

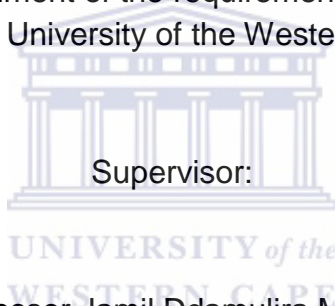
THE SIGNIFICANCE OF JUDICIAL INDEPENDENCE IN HUMAN RIGHTS
PROTECTION: A CRITICAL ANALYSIS OF THE CONSTITUTIONAL REFORMS IN
ZIMBABWE

BY

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A thesis submitted in the fulfilment of the requirements for the Doctor of Law in the
Faculty of Law of the University of the Western Cape, South Africa



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15 November 2013

DECLARATIONS

I, Lovemore Chiduza, declare that **The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe** is my work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly acknowledged.

Lovemore Chiduza

Signed.....

15 November 2013

Supervisor

Signed

15 November 2013



ABSTRACT

If human rights are to be effectively protected in any country, the judiciary has to recognise that it also has a role to play in this regard. The primary basis of this construction is that one of the roles of the judiciary is that of enhancing and protecting human rights. This is an important function which is best implemented through judicial independence. Across Africa and most notably in Zimbabwe, political interference has been noted as a factor that limits judicial independence. The judiciary's lack of independence has made it impossible for it to protect human rights in Zimbabwe. This signifies that a new approach to judicial protection of human rights in the country is required. Constitutional reform could be the appropriate legal tool to achieve this objective. Zimbabwe has undertaken constitutional reforms which may help in addressing the human rights situation in the country. These reforms have captured legal principles which will ensure an improvement in the human rights situation. Key to the reforms, has been the independence of the judiciary. The Constitution guarantees the independence of the judiciary. Despite such guarantees there are a number of challenges with regards to this independence. The aim of this research is to show what measures need to be taken for the judiciary to adequately protect human rights and to establish other measures that can be taken to address the human rights issues in Zimbabwe.

KEY WORDS

Constitutional Reforms

Democracy

Executive

Human Rights

Independence

Interference

International Law

Judiciary

Legislature

Protection

Rule of Law

Separation of Powers

Zimbabwe



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DEDICATION

To my beloved parents, Professor C Chiduza and Mrs. V. Chiduza, who through their support have made me the man I am today.



ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	Inter-American Convention on Human Rights
AG	Attorney General
AU	African Union
AIPPA	Access to Information and Protection of Privacy Act
BCC	Batsirai Children's Care
BSA	Broadcasting Services Act
CFU	Commercial Farmers Union
COPAC	Constitution Select Parliamentary Committee
CPEA	Criminal Procedure and Evidence Act
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
FTLRP	Fast Track Land Reform Program
GPA	Global Political Agreement
GNU	Government of National Unity
HRC	Human Rights Council
HRW	Human Rights Watch
I-ACHR	Inter-American Commission of Human Rights
IBAHRI	International Bar Association Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic and Cultural Rights
JSC	Judicial Service Commission
LAA	Land Acquisition Act
MDC-T	Movement for Democratic Change- Tsvangirai
MDC-N	Movement for Democratic Change- Ncube
NCA	National Constitutional Assembly

NGOs	Non-Governmental Organisations
NHRIs	Independent National Human Rights Institutions
NPA	National Prosecuting Authority
NSSA	National Social Security Association
OAS	Organisation of American States
OSISA	Open Society Initiative for Southern Africa
POSA	Public and Security Order Act
PRA	People's Redemption Army
PVOA	Private Voluntary Organisations Act
RBZ	Reserve Bank of Zimbabwe
SADC	Southern African Development Community
SARPPCO	Southern African Regional Police Chiefs Co-operation Organisation
UDHR	Universal Declaration of Human Rights
UJOA	Uganda Judicial Officers Association
UN	United Nations
ZANU-PF	Zimbabwe African National Union Patriotic Front
ZHRC	Zimbabwe Human Rights Commission
ZLR	Zimbabwe Law Reports
ZNLWVA	Zimbabwe National Liberation War Veterans Association
ZRP	Zimbabwe Republic Police

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CHAPTER 1

INTRODUCTION AND BACKGROUND OF STUDY

1 Introduction and Background of Study

The protection of human rights is one of the most fundamental aspects of any democracy in the modern world. As a result, a number of countries around the world have adopted constitutions that seek to promote and protect various rights.¹ At the epicentre of human rights protection is the role played by the judiciary in the protection of human rights.² The judiciary plays a crucial role in the protection of human rights and this role is a fundamental aspect of a democratic society.³ The failure of the judiciary to protect human rights in Zimbabwe has been a major highlight of the human rights situation in Zimbabwe.⁴ As a result of its human rights track record, a new Constitution has been adopted⁵ (hereinafter Constitution of Zimbabwe) to address concerns regarding the independence of the judiciary and consequentially judicial protection of human rights. This research therefore makes an in-depth analysis of the new Constitution of Zimbabwe to establish whether the undertaken reforms can suffice in improving the independence of the judiciary, thus leading to improved judicial protection of human rights.

¹To show the importance of human rights protection around the world a number of African countries have a Bill of Rights in their Constitutions. Such countries with the Bill of Rights in brackets include South Africa (Chapter II) Botswana (Chapter II), Lesotho (Chapter II), Nigeria (Chapter IV) and Namibia (Chapter III).

²Apple J 'The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights' in Cotran E and Yamani M (eds) *The Role of the Judiciary in the Protection of Human Rights* (1997) 197.

³Ruppel C.O *The Role of the Executive in Safeguarding the Independence of the Judiciary in Namibia* (2008) 207. Paper Presented at the Conference on the Independence of the Judiciary in Sub-Saharan Africa: Imperial Beach Hotel Entebbe Uganda from 24 to 28 June 2008.

http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/ruppel.pdf (Accessed 10 June 2011).

⁴International Bar Association Human Rights Institute (IBAHRI) and Open Society Initiative for Southern Africa (OSISA) *Zimbabwe: Time for a New Approach* (2011) 25.

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=268BE2D5-5E46-4713-B3BE-A982798A314A> (Accessed 14 June 2012).

