independent judiciary ensures effective justice against all forms of corruption and strengthens courts' ability to ward off external influences.

Independence of the judiciary means that in the execution of their duties judges must be impartial. Impartiality of the judiciary is key in adjudication of matters as it is common cause that disputes must be presided over by independent and neutral judges.[75]

Simply stated parties to a dispute must have confidence and trust that a neutral judgment based on the law shall be pronounced without the judge having interest in the outcome of the matter. Basically, it can be stated that impartiality involves and addresses the mind of a judge in his person,[76] that he must be free from any form of influence in the matter before him or her. Equally, the independence of a judge also reflects his relationship with other arms of the state - the executive and the legislature. It follows therefore that in the execution of its duties the judiciary as an institution must not be interfered with. A judge must be fair and free from bias and prejudice. He or she must not be partisan or be linked to any side in litigation or to race, tribe or religion in execution of his or her work. Judicial independence also involves being independent from influence exerted either by the executive, legislature and or the public.[77]

[75] A. Hunt *'Impartiality, Bias, and the Judiciary'* Oxford; Berg 1992 page 241.
[76] D. Harris, 'The Right to Fair Trial in Criminal Proceedings as a Human Right' (1967*), Law journal volume 16 No. 2 April 1967* page 352 – 378.
[77] A report of seminars held in Lusaka on the 'The Independence of the Judiciary and the legal profession in English speaking Africa (280), 10 – 14 November 1986 and in Banjul 6 – 10 April 1987 Centre for the independence of judges and Lawyers, African Bar Association, International commission of jurists. http//hdl.handle.net/10625/1125 accessed on 18 December 2020.

2.2 Assessing Judicial Independence in South Africa

Although the independence of the judiciary is regarded as a tool of democracy, the formula for measuring this notion is still unsettled although as an abstract concept, independence is measurable through court decisions and constitutional provisions.[78] Section 165 (2) of the Constitution of South Africa provides that the courts are independent and only subject to the constitution and the law, and that they are required to apply the law impartially and without fear, favour or prejudice. Organs of the state, through legislative and other matters, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[79]

The Constitution of South Africa makes provision for the establishment of an independent body called the Judicial Service Commission (JSC) to assist and protect the courts.[80] This body is critical during the appointment and removal of judges.[81] It is not in doubt that this commission's role is to promote constitutionalism and judicial independence.[82] This body recommends to the President who should be appointed to the Constitutional Court, Supreme Court of Appeal, High Court and other special courts namely; the Labour Courts and Labour Appeal Court. The JSC among other duties conducts interviews[83] for candidates interested in those appointments and prepares a list of three successful candidates for submission to the president for approval.[84]

[78] R.H.Charpell and J.R Richmond 'Judicial Independence; cornerstone of democracy which must be defended" 2010, Preliminary Draft, November 8 at 7 website: http//politics.as.nyu.edu/docs/10/27/87 accessed on 6May 2017.
[79]Section 165 (4) Constitution of the Republic of South Africa, 1996.
[80]Section 178 Constitution of the Republic of South Africa, 1996.
[81]Section 174 (3) and 177 Constitution of the Republic of South Africa, 1996.
[82]R. Calland "*Zuma Years South Africa' changing face of power*" Zebra Press Cape Town 2013 page 280.
[83]Section 178 (6) Constitution of the Republic of South Africa, 1996.
[84]Section 174 (4) Constitution of the Republic of South Africa, 1996.

In the appointment of the Chief Justice and Deputy Chief Justice, the president consults the JSC.[85] The JSC plays a pivotal role in ensuring that all judicial appointments are made on merit.[86]

In this connection, it is appropriate to note that the judgment in the case of *Ell v Alberta*[87] states that courts must be independent of the influence of other arms of the state in particular the executive. According to Larkins,[88] judicial independence is achievable if decisions are made according to the law devoid of political malfeasance. He went on to define judicial independence as:

> "*The existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact neutral justice, and determining significant constitutional and legal values.*"[89]

In the case of *Ell v Alberta*[90] the learned judge stated that judges should be free to resolve cases on their merits and without external interference. The constitution of the United States of America (USA) guarantees the right to a fair trial.[91] Additionally, the doctrine of impartiality is internationally recognized and is essential for constitutional democracy and is now a standard requirement in all administrative actions.[92] Similarly, the Constitution of South Africa in

[85] Section 174 (3) Constitution of the Republic of South Africa, 1996.
[86] Section 174 (1) Constitution of the Republic of South Africa, 1996.
[87] *Ell v Alberta* 2003 227 DLR 217 'SCC' 227 paragraph 18.
[88] C. Larkins , 'Judicial Independence and Democratization; A theoretical and conceptual analysis' (1996) 44/4 *The American Journal of Comparative Law*page 605.
[89] Ibid.
[90] *Ell v Alberta* 2003 227 DLR 217 "SCC" 227 paragraph 18.
[91] US constitutional Amendment XIV.
[92] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (7) BCLR 725 paragraph 256.

accordance with international best practice also recognizes the right to a fair and impartial trial.[93] It is important to note that the principle of judicial independence advocates for democracy and upholds the rule of law. Also, the South African constitution adequately caters for judicial independence and promotes the right to a fair trial while safeguarding fundamental human rights in general.

As stated earlier, judicial independence is inseparably related to the concept of separation of powers. Basically, the idea behind this thinking is that in the execution of their work judges must not be influenced by the other organs of the state. The separation of powers thus compels arms of the state not to dominate the other and importantly, to promote human rights.[94] The doctrine neatly fits in with the checks and balances system which is fundamental in promoting accountability and openness. As a result, the South African Constitution vests executive authority in the President, who executes it alongside other cabinet members.[95] Legislative power is bestowed in Parliament,[96] while judicial power is ensconced in the courts.[97] In *ex parte chairperson of the constitutional assembly; In Re: certification of the constitution of the Republic of South Africa,*[98]the Constitutional Court stated that:

> *"The principle of separation of powers, on the one hand, recognizes the functional independence of branches of government. On the other hand, the principle of checks and balance focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from*

[93] Section 34 read with s 165 (2) of the 1996 Constitution of South Africa.
[94] K. O' Regan; "Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution*", Potchefstroom Electronic Law Journal volume 8* (2005) 1 Pages 1-3.
[95] Section 85 (1)(2) Constitution of the Republic of South Africa,1996.
[96]Section 43 (a) Constitution of the Republic of South Africa, 1996.
[97]Section 165 (1) Constitution of the Republic of South Africa, 1996.
[98]*In Re: certification of the constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paragraph 109.

usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch over the terrain of another."[99]

The judiciary interprets the law and makes judgments which may be against the executive and the legislature and, by so doing limits their powers and maintains checks and balances. It is therefore trite that the judge is required to be impartial. He or she must not be linked with the parties or even the subject matter before him during litigation. In other words, impartiality refers to a tribunal's state of mind when dealing with a wide range of situations.[100]

Bias is when one harbours ambitions of viewing situations in favour of one at the peril of the other. Bias was proven in *exParte Pinochet*,[101] where it was held that the fact that one of the judges was a director in one of the parties cited shows that he had an interest in the proceedings. In order to protect the image of the judiciary the available option was for him to recuse himself from the panel of presiding judges.

South Africa's constitution establishes independent courts that are only bound by "the constitution and the law, which they must apply impartially, without fear, favor, or bias."[102] The principle of judicial independence was enunciated in the case of *Van-Rooyen v The State*[103]where it was stated that the two key elements to this concept were personal and institutional independence. The case went on to elaborate that personal independence has to do with the security of tenure of judges, their salaries and removal from office while institutional independence canvases the independence of the judiciary as an institution which is independent of the executive and the legislature and that in its mandate must be free from any influence or

[99] Ibid
[100] *Valente v The Queen* 1985 24 DLR (4th) 161 SCC paragraph 3.
[101] *Ex Parte Pinoche*t (No. 2) (2000) IA C 119 paragraph 1
[102] Section 165 (2) Constitution of the Republic of South Africa 1996.
[103] *Van-Rooyen v The State* 2002 (5) SA 246 paragraph 1.

bias.[104] There have been notable incidences in the history of South Africa where the judiciary was criticized by politicians.[105] This criticism did not only pose a threat to the independence of the judiciary but negatively impacted the constitution and administration of justice.

The most difficult assignment is on how to prove bias. It is interesting that globally, courts agree on the test to apply in ascertaining bias. The test to be applied is that of a "reasonable man".[106] The courts have since shifted from the test of "likelihood or danger of bias"[107] test in proving bias. South Africa has also adopted "the reasonable man test" as confirmed in the *President of RSA v South African Rugby Football Union.*[108]

The right to a fair, independent, and unbiased trial is guaranteed under the South African constitution. This right is at the very pinnacle of the country's legal system.[109] Anyone who alleges bias must prove it, thus the integrity of the courts cannot be questioned unnecessarily without reasonable facts, as this may affect the reputation of the courts and also shake public confidence in the courts.

2.3 The role of the JSC in South Africa

Section 178 of the South African Constitution establishes the JSC. This body is responsible for "appointing, disciplining, and removing judges".[110] It consists of 23 members and in certain

[104] C. Larkins. 'Judicial Independence and Democratization: A theoretical and conceptual analysis' (*1996) 44 Am J.CompL* page 610.
[105]M. De Vos (2014) at http //constitutionallyspeaking.co.za/category/criticism of courts) accessedon 07 November 2018.
[106] In *RDS v The Queen* 1997 27-09 the reasonable man test is defined as an "informed person with knowledge of all relevant circumstances, including the tradition of integrity and impartiality that forms part of the background and appraised also the fact that impartiality is one the duties that judges swear to hold".
[107] *R v Gough* 1993 AC 646 661 paragraph 5.
[108]*President of RSA v South African Rugby Football Union* 1999 7BCLR 7 25(CC) paragraph 1.
[109]Section 34 and 165(2) Constitution of the Republic of South Africa, 1996.
[110]Section 178 (1) (k) Constitution of the Republic of South Africa, 1996.

defined circumstances; two more members are drafted in.[111]This body is made up of individuals with a variety of backgrounds, including members of the judiciary, the legal profession, the executive, the legislature, politicians, and legal academia.[112]

The JSC assists in the promotion of judicial independence. Its composition and its overarching functions arguably neutralize executive power. The composition of the JSC however has been criticized over the number of alleged political appointees.[113]One can argue that increasing the number of representatives from the legal fraternity in the JSC would blunt the executive's interference in the commission and as a result, allow the commission to achieve its purpose of ensuring effective administration of justice.[114] The composition of the JSC shows a careful balancing of all interested parties in the administration of justice. This would to a large extent ensure openness in judicial appointments and may prevent interference from the executive.[115] Gordon and Bruce have however criticized its composition especially the fact that the body is packed with politicians and their enablers. The fact that the ANC dominates the political sphere means it can dominate the appointment of commissioners[116] and this invariably weakens the separation of powers.

The inclusion of politicians in the JSC bedevils the exercise of appointing proper and qualified persons to the bench to dispense justice in the public interest.[117] The constitutional court however

[111]Section 178 (1) (k) Constitution of the Republic of South Africa, 1996.
[112]Section 178 (1) (a-k) Constitution of the Republic of South Africa, 1996.
[113] J.P Van De Vyver, 'The separation of powers' (A South African perspective*)South African Journal of Public law Volume 8* (1993) pages 177- 178.
[114] K. Malleson& P.H Russel, "*Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World*" 2007 University of Toronto Press page 285.
[115] C.M Fombad, '*Some Perspectives on the Prospects for Judicial independence in Post 1990 African constitution* ,University of Pretoria 2012 page 39.
[116] A. Gordon & D.Bruce "Transformation and the Independence of the Judiciary in South Africa 50 at www.csvr.org.za accessed on 11 February 2019.
[117] Article by P. Hoffman; Institute for Accountability in southern Africa "*Irrational decisions demand urgent reform of the JSC*" Business day 1 June 2011 at https:// accountabilitynow.org.za accessed on 10 February 2019.

in the case of *In re: Certification of the Constitution of the Republic of South Africa*[118] dismissed the contention of executive manipulation in the composition of the JSC and endorsed its composition while ruling out interference.

2.4 Components of Judicial Independence in South Africa

The African Charter, the United Nations Basic Principles, the Latimer House Guidelines, the Bangalore Principles, and the Mt Scopus Standards of judicial independence are only a few of the regional and worldwide practices that support judicial independence. The components of an independent judiciary have been incorporated by the South African Constitution. These regional and worldwide norms provide principles that must be incorporated into the constitutions of all nations around the world in order to maintain and promote judicial independence. The following features of an independent judiciary have been seen as vital.

2.4.1 Institutional independence

The judiciary as an institution is a separate arm of the state which must be independent in its functions and purpose. Institutional independence is put in place to protect the courts and judges from interference by other arms of the state, be it the executive, the legislature or private stakeholders. The judiciary must perform its duties independently.[119] Commenting on the "Three Branches of Government 2003", the Latimer House Principles underscored the importance of independence, honesty and competency for any judicial body dispensing justice.[120]Principle 1 of the UN Basic Principles on the independence of the judiciary enjoins states to guarantee judicial independence as enshrined in their constitutions.

[118]*In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paragraph 124.
[119]Section 165 (2) and (3) Constitution of the Republic of South Africa, 1996.
[120] Latimer House on three branches of government 2003.

Constitutional provisions are not enough to ensure or guarantee judicial independence though.[121] They are important precautionary measures intended to ensure that other organs of the state respect the judiciary as a separate entity. It insulates the judiciary from other government departments and forms a bulwark against executive domination. Furthermore, it throws a ring around judges thus shielding them from executive manipulation. Furthermore, the state has a responsibility to "help and safeguard the courts" through its organs in order to "maintain the independence, impartiality, dignity, accessibility, and effectiveness of the courts".[122]

The freedom of the judiciary as an institution is an essential characteristic of judicial independence. Institutional freedom advocates for judicial independence which must be clearly and satisfactorily provided for in a constitution.[123] Freedom of the judiciary guarantees impartiality a cardinal tool judges need to execute their duties. The judges are thus mandated to execute their functions strictly in accordance with the law and the constitution without fear, favour or prejudice.

It is widely known that the judiciary in South Africa was routinely manipulated during the apartheid era[124]by both the executive and the legislature, meaning there was no rule of law as impartiality was compromised. John Dugard described this as a crisis and wondered whether judges working under such conditions could competently serve societies in which basic human rights are trampled underfoot by autocratic regimes.[125]

[121] L. Van de Vijver, *'The judicial institution in Southern Africa; A comparative Analysis of common law jurisdictions* '2006 Silberlink page 4.
[122]Section 165 (4) Constitution of the Republic of South Africa, 1996.
[123]C. Fombad "Some perspectives on the prospects for judicial independence in post 1990, African constitutions" 2001-03 *Denning Law Journal* pages 16, 17 and 28.
[124] See IDASA, Judicial accountability mechanisms; A resource document (2007) page 3.
[125] J. Dugard; "The judiciary in a state of crisis with special reference to the South African experience "(1987) 44 *Washington and Lee Law Review Volume 44* page 477.

The promulgation of the 1996 constitution in South Africa triggered a paradigm shift which ushered in constitutionalism and democracy underpinned by an independent judiciary. The judiciary adopted a slew of progressive changes intended to narrow the gap between the government and its citizens. This has been achieved through handing down of bold and transformative judgments giving expression to the intentions of the framers of the Bill of Rights, which in chapter 7 (1) of the Constitution of South Africa identifies it as the cornerstone of democracy. Further, the constitution says the state must "respect, protect, promote and fulfill the rights" of all in the Bill of Rights.

Section 2 of the Constitution of South Africa installs the constitution as the supreme law of the land and reiterates that the constitution and its obligations must be protected and respected especially as the state must protect and respect the Bill of Rights. The judiciary through the 1996 constitution was mandated with the special responsibility of applying the law impartially without fear, favour or prejudice. Section 165 (1) and (2) enjoins the judiciary to maintain its independence and apply the law according to the constitution as its authority is vested in the courts. The judiciary must not be subjected to the control of the executive and the legislature as was the case during apartheid.

This emboldened the reconstituted judiciary to pronounce judgments against the government in enforcing socio-economic rights of citizens.[126] The Constitutional Court has tackled sensitive cases involving the government and presided over them with integrity and courage. It has stubbornly advanced the rule of law, constitutional integrity and preservation of human rights in its quest for judicial independence.[127]

[126]*Government of the Republic of South Africa and others v Grootboom and others* 2000 (11) BCLR 1169 paragraph 99.

[127]*Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 9 BCLR 865 CC paragraphs 52,60 and 63. Madala J argued that "*In more recent years ,and in particular the period from 2002*

As a consequence, the Institute for Democracy in South Africa argues that the judiciary is key in creating an egalitarian society and in redefining jurisprudence. This, therefore, means that the independence of the judiciary must be constitutionally protected for it to capture public confidence.[128]

2.4.2 Personal Independence

This involves the personality or security of a judge in relation to his or her work.[129] This principle promotes professionalism and integrity in the work of an individual judge. Personal independence protects judges from meddling by government, the public and parliament. Rautenbach and Malherbe noted that:

> *"The personal independence of the judiciary means that the appointment, terms of office and conditions of service of judicial officers are not controlled arbitrarily by other government bodies."*[130]

In the main, personal independence emboldens the judiciary and propels it to carry out its mandate independently and professionally. Principle 10 of the Basic Principles on the Independence of the judiciary pushes for appointment of individuals of integrity and competence to the judiciary.

Additionally, for judges to enjoy total personal independence they must have the following attributes:

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onwards ,courts have been inundated with situations where court orders have been flouted by State functionaries ,who ,on being handed such court orders ,have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional State, as the right of access to courts entails a duty, not only on the courts to ensure access, but on the State to bring about the enforceability of court orders." paragraph 60.

[128] IDASA, judicial accountability mechanisms: A resource document (2007) page 3.

[129] I.M Rautenbach& E.FJ Marlherbe' *Constitutional law'* Beck Munchen (2009) 5th edition page 236.

[130] Ibid page 236.

(i) Security of tenure

The South African constitution in Section 176 states that judges of the Constitutional Court should stay in office for 12 years or until they turn 70. The same section provides for a period under which other judges hold office. This provision dovetails with the Latimer House Principles.[131] This will confer a sense of security on judges in their office and in ensuring they do not compromise professionalism henceforth.

(ii) Removal of judges

The method and conditions used to remove judges from office may have serious implications on judicial independence. A clear process must be outlined in the constitution to avoid arbitrary dismissal of judges. According to section 177 of the Constitution of South Africa a judge can dismissed if he is incapacitated, is not good at his job or has been found guilty of gross misconduct. Parliament may, by a resolution of two thirds, also call for the removal of a judge.

The constitution is very clear and states when and how a judge can be dismissed. A judge may only be dismissed if they are found to be incapacitated and are grossly incompetent and or is guilty of gross misconduct. The Latimer House principles list *"*incapacity or behavior that renders them unfit to discharge their duties" among others as key reasons for dismissal.[132]

In the event where a judge suffers incapacity as provided for in the constitution a disciplinary hearing has to be conducted in a *"*fair and objective*"*[133] manner. This is critical in ensuring the safety of the judicial officers and promotion of judicial independence. In an effort to secure

[131] Latimer House Principles section IV (b) arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.
[132] Latimer House Principles section IV (d) .
[133] Latimer House Principles VI (b) .

safety of the judiciary, judges must not be liable for actions which arise in the course of their duties.[134] Section 14 (1) of the JSC Act 9 of 1994 states that any person may lodge a complaint against a judge, and the same section provides the basis upon which such complaints are to be made. The grounds are gross incompetence or gross misconduct which will inhibit the judge from executing his or her duties as set out in section 177 (1) (a) of the South African constitution which warrants removal of a judge from office. Section 15 (2) of the JSC Act provides some exceptions to the complaints, if the complainant does not fall in the category of those stated in section 14 (1) of the JSC Act, it will not have any merit and ought to be dismissed.

(iii) Financial security

Financial security is fundamental in securing the individual independence of a judge. It involves adequate salaries and prevents salary reduction of judges arbitrarily. More so, financial security ensures that the judiciary functions properly as a lack of financial resources affects the smooth running of the judiciary.[135]Rosenn notes that:

> *"The underlying policy is to protect judges from financial retribution for rendering decisions that displease the legislature or the executives."*[136]

Financial security protects judges from being exposed to corruption. The executive is also barred from tampering with judges' salaries as reprisals for purportedly passing unfavourable judicial decisions against the executive and the legislature. It is crucial that judges are paid well in order to promote the integrity of the judiciary. Section 176 (3) of the Constitution of South Africa provides that "salaries, allowances and benefits of judges may not be reduced". This is essential

[134] UN principle, section 16 .
[135] Latimer House Principles section IV (c).
[136]K.S Rossen; "The protection of Judicial Independence in Latin America" 1987-1989 19/1 *Inter American Law Review Volume 19.1* page 15.

in the promotion of judicial independence particularly individual independence of a judge,[137] which ensures and promotes impartiality in the adjudication of cases before them.

(iv) Judicial Appointment

Section IV (a) of the Latimer house Principles states that judges should be appointed in a public process and on set values and criteria. Judicial appointments have pride of place in securing the independence of the judiciary. Appointments must be made on merit and only qualified individuals must be appointed. Safeguards must be made against appointments for improper motives and of poorly qualified personnel[138] as this can jeopardize judicial independence. According to the Constitution of South Africa any person to be appointed as a judge must be qualified and must be a "fit and proper person".[139]

Slabbert interpreted the "fit and proper" requirements as follows:

> *"It is commonly accepted that in order to be 'fit and proper' a person must show integrity, reliability and honesty as these are the characteristics which could affect the relationship between a lawyer and a client and a lawyer and the public."*[140]

Appointing qualified personnel underwrites professionalism. One can therefore argue that making appointments in secret and irregularly could present the executive with opportunities to pack the judiciary with its cronies mandated to overthrow the rule of law and judicial autonomy.