⁵The new Constitution of Zimbabwe was signed into law by the President in May 2013. See *All Africa* 'Mugabe Signs New Constitution Into Law' 22 May 2013.

<http://allafrica.com/stories/201305230285.html> (Accessed 3 April 2014).

Zimbabwe, like most nations around the world, has a Constitution and the constitutional reforms have resulted in the adoption of a new Constitution. The new Constitution has replaced the previous Constitution of Zimbabwe (hereinafter Lancaster House Constitution), which was a product of negotiations between the British government, the then Rhodesian government led by Ian Smith (then Prime Minister), and nationalist politicians from the liberation movements at the Lancaster House negotiations in 1979 in London.⁶ The Lancaster House Constitution, modelled on the European Convention on Human Rights (ECHR)⁷, guaranteed the protection of civil and political rights. However, it should be noted that the enjoyment of these rights had been severely watered down over the years through constant amendments⁸ and the passing of repressive legislation⁹, most of which are still applicable up to today contrary to the Global Political Agreement of 2008¹⁰, in which the political parties to the agreement (Movement for Democratic Change- Tsvangirai (MDC-T), Movement for Democratic Change- now led by Welshman Ncube (MDC-N) and the Zimbabwe African National Union Patriotic Front (ZANU-PF) agreed to the repealing of such legislation. The constant amendments to the Lancaster House Constitution and the enactment of repressive legislation greatly contributed to the abuse of human rights in the country as

⁶De Bourbon A 'Human Rights Litigation in Zimbabwe: Past, Present and the Future' (2003) 3 *African Human Rights Law Journal* 195 221.

⁷The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, signed at Rome 1950.

⁸The Lancaster House Constitution was amended nineteen times since the attainment of independence. Examples of Constitutional Amendments that have watered down the enjoyment of human rights in the country include Constitution of Zimbabwe Amendment Act 23 of 1987 (commonly referred to as Constitutional Amendment Act No.7) which includes a number of provisions that entrenched executive power and various other land reform amendments; Constitution of Zimbabwe Amendment Act 5 of 2000 (commonly referred to as Constitutional Amendment No.16) which removed the obligation of paying compensation for land acquired from the Zimbabwean government to the British government and Constitution of Zimbabwe Amendment Act 5 of 2005 (commonly referred to as Constitutional Amendment No.17) which ousted the jurisdictions of the courts from hearing any matter pertaining to land reform and seizures.

⁹Examples of such repressive legislation include the Public and Security Order Act 5 of 2002 (POSA), Access to Information and Protection of Privacy Act 1 of 2002 (AIPPA), Criminal Law (Codification and Reform) Act 23 of 2004 and The Broadcasting Services Act 3 of 2001 (BSA) amongst many others.

¹⁰Human Rights Watch *False Dawn: The Zimbabwe Power Sharing Government's Failure to Deliver Human Rights Improvements* (2009) 15.

<http://www.hrw.org/reports/2009/08/31/false-dawn-0> (Accessed 12 March 2013).

most of the amendments had watered down the enjoyment of rights in the Declaration of Rights.¹¹

A brief historical analysis of human rights issues in Zimbabwe clearly portrays the long history of human rights abuses and how the judiciary over the years has handled various challenges from the executive. The judiciary, under the leadership of Justice Enoch Dumbutshena,¹² was faced with many political challenges that included the Matebeleland civil war where atrocities were committed by the Fifth Brigade against the Ndebele people for alleged dissident activities.¹³ This period also saw the nation placed under a state of emergency¹⁴ with thousands of people being killed. This state of emergency came to an end in 1987 when the Unity Accord was signed between ZANU-PF and the Zimbabwe African People's Union Patriotic Front (ZAPU-PF).¹⁵ This period was mainly characterised by detentions without trial, rape, beatings and disappearances.¹⁶ However, as De Bourbon notes, judicial involvement and accountability for human rights were minimal and he attributes such lack of involvement to the state of emergency and the lack of human rights experience on the part of the judiciary.¹⁷ As a result the government got away with various human rights abuses as seen with the Matebeleland atrocities.¹⁸ Despite these political challenges, the judiciary

¹¹See footnote number 8 above on some of the amendments to the Constitution that have watered down the enjoyment of rights.

¹²Dumbutshena CJ served as Chief Justice from 1984-1990.

¹³Mapfumo T *Whither to the Judiciary in Zimbabwe? A Critical Analysis of the Human Rights Jurisprudence of the Gubbay and Chidyausiku Supreme Court Benches in Zimbabwe and Comparative Experiences from Uganda* (LLM-thesis, University of Pretoria, 2005) 19.

¹⁴Hatchard J *Individual Freedoms and State Security in the African Context: The Case of Zimbabwe* (1993) 35.

¹⁵International Bar Association Human Rights Institute (IBAHRI) and Open Society Initiative for Southern Africa (OSISA) (2011) 11.

¹⁶Bourne R *Human Rights in Contemporary Zimbabwe* Paper Presented at the Uppsala Conference (2011) 3.

<http://www.nai.uu.se/ecas-4/panels/21-40/panel-29/Richard-Bourne-Full-paper.pdf> (Accessed 25 June 2012).

¹⁷De Bourbon A (2003) 206.

¹⁸De Bourbon A (2003) 206. See also Clemency Order 1/1988 which granted immunity to those implicated in the Matebeleland atrocities which meant that no single individual was brought before the courts to be held accountable for the Matebeleland atrocities.

showed great character and was able to main its independence and made various rulings that contributed to the cause of human rights.¹⁹

The judiciary, under the leadership of Gubbay CJ (appointed in 1990), was well-known for its independence.²⁰ Although faced by various political challenges at the time, such as the State of Emergency and the use (by government) of legal means to circumvent the implications of various judgments by passing amendments to the Constitution²¹, by passing legislation, and by making extensive use of clemency orders, the judiciary served with distinction and showed great character in upholding its independence and fighting for the cause of human rights in the country.²² Widner and Scher note that prior to the introduction of the land reform, the courts stood firm in the face of executive pressure on a variety of issues, from suspension of *habeas corpus* and trials within a

¹⁹See amongst many other rulings *Slatter v Minister of Home Affairs* HC 313/83 a case in which the judiciary condemned the use of torture. See also *Minister of Home Affairs v Dabengwa* 1982 (1) ZLR 236 (SC); 1982 (4) SA 301 (ZS) a case where the Supreme Court had to deal with the application of Emergency Powers Regulations that still existed in Zimbabwe, and in particular the rights of persons detained without trial to have access to their lawyers. In this case prominent members of ZAPU had been arrested and tried for treason. They were acquitted of the charge of treason, but immediately detained in terms of emergency legislation. They were denied access to their lawyers, and sought an order from the High Court that such access was their right. This order was granted by McNally J, after which the government appealed, and the appeal was dismissed by the Supreme Court.

²⁰Widner J and Scher D 'Building Judicial Independence in Semi-Democracies' in Tom G and Moustafa T *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) 249.

²¹See the case of *Catholic Commission for Peace and Justice in Zimbabwe v Attorney-General* 1993 (1) ZLR 242 (S) in which the Supreme Court had held that delay in the execution of the death penalty was inconsistent with section 15(1) of the Lancaster House Constitution as it amounted to cruel, inhuman degrading punishment. However, it should be noted that this decision was reversed by the Zimbabwean Legislature which proceeded to amend the Constitution through the enactment of Zimbabwe Constitution Amendment Act 9 of 1993, which legalised delays in execution with the inclusion of section 15(5) which read 'Delay in execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be a contravention of section 15(1).' See also the case of *S v Juvenile* 1989 (2) ZLR 61 (S) which dealt with the constitutionality of sentences of corporal punishment imposed upon juveniles in terms of the Criminal Procedure and Evidence Act Chapter 9:07. In this case the Supreme Court ruled that corporal punishment was unconstitutional as it was in violation of section 15(1) of the Constitution which provided that 'no person or individual shall be subjected to inhuman and degrading punishment.' The legislature amended the Lancaster House Constitution and added a derogation that allowed corporal punishment to be carried out. Through the Zimbabwe Constitution Amendment Act 30 of 1990, section 15(3) which read '[n]o moderate corporal punishment inflicted (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone in *loco parentis* or in whom are vested any of the powers of his parent or guardian; or (b) in the execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of section 15(1) on the ground that it is inhuman or degrading' was incorporated into the constitution.'

²²Saller K *The Judicial Institution in Zimbabwe* (2004) 3. See also the cases of *Catholic Commission for Peace and Justice in Zimbabwe v Attorney General* and *S v Juvenile* discussed above.

reasonable time to freedom of speech.²³ The courts were thus, truly independent and the period before the 2000 land reform program has been characterised as

'The golden period of human rights litigation in Zimbabwe where the court did not always find for the ordinary litigant, but one knew that whatever point was being raised was carefully considered, and one knew even when the court found for the state that the judgment represented the honest view of the judges who heard the matter.'²⁴

De Bourbon praised the Zimbabwean judiciary for its strong reputation for human rights protection before the commencement of the land reform programme.²⁵ The Supreme Court of Zimbabwe achieved a lot as most of its judgments are regularly referred to in South Africa and other countries, including by the Privy Council, and it also handed down various judgments that sought to comply with various international law principles.²⁶

Despite the great work and example displayed by the previous bench in upholding its independence through difficult times, the same, however, cannot be said of the present judiciary under the leadership of Chidyausiku CJ.²⁷ Although this research recognises the difficult political environment that the judiciary has been operating under, the author recognises that after many years of institutional independence in Zimbabwe, the current political problems in the country have put the judiciary to the test. As a result, the judiciary has displayed a new philosophy of human rights protection which has been below standard when compared to the approach adopted by the previous benches.²⁸

More crucially, the weak constitutional guarantees under the Lancaster House Constitution resulted in the independence (of the current judiciary) being consistently eroded through the use of various tactics by the executive and the manner in which the

²³Widner J and Scher D (2008) 249.

²⁴De Bourbon A (2003) 206.

²⁵De Bourbon A (2003) 206.

²⁶See *Pratt v Attorney-General for Jamaica* 1993 ALL ER 769 (PC). This was a case in which the Privy Council considered whether Jamaica lawfully could execute two prisoners held for fourteen years after sentencing. The Privy Council noted that Jamaican law authorised the death penalty, but however concluded that "it was an inhuman act to keep a man facing the agony of execution over a long extended period of time. The Privy Council made reference to the Zimbabwe's Supreme Court case of *Catholic Commission for Peace and Justice in Zimbabwe v Attorney-General* 1993 (1) ZLR 242 (S).

²⁷Chidyausiku CJ was appointed as Chief Justice in July 2001.

²⁸Mapfumo T (2005) 20.

executive sought to appoint ZANU-PF party loyalists to the bench. Legislative inadequacies in the appointment of judges cast serious doubts on the capacity of the current bench to discharge its constitutional mandate of protecting human rights.²⁹ The constant interference with the independence of the current judiciary contributed to the lack of human rights protection in the country. It is therefore the aim of this research to establish the significance of the new constitutional dispensation with regards to its protection of the independence of the judiciary, and whether such will bode well for human rights protection in the country.

The lack of judicial independence of the current bench has been a major highlight in its failure to protect human rights. The manner in which judges were appointed and the calibre of the individuals raised several questions about the independence of the current bench.³⁰ With regards to the appointment of judges, the Lancaster House Constitution established a Judicial Service Commission (JSC) which acted in consultation with the President, in order to ensure that the appointment of judges was done impartially and in a fair and transparent manner.³¹ It should be noted that transparency in judicial appointments is crucial so as to maintain and protect judicial independence because an independent judiciary is the hallmark of the protection of human rights in any democracy. This is so because the judiciary is the primary body from which victims of

²⁹The mandate of the judiciary in the protection of human rights was dealt with under section 24(1) of the Lancaster House Constitution which read 'if any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any person alleges such contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may subject to the provisions of subsection 3, apply to the Supreme Court for redress.'

³⁰It should be noted that a similar scenario arose in South Africa with reference to the appointment of Chief Justice Mogoeng Mogoeng. See *Daily News* 'Controversy Follows Mogoeng Appointment' 5 September 2011.

<http://www.iol.co.za/dailynews/news/controversy-follows-mogoeng-appointment-1.1131436#.UoMtYVLEPcs> (Accessed 12 March 2012).