[137]US Agency for International Development Guidance for promoting judicial independence and impartiality (January 2002) (revised) page 5.
[138] UN Principles, section 10.
[139]Section 174 (1) Constitution of the Republic of South Africa, 1996.
[140] M. Slabbert "The requirement of being a 'fit and proper' person for the legal profession" *Potchefstroom Electronic Law Journal Volume 14 Number 4 (*2011) page 212.

Appointments which are made on merit ensure that those appointed to the bench have requisite legal knowledge and experience. Importantly, this will boost chances of delivery of quality judgments.

(v) Judicial Accountability

The preamble to the Bangalore Principle of judicial conduct 2002 states that:

> *"Public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic state."*

The judiciary must be effective, uphold justice and promote democratic values.[141] The courts are there to shield the people from the executive and the legislature which may be wont to arbitrarily use their excessive powers to trample underfoot citizens' constitutional rights. The people must view the courts as an independent body to which they can turn for protection of their rights and constitutional democracy. Judicial accountability involves transparency, professionalism, competence and judicial independence.[142] These values enjoin judges to perform their duties in an impartial manner, delivering quality decisions in accordance with the law.

The judiciary has to be accountable to the people to boost public confidence in the administration of justice. Judicial accountability and faith also emanate from judicial appointments as judges who are appointed on merit and procedurally are key in fortifying the independence of the judiciary through sound administration of justice. There must be a formal way of registering

[141] S. Shetreet and C.F Forsyth, *The culture of judicial independence: Conceptual foundations and practical challenges* 2011, Boston: MartinusNijhoff publishers page 189.
[142] L. Van der Vijver, *The Judicial Institution in Southern Africa; A comparative study of common law jurisdictions,* 2006, University of Cape Town, Democratic Government and Rights Unit, Cape Town; Siber ink page 597.

complaints against members of the judiciary, which is another factor of promoting judicial accountability.[143]

It is trite that the judiciary must be accountable in its operations. The issue of judicial accountability however is critical since it is an embodiment of constitutional democracy. What this means is that members of the public should be allowed to make comments on judicial performance and especially on judgments which are against the constitution and the law as well facets of natural justice.[144]Laurance M. Hyde, Jr notes that:

> "*This vital independence must be balanced by concepts and duties which will assure our citizens that judges will impartially interpret and apply the law of the land. Judges must be, and just as important must appear to be, above reproach. Much of this will always be up to the consciences of those individuals who are called to the bench, and no code of ethics can substitute for the personal qualities which are the makings of good judges. However just as there must be laws, not merely the sense of justices of good and wise people serving as judges, so there must be not only judges of good conscience, but rules of ethical judicial conduct which are mandatory and sanctions for the violation of those rules."*[145]

2.5 Independence of the Judiciary versus Constitutionalism in South Africa

During apartheid, the judiciary was at the disposal of the executive and was constructed to give effect to its oppressive rule. As such, it lacked credibility robbing it of public respect and trust.[146]

[143]L. Van der Vijver, *The Judicial Institution in Southern Africa; A comparative study of common law jurisdictions,* 2006, University of Cape Town, Democratic Government and Rights Unit, Cape Town; Siber ink page 597.
[144]P.N.Bhagwati, "*Judicial Independence v Judicial Accountability*: CIJL year book 1999 pages 20 -24.
[145] In his introduction to the book "*Modern Judicial ethics*" by Dilweg, Fretz, Muphy, Rodgers and Wicher 1992 page 10.
[146] J. Hlope, "The role of the judges in a transformed South Africa Problems, Challenges and Prospects", *South African Law Journal Volume 1* (1995*)* page 24.

The apartheid state systematically structured the judiciary to fail to properly administer justice and to protect human rights.

The judiciary was used as a device to punish dissent as anti-apartheid activists were dragged to court where heavy penalties including the death sentence were meted out. The courts other than being a symbol of justice became objects of perpetuating an oppressive rule. One of the gallant freedom fighters who was once persecuted and dragged to court under the apartheid government, former President Nelson Mandela used the same courts to challenge the apartheid government and had this to say:

> *"During the proceedings, the magistrate was diffident and uneasy, and would not look at me directly. The other attorneys also seemed embarrassed, and at that moment I had something of a revelation. These men were not only uncomfortable because I was a colleague brought low, but because I was an ordinary man being punished for his beliefs. In a way I had never quite comprehended before, I realized the role I could play in court and the possibilities before me as a defendant. I was the symbol of justice in the court of the oppressor, the representative of the great ideals of freedom, fairness and democracy in a society that dishonoured those virtues. I realized then and there that I could carry the fight even within the fortress of the enemy."*[147]

The interim Constitution of 1993 [148] drew a line in the sand and marked a new constitutional dispensation.[149] The 1996 Constitution established the Constitutional Court which is at the heart of ensuring equality, promoting and extending of socio-economic and political rights to all

[147] N.Mandela "*The Autobiography of Nelson Mandela", Long Walk To Freedom*, Back Bay Books, 1st paperback Ed edition(October 1 1995) pages 375 – 376.
[148]Interim Constitution 1993.
[149] South Africa held its first democratic elections where all eligible citizens were allowed to vote for the very first time.

citizens. The Constitutional Court strives to achieve natural justice and abolished the death sentence in its landmark ruling in the case of *S v Makwanyane and Another.*[150] The court observed that the death penalty was against human rights as expressed in the constitution. The Constitutional Court has played a pivotal role in promoting constitutionalism in South Africa.

The other breakthrough in the new constitutional order of South Africa is the recognition of the constitution as the supreme law of the land.[151] The courts are tasked to uphold the rule of law and interpret the constitution.[152] It is however one of the requirements of the democratic constitution to honour human rights and to make sure those rights are protected. According to Fombad[153] the judiciary is "one of the core elements of modern constitutionalism" and is a fundamental element for construction of a democratic government. A constitution will be meaningless and serve no purpose if there is no independent judiciary. The 1996 Constitution marked a radical departure from the apartheid constitution and was touted as a shining example to the rest of the region of what democratic constitution ought to be.[154] The judiciary thus is burdened with the task of guarding against constitutional violations of individual rights. According to justice P.N Bhagwati:

> *"The judiciary stands between the citizen and the state as a bulwark against executive excesses and misuse or abuse of power or transgression of constitutional or legal limitation by the executive as well as the legislature."*[155]

[150] *State v Makwanyane and Another 1995 (3) SA 391 (CC)* paragraph 151.
[151] Section 1(c) Constitution of the Republic of South Africa, 1996.
[152] Section 165 (2) Constitution of the Republic of South Africa, 1996.
[153] C. Fombad, A Preliminary Assessment of the Prospects for Judicial Independence in Post 1990 African Constitution*,59 Buffalo Law Review* 1007 page 233.
[154]Section 39 Constitution of the Republic of South Africa, 1996.
[155] P. N Bhagwati, "The Pressures on and Obstacles to the independence of the judiciary, Centre for the Independence of the judges and Lawyers *(Centre for the independence of judges and lawyers)Bulletin No.23* 1989 page 15.

2.6 Positive Constitutional Court developments in the promotion of judicial independence in South Africa

The Constitutional Court has transformed the judiciary and shown great courage and integrity in its functions. It has tackled many controversial issues ranging from issues dealing with the separation of powers, culture, ethics, and socio-economic rights, cultural to religious rights.[156] The Constitutional Court has paid respect to the constitution and left no stone unturned in its constitutional mandate of interpreting and upholding the constitution and protecting all citizens' rights. As such the constitutional court has gained respect and support for its independence.[157]

The Constitutional Court is fundamental in the implementation of justiciable rights unlike superior courts that existed during apartheid. The Constitution provides that:

> *"(1)When interpreting the Bill of Rights, a court, tribunal or forum—*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) must consider international law; and*
>
> *(c) may consider foreign law.*
>
> *(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*
>
> *(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."*[158]

[156] E. F Tambe "Democratic constitutionalism in post-apartheid South Africa: The interim constitution re-visited " *Africa Review JournalVolume 7* (2015) pages 67-79.
[157] H. Deegan, *South Africa Reborn: Building a Democracy,* Routledge 1998 page 248.
[158] Section 39 Constitution of the Republic of South Africa, 1996.

It is common cause that the arms of the state are at central to the wellbeing of the justice system. The essence of the separation of powers doctrine is to draw parameters within which each arm of the state should operate with a view to preventing the three pillars of the state from straying into another's sphere, but especially to stop the executive from interfering with the judiciary.[159]

This has proved a boon to the Constitutional Court which has been unshackled to hand down quality judgments without fear of external interference. The court strikes a balance in the administration of justice and has pronounced judgments which align with constitutional norms. As a result, the courts have continued to assert individual liberties against the government. The Constitutional Court has since its inception ruled against the death penalty; capital punishment violated human rights and was thus unconstitutional.[160]

In a 1996 groundbreaking judgment which signalled the total rejection of apartheid era sham trials and jaundiced justice, the court underlined the notion of equality before the law, race and class of litigants.[161] Unlike during apartheid where the courts were used to promote the interests of the executive, the constitutional court has held the government liable for failure to secure and protect citizens' rights. The court has advocated and ruled for the protection of women from violence both in public and the private domain.[162] Importantly, the judiciary in *RSA v Grootboom*,[163] entrenched the socio economic rights of people. In this case, a local authority had

159 South African Government 2012: Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State at Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State | South African Government (www.gov.za) accessed on 10 February 2020.

160*The state v Henry Williams and others* 1995 (3) SA 632 (CC) and *State v Makwanyane and Another 1995 (3) SA 391 (CC)* paragraph 151.

161In the case of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* [2017] JOL 37679 (CC) the court held that "'k*****' is the worst insult that can ever be visited upon an African person in South Africa, particularly by a white person. The court said that it 'runs against the very essence of our constitutional ethos or quintessence" paragragh 7.

162*State v Baloyi* 2000(1) BCLR 86 (CC) paragraph 11 and 12.

163*Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 paragraph 99.

been challenged "to provide adequate basic temporary shelter" for the community and its children after they had been evicted from their dwellings. The applicants cited section 7 of the Constitution which states that the Bill of Rights is the cornerstone of democracy and that the state must respect, protect and promote the fulfillment of those rights.

The Constitutional Court since its inception has proved its consistency and effectiveness in promoting the rule of law, constitutional supremacy and preservation of human rights. Jackie Dugard [164] argues that the effectiveness of the Constitutional Court in the promotion of democracy and human rights is largely dependent on government and civil society support. She however noted that the courts are cautious when it comes to enforcement of socio-economic rights as opposed to enforcement of civil and political rights.

2.7 Weaknesses of the Judiciary in South Africa

The early years of constitutional democracy in South Africa proceeded positively even though criticism was intermittently voiced on the appointment of judges based on race.[165]There were also notable incidences which shook or attempted to threaten independence of the judiciary in South Africa. The appointment of Advocate Mpshe as an acting judge, the former acting National Director in the Public Prosecutions in South Africa by the Minster of Justice was met with vociferous criticism.[166]Advocate Mpshe was appointed after he had dropped corruption allegations against Mr Zuma, creating the impression that his appointment was intended to

[164] J. Dugard ,Court of First Instance? Towards Pro–Poor Jurisdiction for the South African Constitutional Court; *South African Journal on Human Rights Volume 22* (2006) pages 261 to 282.
[165] H. Stydom, Taking control of the final instrument of power. http://www.fwdklerk.org.za accessed on 18 April 2018.
[166] P de Vos "Mpshe appointment :scandalous attack on independence of the judiciary"2010 available at http:// constitutionallyspeaking.co.za/mpshes-appointment-scandalous-attack-on-independence-of-the-judiciary/ accessed on 21 January 2016.

produce compliant judges. Also, the other basis of the criticism was that, he had not yet resigned from his post as a state employee,[167] a serious breach of the separation of powers.

The appointment of Judge Heath as head of the Special Investigative Unit[168] (SIU) was criticized as another attempt by the executive to undermine judicial independence. The Constitutional Court in the matter of *South African Personal Injury Lawyers v Heath*[169]in its ruling criticized the appointment and made the following remarks:

"Judge Heath's appointment to head of the SIU could result in a public perception that judges were functionally associated with the executive and therefore unable to control the power of that executive with the detachment and independence called for by the constitution. This in turn would undermine the separation of powers and independence of the judiciary. Therefore, the appointment of a judge to head the SIU could not be supported and thus invalid."[170]

Another incident which sparked outrage in South Africa is the Hlophe saga. John Hlophe a Judge President in the Western Cape in 2008 was allegedly implicated in a ploy to improperly interfere with court proceedings which involved Mr Zuma the former President of South Africa. It was alleged Hlophe approached judges of the Constitutional Court Justice Nkabinde and Justice Jafta to persuade them to rule in favour of Mr Zuma.

In March 2008 the apex court heard arguments for leave to appeal on four matters involving Mr Zuma. The matters are referred to as (Zuma/Thint matters). The two justices however notified

[167] M.Trapido "Mpshe's appointment cannot be justified"(2010) available at http://www.thoughtleader.co.za/traps/2010/02/13/mpshe-appoinment-cannot-be-justified/ accessed on 5 December 2019.
[168] Established in terms of Special Investigating Units and Special Tribunals Act 74 of 1996.
[169] *South African Personal Injury Lawyers v Heath* 2001(1) SA 883 paragraph 46.
[170] Ibid

senior Constitutional Court judges and together lodged a complaint with the JSC against Hlophe. They further told the media on the alleged misconduct. Hlophe however made a counter complaint accusing the Constitutional Court judges of violating the Constitution and the principle of natural justice. He accused the judges of rushing to publish the allegations before he was heard by a tribunal appointed as provided for in the Constitution. He indicated that their conduct was tantamount to defamation.

The Constitutional Court justices unanimously decided to make a formal complaint against Hlophe with the JSC. Presiding judges, Chief Justice Pius Langa and Deputy Chief Justice Dikgang Moseneke concluded that Judge President Hlophe's actions were a menace to independence of the judiciary. On 30 June 2008 Justice Hlophe responded to the complaint arguing that it was a political gambit by then Chief Justice Langa to get rid of him. The JSC convened a hearing but Hlophe did not turn up citing poor health. When he failed to appear at a rescheduled hearing the JSC heard the matter in his absence.

Hlophe however approached the South Gauteng High Court seeking an order declaring the proceedings in his absentia unlawful.[171] The JSC convicted Hlophe on the allegations after hearing evidence. Hlophe appealed the JSC findings citing that the JSC was not properly constituted and its decision was not supported by the majority. The court in the case of *Langa v Hlophe*[172] dismissed the defamation claims by Hlophe for lacking merits and confirmed the decision of the JSC as lawful. The court ruled that the allegations against Hlophe were tantamount to gross misconduct. He was charged with "gross misconduct" as provided for in section 177 of the Constitution of South Africa.

[171] *Hlophe v The Judicial Service Commission and other*s (2009) ALL SA 67 (GSJ) paragraph 55.
[172] *Langa CJ and others v Hlophe* 2009 (8) BCLR 823 SCA and *Freedom Under Law v Acting Chairpersons:Judicial Service Commission and Others (*2011 (3) SA 549 (SCA) paragraph 124.

Mr Zuma became President of South Africa leading to Mogoeng Mogoeng being appointed Chief Justice. Also, a new Minister of Justice was appointed and subsequently became an *ex officio* member of the JSC. President Zuma replaced four members of the JSC who had been appointed by his predecessor. The new members agreed to reopen the Hlophe matter. The new Chief Justice was requested to appoint a Judicial Conduct Committee and a tribunal to deal with judicial complaints. The Chief Justice appointed a tribunal to look into the Hlophe issue in 2013.However, after a litany of delays, Hlophe on the 9th of April 2021 was convicted of misconduct after the tribunal found out that he had attempted to influence the two Constitutional Court judges to rule in favour of Mr Zuma. The JSC filed its report with the Chairperson of the JSC recommending his impeachment.

According to the Section 177 (1) of the Constitution:

> *"A judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and if the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members."*[173]

As it stand Hlophe's removal lies with the National Assembly. A two thirds majority vote of its members will lead to his removal from office.

2.8 Conclusion

The Constitution of South Africa entrenches judicial independence and sufficiently insulates judges from improper influence. This has been evinced by the Constitutional Court, which has stuck to the letter and spirit of the constitution.[174] However, there have been some standout experiences which have posed a danger to judicial independence in South Africa. Issues to do

[173]Section 177 (1) Constitution of the Republic of South Africa, 1996.
[174]*RSA v Grootboom& others* 2000 (11) BCLR 1169 paragraph 99.

with race in judicial appointments as provided in terms of section 174 (2) of the Constitution of South Africa (1996) have been subjected to withering criticism.[175] The JSC has been criticized of concentrating on race and gender rather than the competence of judicial officers.[176] The general fear is that the issue of balancing race and gender in judicial appointments if poorly handled can affect the independence of the judiciary.[177]

The manner in which Judge President Hlophe improperly attempted to interfere with the court as discussed above is a classic example of the way public confidence in the judiciary may be questionable. This is because it is commonly agreed that judges are custodians of the law and are thus required to conduct themselves in a professional manner.

2.9 Judicial Independence in Zimbabwe

The Constitution of Zimbabwe (2013) replaced the Lancaster House Constitution, 1980. This section of the study analyses the dawn of a new era in Zimbabwe in order to ascertain whether the constitution adopted in its wake strengthened judicial independence. It is the intention of the study to analyze these reforms to establish whether they adequately foster judicial independence. The Constitution of Zimbabwe recognizes the importance of the independence and the need for impartial judges. This it does by stating that the courts are independent and are subject only to the law and the constitution.[178] In section 180, it espouses a transparent process under which judges are appointed to ensure impartiality.

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[175] A. Gordon and D. Bruce; "Transformation and the Independence of the Judiciary in South Africa" The *Centre for the Study of Violence and Reconciliation (CSVR)* 2006 page 47.

[176] A.Gordon and D. Bruce: "Transformation and the Independence of the judiciary in South Africa" (2006) *The Center for the Study of violence and Reconciliation* (CSVR) at 47 http//www.csvr.org.za accessed on 15 June 2019.

[177] Ibid.

[178] Section 164 (1) (2) (a) and (b) Constitution of the Republic of Zimbabwe, 2013.

(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.

(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore.

(a) neither the State nor any institution or agency of the government at any level, and no other

2.9.1 Assessing Judicial Independence in Zimbabwe

The appointment of judges, their removal from office and their welfare is used as barometer with which to gauge the sturdiness of their independence.[179] In the case of *Markin v New Brunswick*[180]the importance of judicial independence was clearly elaborated and the court argued that:

> *"Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it."*[181]

It is correct that the independence of the courts ensures there is counterbalance in government thereby promoting the separation of powers.[182] The constitution provides a clear statement on the independence of the judiciary.[183] Constitutions must articulate on the independence of the

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person, may interfere with the functioning of the courts;
(b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.

[179] L. Madhuku,' Constitutional Protection of the Independence of the Judiciary': A survey of the position in South Africa Published by Cambridge University Press, *Journal of African Law Volume 46 No.2 (*2002) page 232.
[180]*Markin v New Brunswick (*2002) 209 DLR paragrgh 4 page 564.
[181] Ibid paragraph 4 page 564.
182 M. Okumu-Masiga, (2020). MAVERICK CITIZEN OP-ED: Judicial independence under threat in Zimbabwe. [online] Daily Maverick. Available at: https://www.dailymaverick.co.za/article/2020-07-23-judicial-independence-under-threat-in-zimbabwe/ accessed on 9 January 2022.
183Section 164, Constitution of the Republic of Zimbabwean, 2013.

judiciary making it imperative for one to seek redress in case one's rights are undermined. Also, this promotes public confidence and also enhances public scrutiny of executive powers.[184]

Section 164 (1) of the Constitution of Zimbabwe provides that:

> *"The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice."*

This section expressly guarantees independence of the judiciary and strictly calls for the government to respect judicial independence and its judgments. This acts as a reminder to everyone to abide by the courts' decisions. This provision is in line with international law principles which demand that judicial independence must be adhered to by states and must be incorporated in their constitutions.[185] Section 164 (2) (b) states that:

> *"The State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165."*[186]

Further section 164 (2) (a) provides that:

> *"Neither the state nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts."*

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184 Zimbabwe: constitutional amendment undermines judicial independence. (2017). [online] Available at: https://www.icj.org/wp-content/uploads/2017/07/Zimbabwe-Constitutional-Amendment-News-web-stories-2017-ENG.pdf accessed on 9 January 2022.

185See Principle 1 of the United Nations, Basic Principles on Judicial Independence (1985).

186 Section 165 in part notes that:

1. In 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.
2. Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.
3. When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.

Judges in the execution of their duties must be impartial and must do so without any interference.[187] Section 162 of the Constitution of Zimbabwe (2013) states that:

> *"Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise (a) the Constitutional Court (b) the Supreme Court (c) the High Court (d) Labour Court (e) the Administrative Court, (f) the magistrates Court (g) the customary law Courts and (h) other Courts established by or under an Act of Parliament."*

The Lancaster House Constitution (1980) did not provide for a Constitutional Court which has been established in the current constitution (2013). The Constitutional Court is the superior court which deals with cases of violations of constitutional rights protected in chapter four of the Constitution (2013). Zimbabwe's history is replete with human rights abuses and it was hoped the introduction of the Constitutional Court would improve and enhance the security of human rights.