³¹Section 84(1) of the Lancaster House Constitution read 'The Chief Justice, Deputy Chief Justice, Judge President and other judges of the Supreme Court and other judges of the High Court shall be appointed by the President after consultation with the Judicial Service Commission.' For the Composition of the Judicial Service Commission see section 90 of the Lancaster House Constitution.

human rights violations obtain formal redress, and therefore plays a unique role in nearly all societies with regards to the protection and promotion of human rights.³²

However, despite the existence of such provisions ensuring impartiality in the appointment of judges, Saller was of the belief that the situation on the ground was different as the appointment of judges in Zimbabwe was not as open as it appeared on paper, and the appointment process was strongly influenced by various political considerations.³³ Thus, the JSC under the Lancaster House Constitution was widely viewed as an extension of the President's office in that the President appointed virtually all the members of the Commission.³⁴ The nomination process was shrouded in controversy as the President could act against the advice of the JSC. Although the Lancaster House Constitution stipulated that if such a scenario occurred, the President had to inform Parliament, it was, however, silent on the action that Parliament had to take.³⁵

The legislative inadequacies led to the controversial appointment of a number of judges to the bench most notably that of Chidyausiku CJ, who had previously served in government and was widely perceived to be sympathetic to the government.³⁶ Chidyausiku CJ was appointed in 2001 at the height of land invasions in Zimbabwe. Justice Chidyausiku had previously chaired the 1999-2000 Constitutional Commission and had also previously served as a Deputy Minister for Justice (under the ZANU-PF

³²Gibney M and Frankowski S *Judicial Protection of Human Rights: Myth or Reality* (1999) vii. See also Kirby M *Strengthening the Judicial Role in the Protection of Human Rights-An Action Plan Inter-Regional Conference on Justice Systems and Human Rights* (2006) 12.

³³Saller K (2004) 18.

³⁴Section 90(1) of the Lancaster House Constitution.

³⁵Section 84(2) of the Lancaster House Constitution. It should be noted that although the Lancaster House Constitution was silent on the action that Parliament had to take, in other countries such as Uganda, Parliament performs an important role in the appointment of judges. Article 142(1) of the Constitution of Uganda states that "The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament." The example of Uganda shows the need to have a strong and well-functioning Parliament which will always check the exercise of executive powers. A strong and well-functioning Parliament, representing the people, is essential for democracy. However, Zimbabwe has for many years had a Parliament, which has not been able to assert itself in relation to the executive power.

³⁶Chigara B *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy* (2012) 212.

government) from 1980 until his appointment as Attorney-General in 1982. He was appointed to be the Chief Justice directly from the High Court over the heads of other more experienced and independent minded Supreme Court judges, including Gillespie J (who later resigned and went into exile after Gubbay's resignation) and Chatikobo J.³⁷ Madhuku notes that the appointment of Chidyausiku CJ was highly politicised, although the appointment was made in line with the provisions of the Constitution.³⁸ Madhuku further states that:

'The political angle rose from the following features: the new Chief Justice came from the High Court and was chosen over four serving judges of the Supreme Court. This was contrary to a precedent that the same government had set in 1990 when it appointed Chief Justice Gubbay, who was the most Senior Supreme Court judge. Further, just a year before his appointment, the new Chief Justice had chaired the highly controversial government appointed Constitutional Review Commission whose Draft Constitution for Zimbabwe had been rejected in a national referendum. In addition, his publicised views on land reform mirrored those of the government.'³⁹

The appointment of Chidyausiku CJ by the President further strengthened the view that the appointment of judges in Zimbabwe was subject to political interference. It should be noted that since 2000, the President has appointed to the bench judges with close connections to the government and known sympathisers of ZANU-PF.⁴⁰ In order to ensure the loyalty of judges, including the Chief Justice, the government allocated land to them seized under its controversial land reform.⁴¹ Seductive donations were also made to members of the judiciary, most notably through the Reserve Bank of Zimbabwe which has donated a fleet of new vehicles, generators, sets of plasma screen televisions, and full sets of satellite dishes to current judges.⁴² Such actions raised serious doubt regarding the independence and impartiality of the judges that benefitted

³⁷Linington G *Constitutional Law in Zimbabwe* (2001) 170.

³⁸Madhuku L 'The Appointment Process of Judges in Zimbabwe and Its Implications for the Administration of Justice' (2006) 21 *SAPR/PL* 345 360.

³⁹Madhuku L (2006) 361.

⁴⁰Human Rights Watch *Our Hands are Tied. The Erosion of the Rule of Law in Zimbabwe* (2008) 15. <http://www.hrw.org/en/reports/2008/11/08/our-hands-are-tied-0> (Accessed 30 May 2011).

⁴¹Gubbay A *The Progressive Erosion of the Rule of Law in Independent Zimbabwe* Third International Rule of Law Lecture Bar of England and Wales (2009) 2. <http://www.swradioafrica.com/pages/gubbay160210.htm> (Accessed 30 May 2011).

⁴²Human Rights Watch (2008) 13-18.

from the Land Reform Program and the seductive gifts, as it was viewed as a case of “one not biting the hand that feeds him”.

The lack of transparency in the appointment process had a great effect on the independence of the judiciary as the judiciary was purged and packed with ZANU-PF supporters who were bribed and given land by the executive so as to ensure their loyalty to government.⁴³ The loss of independence of the current bench is strongly manifested in its failure to tackle fundamental human rights issues raised in several court applications.⁴⁴ De Bourbon goes on to state that “[t]he current composition of the Supreme Court of Zimbabwe bodes ill for human rights in Zimbabwe.”⁴⁵ Therefore, until and unless changes are made within the judiciary, human rights protection in the country will always remain a thing of the past.

The current state of the judiciary is one of the reasons why the human rights situation has worsened.⁴⁶ As a result of the human rights situation in the country, efforts have been made under the new Constitution to address the issue of judicial independence which consequentially would lead to the improved judicial promotion and protection of human rights.⁴⁷ Thus, the Constitution of Zimbabwe has been adopted with a new Declaration of Rights, and with provisions relating to the independence of the judiciary. It is therefore imperative that the Constitution must address the issue of judicial

⁴³International Bar Association (Human Rights Institute (IBAHRI) and Open Society Initiative for Southern Africa (OSISA) (2011) 25.

⁴⁴A host of judgments exist where the current judiciary has failed to address fundamental human rights issues. See amongst others the case of *The Diaspora Action Group v Minister of Justice and Parliamentary Affairs* Supreme Court Case No.22/05 (Unreported) where a case relating to the right to vote for Zimbabweans in the Diaspora was dismissed without any reasons being provided by the court. See also the cases of *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development* Harare High Court Case No.2467/05 (unreported); *Batsirai Children's Care v The Minister of Local Government and Urban Development* Harare High Court Case No. 2566/05 (unreported) where the courts sanctioned government's unlawful eviction programme of 2005 despite the fact that evictions were conducted in a violent manner, with deaths being reported and the evicted families were not provided with any alternative accommodation. A number of other cases exist where the current judiciary has failed to address fundamental human rights issues in the country. These cases will be dealt with in detail in the body of the thesis.

⁴⁵De Bourbon A (2003) 217.

⁴⁶The human rights situation has also worsened due to government's disregard of judicial decisions which it perceives to be contrary to its policies.

⁴⁷Amnesty International *Zimbabwe* 'Constitutional Reform: An Opportunity to Strengthen Human Rights Protection.'

<http://www.amnesty.org/en/library/asset/AFR46/001/2000/en/d3bd173f-dfcc-11dd-8e17-69926d493233/afr460012000en.pdf>. (Accessed 20 August 2011).

independence, in order to address the ills of the past and improve human rights protection in Zimbabwe. The issue of the extent to which the Constitution of Zimbabwe can significantly address the issue of judicial independence and consequently the improvement of the judicial protection of human rights, will be dealt with in this study.

1.1 Research Problem

The continued abuse of human rights has resulted in Zimbabwe becoming a pariah state.⁴⁸ In response to questions concerning the ability of the Lancaster House Constitution to carry through a new democratic process, it may be argued that judicial independence in the country is a “compelling interest” which must be adequately addressed in the Constitution of Zimbabwe. This is so because it enhances greater emphasis on the significance of the role of judicial independence in promoting justice in the country. In a climate where judicial independence is under increased scrutiny, it is important that the Constitution of Zimbabwe must effectively address this crucial issue.⁴⁹

1.2 Hypothesis

This study emanates from the hypothesis that judicial independence is crucial to the promotion and protection of human rights in any democratic society. The issue of the judicial protection of human rights in Zimbabwe has been problematic as the judiciary has been viewed not being independent and hence this has greatly affected its ability to protect human rights. A new Constitution has been adopted with a view to addressing the challenges to the independence of the judiciary and human rights protection. Human rights in Zimbabwe have been violated and continue to be violated, and individuals have failed to obtain any justice from the judiciary since the judiciary is not independent and has been corrupted. It is therefore crucial that the newly enacted Constitution, in order to safeguard the independence of the judiciary, must prohibit administrative interference with the judiciary and also possibly ensure that judicial services are carried out with the objective of promoting an actual fortification of human rights in Zimbabwe. Although this

⁴⁸Linington G ‘Developing a New Bill of Rights for Zimbabwe: Some Issues to Consider’ in Kersting N (eds) *Constitution in Transition: Academic Input for a New Constitution in Zimbabwe* (2009) 46.

⁴⁹Kersting N ‘Constitution in Transition’ in Kersting N (eds) *Constitution in Transition: Academic Input for a New Constitution in Zimbabwe* (2009) 19.

research advocates for an independent judiciary to protect human rights in Zimbabwe, it does recognise that other domestic measures need to be adopted to complement the role of the judiciary in human rights promotion and protection.

1.3 Significance of Research

The Lancaster House Constitution provided for individual human rights. The mandate of protecting such rights was placed on the judiciary.⁵⁰ The role of the judiciary in protecting human rights and upholding the law cannot be underestimated.⁵¹ The judiciary is one of the greatest pillars in ensuring that the Constitution and all its obligations are fulfilled and, as such, it plays a unique role in the protection and promotion of human rights.⁵²

The judiciary has a vital role in ensuring that all the other organs of state fulfil and uphold their constitutional obligations.⁵³ It is therefore important that the judiciary should, in so far as it is within its power, ensure that the obligations imposed by the Constitution are faithfully observed by other organs of government in order to ensure that the rule of law prevails.⁵⁴ The role of the judiciary in upholding the rule of law can never be underestimated since the rule of law is essential to the effective functioning of the system of government in a democratic society.⁵⁵ It is therefore imperative that the judiciary should be free from any external control so that it can be able to deliver and uphold the law. The doctrine of separation of powers is of great importance in ensuring the effective functioning of the judiciary.⁵⁶ An independent judiciary is one of the

⁵⁰Apple J (1997) 197.

⁵¹Keith LC 'Judicial Independence and Human Right Protection Around the World' (2002) 85:4 *Judicature* 195 195.

⁵²Prefontaine DC and Lee J *The Rule of Law and the Independence of the Judiciary* (1998) 164. Paper prepared for the World Conference on the Universal Declaration on Human Rights, Montreal December 7- 9 1998.

http://rs.sqdi.org/volumes/11.2_-_prefontaine-lee.pdf (Accessed 24 April 2011).

⁵³Motala Z 'Toward an Appropriate Understanding of the Separation of Powers and Accountability of the Executive and Public Service under the new South African order' (1995) 112 *SALJ* 503 518.

⁵⁴Meyerson D 'The Rule of Law and Separation of Powers' 2004 *Macquarie Law Journal* <http://www.austlii.edu.au/au/journals/MqLJ/2004/1.html> (Accessed 15 August 2011).

⁵⁵*Smith v Mutasa* NO 1989 (3) ZLR 189 (SC).

⁵⁶Meyerson D 2004. See also United Nations Basic Principles of the Judiciary adopted by the General Assembly in 1985.

essential pillars of a democratic state as it enables citizens of a state to obtain a legal remedy for their claims.⁵⁷

This research seeks to show that for the judiciary to be able to preserve and promote the purport, spirit and objects of the Constitution, the Constitution of Zimbabwe must be enforced in such a manner as to prevent any interference with the functions of the judiciary in order to ensure that its independence is upheld, thus improving the human rights situation in the country.