2.9.2 The role of the JSC in Zimbabwe

The JSC was established in terms of section 189 of the Constitution of Zimbabwe (2013)"to promote and facilitate the independence and accountability of the judiciary" and foster "the efficient, effective, and transparent administration of justice".[188] This body is responsible for

[187] 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.

[188] Section 189: Establishment and composition of Judicial Service Commission
(1) There is a Judicial Service Commission consisting of-
(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;

the administration of justice.[189] It can also be stated that the same body has a regulative, advisory and supervisory role which enables the judiciary to effectively deliver its constitutional mandate.[190] Its administrative mandate also extends to the appointment[191] of judges by conducting public interviews and also by passing regulations in the governance of the judiciary with the authorization of the Minister of Justice, Legal and Parliamentary Affairs.[192]The JSC in Zimbabwe consists of thirteen members whose term is limited to six years.[193] The composition of the JSC in theory and practice has got implications on the independence of the judiciary. Madhuku argues that the extent to which the appointment of judges is made free from political manipulation is reflected by the independence of the JSC itself.[194]

The composition of JSC in the 2013 constitution shows diversity in the representation of various interests other than its predecessor, the Lancaster House Constitution. The inclusion of senior members of the judiciary and independent legal practitioners reflect the integrity and independence of the JSC. It is clear from this composition that the President's powers in the

(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 an 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.

(2) (2)The Chief Justice or, in his or her absence, the Deputy Chief Justice presides at meetings of the Judicial Service Commission, and in the absence of both of them at any meeting the members present elect one of their number to preside at the meeting.

(3) The members of the Judicial Service Commission referred to in paragraphs (d), (h), (i), (j) and (k) of subsection (1) are appointed for one non-renewable term of six years.

[189]The JSC was first introduced into Zimbabwe's Lancaster House Constitution by Constitutional Amendment Act No.23 of 1987 (the 7th Constitutional Amendment.)

[190]*JSC V Ndlovu and Others* HB 172/13 in which Justice Moyo stated that the JSC does the administrative work leading to the appointment of judges, paragraph 9.

[191]Section 180(2) Constitution of the Republic of Zimbabwe, 2013.

[192]See section 190(3) Constitution of the Republic of Zimbabwe, 2013.

[193]Section 189(3) Constitution of the Republic of Zimbabwe, 2013.

[194] L. Madhuku , *Journal of African Law 2002 Volume 46 No.2* page 238, see also L.Chiduza note 26 page 379.

appointment of JSC members have been reduced. This will promote and ensure appointment of quality judges after a critical assessment on the suitability of judicial candidates.[195] There are no political appointees in the Zimbabwean JSC. The President is only directly linked to the appointment of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges.[196] Furthermore, two JSC members are appointed indirectly by the President.[197] This effectively implies that executive influence is reduced in the composition of the JSC and will depend on their integrity to perform their constitutional mandate.

2.9.3 Components of Judicial Independence in Zimbabwe

Judicial independence is an essential element of constitutionalism and it is provided and well catered for at both regional[198] and international level.[199] The Constitution of Zimbabwe in conformity with regional and international practice thus incorporates this essential and fundamental principle.[200] The emphasis however is on establishing a competent, independent and impartial tribunal.[201] Judicial independence has two components which are institutional and personal independence.[202] It however manifests itself in various essential categories as highlighted below.

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[195]G.Manyatera and C.Fombad *Zimbabwe Rule of Law Journal Volume 1,Issue 1* February 2017-Legal Resources Foundation page 18.

[196]Section 180 Constitution of the Republic of Zimbabwe, 2013.

[197] These are the Chairperson of the Civil Service Commission and the Attorney General –see Section 189(e)(g) Constitution of the Republic of Zimbabwe, 2013.

[198] Article 26 of the African Charter on Human and Peoples' Rights provides that: "state parties to the present charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present charter".

[199]Section 10 of the Universal Declaration of Human Rights (UDHR) states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[200]Section 164 Constitution of the Republic of Zimbabwe, 2013.

[201] Article 19 of the Universal Declaration of Human Rights 1948 which recognizes the right of every person to equality and to a fair and public hearing by an independent, competent and impartial tribunal established by law.

[202] An examination of institutional and personal independence is provided for in detail in chapter 2 from page 11-16. Also see International Bar Association …" Beyond Polokwane; Safeguarding South Africa's judicial independence" (July 2008) 20 .http//www.ibanet .org accessed on 3 November 2015.

2.9.3.1 Removal of judges

Section 187 of the constitution provides for the removal of judges from office. A judge can be removed for among others inability to perform his or her "functions due to mental or physical incapacity, gross incompetence and gross misconduct". The same section provides for a procedure that must be followed when removing a judge from office.[203] It should be noted that removal of a judge from office should not be at the discretion of the executive and must be carefully done since the arbitrary removal of a judge, has serious negative connotations on judicial independence. Madhuku contends that:

> *"If a judge can be removed from office easily it matters very little that the appointment process is rigorous and free from political manipulation."*[204]

In the event of a judge failing to perform his or her judicial functions properly, he or she must be removed from office following proper procedure which stipulates that the judge must be heard by an independent and impartial tribunal before he or she is removed from office. Section 187 (2) empowers the President to initiate removal proceedings against the Chief Justice. According to section 187 (2) of the Constitution of Zimbabwe (2013):

> *"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."*

Further section 187 (3) empowers the Judicial Service Commission to advise the President when the need to remove any judge, including the Chief Justice arises. The President is then mandated to appoint a tribunal to investigate the matter.

[203] Section 187 Constitution of the Republic of Zimbabwe, 2013 Removal of judges from office.
[204] L. Madhuku '*Introduction to Zimbabwean Law'* Weaver Press, Box A1922, Avondale, Harare and Friedrich – Ebert – Stiftung (FES) Box 4720, 6 Ross Avenue, Belgravia, Harare 2010page 96.

The new constitution stipulates the circumstances which can lead to the Chief Justice's dismissal from office and differs markedly from the Lancaster House constitution. Again, the new constitution clearly outlines reasons and conditions under which a judge can be removed[205] unlike under the Lancaster House Constitution which only stated a judge could only be removed because of inability to discharge duties and misbehavior. These were the only two cardinal conditions which could have precipitated the ouster of the Chief Justice. The new constitution nonetheless delineates procedure for the removal of a judge. The constitution empowers the President to trigger proceedings to remove the Chief Justice in section 187 (2) of the constitution. It can be argued that although some authority is given to the JSC in this regard the President still retains supreme powers on the question of removal of judges. However, this hands the president the sword of Damocles which he can use to scythe dissenting judges purely on political grounds.[206] The President's powers to unilaterally appoint a tribunal raises questions on the independence of such a tribunal, which after having investigated the possibility of removing a judge recommends to the same President its findings.[207]

Given the President's full powers the tribunal may be appointed with the motive of removing a judge who resists being corrupted. This may have a negative impact on the independence of judiciary and may compromise the separation of powers. In order to guarantee judicial independence, the JSC should have the central role in any process of removing a judge or Chief Justice. The JSC must be given the sole power to launch and investigate any judge or Chief Justice and also the mandate to appoint a tribunal to investigate such issues. This will ensure

[205] Section 187 (1) Constitution of the Republic of Zimbabwe, 2013.
[206] *Commercial Farmers Union v Minister of Lands Agriculture and Resettlement* (2002) ZLR HC 503;Gubbay C.J. (as he then was) was forced to retire prematurely after he delivered a judgment where he interdicted government, barring further land acquisitions, as such acquisitions were unconstitutional and were carried out in a violent manner paragraph 9.
[207] Section 187 (7) Constitution of the Republic of Zimbabwe, 2013, "*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."*

impartiality of the tribunal and would also greatly enhance that independence. This is the position with the Namibian constitution[208] which gives the sole power to the JSC to oversee the removal of a judge or Chief Justice from office.

In South Africa, the JSC has a central role in this process.[209] It is empowered to investigate and remove a judge. A judge can only be removed from office on two grounds which are stated in section 177 (1) of the Constitution of the Republic of South Africa (1996) that is when:

> *"(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and*
> *(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members."*

It can be rightly posited that the President's role in the removal of a judge is limited in Namibia and South Africa. Therefore, to adequately secure judicial independence in Zimbabwe, its constitution should have curtailed the presidential powers in the process of removing judges.

2.9.3.2 The tenure of judges

Section 186 of the Zimbabwean Constitution (2013) states that:

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[208] Section 84 (1) Constitution of the Republic of Namibia, 1990 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 JSC, (3) the JSC 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."

[209] Section 177 Constitution of the Republic of South Africa, 1996.
(1) A judge may be removed from office only if is grossly incompetent or is guilty of gross misconduct; and
adopted with a supporting vote of at least two thuds of its members.
(a) the Judicial Service Commission finds that the judge suffers from an incapacity,
(b) the National Assembly calls for that judge to be removed, by a resolution
(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
(3) The President, on the advice of the Judicial Service Commission, may suspend a
judge who is the subject of a procedure in terms of subsection (1).

(1) "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, the High Court and any other Judges hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire."

Security of tenure is essential to judicial independence. The constitution is clear that judges must not be removed from office unnecessarily and also provides for a compulsory retirement age for their removal though with exceptions on Constitutional Court judges. Professor Madhuku contented that given the enormous powers bestowed on judges it is important that they must not occupy the judicial seat forever.[210] He went on to suggest that this in the main reduces the executive's stranglehold on the appointment process which allows it to extend terms of office of their favorites. This in turn would have serious negative implications on the independence of the judiciary.[211]

The constitution does not allow the executive to extend the term of office of judges in the Supreme Court and High Court[212] who are compelled to retire when they reach the age of seventy. However, constitutional court judges can be re-appointed upon reaching seventy years by the executive to the Supreme Court or High Court if they so wish and again if they are

[210] L. Madhuku 'A survey of the position in Southern Africa' *Journal of African law Volume 46 No.2 (*2002) page243

[211] L. Madhuku ' A Survey of the position in Southern Africa'*Journal of African Law Volume 46 No.2 (*2002) page 243.

[212] S 186(1)(b) Constitution of the Republic of Zimbabwe, 2013.

capable for such appointment. The weakness here is that there is no ceiling to the tenure of the re-appointed judges.[213] The absence of such tenure limits affects the smooth functioning of the judiciary and concomitant independence. However, the constitutions of Uganda[214] and Ghana[215] which articulate that judges must complete their cases before their retirement depart from this issue.

2.9.3.3 Remuneration

Financial autonomy of the judiciary system is important in securing judicial independence. Rosenn explicitly puts it in these terms:

> *"the underlying policy is to protect judges from financial retribution for rendering decisions that displease the legislature or the executive."*[216]

Fundamentally, judicial officials' must be adequately remunerated to ensure that judges are not susceptible to corruption and bribes. Their salaries must be adequate and must not be reduced during their tenure of office in order to promote integrity and ensure judicial independence.[217]

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[213]Section 186 (4) Constitution of the Republic of Zimbabwe, 2013.

[214] Section 144 Constitution of the Republic 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*".

[215] S 145 Constitution of the Republic of Ghana states that "(1) *A Justice of a Superior Court or a Chairman of a Regional Tribunal may retire at any time 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*".

[216]K.S Rosenn "The protection of judicial independence in Latin America" (1987 -89) 19/1 *Inter – American Law Review Volume 19.1* page 15.

[217] US Agency for International Development Guidance for promoting judicial independence and impartiality (January 2002) revised edition. The USAID Guidance for Promoting Judicial Independence and impartiality indicates that most judges who participated in their study agreed that, "*respectable salaries are a necessary element of judicial independence*." page 5.

The executive and the legislature are not allowed to tamper with their salaries.[218] Section 188 of the Constitution of Zimbabwe states that:

> *(1) "Judges are entitled to the 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 a charge 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."*

This provision is in line with international best practice which advocates that remuneration of judges must be adequately and clearly set out in a constitution. According to international standards for proper functioning of the judiciary there must be sufficient funds with which to promote efficiency and independence of the judiciary.[219] According to Magaisa,[220] this promotes judges' financial freedom and ensures judicial independence. Basically, a clear constitutional

[218] See section 128 Constitution of the Republic of Uganda and section 127 Constitution of the Republic of Ghana.
[219] Principle 11 of the United Nations Basic Principles of judicial independence which states that: "*the term of office judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by the law*."
[220] A.Magaisa2009http://blog.newzimbabwe.com/2009/05/amagaisa/judiciary-must-be-financially-independent/comment-page-13/ 23 September 2013. Accessed on 20 September 2017.

provision will prevent direct control of judges' financial affairs by the executive and the legislature. In Magaisa's view the judiciary will have access to funds to cater for its operations whenever necessary. This would keep both the executive and the legislature at bay. In South Africa, the remuneration of judges is provided for in the Judges Remuneration and Conditions of Employment Act,[221] and is set by an independent commission.[222] However in regards to the Constitution of Zimbabwe it is parliament which caters for judges' salaries, allowances and other benefits, drawn from the consolidated revenue fund. Zimbabwe could have borrowed from South Africa and entrusted remuneration of judges to an independent commission, thereby entrenching judicial independence.

2.9.3.4 Judicial Conduct

Section 165 of the Constitution of Zimbabwe (2013) sets out principles which govern the conduct of the judiciary.[223] These principles ensure that a judge remain professional in the execution of their duties and delineates conduct expected of members of the judiciary. It is incumbent upon the judiciary to monitor the conduct of judges in order to ensure efficiency,

[221]Judges Remuneration and Conditions of Employment Act of 47 of 2001.
[222]Independent Commission for the Remuneration of Public Bearers Act 92 of 1997.
[223]Principles guiding judiciary.
(1) In 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.
(2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.
(3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.
(4) Members of the judiciary must not--
(a) engage in any political activities;
(b) hold office in or be members of any political organisation;
(c) solicit funds for or contribute towards any political organisation; or
(d) attend political meetings.
(5) 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.
(6) Members of the judiciary must give their judicial duties precedence over all other activities, and must not engage in any activities which interfere with or compromise their judicial duties.
(7)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.

accountability, professionalism to inspire public confidence in the justice system. The judiciary is mandated to formulate a code of conduct for the judges since this is in accordance with judicial independence and thus it should be adopted in every constitution.[224] In Zimbabwe, judicial conduct is monitored by the Judicial Service (code of ethics) Regulation[225] which regulates the conduct of judges. It can be rightly stated that even though this regulatory body is in place, judges collectively must uphold and preserve values due to their office. The JSC also has a mandate to promote and facilitate independence and accountability of the judges in order to enhance professionalism and efficiency in the justice delivery system.[226] It is the role of the courts to safeguard human rights, freedoms and the rule of law[227] but in doing so they must apply the law without fear, favour or prejudice. The courts however have got a mandate to deliver justice on time and for them to apply the law impartially regardless of one's standing in society.[228] Justice Baron in the case of *Mandirwhe v Min of State and Security*[229] noted:

> *"...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."*[230]

In Zimbabwe, judgments have in the past been delayed in political cases. In *Tsvangirayi v Registrar General of Elections*[231] for instance the court reserved judgment for a month after the applicant had sought to assert his electoral rights. Judgment was reserved until after the elections

[224] Preamble of the Bangalore Principles of judicial conduct (2002.)
[225] Judicial Service (code of ethics) Regulations Statutory Instrument 107 of 2012.
[226] Section 190 (2) Constitution of the Republic of Zimbabwe, 2013.
[227] Section 165 (1) (c) Constitution of the Republic of Zimbabwe, 2013.
[228] Section 165 (a) and (b), Constitution of the Republic of Zimbabwe, 2013.
[229] *Mandirwhe v Minster of State and Security* 1981 (1) SA 59 (ZA) paragraph 61.
[230] Ibid paragraph 1.
[231] *Tsvangirai v Registrar General of Elections* 2002 ZWSC paragraph 20.

were held.[232] In a similar case, 37 election petitions filed by the opposition MDC party in 2000 challenging the credibility of the polls which had been characterized by violence, intimidation and rigging stalled in the courts. The delay seriously affected the independence and efficiency of the judiciary and gave currency to the perception that the executive controls the judiciary and influences court decisions in favour of the ruling ZANU (PF). The courts had thus abandoned their constitutional mandate of protecting and promoting human rights and freedoms.[233]

2.9.3.5 Integrity of the Judiciary

The image of the judiciary and of its officers is of paramount importance. The judges must strive to maintain a positive image of the judiciary collectively. Section 165 (2) of the Constitution of Zimbabwe (2013) states that judicial officers "must individually and collectively respect and honour their judicial office" and must endeavor to "enhance their independence in order to maintain public confidence" in the judiciary. The Constitution of Zimbabwe in this section subscribes to the Bangalore Principles of judicial conduct of 2002 [234] which call for the independence of the judiciary. It is worth mentioning that an individual judge must promote judicial independence and must exhibit high standards of professionalism. Furthermore, they must assist each other to achieve judicial independence in order to maintain and shore up public confidence in the judiciary.[235] In his remarks Brennan CJ argued 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*

[232] Legal Resources Foundation 2002 http://www.humanrightsfirst.org/defenders/hrd_zimbabwe/ LRFreport30-09.pdf 73, accessed on 30 May 2018.
[233] 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*".
[234]Preamble of the Bangalore Principles of Judicial Conduct (2002).
[235]Principle 1.6 of the Bangalore Principles of Judicial Conduct (2002).

unless there is continual realization 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 command."[236]

Section 165 (4) (a - d) of the Constitution states that in order to achieve total judicial independence, judicial officers must not engage in politics, hold office or be members of any political organization, solicit funds for or contribute towards any political organization or attend political meetings. This will enhance public confidence in the judiciary and ensure that the judiciary earns respect and dignity. Significantly this would promote judicial independence which will enable judges to deliver quality judgments, without any allegiance to anyone. It is imperative that judges stick to these guidelines to avoid any activities or conduct that brings shame to the judiciary. The principle of judicial independence enjoins states to establish a code of conduct for judicial officers which must, correctly, be adopted globally.[237]

2.9.3.6 Judicial Interference

Judges must be independent and free and must not be interfered with. Judges as custodians of the law must execute their duties in accordance with the law and the constitution.[238] They must however not be subjected to any pressure whatsoever be it from the executive, parliament and

[236] Brennan 1996 http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf accessed on 3 April 2017.
[237] Preamble of the Bangalore Principles of Judicial Conduct (2002).
[238] Section 164(1) Constitution of the Republic of Zimbabwe, 2013.

members of the public in their functions. An individual judge must not interfere with the decisions of another judge. There must be internal freedom amongst judges.

Section 165 (3) of the constitution is clear and states that:

> *"When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence."*

It can be rightly concluded that this constitutional clause protects judicial independence. The section is in accordance with the international best practice on independence of the judiciary which advocates for judicial freedom and independence of judges in the execution of their duties.[239] Judges are required by the constitution to make quality decisions based on the law and the constitution and in doing so they must apply the law without fear, favour or prejudice.[240]

The inclusion of section 165 (3) of the Constitution of Zimbabwe is a bar the executive from interfering with the judiciary. The land invasions orchestrated and subsequent pro-land seizure judgments raised suspicion that pressure had been exerted on judges to sanitize the illegal farm seizures. This badly dented the image of the judiciary as it failed to protect citizens' human and property rights.[241] There was total erosion of public confidence in the judiciary. During this tumultuous period, the government packed the bench with pliant judges, some who later

[239]Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary (1985). See also Principle 8.

[240] C.G Geyh and E.F Van Tassel , 'The independence of the Judicial Branch in the New Republic' *Chicago Kent Law ReviewVolume 74*, Issue 1(1998), page 34.

[241]*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.

benefited from the programme. Judges were at the disposal of the executive henceforth. They deviated from their duty of protecting and promoting human rights in the country, paving the way for the total collapse of judicial independence in Zimbabwe.

It can thus be positively stated that the new constitution honours and respects judicial independence. Judicial officers must therefore always remember not to lend themselves to executive manipulation.[242]It must be inculcated into them to jealously guard against executive interference and to maintain professional values and integrity in order to vital retain public confidence in the judiciary. The new Constitution in Zimbabwe added more gravitas and braced up judicial independence.

2.9.4 Independence of the Judiciary versus Constitutionalism in Zimbabwe

It is not in dispute that on paper the Constitution of Zimbabwe guarantees judicial independence and consequently this confirms Fombad's point that:

> "*Formal constitutionally entrenched, independent judiciary is absolutely essential and a necessary precondition to functional and substantive judicial independence."*[243]

The new Constitution of Zimbabwe (2013) if fully implemented can result in total independence of the judiciary. The constitution vests judicial authority in the courts.[244] Judges are required to

[242] C.G Geyh and E.F Van Tassel, 'The independence of the Judicial Branch in the New Republic' *Chicago-Kent Law Review Volume 74 ,Issue 1(1998)* page 34.
[243] C. Fombad "*The Constitution as a source of Accountability: The role of constitutionalism* (2010) Speculum Juris pages 41 and 47.
[244]Section 162 Constitution of the Republic of Zimbabwe, 2013.
Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise--
(a) the Constitutional Court;
(b) the Supreme Court;
(c) the High Court;
(d) the Labour Court;
(e) the Administrative Court;

be independent in their individual capacities and as an institution which is a standard requirement inherent in regional and international instruments. The personal independence of judges is provided for in detail in section 180 of the Constitution of Zimbabwe which 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*
>
> *(e) 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)(e) are 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*

(f) the magistrates courts;
(g) the customary law courts; and
(h) other courts established by or under an Act of Parliament.

appoint one of the nominees to the office concerned.