1.4 Research Aims and Objectives

1.4.1 Aims

This research seeks to show how the completed constitutional reforms that culminated in the adoption of the Constitution of Zimbabwe can be used as a foundation for the improved protection and promotion of human rights values by the judiciary in Zimbabwe. As a result of its loss of independence, the judiciary has been unable to deliver on its constitutional mandate. In order to ensure that there is an improvement in the judicial protection of human rights, the Constitution of Zimbabwe has been adopted to address this issue. This research will analyse the role of the Constitution of Zimbabwe and the significance, if any, of the reforms in the Constitution on the protection of the independence of the judiciary and the effects that such independence will have on the future of human rights protection in the country.

1.4.2 Objectives

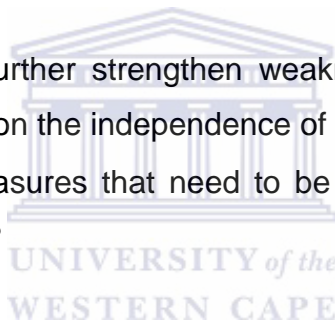
- To examine the state of the judiciary before the Constitution of Zimbabwe was drafted and the factors that necessitated the drafting of the new Constitution.
- To critically review the legal significance of the Constitution of Zimbabwe with regards to the independence of the judiciary.
- To examine what must be done in the light of the Constitution of Zimbabwe to more effectively protect judicial independence.

⁵⁷Vysas V 'The Independence of the Judiciary: A Third World Perspective' 1992 *Third World Legal Studies* 127. See also Gubbay A (2009) 1.

- To make recommendations on how the Constitution of Zimbabwe may contribute to an improved protection of human rights by the judiciary.
- To examine if other measures, besides the judicial reforms, need to be taken in order to improve the human rights situation in the country.

1.5 Research Questions

- What is the importance and significance of judicial independence in the protection of human rights?
- What are the most practical and effective measures to ensure judicial independence in Zimbabwe?
- Do the new Zimbabwean constitutional provisions on judicial independence suffice?
- What can be done to further strengthen weaknesses (if any) with regards to constitutional provisions on the independence of the judiciary?
- Are there any other measures that need to be taken to improve human rights protection in the country?



1.6 Literature Review

An array of literature has been written about the human rights abuses and the conduct of the judiciary in Zimbabwe. A great volume of this literature will be referred to in the body of the thesis. The literature explores the extent of the human rights abuses in the country as well as analysing the various reasons that have contributed to such abuses. An array of literature has also been written with regard to the independence of the judiciary and how such independence is vital to the effective functioning of the judiciary.

Wade and Bradley⁵⁸ make an in-depth analysis of the importance of the doctrine of judicial independence. The authors analyse how it is vital that the separation of powers doctrine should be maintained in any jurisdiction so as to ensure that the judiciary closely guards its independence and also to ensure that other organs of the state

⁵⁸Wade ECS and Bradley AW *Constitutional and Administrative Law* (1991) 51.

remain accountable for their actions. The same subject is also addressed by McQuoid *et al*⁵⁹, who attach much significance to the importance of the doctrine of separation of powers and judicial independence in the protection of human rights.

English and Stapleton⁶⁰ look at the importance of the courts as they play a central role in maintaining the rule of law which is essential for the protection of human rights and fundamental freedoms. The authors also emphasise the importance of an independent judiciary in the protection of human rights and state that an independent judiciary is one of the cornerstones of a democracy.⁶¹ An independent judiciary is therefore an essential component in the proper administration of the rule of law.

Simmons discusses how the doctrines of rule of law and separation of powers are an integral part in the maintenance of judicial independence in any jurisdiction.⁶² Despite the varying interpretations given to the rule of law, there are basic underlying tenets associated with the rule of law doctrine⁶³, and Feltoe states that the rule of law includes the following concepts discussed below:

'The rule of law is an essential foundation of any democratic system. It is a complex concept but its core aspects are straightforward. The rule of law requires that power be exercised in accordance with the law and disallows the arbitrary use of extra legal power. Everyone should therefore be equally subject to the law and no other law should be above the law. Law enforcement agencies and the courts should enforce and apply the

⁵⁹McQuoid-Mason D, O'Brien EL and Green E (eds) *Human Rights for All: Education Towards a Rights Culture* (1993) 33.

⁶⁰English K and Stapleton A *The Human Rights Handbook: A Practical Guide to Monitoring Human Rights* (1997) 80.

⁶¹English K and Stapleton A (1997) 80.

⁶²Simmons D 'Issues of Judicial Independence in the Caribbean Court Room' (2001) 14 8 *Journal of the Commonwealth Magistrates' and Judges Association* 8-11.

⁶³See also Ngugu J.M 'Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse' (2005) 26:3 *U. PA. J. INT'L ECON. L.* 513 553 who describes three different kinds of definition of the rule of law; a formal definition measuring a legal system against specified criteria; a substantive definition looking at substantive outcomes, such as justice and fairness, that is driven by a moral vision of the "good legal system;" and a function definition focusing on how well a legal system performs as specified function.

law impartially and the law should protect everyone equally against illegal action causing harm.⁶⁴

The academic input by the mentioned authors on the above subject will therefore add great value to this research.

The importance of an independent judiciary in the protection of human rights is a fundamental element of democracy and the protection of human rights since the judiciary exercises checks and balances on other organs of state to ensure that there is no abuse of power.⁶⁵ Rautenbach and Malherbe discuss the importance of issues, such as, separation of powers and judicial independence.⁶⁶ The authors discuss the importance of separation of powers and why the judiciary should be free from executive control to ensure the effective functioning of the judiciary. Authors, such as, Eso⁶⁷, Savage and Chimhini⁶⁸ and Currie⁶⁹, also discuss the importance of the separation of powers and judicial independence.⁷⁰

Saller conducted a detailed study of the judicial institution in Zimbabwe.⁷¹ The author dealt with the doctrine of separation of powers and discussed the issue of whether the judiciary is indeed independent from other organs of state. The book also deals with the importance and role of the judiciary in the protection of human rights.⁷² Authors, such as, Hatchard *et al*⁷³ and Madhuku⁷⁴, have conducted a detailed study of the independence of the judiciary in Zimbabwe and other jurisdictions in Africa. Such

⁶⁴Feltoe G 'The onslaught against democracy and the rule of law in Zimbabwe' (2001) 4 *Zimbabwe Human Rights Bulletin* 130-131. See also Devenish GE *The South African Constitution* (2005) 10-15; Devenish GE *A Commentary on the South African Bill of Rights* (1999) 13-15.