(4) *The President must cause notice of every appointment under this section to be published in the Gazette."*

It is critical that this section creates openness in the appointment process so that proper and qualified persons are as appointed as judges. The constitution as well caters for the independence of the judiciary as an institution[245] insists that no one should interfere with its functions. Furthermore, an independent body was established by the JSC. This body is independent and is responsible for the independence and accountability of the judiciary to ensure transparence in the administration of justice.[246] One however can criticize the independence of the JSC in that it does not retain full independence in the appointment and removal of judges which power is bestowed in the president. The president may interfere with the JSC and retain control over it on the question of removal of a judge. The fact that he appoints a tribunal to preside over removal of a judge discredits the independence of the judiciary. On the appointment of judges if the president if not satisfied with the names forwarded to him for endorsement he can request for another list. It is the same case with salaries of judges; the president determines their salaries without consulting the (JSC). The president's wide executive a power has a catastrophic impact on the financial freedom of the judiciary and threatens judicial independence.[247] Given these gaps in the

[245]Section 164 Constitution of the Republic of Zimbabwe, 2013.
[246]Section 190 Constitution of the Republic of Zimbabwe, 2013.
Functions of Judicial Service Commission
(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, effective 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.
[247]W.S Ferguson, "Judicial Financial Autonomy and Inherent Power "1971-72 ,*Cornell law Review* ,*Volume 57,* page 975.

constitution one wonders whether total independence of the judiciary is achievable and obviously these gaps urgently need redress to achieve judicial independence. It is highly recommended that the JSC should have final say on the removal and appointment of the judges and must make recommendations to the president based on its independent findings.

Section 165 (7) of the Constitution of Zimbabwe requires the (JSC) and its members to have workshops to enhance their knowledge, skills and personal qualities in order for them to keep abreast with developments in domestic and international law. These workshops impart knowledge in judges and skills to remain professional and to adequately protect human rights. If judges continuously and religiously attend such seminars this will help them to come up with quality and sound judgments which will have a positive impact on growth of independent jurisprudence.

It must be realized that respect for the judiciary goes beyond judges' appointment, removal and their salaries. It is of paramount importance to note that respect for the judiciary is steeped in its relationship with the executive and the legislature. The late Chief Justice Godfrey Chidyausiku noted that this relationship is not achieved by a structured constitution.[248] He lamented the lack of commitment by judges themselves in safeguarding judicial independence and entreated to protect this virtue. He argued that notwithstanding the powers of the executive and the legislature if the judges and the people are ready to defend judicial independence it cannot be achieved and called for a smooth relationship between the judiciary, the executive and the legislature.[249]

Economic difficulties in Zimbabwe have resulted in funding cutbacks to the judiciary, a situation which has a negative impact on judges' wages, which however raises the prospect of judges

[248]Chidyausiku 2010 http//www.venice.com.int/SACJF/2010 accessed on 18 December 2019, "Modern Challenges to the independence of the judiciary" accessed on 19 June 2018.
[249]Ibid.

dabbling in corruption. Judges salaries must be reviewed upwards periodically to curb corruption and also to enhance their financial freedom.

Although there are notable positive changes in the new constitution it can still be noted that, it lacks practice and accountability. The executive has enormous powers available to it to muzzle the constitution especially the independence of the judiciary. Magaisa contended that a constitution in Zimbabwe is:

> *"An instrument for autocratic control, legitimizing rather than preventing arbitrary power."*[250]

The wide powers of the executive in the appointment, removal of judges and remuneration of the judges will enamel the judiciary to these institutions which makes judges pronounce judgments in its favour for fear of victimization.[251] The presidential powers must be limited by giving the JSC sole mandate and responsibility in this aspect without the involvement of the executive as is South Africa and Namibia.[252]

2.9.5 Positive Constitutional Court developments in the promotion of Judicial Independence in Zimbabwe

The Constitutional Court is established in terms of section 166 of the Constitution of Zimbabwe (2013) and it is the superior court of record. It is the highest court in all constitutional matters and its decisions are binding on all other courts. The Constitutional Court has been commended for upholding the rule of law and constitutionalism in cases involving private individuals whilst

[250] A. Magaisa, "Constitutionality versus Constitutionalism: Lessons for Zimbabwe's Constitutional reform process 51, 52 at http://kar.kent.ac.uk accessed on 11 November 2019.
[251] Ibid .
[252] Section 177 Constitution of the Republic of South Africa,1996 and section 84(1) Constitution of the Republic of Namibia.

it has been accused of bias in political cases.[253] Section 166 (3) (a) provides that the Constitutional Court presides over cases involving infringements of fundamental rights as provided for in chapter 4 of the constitution, or concerning the election of the president or vice president. The election petition by Nelson Chamisa of the MDC Alliance put the judiciary to test in this area.[254]Chamisa the president of the MDC Alliance took President Mnangangwa of ZANU (PF) to the Constitutional Court arguing that the election had been rigged and that President Mnangagwa had violated the Electoral Act and the constitution. He also stated that the election was associated with violence, violation of people's rights, vote buying and also harassment of opposition party supporters. The Constitutional Court ruled in favour of the ruling party ZANU (PF) and declared Mnangagwa winner of the 2018 harmonized elections. The judiciary's role as neutral arbiter was brought into question. It was accused of always favouring the ruling party although in the Constitutional Court judgment the appellant was challenged for failing to produce enough evidence to substantiate his claim.

Tony Reeler challenged the impartiality of the judiciary because of its frequent pro ZANU (PF) judgments. He argued that of all the 38 election petitions filed by the opposition since 2000 none had succeeded. In his remarks he noted that:

> "*The courts of law in Zimbabwe have no good record of election as they are accused of deciding on behalf of the state and not showing impartiality at all."*[255]

The election petition by Nelson Chamisa however hinged on whether he had enough evidence to show that the election was rigged. In this connection, one cannot be quick to conclude that

[253] L. Madhuku, 'Constitutional Protections of the independence of the judiciary': A survey of the position in Southern Africa, *Journal of African Law Volume 46 No.2 (*2002) (232 to 245) on page 235.
[254]*Chamisa v Mnangagwa and 24 others* (CCZ 42/18) ZWCC 42 (24 August 2018) paragraph 1.
[255] T. Reeler , a senior researcher at the research and advisory unit (RAU) on his comments on the MDC election petition results at the Constitutional Court of Zimbabwe in Harare on 10 August 2018, a test on judicial independence.

judges of the Constitutional Court ruled in favour of the ruling party in the absence of such vital evidence. It is the version of one independent group of observers that the Zimbabwe Election Commission (ZEC) did its work above board and that the elections were free, fair and credible.[256] According to Reeler the behaviour of the ruling party ZANU (PF) after the election raised suspicion that they had rigged the elections. The fatal shooting of unarmed civilians by the military raised eyebrows. The other scenario also saw Tendai Biti flee to neighbouring Zambia seeking refuge because of alleged political persecution.[257]

2.9.6 Weakness of the Judiciary in Zimbabwe

The former president of Zimbabwe Robert Mugabe on many occasions showed scant respect for the judiciary when he publicly denounced the judiciary. In 1999 when Supreme Court judges engaged him with a view to getting clarity on torture charges of journalists Mark Chavunduka and Ray Choto whom the Supreme Court had ordered released after they were abducted by soldiers for publishing stories that alleged the military had been plotting a coup, Mugabe stated that:

> *"The judiciary has no right to give instructions to the President on any matter as the four judges have purported to do. In those circumstances, the one and only honorable course open to [the judges] is quitting the Bench."*[258]

Another devastating event in the history of Zimbabwe's justice delivery system was the arrest of Justice Paradza on allegations of defeating the course of justice. He was subsequently charged

[256] Zimbabwe Election Resource Centre Network (ZERCN) in its finding in its projections in using what they call the sample based observations (SBO) method, said that the election results by the electoral body, (ZEC) tallies with theirs.
[257] T. Reeler, a senior researcher at the research and advisory unit (RAU) on his comments on the MDC election petition results at the Constitutional Court of Zimbabwe in Harare on 10 August 2018.
[258] Attacks on the press in 1999-Zimbabwe, February 2000 available at https://www.refworld.org/docid/47c565cd23.html accessed on 8 may 2019.

under the Prevention of Corruption Act.[259] The charges emanated from his judgment ordering the release of Elias Mudzuri an opposition activist for the MDC from police custody. The general view was that his judgment worked against the ruling party ZANU-PF. The treatment he got posed a serious threat to judicial independence especially and was a chilling reminder to fellow judges that they could find themselves in a similar predicament if they passed judgments against the ruling party.

Also, the executive's disdain for the judiciary was underlined in the case of journalists Mark Chavunduka and Ray Choto whom the Supreme Court had ordered released after they were abducted by soldiers for publishing stories that alleged the military had been plotting a coup.[260] The army refused to release the journalists in open defiance of a court order. This became the norm as the executive routinely refused to uphold execute judgments it considered contrary to its interests.[261] Again on 17 March 2005 Mugabe described a decision by Justice Tendai Uchena[262] as "madness" and went on to publicly state that:

> "*I don't understand the court's decision. We can't be held at ransom by a man who is in prison. That is absolute nonsense. We will study the decision and appeal against it… He has a case to answer. Proceed as if nothing has happened."*

The Zimbabwean judicial system is replete with poorly handled human rights cases. For instance, the government in 2005 launched operation Murambatsvina and Operation Restore Order. Lawyers made urgent court applications to the superior courts in order to protect the interests of people who were subjected to forced evictions and mass destruction of their property

[259] Prevention of Corruption Act, Chapter 9.16.
[260] *Mark Chavunduka and Raymond Choto v Ministry of Defence 2000 ZLR 418 (S*) paragraph VI.
[261] On 2/09/2017 the former President of Zimbabwe Robert Mugabe was quoted accusing judges of being reckless in allowing antigovernment demonstrations that later turned violent in Harare. He then responded by banning all protests in Harare for two weeks from September 2 to 17, through statutory Instrument 101a of 2016 following a wave of protests in Harare.
[262] *Roy Leslie Bennet v The Constituency Election Officer, Chimanimani Constituency* Ep1/05 paragraph 1.

and their livelihoods. The applications were to the effect that the conduct by the Local Authority was against the constitution and the African Charter on Human and People's Rights. The courts ignored the applications and delayed finalization of the cases.[263] Some cases were dismissed and in their judgments, the courts failed to address critical arguments which were a clear failure by the courts to uphold the rule of law in Zimbabwe.[264] The courts in this regard failed to uphold the constitution and protection and promotion of human rights as provided under the Bill of Rights.

2.9.7 Conclusion

The new constitution introduced positive fundamental changes in promoting and strengthening judicial independence in Zimbabwe. It can be rightly stated that if these provisions were to be jealously guarded and implemented judicial independence will be guaranteed in Zimbabwe. However, concerns have been raised on some provisions of the constitution which threaten judicial independence. These provisions relate to the involvement of the President in the appointment and removal of judges. The president's unfettered discretion is also conspicuous when determining salaries of members of the judiciary without the advice of the JSC. This has a negative impact on the financial autonomy of the judiciary. In a nutshell, one can conclude that although the new constitution has positively dealt with the independence of the judiciary, it has not authoritatively done so. There are still some notable gaps, huge gaps which can be negatively manipulated by the executive to suborn the judiciary.

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[263] In the case of *Batsirai Children's Care v Minister of Local Government and Urban Development* & 4 Ors HC 2566/05 paragraph 1 an urgent relief was sought against the continuing eviction of children, including those orphaned by HIV/AIDS, who had been living in an orphanage run by Dominican sisters.
The matter was set down before Justice Benjamin Hlatshwayo in late May 2005. To date, the judge has continuously postponed the matter, which has had the effect of exposing the children to further human rights violations and ever-deteriorating living conditions.

[264] See, for example, the matter of *Dare Remusha Cooperative v Minister of Local Government, Public Works and Urban Development* HC 2467/05, where Justice Tedius Karwi stated: "*It would be naïve for me to conclude my judgment without mentioning the fact that the action taken by the respondents, however, has caused untold suffering to a number of people. I am told by the applicant that a lot of people have obviously been displaced and appear to have nowhere to go. Many have been sleeping in the open and the cold weather. Many school going children are not going to school. It is my considered view that, notwithstanding the fact that the action taken and the manner in which it was taken was lawful, hardships which have befallen the affected people would have been avoided by giving adequate notice to the affected people to relocate and reestablish themselves. A few days' notice was, in my view, not adequate. Be that as it may, I find that the application is devoid of merit*…" (emphasis added).

CHAPTER 3

THE PROCESS OF APPOINTING JUDGES IN SOUTH AFRICA

3.1 Introduction

The preceding chapter looked at judicial independence in both South Africa and Zimbabwe and judicial independence has been identified as a fundamental aspect in shaping democracies and also has a significant role in upholding the doctrine of separation of powers in modern states.[265] In this chapter the study turns to examine judicial independence in South Africa, the way in which judges are appointed and the processes involved determines their independence and how they dispense justice, the process must be transparent and free from political interferences.[266]The chapter will articulate the role of the president, parliament and the judicial service commission or councils in the appointment of judges in this jurisdiction.

South Africa has a new constitution,[267]and it is against this background that an analysis of constitutional development on judicial appointments ought to be examined. South Africa has since shifted from its discriminatory past where only white males were eligible for the judgeship[268] to a system which promotes diversity.[269] The Constitution of South Africa makes provision for appointment of judges from diverse cultural backgrounds and gender who are fit and proper[270] in an open and transparent manner.[271] A notable characteristic of the appointments of judges in South Africa is its selection process which promotes transparency and

[265] V. Georg "*The politics of constitutional review in Germany"* (2005) page 1.
[266] T. David and H. Charles *Multi-party politics in Kenya; The Kenyatta and Moi States and the triumph of the system in the 1992 election* (1998) page 101.
[267]The Constitution of the Republic of South Africa, 1996 .
[268]C.Albertyn and E. Bonthuys 'South Africa ;A Transformative Constitution and a Representative Judiciary' in G. Bauer and J. Dawuni Gender and the judiciary in Africa ;From obscurity to Parity(2006),R Chitapi*Women in the Legal Profession in South Africa; Traversing the tension from the bar to the bench* (LLM thesis, University of Cape Town ,2015 page 6 .
[269] G. Budlender 'Transforming the judiciary :The politics of the Judiciary in a Democratic South Africa '*South African Journal on Human Rights Volume 122 part 4 2005* page 716, see also M Olivier 'A Perspective on Gender Transformation of the South African judiciary '(2014) *South African Journal on Human Rights* page 449.
[270] Section 174(1) Constitution of the Republic of South Africa,1996.
[271] See 'Judicial transformation in South Africa 'Africa Investor (December 2004)4 online; Omega "Investment Research -http;//www.omegainvest.co.za/Ai-December-2004.pdf accessed on 6 July 2018.

accountability.[272] Judges in South Africa during apartheid were appointed from senior members of the bar.[273] In the event where there was need for a new judge, the Judge President of the court concerned would identify a candidate with the requisite qualities and make recommendations to the Minister of Justice. If the Minister accepted the recommendation, the name was forwarded to the President for endorsement.

3.2 The appointment process

The power of appointing judges in South Africa is vested in the President as head of the executive and involves consultation with the JSC and leaders of parties represented in the National Assembly. Section 174 (1) and (2) of the South African Constitution requires the appointment of a woman or a man who is a fit and proper person and as well a citizen of South Africa. The constitution advocates for gender and racial balancing in the appointment of judges. This constitutional requirement is a departure from the apartheid era where judicial appointees were predominantly white males. This was done to create a representative and diversified bench that would enjoy the confidence of all South Africans. It is apparent that this new constitutional trajectory ensures equality in the judicial composition.[274] South Africa is largely dominated by various races and this provision ensures equal and total representation that ensures constitutional democracy[275] which is fundamental in the creation of a transformative judiciary.

Since 1996, priority has been placed on achieving racial and gender balance in the judiciary to remove the semblance of inequality and to give dignity to the institution. As such, there has been

[272] K.Malleson '*The Legal System* " (3rd edition) 2007 Oxford University Press page 216 .
[273]L. Van de Vijver' *The Judicial Institution in Southern Africa; A comparative study of Common law jurisdiction'* University of Cape Town2006 page 122.
[274] South Africa Justice Sector and the rule of Law, A review by Afrimap and open society foundation for South Africa 2005 .http//www.opensocietyfoundations.org chapter 4-pdf-part 2 accessed on 13 March 2018.
[275] J. Dugard, 'Courts and the Poor in South Africa': A critic of systemic judicial failures to advance transformative justice*, South African journal on Human Rights Volume 24* page 2008. Dugard argues that "*The judiciary is untransformed to the extent that it remains institutionally unresponsive to the problems of the poor*," and that "the courts in South Africa have not adequately realized their potential to promote socio-economic transformation in the interest s of materially disadvantaged South African "accessed on 8 February 2018.

a radical redrawing of the composition of the bench. Importantly the insertion of this provision has increased the number of black people on the bench.[276]

The democratic transformation in South Africa has seen the emergence of a racially diversified bench though the process falls short of achieving full gender diversity. Female judges are not properly represented on the bench which raises the question of their appointment to the bench amid the overall makeover of the judiciary.[277] It has been noted that women are not properly integrated in the legal system, be it at legal academy, legal practice or in the judiciary.[278] Although the JSC was successful in the transformation exercise which saw the appointment of significant black male judges, the appointment of black and white female judges is to some extent lethargic.[279] There is however a number of notable factors which were examined which worked as a barrier to female judicial appointments. In the apartheid era there was the distribution of resources was skewed in favour of white South Africans which impacted negatively on black women who were overlooked for education in deference to black men.[280] Because of this negative factor only a few black women were able to attain tertiary education, especially in the legal profession.[281] It can definitively be argued that there has been sharp increase in the number of black women entering the legal profession and this can only bode well

[276]Transformation and the independence of the judiciary in South Africa, the Centre for the study of violence and reconciliation (2007) at www.csvr.org.za accessed on 1 April 2019.

[277]K.Maema "Lack of transformation in the judiciary in South Africa" :African Commission on Human and People's rights: CGE reports-women , youth and persons with disabilities 31 October 2017 , from Parliamentary monitoring group. See also ElsjeBonthuys , Gender and Race in South African judicial appointments 23(2):127-148.August 2015 by University of Witwatersrand –South Africa.

[278] The so called legal services charter is intended to transform the legal services sector, see Department of Justice and Constitutional development, "Media breakfast to announce the members of the steering committee for the legal services charter" South African government information (11 Aug 2006) www.info.gov.za/speeches/2006/06081413451001.htm accessed on 20 June 2017.

[279] K. O'Regan "Transforming the judiciary: Notes from a continuing South African journey"(Ethel Benjamin lecture, 23 April 2012); M Swart "The Carfinian Curse: The Attitudes of South African Judges Towards Women between 1900 and 1920, *African Law Journal Volume 120* , (2003) pages 536,548-51.

[280] C. Murray et al., *Gender and the New South African Legal Order* (Cape Town: Juta, 1994).

[281] See generally centre of concern, "Gender, Race and the Legal Profession in South Africa". htttp://www.coc.org/index.fpl/1255html?article=1947 accessed on 4 April 2019.

for efforts to achieve gender parity on the bench.[282] Although it is trite that white males dominate the legal profession in South Africa, it would be a misnomer to conclude that the profession is a domain of white men. This perception could be an offshoot of the trend on the African continent that relegates black women to the edges of society where they are allocated child bearing and rearing roles. In October 2005 in South Africa, Carmel Rickard a prominent legal journalist exposed the condescending nature of the country's patriarchal system when she narrated how a member of the JSC had asked a candidate for a judgeship on the constitutional court, resident abroad, whether acquiring a boyfriend in South Africa could lure her back.[283] The member wanted to know whether this would be a pull factor even if she failed to land the constitutional court job.[284] In another scenario a female candidate who had applied for promotion to the position of Deputy Judge President who was openly gay was asked whether appointment would make her friends uncomfortable towards her.[285] It is this researcher's fervent submission that these questions were inappropriate, unconstitutional and segregated a female candidate.

Section 174 (2) has been subject of debate and criticism and one of those critics hinges on the failure by JSC to appoint enough women to the bench.[286] The requirements for judicial appointments as provided for in sections 174 (1) and (2) of the constitution are not exclusive and must not raise much debate. They must be given value in relation to other important factors in determining the quality of a judge such as professional background, expertise, judicial

[282]M. R Phooko and S. B Radebe ,'Twenty-three years of gender transformation in the Constitutional Court of South Africa': Progress or Regression. *Constitutional Court Review* 8(1) 2016 pages 306-331.
[283] These attitudes were plainly apparent , to the dismay of the press and the public , during the JSC hearings in Cape Town in October 2005 see Carmel Rickard , "*Judging Women Harshly"* Sunday times (23 October 2005) http:www.sundaytimes.co.za accessed on 15 October 2019 .
[284]Ibid.
[285] Ibid.
[286] A. Hassim "JSC: A few good women needed." Mail and Guardian 30 November 2012 available at http://mg.co.za/article/2012-11-300-00-jsc-a-few-good-women-needed accessed on 3 December 2012.

philosophy, "political views; cultural heritage, language, religious affiliations and geographical factors".[287]

The JSC has also been criticized for concentrating on race and gender without giving much attention to the above mentioned factors which are equally important.[288] If in most cases particular emphasis was to be given to these other important factors other than JSC preoccupying itself with issues of race and gender, this would largely assist the public and the JSC itself in the selection process and the public to understand the quality of judges expected. Significantly, this would help in the interpretation of appropriately qualified the "fit and proper person"[289]requirement as provided for in section 174 (1) of the constitution. The critical point now is whether section 174 (2) seeks to address demographic representation of the judiciary or it is there to guide in the appointment process. In an attempt to explain the interpretation of this section, former Constitutional Court judge, Justice Kriegler argued that:

> *"The constitutional mandate instructs the Judicial Service Commissioner in section 174 (1) to appoint people that are appropriately qualified. That is a precondition. That is a mandatory requirement. And then subsection (2), as a rider to that, says and in doing that, have regard to the racial and gender balance on the bench. And it's for obvious reasons that the constitution, while mentioning the transformational criterion in subsection (2), demands in subsection (1) as the primary and essential requirement that appointees be appropriately qualified.*

[287]M .Olivier 'A perspective on transformation of the South African judiciary (2014*) South African Journal on Human Rights449* page 317.
[288] M. Olivier The dangers highlighted cover the dangers of failing to seriously question deeper issues of race and gender beyond skin pigmentation and sex(2014*) South African Journal on Human Rights449* pages 450 - 452.
[289] The meaning of fit and proper has received a considerable amount of attention from the courts and academics alike but still remains vague. In the context of the admission of legal practitioners and their stricking from the roll, the courts are conferred a wide discretion in determining a person's "fitness". see for example, *Summerley v law Society ,Northern Provinces* (2006) ZASCA 59,2006(5) SA 613(SCA) paragraph 2.

Now these two essential factors, the one absolute and the other discretionary, have been turned on their heads."[290]

From the interpretation above it can reasonably be deduced that section 174 (2) is intended as a guide and not a yardstick for those charged with appointing judicial officers. One can argue that Justice Krigler's interpretation is found wanting as it leaves out the aspect of race which is the major concern of the constitution. It is not in dispute that the section seeks to address the imbalance between white and the black people and as discussed above since black people were previously disadvantaged during the apartheid era and for that reason the same section cannot be read in isolation of section 9 (2) of the constitution which section seeks to guard against discrimination. It is prudent to say that section 174 (2) of the constitution intends to break with the apartheid past which was tainted with inequality and gross human rights abuses and is setting a new trajectory for constitutional democracy in South Africa.[291] The provision is a test to the justice delivery system and to ascertain whether the JSC is committed to the constitution and the requirements of equality.[292] In the case of *Minister of Finance and Another v Van Heerden*[293] the Constitutional Court concluded as follows:

"The substantive notion of equality recognizes that besides uneven race, class and gender attributes *of our society, there are other levels and forms of social differentiation and systematic under – privilege, which still persist. The*

[290] J. Kriegler "Can Judicial Independence Survive Transformation?" A public lecture delivered by Judge Johann Kriegler at Wits School of Law on 18 August 2009, paragraph 19. https://constitutionallyspeaking.co.za accessed on 18 May 2018.

[291] The Preamble to the Constitution states that the Constitution is the supreme Law of the Republic, and was conceived so as to, amongst other objectives "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".

[292] A.Nel 'We must look into our national soul to make sure it lives forever", Deputy Minister of Justice and Constitutional Development, Sunday Independent accessed on 4 March 2012 at www.justice.gov.za./docs/article/20120304-dm-transformation.html 19 November 2012 accessed on 20 March 2017.

[293] *Minister of Finance and Another v Van Heerden* 2004(11) BCLR 1125 CC SA –particularly page 1127 paragraph 4.

constitution enjoins us to dismantle them and to prevent the creation of new pattern of disadvantage."[294]

It can be argued that section 174 (2) seeks to remedy inequality in the judiciary and is advocating for equality in the appointment process. Section 174 (1) and section 174 (2) are one and must be read together, meaning that while section 174 (1) requires that a candidate who is appropriately qualified, be it a woman or man, must be a fit and proper person, section 174 (2) comes in to ensure that those previously disadvantaged persons get priority on condition that they are qualified. It is further submitted that a judiciary which is reflective of race and gender dynamics promotes "public confidence in the administration of justice".

3.3 The appointment of the Chief Justice and Deputy Chief Justice

Section 174 (3) of the Constitution makes provision for the appointment of the Chief Justice and the Deputy Chief Justice. It provides:

"The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice…."

Whenever a vacancy arises for the office of the Chief Justice and Deputy Chief Justice the JSC is required to advertise the position, invite the President and the public to make nominations within a specified period.[295] Members of the public who intend to make nominations are required to complete nomination forms, which would be attached to the nominee's detailed curriculum vitae together with the nominee's written acceptance of the nomination. The nominee's curriculum vitae must contain his or her formal education and personal details which must be accompanied

[294] Ibid.
[295] Section 2 of the Government Gazette, 27 March 2003, JSC Act 9 of 1994, procedure of commission.

by a detailed completed questionnaire by the nominee prepared by the JSC. In the questionnaire document, the nominee is required to provide all the information in detail about his or her career path since the completion of tertiary education. The nominee must indicate his or her career history in the field of law, detailing previous employment, principal areas of practice, interests and involvement. He or she must indicate court work experience, noteworthy matters argued, number of reportable judgments written and appearances made in the court.[296] The nominees must also indicate in the detailed questionnaire form their significant contribution to the law and the pursuit of justice, whether they have publications in the field of law or publications in any other field. They should also include any existing social, financial, political or other circumstances which may bring the judiciary into disrepute or have implications on the probity of the nominee for the office of a judge. Nominees who fail to complete the detailed questionnaire form within the stipulated time will be formally disqualified from participating in the public interviews. The JSC would go through the nominees' forms and compile a list of suitable candidates to go for public interviews. The JSC shall recommend the suitable candidates with reasons and publicly announce them. They would "prepare a list of nominees with three names more than the number of appointments to be made and submit the list to the President,"[297] for appointment.

The President must appoint one of these nominees as the Chief Justice or Deputy Chief Justice depending on the advertised vacancy by the JSC. The President may consider that none of the nominees are suitable for appointment, he or she must advise the JSC with reasons,[298] and "require the JSC to submit a further list of three qualified persons" whereupon the President appoints.[299] It is critical to note that the Constitution of South Africa confines the President to

[296] South African Judicial Education Institute- Application form for aspirant judges training course: July 2020.
[297]Section 174 (4) (a) Constitution of the Republic of South Africa, 1996.
298 Section 174 (4) (b) and (c) Constitution of the Republic of South Africa,1996.
299 Section 180 (3) of Constitution

appoint from the list submitted by the JSC and should he fail to do so he or she must provide reasons. It can be argued that South Africa through its constitution has put in place a solid constitutional foundation. The rights given to citizens to challenge any violations on transparent and fair judicial appointments prevent the executive from manipulating the appointment process. The JSC on many occasions has been taken to court where suspicion of executive manipulation on its decisions on judicial appointments was observed.[300] The Constitutional Court which is the superior court in constitutional and non-constitutional matters[301] consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other Judges.

3.4 The appointment of other Judges of the Constitutional Court

The President appoints judges of the Constitutional Court following widespread consultations with the Chief Justice and political parties in the National Assembly. This is provided for in section 174 (4) of the Constitution.[302]Candidates are drawn from a list prepared by the JSC. The selection process starts with the Chief Justice informing the JSC of any vacancy. The JSC makes the vacancy public and invites nominations in writing. The nominations shall include the details of the prospective candidate which must be entered into a completed application form including "the applicant`s letter of consent to the nomination".

[300] *JSC v Cape Bar Counci*l,2013 (1) SA 170 (SCA),the Supreme Court of Appeal held that the decision by the JSC note to recommend any of the candidates it had interviewed for judicial appointment to fill existing vacancies without giving any reasons was prima facie irrational and invalid. The effect of this has been to ensure that the judicial appointment processes are transparent and fair paragraph 38.

[301]Section 167(3) Constitution of the Republic of South Africa, 1996.

[302] The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure,

(a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.

(b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.

(c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

The completed detailed application seeks background information on the applicant's personal and professional life among others and the applicant`s commitment to values of the constitution. The constitution, financial interests, and relevant experience are all factors that are considered. The nomination form will also require the applicant to include a statement from his or her professional organization with his or her recommendations for the job. The completed nomination forms will circulate among JSC members and eventually the JSC will appoint a committee to examine those applications. A list of prospective candidates is then drawn up which is distributed to all members of the JSC.[303] The JSC members would further examine the list for approval. The approved list would then be published for interviews. The JSC finally prepares a list which must have three nominees, with three more names than the number of appointments to be made.[304]

The President may make appointments from the list, and any nominees who were unsuccessful, as well as those appointments that remain to be made, must notify the JSC with reasons.[305] The JSC will thus supply another list by giving the President other nominees from whom he must appoint.[306]At all times, at least four members of the Constitutional Court must be judges at the time of their appointment. Significantly, appointees to the Constitutional Court must be South African nationals, which is significant.[307]

A Constitutional Court judge serves for a non-renewable term of twelve years or until he or she reaches the age of 70, whichever comes first, unless his or her term of office is extended by an

[303]www.judiciary.org.za. (n.d.). About the JSC. [online] Available at: https://www.judiciary.org.za/index.php/judicial-service-commission/about-the-jsc accessed on 10 May 2021.
[304] Ibid
[305]Section 174 (4) (b) Constitution of the Republic of South Africa, 1996.
[306]Section 174(5) Constitution of the Republic of South Africa, 1996, At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
[307] Ibid Section 174 (1) Constitution of the Republic of South Africa, 1996.

Act of Parliament.[308] However, a Constitutional Court judge whose 12-year term has expired or who has reached the age of 70 before completing 15 years of active service must continue in office until he or she completes 15 years of active service or reaches the age of 75, whichever comes first, according to section 4 of the Judges Remuneration and Conditions of Employment Act 247 of 2001.Section 8 (a) of the Judges Remuneration and Conditions of Employment Act 247 of 2001 further provides that:

> *"A Chief Justice who becomes eligible for discharge from active service in terms of section 3(l)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years".*[309]

It could be argued that section 8 (a) of the Judges Remuneration and Conditions of Employment Act, which allows the President to extend a Constitutional Court judge's term of office, is incompatible with section 176 (1) of the South African Constitution, which states that only Parliament has the power to extend a Constitutional Court judge's term of office.

It is trite that there is an improvement from the apartheid[310] past where judicial appointments were secretive without public engagement and at the instance of the Minister of Justice. In all instances when the President is to appoint a judge consultations take place with the JSC[311] and there is a clearly laid out procedure which has to be followed before a Constitutional Court judge is to be appointed. Section 174 (4) (a-c) of the Constitution of South Africa provides a detailed

[308]Section 176 (1) Constitution of the Republic of South Africa, 1996. "A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge."
[309]*Justice Alliance of South Africa v President of South Africa and others* 2011 (5) SA 388 (CC) D paragraph 7.
[310] R. Carmel." The South African Judicial service commission" http://www.law.cam.ac.uk/faculty - resources/10000879.doc) accessed on 30 December 2018.
[311] Section 174 (4) (a-c) Constitution of the Republic of South Africa, 1996.

deliberative process which involves members of the public and the President. In this regard, the constitution aims to ensure high-quality judicial nominations that boost public trust in the system.

3.5 The appointment of the Judge President and Deputy Judge President of the Supreme Court of Appeal

The President appoints the President and Deputy President of the Supreme Court of Appeal after conferring with the JSC.[312]If a vacancy occurs or will occur in the SCA, the JSC will be notified by the President of the Supreme Court of Appeal or the relevant Judge President. The JSC will publicize the position and invite the President and the general public to submit nominations within a specified timeframe.[313]The general public intending to make nominations must fill in nomination forms. These forms will require the member making the nomination to identify himself or herself and the candidate against whom nomination is being made and the division of the SCA for which the candidate is nominated for. Prospective candidates' information is included in the nomination forms, as well as the applicant's letter of agreement to the nomination. The candidate must include a detailed curriculum vitae indicating his or her formal qualifications, as well as a questionnaire type document created by the JSC and filled by the candidate, to the nomination forms. The candidate and the members of the public are also required to attach any other pertinent information as he or she or the person nominating him or her, wishes to provide. The candidate must include any significant contribution he or she makes to the law which may be publications and reported written judgments. They should also include any physical disability or health conditions and any existing factors being it social, financial, political or other circumstances which may affect the integrity of the judiciary. Nominees who fail to complete a detailed questionnaire form would be disqualified from participating in the

[312] Ibid section 174 (3) Constitution of the Republic of South Africa, 1996. The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
[313]Section 3(a) of the JSC Regulations number 423 of 2003.

public interviews. The Commission would be provided with a list of the nominated candidates and the screening committee shall be constituted which would closely go through the list and prepare a list of candidates to be interviewed. The list again shall circulate among members of the JSC for recommendations. The list would be published for comments from the Law Society or recognized Bar Association and members of the public. The comments received shall be distributed to the commission. The candidates would be informed of any adverse comments received and they may be questioned about them at interview. The JSC would publicize the list of candidates to undergo interviews and provide the date, place and time on which those interviews would take place. The publication would allow access and attendance of members of the public who may wish to witness the proceedings.[314]

The Chairperson or deputy Chairperson of the commission shall preside over the interviews. All Commissioners would be given an opportunity to interview the nominees and the commission is required to be fair in their questions that is, there must be uniformity of questions and or length of the interviews. After the interviews deliberations on the performances of the nominees shall be conducted in private and the selection of successful candidates shall be based on merit. The selection of the final list of successful candidates shall be compiled against diverse cultural background and gender composition of South Africa. The JSC would then prepare a list of three qualified persons as nominees and submit it to the President for appointment. The appointment of the Judge President and Deputy Judge President is apparently within the discretion of the executive. It is important to note that the President's executive discretion on the appointment of other judges of the Supreme Court of Appeal is limited to the list submitted by the JSC.[315] It is therefore critical to note that the implications of the constitution is properly adhered to, which

314Judges Matter.(n.d.). JSC Interviews. [online] Available at: https://www.judgesmatter.co.za/jsc-interviews/] accessed 15 Jan. 2022

[315]J.D Van der Vyver, 'Separation of Powers', *South African Journal of Public Law Volume 8 (*1993) page 177.

states that the President appoints judges on the advice of the JSC.[316] Thus it can be properly put that the JSC plays a critical role in the appointment of judges of the SCA. It would therefore appear that the Supreme Court of Appeal is an elevation court for judges who would have been in the lower courts.[317] One can however suggest that there is need for the Legislature to provide a procedure in relation to the appointment of other judges of SCA.[318]

3.6 The appointment of other Judges in the Supreme Court of Appeal

The President, in agreement with the JSC, appoints the remaining judges in the SCA. On the advice of the JSC, the President must appoint judges to all other courts under section 174(6) of the constitution. [319]

The President of the SCA in the event of a vacancy appearing would inform the JSC of such a vacancy.[320]The JSC, under section 178 (6) of the constitution, has the authority to nominate judges using procedures other than those set out in the constitution. The processes that have been adopted are published in the gazette.[321] The appointment procedures for other judges of the SCA are similar to those of the appointment of other judges of the Constitutional Court. The President would appoint the rest of the judges of the SCA from a list prepared by the JSC after a rigorous process as discussed above.

The President appoints other judges to the SCA after consulting the JSC.[322] The appointment procedure in relation to the other judges of the SCA is the same as in the appointment of other

[316] Section 174(6) ,Constitution of the Republic of South Africa,1996,The President must appoint the judges of all other courts on the advice of the Judicial Service Commission".
[317] G. Manyatera, *A critic of the Superior Courts judicial selection mechanisms in Africa: The case of Mozambique, South Africa and Zimbabwe* University of Pretoria ,2015 page 148.
[318] Ibid page 148.
[319]See also section 3 of the JSC Regulations no.423 of 2003.
[320] Government Gazette 24596,27 March 2003,JSC Act 9 of 1994;Procedure of Commission.
[321] L.V.D Vijver, *The judicial institutions in Southern Africa; A comparative study of common law jurisdictions*, University of Cape Town 2006 page 1.
[322]Section 174 (3) Constitution of the Republic of South Africa, 1996. The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National

judges of the Constitutional Court.[323] The only difference is that the President of the Supreme Court of Appeal notifies the JSC whenever a vacancy arises.

3.7 The appointment of the Judge Presidents and Deputy Judge Presidents of the various High Court Divisions

After consulting the JSC, the President appoints the President and Deputy President of the High Court.[324] The processes and procedures of appointing judicial officers of SCA and the High Court are similar to those followed in the appointment of other Constitutional Court judges. The only difference however is noticeable from the court in which a vacancy would have arisen.[325] The President of the SC or the Judge President of the High Court informs the JSC of the vacancy.

The rest of the judges of the various High Court divisions are appointed by the President after consultation with the JSC.[326] In the event of a vacancy the Judge President of the High Court notifies the JSC. The JSC will then publish the vacancy in the gazette and allow nominations from the President and the public. The same nomination procedures in respect of appointments of other Constitutional Court judges are then followed.[327]It is critical that the JSC publishes judicial vacancies and the same processes and procedures apply in the appointment of other judges of the Constitutional Court, Supreme Court of Appeal and High Court.

Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

[323] Ibid Section 174(3) Constitution of the Republic of South Africa 1996.

[324] Section 174(3) Constitution of the Republic of South Africa,1996.

[325] Paragraph 3(a) Government gazette 24596 of 2003, The procedure for the selection of candidates for appointment as judges of the High Court in terms of section 174 (6) of the Constitution shall be as follows: (a) The President of the Supreme Court of Appeal or responsible Judge President shall inform the Commission when a vacancy occurs or will occur in the Supreme - Court of Appeal or any provincial or local division of the High Court.

[326]Section 174 (3) Constitution of the Republic of South Africa, 1996.

[327] Section 174(4) Constitution of the Republic of South Africa, 1996. 'The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure'

3.8 Qualifications of a Judge in South Africa

The constitution expressly provides the requirements necessary in appointing judges.[328] There are two critical elements which have to be considered, which are, the person to be appointed must be "appropriately qualified" and also that he or she must be "a fit and proper person "to be appointed a judge.[329]Any person appointed to the Constitutional Court must be a South African citizen. This is however a standard measure and denotes the threshold which a person to be appointed a judge has to meet. The constitution however, does not specifically provide in detail the contents of these two essential requirements. The definition of "appropriately qualified" personnel has been given a wider definition other than mere possession of a tertiary degree[330] but to include appropriate skills and experience in the legal fraternity which makes one suitable for appointment as a judge.[331] The former president of the Supreme Court of Appeal P. Mpati had this to say:

> *"The requirement of "suitably qualified" is not defined, but cannot be interpreted as being a reference to academic qualifications only, legal knowledge and experience must form part of that requirement."*[332]

There is, however, no correct way to classify what constitutes qualities which relate to the "fit and proper person" requirement. The classification may be derived from the Constitution of South Africa itself. Shientag emphasized the independence, impartiality, justice, integrity,

[328] Section 174 Constitution of the Republic of South Africa,1996.
[329] Section 174(1) 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.
[330] One definition of a qualification is "an official record of achievement awarded on successful completion of a course of training or passing of an examination "www.the freedictionary.com/qualification accessed on 6 June 2020.
[331] F. Rabkin"that merit is not a value free or objective concept and former Chief Justice Arthur Chaskalson (that merit means different things to different people. The fact, its meaning may be contested does not mean that it is not objective" Business Day 4 January 2010.
[332] See Transformation of the judiciary –a constitutional imperative, inaugural lecture by the president of the supreme court of appeal, judge Mpati, University of the free state, 6 October 2004; www.supreme court of appeal/speeches/mpati.pdf accessed on 17 July 2009.

judicial temperament, and adherence to constitutional values as judicial traits.[333] Any person appointed as a judge must be independent and able to withstand any external pressures be it from the executive or any private or commercial interests.[334] Section 165 (2) of the constitution requires judges to be impartial and to execute their duties without fear, favour or prejudice. Judges are also expected to show a high level of integrity,[335] and to make judgments in respect of the law and the constitution.[336] Judicial temperament, which involves behaviour, reasoning and reactions to situations also constitute qualities of a fit and proper person. When evaluating judicial temperament considerations have to be given to:

> *"The judge's compassion, decisiveness, opens mindedness, courteous, patience, freedom from bias and commitment to equal justice under the law."*[337]

Judges as custodians of the constitution must be committed to constitutionalism. Values inherent in a constitution are supremacy of the constitution, rule of law, fundamental human rights and freedoms, recognition of inherent human dignity, worth and equality of each human being, gender equality, good governance, the principle of separation of powers, justice, accountability and respect for vested rights.[338] A fit and proper person must be committed to the realization of those values as enshrined in the constitution. They must also be able to pronounce justice in a diverse and pluralist society and as such they must have respect for difference. Justice Sachs held

[333] Bangalore Principles of Judicial Conduct 2002 and the Guideline for judges of South Africa: Judicial Ethics in South Africa issued in 2000 by the Chief Justice, The President of the Constitutional Court, the Judge's President of the High Court and the labour Appeal Court and the President of the Land Claims Court.
[334] Former Australian Chief Justice Murray Gleeson expressed the view to the author that a desire for popularity is a quality that often undermines independent – mindedness. Interview with the : Sydney 19 June 2009.
[335] Bangalore Principles of Judicial Conduct 2002 and the Guideline for judges of South Africa: Judicial Ethics in South Africa issued in 2000 by the Chief Justice, The President of the Constitutional Court, the Judge's President of the High Court and the labour Appeal Court and the President of the Land Claims Court.
[336] Section 165(2) Constitution of the Republic of South Africa,1996.
[337] J.B McMillion "Backgrounder" of the American Bar Association Standing Committee on the Federal Judiciary, May 9, 2014 page 6 available on http//www.abanet.org./scfedjud/federal- judiciary09.pdf/ accessed on 10 May 2019.
[338] Chapter 2 Constitution of the Republic of South Africa,1996.

in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others.*[339]

> *"It is no exaggeration to say that the success of the whole constitutional endeavor in South Africa will depend in large measure on how successfully sameness and difference are reconciled."*[340]

It is apparent that integrity constitutes a critical component of the fit and proper person requirement. Integrity refers to qualities such as honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, and reputability that a person possesses.