⁶⁵Motala Z (1995) 503-518.

⁶⁶Rautenbach IM and Malherbe EFJ *Constitutional Law* 6 ed (2013) 165.

⁶⁷Eso K 'Judicial Independence in the Post-Colonial Era' in Ajibola B and Van Zyl *The Judiciary in Africa* (1998) 120.

⁶⁸Savage T and Chimhini A *Hundred Years War. Through Fire with Water: The Roots of Division and the Potential for Reconciliation in Africa* (2003) 20.

⁶⁹Currie I and De Waal J *The New Constitutional and Administrative Law* (2001) 96-119.

⁷⁰See also Gibney M and Frankowski S (1999) vii.

⁷¹Saller K (2004) 1.

⁷²Saller K (2004) 1.

⁷³Hatchard J, Ndulo M and Slinn P *Comparative Constitutionalism and Good Governance in Commonwealth: An Eastern and Southern African Perspective* (2004) 150.

⁷⁴Madhuku L 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa' (2002) 46:2 *Journal of African Law* 232-232.

studies have established the best practices in the protection of the independence of the judiciary.

Bond and Manyanya clearly depict the economic history of Zimbabwe and how the negative economic situation in Zimbabwe has resulted in severe economic difficulties⁷⁵, which have subsequently forced judges to be at the mercy of the executive. The negative economic situation has forced members of the judiciary to become reliant on government donations and has resulted in the impartiality of judges being questioned.⁷⁶

A number of scholarly articles have been written on the state of the human rights situation in Zimbabwe and on the failure of the current judiciary to effectively protect human rights due to the loss of its independence. A report by the International Bar Association (IBA) on the justice system in Zimbabwe, published in 2004, examines how the justice system had collapsed in Zimbabwe.⁷⁷ The report shows how the judiciary and the justice system have been compromised. The report depicts the non-existence of transparency in judicial appointments and how the appointment of judges is clearly influenced by political considerations.⁷⁸ The report shows the partisan nature of the Zimbabwean judiciary and how several members of the judiciary have chosen to protect the interest of the ruling party and how other judges and lawyers, perceived to be unsympathetic to government policy, have been victimised and forced to flee the country.⁷⁹ The report clearly depicts the collapse of the judicial institution and how such collapse has contributed to the increased culture of human rights abuses in the country.

⁷⁵Bond P and Manyanya S *Zimbabwe's Plunge Exhausted Nationalism, Neoliberalism and the Search for Social Justice* (2003) 18.

⁷⁶Human Rights Watch (2008) 13-18. The publication makes a scathing attack on the Reserve Bank of Zimbabwe which donated a fleet of new vehicles, generators, sets of plasma screen televisions, and full sets of satellite dishes to the sitting judges to improve their conditions of service. It goes on further to state that such actions set a bad precedent and pose a great threat to the rule of law, judicial independence and its impartiality.

⁷⁷International Bar Association *The Justice System in Zimbabwe* Final Report 2004.

http://austbar.asn.au/dmdocuments/The_State_of_Justice_in_Zimbabwe_Final_Report_03_12_04.pdf (Accessed 30 May 2011).

⁷⁸International Bar Association (2004) 4.

⁷⁹International Bar Association (2004) 41-55. Former Chief Justice Antony Gubbay was forced to resign in 2001 and threatened with violence by Mugabe's militia of guerilla war veterans after the Supreme Court had ruled that the farm invasions of 2000 were illegal.

[http://www.iol.co.za/general/news/newsprint.php?art_id=qw1032348961589B252&sf=\(Accessed](http://www.iol.co.za/general/news/newsprint.php?art_id=qw1032348961589B252&sf=(Accessed)

Another report published by the International Bar Association's Human Rights Institute (IBAHRI) and the Open Society Initiative for Southern Africa (OSISA) in 2011 focuses on the human rights situation in Zimbabwe.⁸⁰ The report looks at the current state of the judiciary in the country and how the executive and the police have consistently interfered with the functioning of the courts.⁸¹ The report reveals how such interference has made it difficult for the courts to function independently since many orders of the courts have been ignored by the police force, which has developed a tendency of conducting its duties along political lines.⁸² This has resulted in increased human rights violations since perpetrators of human rights violations are seen to be beyond the reach of the law.

Human Rights Watch (HRW) has also published several articles on the abuse of human rights in Zimbabwe. HRW in several of its reports depicts how human rights violations have been a consistent practice in Zimbabwe.⁸³ Its reports also depict the state of the judiciary and how it has been compromised through the persistent interference with its duties by the executive.⁸⁴ Other reports give a detailed analysis of the human rights situation in the country and how the formation of the Government of National Unity (GNU) failed to end human rights violations in the country.⁸⁵ These reports provide

15 September 2011). Justice Benjamin Paradza was arrested in his chambers on 17 February 2003 for allegedly obstructing the course of justice. Justice Paradza had a long history of passing judgments perceived to be unfavourable to the ruling authorities. The arrest led to the judge fleeing Zimbabwe and sought asylum in New Zealand.

http://www.queensu.ca/samp/migrationnews/article.php?Mig_News_ID=2833&Mig_News_Issue=15&Mig_News_Cat=11 (Accessed 15 September 2011).

⁸⁰International Bar Association Human Rights Institute (IBAHRI) and Open Society Initiative for Southern Africa (OSISA) (2011).

⁸¹International Bar Association Human Rights Institute (IBAHRI) and Open Society Initiative for Southern Africa (OSISA) (2011) 25.

⁸²International Bar Association Human Rights Institute (IBAHRI) and Open Society Initiative for Southern Africa (OSISA) (2011) 25. See also International Bar Association *Partisan Policing: An Obstacle to Human Rights and Democracy in Zimbabwe* (2007) 8.

www.ibanet.org/Document/Default.aspx%3FDocumentUid%3Dde4d35d9f-0fd2-4ee0-81af-05bd80e2277e+&cd=1&hl=en&ct=clnk&gl=za (Accessed 13 April 2012).