3.9 JSC Procedures on judicial appointments in South Africa

There is need for JSC to ensure that the procedure for assessing judicial candidate's qualifications is rigorous and transparent. The JSC is mandated to come up with its own procedures on judicial appointment process.[341] Whenever a vacancy arises in the judiciary, the JSC asks for nominations,[342] which consist of a letter of nomination, the candidate's acceptance to the nominations and the questionnaire form prepared by the JSC commission which must be filled by the prospective judicial candidate. It must be extensive showing among other things the candidate's previous employment history and his or her membership to legal, community and political affiliations.[343] The form also will seek to know the candidate's financial information, property ownership or interests and legal publications made by the prospective candidates. This

[339]*National Coalition for Gay and Lesbian Equality v Minister of Justice and Others.* 1999 (1) SA 6(CC) paragraph 107.
[340] Ibid.
[341]Section 178(6) Constitution of the Republic of South Africa, 1996.
[342] In the case of Constitutional Court, vacancies are announced publicly. In the case of the High Court and Supreme Court of Appeal, vacancies are announced to the organized legal profession and the department of justice. JSC commissioners are afforded the opportunity after the closing date for nominations to make additional nominations should they wish to.
[343]These forms are available at the Constitutional Court website at www.concourt.gov.za accessed on 11 December 2021.

questionnaire method will seek to shed more light on the candidate's desirability and capability to hold office as a judge.

The forms however, will be circulated amongst members of the JSC and its sub-committees for assessment. The JSC will come up with a list of candidates shortlisted for interviews which are again distributed among its members for approval, which list will be published in the media. The same procedure applies to those applying for judicial appointment for the first time and even to those already serving as judges but however seeking promotions or transfer to other courts. It is one of the requirements that shortlisted candidates undergo interviews and this will also apply in situations where there is a single candidate shortlisted. Members of the public will be invited to participate in the appointment process and everything has to be conducted in a transparent manner. Concern however has been noted on the non-publication of those candidates' not shortlisted for interviews. The idea behind that is to protect the privacy of the individual concerned.[344] Interviews will take place in private and candidates will be nominated by consensus or majority vote which ever might be the case. Comments on nominations will be accessible from organized legal profession, Ministry of Justice, or any other institute identified by the commission.[345]

3.10 Appointments of acting judicial officers in South Africa

Acting judges are very important in the justice delivery system because they ameliorate the shortage of judges before formal appointments are made. Experience as an acting judge increases a candidate's chances to be appointed a permanent judge. The JSC in South Africa it appears is

[344] This concern seems somewhat misplaced, particularly since candidates voluntarily submit their names for consideration. Public knowledge of their candidacy may therefore not concern them.

[345] Comment is sought from "institutions "as defined in the JSC's procedures. The institutions are the Association of Law Societies, the Black Lawyers Association, the Department of Justice, the General Council of the Bar, the National Association of Democratic Lawyers, the Society of Teachers of Law and such other institutions as the Commission may identify from time to time, with an interest in the work of the Commission .It is not known whether others have been formally identified.

reluctant to appoint a candidate who has not worked as an acting judge although it has no control over appointment of acting judges.[346] Observations can be noted in respect of the appointment of acting judges in South Africa.[347]In the event of a vacancy or if the person holding such an office is absent, the Constitution allows for the appointment of acting judges to the Constitutional Court.[348] It can be noted that there are no limitations to the appointment of acting judges in other superior courts. This can be explained as the reason for the high number of acting judges in the High Court's various divisions.[349]

A limitation in the Constitutional Court on appointment of acting judges was explained in the case of *Hlophe v Premier of the Western Cape Province.*[350]The appointment of between six and eight acting Constitutional Court judges was ruled unlawful by the Constitutional Court. It is critical to note that the reason behind this judgment is to the effect that if a large number of acting judges are appointed to serve in the Constitutional Court this will work against section 178 of the Constitution of South Africa.[351] Section 178 of the Constitution of South Africa establishes the JSC which body is mandated with judicial appointments, so in reality that will imply interference by the executive in judicial appointments. More so, as a final court of appeal it is quite compromising for it to be dominated by judges without full tenure of office as this weakens their independence.

Acting judicial officers are appointed in accordance with section 175 of the South African Constitution.

[346]M.T.K Moerane, 'The meaning of Transformation of the Judiciary in the New South African Context', 713.*South Africa Law Journal Volume 120* page 51.
[347] M. Olivier, 'The appointment of Acting Judges in South Africa and Lesotho' *Obiter Volume 27* (2006) page 554.
[348] J. Trengove'The prevalence of acting judges in the High Court- Is it consistent with an independent judiciary?' 2007, Advocate (Dec), 39 at https:// www.biblio.com/book/instructor-resource-manual accessed on 26 May 2019.
[349]Ibid.
[350]*Hlophe v Premier of the Western Cape Province* 2012 (6) SA 13 (CC) paragraph 22.
[351]J.Trengove, 'The prevalence of acting judges in the High Court- Is it consistent with an independent judiciary?' 2007 Advocate (Dec), 39 at https:// www.biblio.com/book/instructor-resource-manual accessed on 26 May 2019.

"The President may appoint a woman or a man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice. 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."[352]

Acting judges are appointed on the recommendation of the Minister of Justice to the President.[353] Criticism abounds on appointment of acting judges principally because it negatively impacts judicial independence. Furthermore, it purportedly allows executive interference in the appointment process as they can circumvent rigorous procedures as provided in the constitution. The controversy surrounding the appointing of acting judges was clarified in the case of *In re Certification of the constitution of the Republic of South Africa 1996.*[354] The basis of the objections was to the effect that the Minister of Justice should have discretion in the appointment of all acting judges except for acting judges to the constitutional court. The discretion for the Minister to appoint acting judges to the Constitutional Court was said to negate the principle of separation of powers.

The Constitutional Court dismissed the objections after acknowledging its merits and stated that there were securities in place to protect section 175 of the Constitution from possible abuse by the executive. It went on to say that there is urgency in replacing temporal positions and that it is

[352] Section 175 (2) Constitution of the Republic of South Africa,1996.
[353] Ibid section 175 Constitution of the Republic of South Africa,1996.
[354] *Ex Parte Chairperson of the constitution Assembly: in re Certification of the constitution of the Republic of South Africa* 1996 (First Certification Judgment) 1996 (4) SA 744 (CC) paragraph 128.

difficult for the JSC to convene and make such appointments expeditiously. The Constitutional Court argued that the provision of section 165 of the South African constitution is a safeguard that prevents the Minister of Justice from interfering with acting judges.[355]

3.11 Conclusion

The Republic of South Africa provides the way in which judges are to be appointed in section 174 of its Constitution. The section specifies the procedures to be followed whenever a vacancy occurs in the Constitutional Court, Supreme Court of Appeal, or High Court, as well as the procedures to be followed in the appointment of the Chief Justice and Deputy Chief Justice, Constitutional Court judges, President and Deputy President of the Supreme Court of Appeal, and all other judges.[356] The Government Regulations No.R.423[357] complements the South African Constitution by a giving a detailed procedure with which the JCS has to follow in the appointment process. It is a fact that the procedures provided for in the Constitution on judicial appointments are open and transparent which is critical in the appointment of apex court judges. The invitation of public nominations and conduction of public interviews is critical in the preservation, protection and promotion of judicial independence. Concerns however were raised by some critics that besides section 174 being touted as somehow the best as it is open and transparent the Constitution used obscure language when it referred to appointment of any "appropriately qualified woman or man who is fit and proper"[358]which language is tantamount to many interpretations[359] as this does not refer to a mere academic qualification but expertise and experience in the legal field. The Constitution did not specifically state clear set out rules or

[355]Ibid.
[356]Section 174(3)(4)(6) Constitution of the Republic of South Africa,1996.
[357] Dated 27 March ,2003.
[358]Section 174(1) Constitution of the Republic of South Africa,1996.
[359] See S.Cowen ,"Judicial Selection in South Africa page 10" ,available at www.dgru.uct.ac.za//....researchreports/ accessed on 10 April 2019.

standards of assessing what constitutes “appropriately qualified woman or man who is fit and proper” for appointment given judicial transformation in South Africa.

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CHAPTER 4

THE PROCESS OF THE APPOINTMENT OF JUDGES IN ZIMBABWE

4.1 Introduction

This chapter will examine the transition from the Lancaster House constitution to the current Zimbabwean constitution, which was enacted in 2013, and will highlight the favorable reforms made to the nomination of judges. Under the Lancaster House constitution judicial appointments were secretly made,[360] without any public involvement as the whole process was secretive. The new constitution spells out in particular how judicial appointments should be made in an open, fair, and professional way.[361]

4.2 The process of appointment

The JSC is required by law to publicize judicial vacancies and accept nominations from the President and the general public [362] Public advertisement for judicial vacancies ensures appointment of quality judges and promotes openness and transparency. The judicial selection process must be premised on professionalism and integrity.[363]Appointment of judges on merit and on professional grounds guards against external pressure being exerted on the judiciary.[364] The process of judicial appointments must not be made with improper motives. In order to guard against this an independent commission must be tasked to conduct the selection process.

Section 180 of the Constitution governs the appointment of judges in Zimbabwe. Under the Lancaster House constitution, the selection process was secretive, without any advertisements of judicial vacancies or involvement of the public which conduct impacted negatively on the

[360]L .Madhuku , 'The Appointment process of Judges in Zimbabwe and its implications for the administration of justice'*, South Africa Publiekreg- South Africa Public Law, Volume 21, Issue 2*, January 2006, page 345.
[361]Section 18 Constitution of the Republic of Zimbabwe, 2013.
[362] Section 180(2)(a)(b Constitution of the Republic of Zimbabwe, 2013.
[363]Principle 10 of the Basic Principles on the independence of the judiciary.
[364] *Aguirre Roc, Rey Terry and RevoradoMarsano v Peru- A court HR, Constitutional Court case,* Order (1ACtHR, 14 March 2001*)* paragraph 66.

integrity of the judiciary. Although the Lancaster House constitution stated that judges are appointed by the President following consultation with the JSC, the JSC's position was not clearly defined. Also, the procedure to be followed in the appointment of a judge was not clearly defined. According to Matyszak the Lancaster House constitution contained weak provisions on judicial appointments which created loopholes allowing the executive to manipulate the process. Section 180[365] marks a significant departure from the old system since it advocates for transparency in the whole appointment process. Fundamentally, this will promote public confidence in the appointment process as the whole process is under public scrutiny. It can be argued that the appointment process as provided for in section 180 strives to ensure accountability and transparency in the selection of judges. The JSC has a constitutional mandate to execute its activities in a transparent, fair, and just way under this clause.

4.3 The appointment of the Chief Justice and the Deputy Chief Justice of the Constitutional Court in Zimbabwe

Section 180 provides 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-*

[365]Section 180 Constitution of the Republic of Zimbabwe,2013

(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
(e) 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)(e) are 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 President must cause notice of every appointment under this section to be published in the Gazette.

(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

(e) 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)(e) are 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 President must cause notice of every appointment under this section to be published in the Gazette."

After consulting with the JSC, the President picks the Chief Justice and Deputy Chief Justice of the Constitutional Court. In the event of a vacancy in the Constitutional Court, the Chief Justice notifies the JSC. The JSC advertises the position in the press indicating posts available inviting the President and the public to make nominations.[366] The JSC in its advertisements will state the qualifications expected for one to be a Constitutional Court judge. Members of the public who intend to make nominations would be required to complete nomination forms which must be attached to the nominee's detailed curriculum vitae. The nominees are also required to complete nomination forms and in those forms they must provide their personal details and contact addresses.[367]

[366]Section 180(2)(a)(b) Constitution of the Republic of Zimbabwe,2013.
[367] Ibid.

Nomination forms must be received by the JSC within a period stipulated by the body and advertised in the press. A list of nominations received will be compiled by the JSC and would be due for inspection by members of the public. The JSC will constitute a subcommittee which would go through all nominations received to check whether all information required on those forms is completed in detail. The information will be assessed against the legal requirements as provided in the constitution among others, the issue of age, citizenship, academic history and experience. Nominations and nominees who do not meet the requirements would be rejected and reasons for such rejection would be formally communicated to the nominees. The list of disqualified nominees may be published.

Nominees shortlisted for interviews are required to fill in a detailed questionnaire form, detailing their career path since completion of their tertiary education. They should also include employment details in the legal fraternity, court work carried out, matters argued, reported judgments, court appearances in and outside Zimbabwe if any. They should also indicate if they have made any significant contribution to the legal field in pursuit of justice, whether there are publications in the field of law or any other field. Nominees should also include their social, financial, political or other interests they might have which may bring the judiciary into disrepute. Nominees failing to complete the detailed questionnaire within the stipulated time would be disqualified from participating in public interviews and again the list of disqualified nominees would be published.

The list of qualifying nominees to undergo public interviews is referred to the Law Society of Zimbabwe or any other relevant organization for comment on professional grounds and those comments would be taken into consideration by the JSC in determining whether the nominee is a fit and proper person for judicial appointment.

The list would also be accessible to the public for comment. The JSC would thereafter publish a date, place and time for public interviews. The chairperson and deputy chairperson of the JSC shall preside over the interviews. The JSC after the interviews will privately deliberate on suitable nominees which nominations must be based on merit. The final list of suitable nominees must be prepared against gender and diverse cultural backgrounds. The JSC is compelled to unanimously agree on the list of names suitable for submission to the President for appointment in terms of the law. If the President determines that none of the applicants on the list are suitable for appointment, he or she will request that the JSC compile a new list of three qualified candidates from which he or she will appoint one of the nominees to the position.

According to Mr. Matyszak a prominent lawyer and academic, the appointment process under the new constitution marked a complete departure from the secretive method of appointment under the Lancaster House constitution and he argued that:

> *"The manner in which appointments are to be made under the (then) draft has also been improved and diminishes Presidential influence in this regard. Rather than the opaque manner in which the JSC comes to consider prospective candidates which exists under the (then) current constitution."*[368]

It can be further argued that this method of judicial appointment is widely recommended by regional and international instruments as it offers a transparent procedure for appointing judges.

[368] D. Matyszak "Presidential Power and the Draft Constitution," RAU February 2013 available at http://researchandadvocacyunit.org/system/files/PRESIDENTIAL%20POWER%20AND%20THE%20DRAFT%20CONSTITITION.pdf accessed on 5 August 2017.

4.4 The appointment of other Judges of the Constitutional Court

The President appoints other judges to the Constitutional Court after consulting with the JSC.[369]. When a vacancy in the Constitutional Court opens, the Chief Justice informs the JSC, which then officially publishes the position and invites nominations. Nominations must be made in writing and contain the potential candidate's information, which must be included into a completed application form, as well as the applicant's letter of agreement to the nomination.

The completed application form is a questionnaire-style document that asks about the applicant's personal and professional history, among other things. The applicant will also be required to provide a statement from his or her professional organization along with his or her recommendations for the job on the nomination form. The completed nomination forms will be sent among JSC members, and the JSC will appoint a committee to review them.

A list of potential candidates is then compiled and distributed to all JSC members. The JSC members would go over the list again before approving it. After then, the approved list would be made public for interviews. Finally, the JSC will compile a list of three qualified candidates for the position of judge and present it to the President.

The President may make appointments from the list and if he or she feels that none of the nominees are suitable he or she may require the JSC to submit a further list of three qualified persons upon which he or she must appoint.

[369]Section 180 (1) Constitution of the Republic of Zimbabwe,2013.

4.5 The appointment of the Judge President and Deputy Judge President of the Supreme Court of Appeal

After consulting with the JSC, the President appoints the Judge President and Deputy Judge President of the Supreme Court of Appeal.[370] When appointing the Judge President and Deputy Judge President of the Supreme Court of Appeal, the President is not bound by the JSC's views or recommendations. If the President believes that none of the individuals on the list are acceptable for appointment, he or she may ask the JSC to submit a new list.[371]

If a vacancy occurs or will occur in the Supreme Court of Appeal, the JSC will be notified by the President of the Supreme Court of Appeal or the relevant Judge President. The JSC will publicize the position and invite the President and the general public to submit nominations within a specified timeframe.[372]Members of the public intending to make nominations must fill in nomination forms. These forms will require the member making the nomination to identify himself or herself and the candidate against whom nomination is being made and the division of the Supreme Court of Appeal for which the candidate is nominated for. The nomination forms include information about potential candidates as well as a letter of approval to the nomination from the applicant. The candidate must include detailed curriculum vitae indicating his or her formal qualifications, as well as a questionnaire type document created by the JSC and filled by the candidate, to the nomination forms. The candidate and members of the public must also include any other relevant information that he or she, or the person nominating him or her, desires to include. The candidate must include any significant contribution he or she makes to the law which may be publications and reported written judgments. They should also include any physical disability or health conditions and any existing factors being it social, financial, political or other circumstances which may affect the integrity of the judiciary. Nominees who fail to

[370]Section 180 Constitution of the Republic of Zimbabwe, 2013
[371]Section 180 Constitution of the Republic of Zimbabwe, 2013
[372]Section 180 (2) Constitution of the Republic of Zimbabwe,2013

complete a detailed questionnaire form would be disqualified from participating in the public interviews. The Commission would be provided with a list of the nominated candidates and the screening committee shall be constituted which would closely go through the list and prepare a list of candidates to be interviewed. The list again shall circulate among members of the JSC for recommendations. The list would be published for comments from the Law Society or recognized Bar Association and members of the public. The comments received shall be distributed to the commission. The candidates would be informed of any adverse comments received and they may be questioned about them at interview. The JSC would publicize the list of candidates to undergo interviews and provide the date, place and time on which those interviews would take place.

The Chairperson or deputy Chairperson of the commission shall preside over the interviews. All Commissioners would be given an opportunity to interview the nominees and the commission is required to be fair in their questions that is, there must be uniformity of questions and or length of the interviews. After the interviews deliberations on the performances of the nominees shall be conducted in private and the selection of successful candidates shall be based on merit. The selection of the final list of successful candidates shall be compiled against diverse cultural background and gender composition of Zimbabwe. After that, the JSC would compile a list of three qualified individuals and send it to the President for consideration.

4.6 The appointment of other Judges in the Supreme Court of Appeal

After consultation with the JSC, the President appoints further judges to the SCA.[373] The procedure for appointing the other justices of the SCA is the same as for appointing other judges

[373]Section 180(2) Constitution of the Republic of Zimbabwe,2013.

of the Constitutional Court.[374]In the case that a vacancy occurs or will occur in the SCA, the President of the SCA will notify the JSC. After a thorough process as described above, the President would pick other SCA justices from a list produced by the JSC. The main distinction is that whenever a vacancy occurs, the President of the Supreme Court of Appeal notifies the JSC.

4.7 The appointment of the Judge Presidents and Deputy Judge Presidents of the various High Court Divisions

After consulting the JSC, the President appoints the President and Deputy President of the High Court. [375] The processes and procedures of appointing judicial officers of SCA and the High Court are similar to those followed in the appointment of other Constitutional Court judges. The only difference however is noticeable from the court in which a vacancy would have arisen. The JSC is notified of the vacancy by the President of the SC or the Judge President of the High Court.

After consulting with the JSC, the President appoints the remaining justices of the various High Court divisions.[376] In the event of a vacancy the Judge President of the High Court notifies the JSC. The JSC will then publish the vacancy in the gazette and allow nominations from the President and the public. The same nomination procedures in respect of appointments of other Constitutional Court judges are then followed.[377] It is critical that the JSC publishes judicial vacancies and the same processes and procedures apply in the appointment of other judges of the Constitutional Court, Supreme Court of Appeal and High Court.

[374]Section 180(2) Constitution of the Republic of Zimbabwe,2013.
[375] Section 180(1) Constitution of the Republic Zimbabwe,2013.
[376]Section 180(3) Constitution of the Republic of Zimbabwe,2013.
[377]Section 180 (3) Constitution of the Republic of Zimbabwe,2013.

4.8 Qualifications of a judge in Zimbabwe

If a person is a Zimbabwean citizen, he or she is competent for appointment as a Constitutional Court judge, according to section 177 of the constitution. He or she must be over the age of forty and have a thorough understanding of constitutional law. In addition, a Zimbabwean citizen who has served as a judge of a court in a country where the common law is Roman–Dutch or English law and who has qualified as a legal practitioner in Zimbabwe or any Roman–Dutch or English law jurisdiction for at least twelve years qualifies to serve on the Constitutional Court. Finally, a person must be physically and mentally fit to take office.[378] It is no doubt that these constitutional criteria ensure appointment of a person with vast legal knowledge to the apex court.

The key critical requirements of the constitution are demonstration of "sound knowledge" in constitutional law and most importantly that he or she must be a fit and proper person. These two critical requirements are quite contentious and lack clarity unlike the other requirements which are straight forward relating to age, citizenship, and years of experience in both Roman–Dutch and English jurisdictions. The constitution is silent in respect of what it entails to be sound knowledge and the requirements of fit and proper person. It's uncertain if a legal degree is enough to meet the requirements for competent constitutional law knowledge, or if a person must have specialized in constitutional law in theory or practice. One wonders as to what the meaning of these two constitutional requirements is. Under the Lancaster House constitution judicial appointments were secret and there were no clear criterion requirements on which appointments were made.[379] The new constitution of Zimbabwe must have clarified the meaning of these two constitutional requirements. The constitution also provides qualification requirements for judicial

[378]Section 177(2) Constitution of the Republic of Zimbabwe, 2013.
[379]Interview with Law society of Zimbabwe secretariat, Harare, 9 August 2018.

appointments to the Supreme Court.[380]An eligible candidate for appointment must be a citizen of Zimbabwe and must be at least forty years old. An eligible candidate for appointment must be a Zimbabwean citizen with a minimum age of forty. He or she must have served as a judge in a Roman–Dutch or English law jurisdiction for at least ten years, or have qualified to practice law in any Roman–Dutch or English law jurisdiction for at least 10 years.[381]Finally, the person must be "a fit and proper person" to hold office as a judge.[382] Again, an analysis of this provision shows that other constitutional requirements are clear but the constitution retains the contentious requirement of a fit and proper person as a critical requirement for one to be appointed a judge in the Supreme Court.[383]The JSC should develop additional criteria to augment and guide the interpretation of this constitutional stipulation.

The constitution establishes qualification requirements for judge nominations to the High Court. The individual must be at least forty years old. He or she must have served as a judge in a Roman-Dutch or English-law jurisdiction or qualified to practice law for at least seven years in Zimbabwe,[384] or another Roman–Dutch or English-law jurisdiction. To serve as a judge, the nominee must be "a fit and proper person".[385] It is clear that the constitution establishes judicial criterion standards for all superior courts that are more or less comparable. The three superior courts' criterion requirements differ only in terms of prospective candidates' professional experience and the requirement of solid constitutional law understanding.

The common requirement in all superior courts for judicial appointment is that a prospective candidate must be "a fit and proper person". These requirements are similar to those outlined in

[380]Section 178(1) Constitution of the Republic of Zimbabwe, 2013.
[381]Section 178(1)(b) Constitution of the Republic of Zimbabwe,2013.
[382]Section 178(2) Constitution of the Republic of Zimbabwe, 2013.
[383] S. Cowen in her article titled "For a comprehensive discussion of what constitutes a 'Fit and Proper person" in the South African context" published on 15 May 2016.
[384]Section 179 Constitution of the Republic of Zimbabwe,2013
[385] Ibid

the South African constitution.[386]The underlying ethos is to make sure that qualified individuals are appointed to the bench and that the fit and proper person requirement is maintained at all cost. Section 184[387] of the Constitution of Zimbabwe is a replica of section 174 (2)[388] of the Constitution of South Africa. It could be stated that the two constitutions provide a roadmap towards constitutional democracy by categorically guaranteeing race and gender equality in judicial appointments.[389]

4.9 JSC Procedures on judicial appointments in Zimbabwe

The JSC in Zimbabwe has since come up with guidelines on judicial appointments.[390] Appointment procedures must be open and transparent to everyone. Whenever a vacancy occurs public nominations are invited by the JSC and prospective candidates must fill in forms called nomination forms. In these forms nominees must give their personal details including contact addresses. The nominees must attach their curriculum vitae together with nomination forms. A list of nomination forms received must be prepared and must be open for inspection by members of the public. These forms will circulate among members of the JSC and its sub-committees for assessment. The assessment will be on whether information required by the nomination forms has been completed in full by the nominees. The committee will also check the signatories on the nomination forms against the nominees and also to check whether they have attached their curriculum vitae. An assessment will be made on the compliance with the legal requirements against each nominee, thus the issue of age, citizenship, academic and experience requirements

[386]174. (1) 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.
[387]Appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe.
[388]The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
[389]Allen , "While this assessment refers to women and men ,the recognition ,protection and fulfillment of the rights of persons with a non –binary gender identity are critical to the achievement of gender equality"
2014:16International Institute for democracy and electoral assistance 2016, "Constitution Assessment for Women's Equality" *European Commission* , June 2016 on page 11.
[390]Judicial Service Commission, "A Zimbabwe in which world class justice prevails: Guidelines on the appointment of Judges*"* (Adopted on 28 June 2019).

against each nomination form. Nomination forms which lack the required details will be rejected and the reasons for rejection would be formally communicated to the nominee. The list of disqualified nominees may be published for public scrutiny.

Nominees who qualify for interviews must complete a detailed questionnaire form. In this form the nominees must outline in detail their career path since completion of formal education or training. The nominees must provide in detail their legal career, from employment history, principle areas of practice, interests and involvements. Also, they must provide in detail their court experience, noteworthy matters argued and if any the number of reported judgments. They must also indicate the appearances they have made in any of the courts be in Zimbabwe or outside Zimbabwe. Nominees should also indicate whether they have made any significant contributions to the law that is their publications in the field of law, indicating the significant ones and the reason why they are to be regarded significant in pursuit of justice. They may also indicate their publications even if they are in any other field other than legal field. They must also indicate their physical disabilities or any chronic health conditions associated with them. The nominees must indicate their social, financial, political or other factors which may bring the judiciary into disrepute. Nominees who fail to provide a detailed questionnaire will be formally disqualified from participating in public interviews and again the list of disqualified nominees will be published for public interest. The list of qualified nominees to undergo public interviews will be submitted to the Law Society of Zimbabwe or any other relevant organization for comments on the professional aspects of the nominees. The comments will be considered by the JSC when determining whether the nominee is "a fit and proper" for appointment as a judge. Nominees will be informed of any comments made by the law society or any other relevant organization and the JSC may question the nominee at the interview with regards to those comments in determining the nominee`s credibility to be appointed a judge. The submission of a

list of successful nominees to undergo public interviews with the law society and any other relevant organization must be simultaneously made with publications of the said list to the public for comments they might wish to make to the nominees.

Anonymous comments will not be considered and again nominees will be informed of any adverse comments from members of the public. And they may be questioned about them during the interviews in ascertaining whether those adverse comments may have a bearing on the nominee`s probity. After that the JSC will announce the date, place and time for public interviews which will be simultaneous with publication of the list of successful nominees to undergo public interviews. Members of the public will be invited to attend the interviews if they so wish. The Chairperson or deputy chairperson shall preside over those interviews and all commissioners shall be given opportunity to put questions to the nominees. The JSC will be required to be fair in the questioning of nominees implying that there must be uniformity in the questions and the length of the interviews. The commissioners would independently give marks to the nominees against their performance. Deliberations of the nominee's performance would be made in private. Suitable nominees would be measured from their performance during interviews, any comments from the law society of Zimbabwe or any other relevant organization and or the public as well as the information supplied by the nominees in a detailed questionnaire. The determining of the final list of suitable candidates shall be considered against diversity and gender composition in Zimbabwe. The JSC would resolve on the list of names that succeeded and the list would be submitted to the president in terms of the law.

It is fundamental to note that the Constitution of Zimbabwe provides for a similar procedure as that of South Africa on the appointment process.[391]Some legal scholars have argued that the

[391]Section 174 (4) Constitution of the Republic of South Afric,1996. The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
(a) The Judicial Service Commission must prepare a list of nominees with three

processes and procedures provided in the Constitution of South Africa are a best international practice.[392] It can be argued that the procedure advocates for transparency in the whole appointment process. The wide consultations with professionals among others accountants, lawyers, professors and human resource managers[393] is critical for transparency and professionalism. The involvement of the public is also fundamental in promoting openness and accountability in the appointment process. It can be contended that the process is rigorous and ensures the appointment of quality judges.[394] The processes and procedures are quite open and transparent and reduce executive manipulation in the appointment process. The appointment of judges has an impact on the judiciary's independence. It can be positively stated that the provision of clear procedures in the selection process in these two jurisdictions ensures appointments to the bench of quality judges who are fit and proper.

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names more than the number of appointments to be made, and submit the list to
the President.
(b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable
and any appointment remains to be made.
(c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list AND Section 180 (2) of the Constitution of Zimbabwe
"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
(e) submit the list to the President;
whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned.

[392] S. A. Akkas, "Appointment of Judges: A key issue of Judicial Independence: available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1293&context=blr: In this regard the composition and working system of the South African Judicial Service Commission may be an acceptable model. Such a mechanism may be very effective to ensure the appointment of the best-qualified people to judicial office." accessed on 10 April 2019.

[393] See the composition of the Judicial Services Commission in Section 189 Constitution of the Republic of Zimbabwe, 2013.

[394] S. A. Akkas, "Appointment of Judges: A key issue of Judicial Independence: available at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1293&context=blr: In this regard the composition and working system of the South African Judicial Service Commission may be an acceptable model. Such a mechanism may be very effective to ensure the appointment of the best-qualified people to judicial office." accessed on 10 April 2019.

4.10 Appointments of acting judicial officers in Zimbabwe

Section 181 (3) of the Constitution of Zimbabwe provides for the appointment of acting judges:

> *"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."*

The JSC plays a pivotal role in the appointment of acting judges and the President appoints acting judges on its advice. Significantly, acting judges are appointed from former judges only and this helps avoid manipulation of the appointment process by the executive. The Zimbabwean Constitution has a severe flaw in that it only allows previous judges to be chosen as acting judges, which is undesirable because there are other candidates who may be appointed on a temporary basis, including practicing lawyers.

It appears that the Constitution of Zimbabwe is fixated with the removal of direct political control by the executive in the appointment of acting judges, a great milestone in strengthening judicial independence.

4.11 Conclusion

It can however be posited that the appointment procedures of judicial officers laid out in the constitution of Zimbabwe to the Constitutional Court, SCA and the High Court are transparent and open to public scrutiny which is in conformity with international standards on judicial

appointments.[395] The advertisement of vacancies by the JSC is a commendable process which seeks to ensure appointment of quality judges.[396]Because the individual who will be appointed a judge must go through a thorough screening process, the process assures that all judicial appointments are made on merit. The system improves the professionalism and accountability in the appointment of judges in Zimbabwe to a large extent.

[395]See Article 9 of the Universal Charter of the Judge available at http://www.iaj-uim.org/universal-charter-of-the-judges accessed on 5 October 2019.
[396]L Chiduza "Towards The Protection of Human Rights: Do The New Zimbabwean Constitutional Provisions on Judicial Independence suffice?"*Potchesftroom Electronic Law Journal Volume 17 No 1* (2014) page 381.

CHAPTER 5

CRITICAL ANALYSIS OF THE PROCESS OF THE APPOINTMENT OF JUDGES IN SOUTH AFRICA AND ZIMBABWE

5.1 Introduction

The process of appointing judges is a yardstick in strengthening judicial independence. When the appointment process is not based on good reasoning or truth unsuitable or compliant judges could ascend to the bench. It is very unlikely for unfit judges to enhance and protect judicial independence. A judiciary which is not independent will rarely perform its constitutional mandate diligently as judges are expected to hear cases and adjudicate on them without fear, favour or prejudice and independent judges maintain public trust in the bench which is critical in the attainment of a modern democratic society.[397]The procedure of appointing judges in South Africa and Zimbabwe as discussed in chapters three and four explains the willingness of these two states towards openness and transparency in the appointment of judges. In both jurisdictions the thrust is to limit executive powers or influence in judicial appointments by neutralizing the powers of the president from appointing judges secretively as was the scenario in these two countries' historical backgrounds by giving constitutional provisions which cater for transparency in the whole judicial appointment process.

5.2 Comparative analysis

In both jurisdictions, public interviews are open to the public and the media. Furthermore, in the Zimbabwean context the JSC sets standards of questions which all candidates are examined upon.[398] This standard ensures fairness and is critical in curbing discrepancies that may occur during judicial nominees' questioning. In the South African context interview questions are not pre-determined and individual commissioners can ask questions on any matter of interest to

[397] A.Barak *The judge in a democracy (2006*) Princeton University Press page 109.
[398] JSC,"A Zimbabwe in which world class justice prevails 'Guidelines on the appointment of judges ".

them. This could be the reason the JSC in South Africa has been criticized in that some of its commissioners ask irrelevant questions not related to the judicial office.[399]

In both jurisdictions publication of performances of candidates is not done after interviews. In the case of *Suzman Foundations v JSC,*[400]Le Grange J dismissed an application to compel the commission to make records of its deliberations public after interviews. The court ruled that:

> "*While it is accepted that transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that the JSC's claim that it should deliberate in private is well founded. In fact, certain of these international courts and academic writers have recognized the justification for confidential deliberations similar to what has been advanced by the JSC. They have held that confidentiality brings candor, that it is vital for effective judicial selection, that too much transparency discourages applicants, and will have an effect on the dignity and privacy of the applicants who applied with the expectation of confidentiality."*[401]

However, allowing the public access to the interview score sheets without publicizing the candidates' performance in newspapers could be a viable option. It can be said that the process of appointing judges in Zimbabwe may provide a chance to the executive to manipulate the appointment process as per the provision of its constitution.[402] It is regrettable that the executive can refuse to pick a candidate from a list submitted to it by the JSC without justifying this action.

[399] See Sunday Independent, 'JSC again makes appointment to the bench appear suspect '29 April 2012 available at http://www.highbeam.com/doc/1G1-288188364.html accessed on 15 January 2015.
[400]*Suzman Foundations v JSC* SA HC 8647/2013 paragraph 48.
[401] Ibid.
[402] Section 180 (3) Constitution of the Republic of Zimbabwe, 2013.

The South African process stands a better chance in neutralizing executive influence in the appointment process by restricting the executive to appointing from the list submitted by the JSC. However, in the South African situation it may be simple for the executive to stack the judiciary with acting obedient judges, which might be a catastrophic blow to the judiciary's independence. In this fashion acting judicial appointments in South Africa may create a "back door" through which the executive interferes with the whole appointment process.[403] It is however critical that appointment of acting judges should be done in accordance with the law in order not to undermine the independence of the judiciary. The nomination of Advocate Mokotedi Mpshe, the previous acting National Director of the Public Prosecutions in South Africa, as acting judge was an intriguing scenario. His appointment came after his decision not to prosecute Mr Zuma. His appointment was met with skepticism as it appeared as if he was being rewarded for refusing to prosecute Mr Zuma the former President of South Africa on allegations of fraud, corruption, racketeering, and money laundering.[404] Advocate Mpshe's appointment sparked an outcry[405] as it was regarded as a threat to judicial independence. His decision to drop corruption allegations against Mr Zuma when he was the acting National Director of Public Prosecution, it was argued, demonstrated his political pliability and consequently rendered him unfit for judicial office.

The two states have given the JSC in their constitutions a very important role in that all appointments in both jurisdictions are made after these bodies have been consulted.[406] The President in respect of both constitutions is not bound by the recommendations made to him or

[403]Section 175 Constitution of the Republic of South Africa, 1996.
[404] J. Radebe RSA "Mpshe 's appointment consistent with the Constitution "available at http://www.justice.gov.za/m-statements/2010/20100218-mpshe.html accessed on 21 May 2010.
[405]P de Vos "Mpshe' appointment:scandalous attack on independence of the judiciary"(2010) available at http://constitutionallyspeaking.co.za/mpshes-appointment-scandalous-attack-on-independence-of-the-judiciary/ accessed on 8 January 2019.
[406]Section 174 Constitution of the Republic of South Africa, 1996 and Section 180 Constitution of the Republic of Zimbabwe 2013.

her by JSC on judicial appointments; instead he or she can require a further list if he or she finds the candidates not fit for purpose.[407] These provisions may be viewed as giving the President an upper hand in the appointment process.

The appointment of the Chief Justice and Deputy Chief Justice is a highly political process that can be easily manipulated by the executive, as was the case with the extension of former Chief Justice of South Africa Sandile Ngcobo's term of office in 2009, which sparked protests from political leaders when President Jacob Zuma ignored proper procedures in doing so. Mr Zuma was said to have written to political party leaders asking their comments after announcing his appointment to the latter.[408] Mr Zuma extended Justice Ngcobo's term of office in line of section 8 (a) of the Judges Remuneration Act, according to the case of *Justice Alliance of South Africa v President of South Africa*.[409] In this case, the Constitutional Court had to determine whether section 8 (a) was *ultra vires* section 176 (1) of the constitution. The Court also had to consider whether section 8 (a) empowers the President to extend the Chief Justice`s term of office and if so whether such delegation is permitted by section 176 (1) of the constitution. Furthermore, the court had to examine whether such delegation by the President was properly done and whether section 176 (1) authorizes a differentiation of terms of office of the Constitutional Court judge.[410]The court determined that section 8 (a) of the Act gives the President the authority to extend or not extend the term of the Chief Justice, whose 12-year term is about to expire. It was further contended that section 176 (1) of the constitution expressly specifies that the Chief Justice's term of office can only be extended by an Act of Parliament. As a result, it was decided

[407]Section 174 (4) (a) and (b) Constitution of the Republic of South Africa, 1996 and Section 180 (3) Constitution of the Republic of Zimbabwe 2013.
[408]See http://www.ifp.org.za/Archives/Releases/100809pr.htm. Perhaps guidance in relation to the interpretation of the word "consult" in making judicial appointments can be taken from the Indian case of *S.P. Gupta v. Union of India AIR* 1982 SC 249 wherein the Indian Supreme Court held that consultation does not necessarily men 'concurrence accessed on 4 April 2014.
[409]*Justice Alliance of South Africa v President of South Africa* CCT 53/11 paragraph 1.
[410]Section 3 (1) (a) of the Judges Remuneration and Conditions of Employment Act 247 of 2001.

that the President's extension did not constitute an Act of Parliament as defined by the constitution.

The court reasoned that section 8 (a) usurps parliament's legislative power and amounts to the President's illegal prolongation of the Chief Justice's term of office. The court, on the other hand, decided that section 8 (a) amounted to an illegal delegation and declared it unconstitutional since it contradicted section 176 (1) of the Constitution. President Zuma was obligated to contact the JSC and political party leaders before issuing the extension, according to the Constitutional Court.

In Zimbabwe the appointment of the current Chief Justice of Zimbabwe Luke Malaba, was nonetheless roundly criticized for allegedly being driven by politics. It is common cause that the Chief Justice's appointment must be on merit and it must not be influenced by politics.[411] It is unfortunate that his appointment was politically manipulated. This however indelibly damaged the process of appointing judges. Section 180 of the constitution was not properly followed in this instance.

The JSC was required to publicize the position, ask the president and the general public to submit nominations, and conduct public interviews with candidates. The then Chief Justice Godfrey Chidyausiku said he was barred by the executive from going through the normal process as provided for in the constitution. He later recanted his stance that there was an executive order to stop public interviews. On the eve of the public interviews Romeo Taombera Zibani a law student filed an urgent application in the High Court of Zimbabwe stopping the interviews.[412]

[411]VOA.(n.d.). Mugabe Appoints Justice Luke Malaba New Zimbabwe Chief Justice. [online] Available at: https://www.voazimbabwe.com/a/mugabe-appoints-justice-luke-malaba-as-new-chief-justice/3787207.html accessed on 19 January 2022.

[412]Anon, (n.d.). High Court has suspended public interviews for a new Chief Justice after UZ law student challenge – newzimbabwevision. [online] Available at: http://newzimbabwevision.com/high-court-has-suspended-public-interviews-for-a-new-chief-justice-after-uz-law-student-challenge/ accessed 19 Jan. 2022..

The application for the interdict was granted by Justice Charles Hungwe and public interviews were subsequently stopped on the basis that section 180 of the new constitution was not transparent and accountable and had to be deemed unconstitutional. His decision was influenced by the fact that there was an intention by the executive to amend section 180 of the constitution. He ruled that upholding the constitution ahead of the executive's decision to change the relevant part would be "slavish adherence" to the same constitution.[413]

The learned judge argued that to follow the process as provided for in section 180 will amount to a threat of judicial independence. The judicial decision was however criticized for being at variance with judicial independence, constitutional supremacy and separation of powers. Alex Magaisa argued that:

> *"The implication of Justice Hungwe's reasoning is that if any citizen does not like a constitutional clause which requires a constitutional body to do something, they can go to court to stop the constitutional body from carrying out its mandate and the court can order the executive or parliament to amend the constitution. Meanwhile, the constitution is put in abeyance pending the fulfillment of the litigant's desires. It negates the basic principle that the constitution, however objectionable it might be, is supreme. It also breeds uncertainty and confusion."* [414]

The JSC however successfully appealed the judgment. Three judges, Justice Luke Malaba, Rita Makarau and Pardington Garwe were later interviewed. Eventually Justice Malaba prevailed and was nominated Chief Justice of the Republic of Zimbabwe. There was speculation of political

[413] Ibid
[414] A.Magaisa " Comment on the Supreme Court decision on judicial appointments" [online] Big Saturday Read. Available at: https://bigsr.africa/comment-on-the-supreme-court-decision-on-judicial-appointments-d10/(2017)accessed 19 January 2022.

influence fanned by factional fighting in the ruling party ZANU (PF) as having influenced Malaba's appointment. Magaisa further remarked:

> "*What is clear from this case is that the process of appointing the chief justice has been the subject of political gamesmanship within the context of ZANU (PF)'s succession politics."*[415]

In contrast to South Africa's attitude on acting judicial appointments, Zimbabwe's constitution empowers the President to appoint acting judges after consulting with the JSC. The position of Chief Justice, Deputy Chief Justice, and Judge Presidents of Superior Courts, on the other hand, is distinct. Their vacancies are automatically replaced in an acting capacity by the next most senior judge within their ranks.

Section 181 (3) of the New Constitution of Zimbabwe provides that:

> *"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."*

It's worth noting that the JSC in Zimbabwe plays a critical role in the appointment of acting judges, as the President does so on its suggestion. The Zimbabwean perspective avoids the situation that exists in the South African constitution, in which the executive is actively involved in the process. As stated above, the Zimbabwean Constitution only allows previous judges to be chosen as acting judges, to the exclusion of other candidates who may be appointed on a temporary basis, including practicing lawyers. It appears the Constitution of Zimbabwe is fixated

[415]A.Magaisa " Comment on the Supreme Court decision on judicial appointments" [online] Big Saturday Read. Available at: https://bigsr.africa/comment-on-the-supreme-court-decision-on-judicial-appointments-d10/ (2017) accessed 19 January 2022.

with the removal of direct political control by the executive at the expense of wider stakeholder participation.

5.3 Conclusion

The appointment of judicial officers is a crucial part in maintaining judicial independence. Certain clauses in the constitutions of both South Africa and Zimbabwe must be amended in order to improve the quality of judicial appointments. The President's ability to refuse to appoint from a list supplied to him, as stipulated in the Zimbabwean Constitution, demonstrates that he has broad discretionary powers over judicial appointments,[416] whereas in South Africa the President is supposed to give reasons if he refuses to pick from the list submitted to him by the JSC.[417] It is important that both jurisdictions provide clear and specific judicial criterion requirements for superior courts. A one size fits all kind of requirement in the selection process causes unnecessary controversies, this relates to the "fit and proper" person requirement and the requirement of "sound knowledge of constitutional law".[418]

The Minister of Justice supervises the appointment of acting judges in South Africa. However, because the Minister is a political appointee, this effectively gives the government power over the nomination of acting judges. The South African jurisdiction might take a page from Zimbabwe's Constitution, which gives the JSC broad powers to select acting judges.[419] In Zimbabwe, the constitution has to be changed to enable for the nomination of acting judges from a wider range of people rather than just former judges. A participative approach will improve openness and accountability while also giving potential candidates a chance to gain bench experience.

[416] Section 180 (3) Constitution of the Republic of Zimbabwe 2013.
[417] Section 174 (4) Constitution of the Republic of South Africa,1996.
[418] Section 177(1) and (2) Constitution of the Republic of Zimbabwe 2013 as read with Section 174(1) Constitution of the Republic of South Africa, 1996.
[419] Section 181 Constitution of the Republic of Zimbabwe ,2013.

The President must appoint from the list provided by the JSC, and the president's discretionary rights to nominate or not appoint must be deleted, as this could create loopholes and allow the executive to manipulate the appointment process. A major concern in both jurisdictions is that they attempt to promote openness and accountability in the nomination process, as stipulated in sections 180 and 174 of the Zimbabwean and South African constitutions, respectively.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The thesis looked at how the judicial appointment process affects judicial independence. This was a study that compared South Africa with Zimbabwe. Both states adopted new constitutions in 1996 and 2013, and both underwent difficult constitutional transitions as they attempted to strengthen democracy by rewriting their constitutions and rejecting the constitutions of their colonial masters. Democracy, decent government, and human rights were their guiding principles.[420]

The researcher compared the constitutions of the two jurisdictions to see if any provisions promote judicial independence. The degree of judicial independence in a specific jurisdiction is determined by how judges are nominated and removed from office. The constitutions of both states effectively protect and provide for judicial independence. The study also analyzed how the constitutions of the two countries define the nomination procedure in order to assess the judiciary's independence and effectiveness. As a separate branch of government, the judiciary must be independent and control executive and parliamentary abuses.

The research was arranged as follows:

The first chapter provided a basic introduction, context, and problem statement, as well as a literature review, study goal, methodology, and definitions of essential terms. In Chapter 2, the researcher tackled judicial independence in both South Africa and Zimbabwe, evaluating the constitutional provisions that protect judicial independence in both countries. The constitution

[420] M.K Mbondenyi, "*International human rights and their enforcements in Africa*" Nairobi, Kenya (2010) pages 89-90.

and legislation, as well as the JSC, courts or tribunals, and international law practices or treaties, were all examined as instruments that safeguard judicial independence. The chapter also looked at the issues that South Africa's and Zimbabwe's judiciaries face. The JSC plays a crucial role in the appointment of judges, which, if handled incorrectly, can negatively impact on the judiciary's independence. The composition of the JSC in both jurisdictions was also examined in this chapter.

The important aspects of judicial independence were also discussed namely; individual and functional independence. The tenets of constitutionalism were also examined with regard to both jurisdictions to ascertain whether their constitutions protect human rights and constitutional democracy. The transition from the apartheid government in respect of South Africa marked a new constitutional dispensation placing courts at the helm of maintaining and promoting constitutional democracy. The Constitutional Court is working very hard to promote human rights and is consistent in promoting and protecting judicial independence in its decisions apart from who could have interest in the matter before it and strictly adheres to the constitution and the law. There were, however certain scenarios which threatened to compromise the independence of the judiciary for example the appointment of Judge Heath as the head of the Special Investigative Unit (SUI).[421] His appointment was met with criticism and was challenged in the Constitutional Court. [422]

This incident portrays an episode where the executive has attempted to undermine judicial independence and the doctrine of separation of powers. In respect of Zimbabwe the chapter looked at various mechanisms in the Constitution which promote judicial independence. The chapter also made a cursory overview of the Lancaster House Constitution and juxtaposed it with

[421]Established in terms of Special Investigating Units and Special Tribunals Act 74 of 1996.
[422]*South African Association of Personal Injury Lawyers v Heath* 2001) (1) SA 883 (CC) paragraph 46.

the new Constitution of Zimbabwe to see whether the new Constitution adequately caters for judicial independence and whether its inception was an improvement on its predecessor. The Constitution of Zimbabwe is sensitive to judicial independence and provides measures and securities to an individual judge and the judiciary as an institution.[423]The Constitution provides for the security of tenure of judges in order to ensure the independence of the judiciary. The Constitution includes safeguards that protect judges' financial security and clearly spells out the processes for removing judges from office. The tasks of the JSC are well defined, and these roles are critical in promoting judicial independence. The constitution specifies the composition and functions of the commission. The JSC is a significant body that is involved in the appointment and removal of judges. The constitution stipulates that judges may neither be dismissed from office or have their salary decreased arbitrarily in order to ensure the security of their tenure.

The Constitution of Zimbabwe makes provisions suitable for the promotion and protection of judicial independence. The chapter also looked at the challenges which the judiciary faces in Zimbabwe. The executive influence is another factor which threatens judicial independence in Zimbabwe[424] as was the case in the appointment of the current Chief Justice of Zimbabwe Luke Malaba. The land reform in Zimbabwe was considered as a major lighting rod to events which resulted in the wanton disregard of human rights.[425] The ZANU-PF government led by former president Robert Mugabe created a "compliant judiciary" which saw the deliberate removal of judges from office who were seen as antagonistic to government's illegal seizures of farm lands. These judges were replaced by a cohort of judicial officers who were sympathetic to

[423]Section 164 Constitution of the Republic of Zimbabwe 2013.
[424] D. T Hofisi and G. Feltoe, "Playing Politics with the Judiciary and the Constitution ?*' The Zimbabwe Electronic Law Journal Volume 1*, (March 2016) page 3.
[425] A. Berks *,American University International Law Review volume 27/issue 1,* Article 5 (2018) on pages 3 and 4.

government.[426] The courts worked in favour of the executive and deviated from its core mandate of dispensing justice in terms of the law and the constitution.

Chapter 3 tackled the process of the appointment of judges in South Africa. Appointment of judges has an impact on the independence of the judiciary. According to international standards the appointment process must be conducted openly and must be largely satisfactory. The Constitution of South Africa provides requirements cardinal to above board on judicial appointments and clearly states the procedures to be followed on judicial appointments. **Chapter 4** focuses on the process of the appointment of judges in Zimbabwe and the Constitution of Zimbabwe is reflective of the South African Constitution on that the appointment process must be open and transparent. Their constitutions share similar sentiments that judicial appointments must be made on merit and only qualified judges must be appointed. Both constitutions establish an independent body which oversees judicial appointments. This body is tasked to make recommendations to the President whenever a vacancy of a judgeship arises. The JSC in both jurisdictions conducts interviews and prepares a list for the President for appointments. Judicial appointments in both jurisdictions must be made strictly on professional grounds and their constitutions advocate for gender diversity in the appointment of judges. The two jurisdictions also provide in their constitutions the appointment of acting judges. It can be positively noted that the appointment process in both jurisdictions is robust and it was also examined that interference by the executive in the appointment process is to a greater extent controlled because of the clearly laid out constitutional provisions which cater for an extensive exercise in the selection process. The executives in both jurisdictions met resistance whenever they tried to interfere in the appointment of particular individuals as judges and were taken to task in the Constitutional Court. In respect of South Africa in the case of *Justice Alliance of South Africa v*

[426] D. Matyszak '*Creating a compliant judiciary in Zimbabwe* ,2000-2003' in Malleson and Russell *Appointing judges in an age of judicial power*; *Critical perspective from around the world* (2006) page 332.

President of South Africa,[427] Mr Zuma was taken to the Constitutional Court for extending the term of office of Justice Ngcobo without first consulting the JSC and members of political parties represented in Parliament. In Zimbabwe the influence of the executive was apparent in the appointment of the current Chief Justice Luke Malaba.[428] The former Chief Justice Chidyausiku hinted about how the executive intended to amend section 180 of the Constitution[429] which requires the advertisement of the post of Chief Justice, invitation of the members of the public to make nominations and conducting of public interviews as per the requirements of the constitution in favour of the President to appoint anyone of his or her choice without following procedures as provided in the constitution. In the Zibani case, however, Justice Hungwe ruled in favour of executive supremacy in the appointment of the Chief Justice.[430] The JSC quickly intervened and lodged an appeal in the Supreme Court where the ruling by Justice Hungwe was overturned in favour of following due process in the appointment of the Chief Justice as enshrined in the constitution. Mr Zibani challenged the Supreme Court ruling in the Constitutional Court arguing that Justice Vernanda Ziyambi's involvement in the appeal was unconstitutional. The Constitutional Court until this day has not yet delivered a ruling on the constitutionality of the appointment of Justice Ziyambi. The Supreme Court decision was however implemented and interviews were eventually conducted which resulted in the appointment of Luke Malaba as Chief Justice of Zimbabwe. This is a positive development which is critical in the appointment of quality judges who are fit and proper. It has been examined that the appointment process which is open, transparent and rigorous as provided for in both jurisdictions is effective to the promotion of judicial independence.

[427] *Justice Alliance of South Africa v President of South Africa* CCT 53/11 paragraph 1.
[428] *Zibani v JSC and others High Court Harare* (Case number 797 of 2017) paragraph 1.
[429] D. T Hofisi& G. Feltoe "Playing politics with the Judiciary and the Constitution", *Zimbabwe Electronic Law Journal Volume 1* (March 2017) page 3.
[430] Ibid.

Chapter 5 gives a critical evaluation of the process of the appointment of judges in South Africa and Zimbabwe whilst **Chapter 6** tackled on conclusion and recommendations to the study. It is not in dispute that both constitutions promulgate clear provisions on appointment of judges and emphasize the need for academic qualifications, diversity, and experience in pursuance of an independent judiciary. Their constitutions provide a platform on which judges can execute their duties as their tenure and financial autonomy are guaranteed thus entrenching their personal and institutional independence. Both constitutions comply with international standards on the welfare and security of judges under democratic constitutions. However, the feared assault on the independence of the judiciary in both jurisdictions has been attributed to executive interference and a lack of financial autonomy of the judiciary as discussed above. It has been analyzed that the judiciary in both jurisdictions is appointed and financed by the executive.[431]

6.2 Recommendations

The composition of the JSC in South Africa is widely recognized as Africa's best and clearly reflects the country's constitutional democracy.[432] This is because it creates a conducive environment to curb executive influence in judicial affairs. It is argued that the JSC's composition is one of the best since it involves all stakeholders ranging from lawyers, academics

[431]A. Hamilton, J. Madison and J. Jay*: Primary Documents in American History (Federalist papers)* University of Pennsylvania Press 2008 page 465.

[432] South Africa's JSC has got many members from different fields (for instance opposition parties must be represented) and this creates a good platform for different stakeholders to have a say in the appointment of judicial officers. For example, in the *Certification of the Constitution of the Republic of South Africa* the CC held that: "The JSC has a pivotal role in the appointment and removal of judges. It consists of the Chief Justice, the President of the Constitutional Court, one Judge President, two practising attorneys, two practising advocates, one teacher of law, six members of the NA, four permanent delegates to the National Council of Provinces ("NCOP"), four members designated by the President as head of the national executive, and the Minister of Justice. The practising attorneys and advocates and the teacher of law are to be designated by their respective professions; the Judge President is to be designated by all the Judges President; at least three members of the NA must come from opposition parties; the four delegates of the NCOP must be supported by the vote of at least six of the nine provinces; and the four presidential appointments are to be made after consultation with the leaders of all the parties in the NA" paragraph 120.

and representatives of political parties who are independent from the executive and the legislature.[433]

Other African states including Zimbabwe should take the South African Constitution as a model of constitutional democracy. In South Africa, the Constitutional Court plays a crucial role in upholding the rule of law, protecting human rights, and promoting judicial independence. Decided Constitutional Court cases marked a new era in human rights discourse and protection of same in South Africa.[434] But instead of accentuating the positive attributes associated with the JSC, lingering concerns over the significant representation of politicians or political appointees in this key body have taken centre stage.[435]

The judiciary in Zimbabwe has a history of failure in protecting human rights as it has lacked independence and effectiveness in safeguarding human rights guaranteed in the Constitution.[436]The Constitutional Court is a superior court which deals among others with infringements of rights protected in chapter 4 of the constitution.[437] Zimbabwe has experienced a series of human rights abuses from land invasions, violation of the rights of political activists from the opposition aisle and willful arrest of individuals who would have violated the interests of members of the powerful executive. The Constitutional Court has failed to perform its

[433] F. Du Bois, "*Judicial selection in Post- Apartheid South Africa*", in Malleson, Russell, "*Appointing Judges in An Age of Judicial Power, Critical Perspectives from Around the World*" University of Toronto Press, 2006 pages 280-312. Du Bois opines that, the proportion of politicians and legal professionals on the JSC goes a long way in precluding the commission's decision making powers from being the exclusive domain of either political or professional interests.
[434] *S v Makwanyane and Another* 1995 (6) BCLR 665 paragraph 1.
[435]S. Debbie "DA to push for changes to JSC composition to ensure confidence in judicial independence" available at http://www.politicsweb.co.za//politicsweb/view/politicsweb/en/page accessed on 13 April 2021.
[436] D. Matyszak "*Creating a compliant judiciary in Zimbabwe*, 2000-2003" in Malleson and Russell *Appointing judges in an age of judicial power: Critical perspective from around the world* (2006) ,University of Toronto Press page 332
[437] Section 166(3)(a) Constitution of the Republic of Zimbabwe,2013.

mandate of protecting human rights in general.[438] The courts especially during land invasions worked lock-in-step with the executive to thwart the aspirations and property rights of disposed farmers.

The safeguarding of human rights is the benchmark by which the judiciary's independence can be measured. The judiciary in Zimbabwe suffered serious manipulation from the executive and obviously lacked independence. The appointment of the new Chief Justice Malaba was criticized as having been politically manipulated without following proper procedures and was regarded as a threat to judicial independence.[439] The process was deemed to be unconstitutional and lacking transparency.[440]

Pointedly, and as has been exposed in this study, both the Zimbabwean and South African systems fail to pass muster in certain areas making it imperative for the researcher to issue a raft of recommendations to help cure identified unfavourable aspects of the respective constitutions. The makeup of the JSC is viewed differently by different people, some views contending that it has too many representatives whilst others support the number of representation arguing that it promotes accountability and ensures representation from all relevant stakeholders.[441] Others also argue that there is more political representation than the legal representation in the commission.[442] The argument is that lawyers who have sufficient knowledge to assess the quality and expertise of candidates to be appointed to the bench must dominate the JSC composition. In the Constitutional Court case of *Ex Parte Chairperson of the Constitutional Assembly: In re*

[438] K. O'Regan "*The enforcement and protection of human rights: The role of the constitutional court in South Africa"* in B/Ajibola et al, "The judiciary in Africa" (1998) page 14.
[439] D.T Hofisi and G. Feltoe, "Playing Politics with the judiciary and the constitution" .*Zimbabwe Electronic Law Journal Volume 1* March 2017page 9.
[440] *Zibani v JSC AND ANO HC* Harare case number 797 of 2017 page 15.
[441] Y.T Fessha "Constitutional Court appointment: The South African process" (2010) SC Working Paper 2010-06 Institute of Intergovernmental Relations School of Policy Studies, Queen's University page 2.
[442] As clearly indicated by section 178 of the Constitution only 8 or 9 members are lawyers out of the 23 or 25 members who constitute the JSC.

Certification of the Constitution of the Republic of South Africa,[443] the court argued that significant representation of many political appointees or politicians to the JSC is not material and does not have any negative impact on the independence of the judiciary. The court reiterated the aspect of separation of powers which is fundamental to the independence of the judiciary[444] and that the JSC is mandated by the constitution to enforce the law impartially and that it is independent of the executive and the legislature.

In South Africa, the appointment of acting judges is done on the recommendation of the Minister of Justice.[445] This has drawn sharp criticism from stakeholders who argue that the minister should not be involved in the appointment of acting judges.[446] It was observed that the process which involves the appointment of acting judges under the South African jurisdiction lacks transparency,[447] and that the minister determines appointments of acting judges and thus indirectly determines eligibility of acting judges for permanent positions. The unfettered discretion given to the executive in the appointment of acting judges is a threat to judicial independence.[448] The Constitution of Zimbabwe however is commended for offering favourable packages to acting judges.[449]

[443] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996(4) SA 744(CC) paragraphs 121 and 123.
[444] Ibid paragraphs 121 and 123.
[445] Section 175(1) Constitution of the Republic of South Africa, 1996.
[446] F. Du Bois, 'Judicial Selection in Post- Apartheid South Africa', 290. Du Bois noes that [i] in 1999, the Judge President of the Natal High Court resigned after the Minister refused to make two acting appointments he had requested on the ground that expertise was needed to counterbalance the inexperience of recent appointees in the pursuit of transformation and the Cape Judge President was asked to stay on in an acting capacity beyond the normal retirement age.
[447] See the report by the United Nations – Special Rapporteur for the Independence of Judges and Lawyers available at http://www.ohchr.org/EN/Issues/Judiciary/Pages/Visits.aspx accessed on 15 January 2014. The UN Special Rapporteur expressed concern over the impact of acting judicial appointments on the independence of the judiciary in South Africa.
[448] See the Lesotho Court of Appeal case of *Sole v Cullinan*2003 8 BCLR 935 (LesCA), which had to deal with question of whether or not acting judicial appointments infringe judicial independence paragraph 48.
[449] Section 181(3) Constitution of the Republic of Zimbabwe, 2013.

The Constitution of Uganda however offers the best practice on appointment of acting judges that the two jurisdictions can learn from. The appointment of acting judges is strictly bestowed on the JSC.[450] The Ugandan constitution ensures appointment of acting judges to be made impartially and free from political influence. It would be pleasing if acting judges in both jurisdictions are appointed by the JSC as this would go a long way in securing independence of the judiciary.

The JSC in the context of Zimbabwe and South Africa is commended for being accountable in the appointment process which involves conducting public interviews and invitation of members of the public in the process accompanied by publishing participants' results.[451] Both jurisdictions are adamant that race and gender be considered key elements when picking successful candidates in furtherance of judicial transformation.[452]

The constitutions of South Africa and Zimbabwe confer appointing authority of judges on the executive.[453] It must be recommended that the President must follow the JSC's recommendations on judicial appointments and must accordingly appoint judges from the list submitted to him or her at the first instance in order to maintain judicial independence. The composition of the JSC in Zimbabwe must be improved to represent all stakeholders to mirror the South African scenario[454]to include representatives of political parties, lawyers and academics. This will ensure it is independent of executive manipulation.

[450] Section 148 Constitution of the Republic of Uganda 'subject to the provision 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'.
[451]*Bar Council v The Judicial Service Commission and others* (2012) 2 AII S.A 143 (WCC) paragraph 3.
[452] Ibid Section 174 (2) Constitution of the Republic of South Africa, 1996 and Section 184 Constitution of the Republic of Zimbabwe, 2013.
[453]Section 174 Constitution of the Republic of South Africa, 1996 and section 180 Constitution of the Republic of Zimbabwe, 2013.
[454] Section 189 Constitution of the Republic of Zimbabwe ,2013 versus section 178 Constitution of the Republic of South Africa,1996.

The removal and remuneration of judges in both jurisdictions must be left to the JSC in order to enhance judicial independence. More so, the President must strictly act on the advice of the JSC in respect of the removal and remuneration of judges. The JSC must be financially sound and it must run its affairs independently without the influence of the executive and the legislature in order to protect its autonomy.

It is trite that the respect for the judiciary goes beyond the constitutional provisions on appointments and removal of judges as well as their remuneration. In its interactions with the government and legislative, the judiciary must find a balance. The judges must be committed to maintain and promote judicial independence and must avoid political influence and must uphold rule of law and democracy. The judiciary must be well funded and the salaries of judges must be lucrative to avoid temptations of bribery and corruption. The executive must change its attitude towards the judiciary. The judiciary must not be seen as the promoter and protector of government policies[455] but instead must be perceived as interpreting the law and the constitution in order to uphold constitutionalism. The failure of the judiciary to provide favourable rulings to the executive has generated a schism between the executive and the judiciary in Zimbabwe.[456] This was noted during land invasions in the early 2000 and operation Murambatsvina in 2005 where judges were jettisoned after ruling in favour of individuals whose rights government agents had trampled underfoot.[457]

[455] C. Goredema *'Whither Judicial Independence'* in Raftopoulos B and Savage T.(eds) Zimbabwe ; "*Injustice and Political Reconciliation"* (Weaver Press Harare 2004) pages 99-118.
[456] C. Goredema '*Whither Judicial Independence*' ibid.
[457] L.Chiduza, "Towards protection of Human Rights .Do the new Zimbabwean constitutional provisions on judicial independence suffice?" .*PotchesftroomElectonic Law Journal Volume 17 .No. 1* (2014) page 409.

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