⁸³Human Rights Watch *Diamonds in the Rough Human Rights Abuses in the Marange Diamond Fields of Zimbabwe* (2009) 3-6.

<http://www.hrw.org/reports/2009/06/26/diamonds-rough-0> (Accessed 23 April 2012).

⁸⁴Human Rights Watch (2008) 2.

⁸⁵Human Rights Watch *World Report 2011: Zimbabwe* (2011) 1-4.

http://www.hrw.org/sites/default/files/related_material/zimbabwe_1.pdf (Accessed 30 November 2011).

useful information on the human rights abuses in the country and the present state of the judiciary

Although the literature discussed above is important in the discussion of judicial independence and judicial protection of human rights, it however does not cover any issues relating to the independence of the judiciary under the new constitutional dispensation in Zimbabwe. Although this thesis relies on the above scholarly writings, this study goes beyond these scholarly writings and endeavours to analyse the significance of the new constitutional dispensation in Zimbabwe. This is done in order to highlight whether the new constitutional dispensation will bode well for the independence of the judiciary and thus lead to an improvement of the judicial protection of human rights in Zimbabwe.

1.7 Research Methodology

This research was desk based. As a desk based research, it was conducted through library search, and the use of various internet sources. The author analysed the law and jurisprudence on the independence of the judiciary in relation to human rights protection. Given that this research seeks to emphasise the importance of an independent judiciary in human rights protection, a substantial part of this thesis analyses a number of scholarly writings on this aspect. Case law and International instruments are also used to highlight the importance of this aspect in human rights protection. This research also makes a historical analysis of the protection of human rights by the judiciary in Zimbabwe. This is done in order to highlight the performance of the judiciary over the years with regards to human rights protection. The historical analysis brings out the marked differences in the protection of human rights and how the present judiciary has lagged behind in the protection of human rights. The research also makes use of a comparative study of the protection of judicial independence in countries, such as, Uganda, South Africa, and Canada. The comparative analysis is made to establish the best practices in the protection of judicial independence and how these countries have incorporated international instruments relating to judicial independence, thus enhancing the protection of judicial independence at the national level.

1.8 Outline of Chapters

This research is divided into seven chapters

Chapter One deals with the general outline of the research. It outlines the aims, objectives, problem statement, assumptions underlying the research, rationale, limitations of the research, and the methodology.

Chapter Two will look at the importance and significance of the doctrine of judicial independence in the protection of human rights. This chapter will focus on the international and African regional instruments that seek to give effect to the protection and importance of the independence of the judiciary in human rights protection.

Chapter Three will deal with the historical analysis of the state of the judiciary in Zimbabwe from the independence era up to the present. The historical analysis will highlight the performance of the judiciary over the years with regards to human rights protection. The historical analysis will bring out the marked differences in the protection of human rights and how the present judiciary has lagged behind in the protection of human rights.

Chapter Four will provide a comparative analysis of the protection of judicial independence in countries, such as, Uganda, South Africa, and Canada. The comparative analysis will be made to establish the best practices in the protection of judicial independence and how these countries have incorporated international instruments, thus enhancing the protection of judicial independence at the national level.

Chapter Five will look at the Constitution of Zimbabwe and the factors that have necessitated the drafting of the new Constitution. The chapter will review the legal significance of the new constitutional dispensation on the independence of the judiciary and the impact of the new constitutional dispensation on the independence of the judiciary and human rights protection in the country.

Chapter Six will look at whether there is a need to put in place other measures, which can be used to complement the role of the judiciary in the protection and promotion of human rights.

Chapter Seven provides the conclusions of the research concerning the protection of human rights and the functioning of the judiciary in Zimbabwe. The chapter will also provide adequate recommendations which will aid in the strengthening of judicial independence and human rights protection in Zimbabwe.

1.9 Limitations

A key limitation of this research is the availability of substantial primary and secondary sources concerning this delicate subject in a country that is eager to gag or limit any discussions concerning judicial independence and human rights protection. The lack of availability of such information (after the Fast Track Land Reform) has been a hindrance in getting vital information relating to the study. This problem can mainly be seen in the lack of case law relating to human rights issues. Although a few of these cases are reported on databases, a substantial number of vital human rights cases remain unreported.

This research notes that there is an array of jurisprudence on human rights issues in Zimbabwe since independence. This will therefore present a challenge with regards to the methodology for the selection of cases and thus the study may not be exhaustive of all the human rights jurisprudence. Thus, the research will highlight landmark human rights cases since independence in Zimbabwe. The same will also be done in the comparative analysis chapter. A discussion of all human rights judgments in Zimbabwe and in the comparative analysis chapter is beyond the scope of this research.

CHAPTER 2

THE IMPORTANCE OF JUDICIAL INDEPENDENCE IN HUMAN RIGHTS PROTECTION BY THE JUDICIARY: AN INTERNATIONAL PERSPECTIVE

2 Introduction

The judicial system in a country is central to the protection of human rights and freedoms.⁸⁶ This is so because courts play a major role in ensuring that victims or potential victims of human rights violations obtain effective remedies and protection.⁸⁷ The existence of an independent judiciary has become a mantra for international institutions and governments around the world.⁸⁸ It is widely believed that an independent judiciary is one of the strongest guarantees for upholding the rule of law and the protection of human rights in any society. It is also argued that a strong judiciary is one of the elements of the rule of law.⁸⁹ As a result of the pivotal role which the judiciary plays in the governance of states and in the lives of individuals, many efforts have been made internationally to formulate and enact rules that are designed to protect the judiciary and ensure that it performs its mandate and secure it from undue influence. This chapter, therefore, seeks to emphasise the importance of judicial independence in the protection of human rights and identify various international instruments that have been put into place to protect and promote the independence of the judiciary. These international law principles provide guidelines that can be used by states around the world to effectively promote and protect the independence of the judiciary

⁸⁶It should be noted that this research recognises that in any democracy, the judiciary is not the only body tasked with human rights protection. This is so because there are other national bodies of organs such as the police, NGOs and national human rights institutions that are also tasked with human rights protection. Since the focus on this thesis is on the judiciary, specific reference will be made on the role of the judiciary as the other bodies fall outside the scope of discussion of this thesis.

⁸⁷Gibney M and Frankowski S (1999) vii.

⁸⁸Kirby M (2006) 12.

⁸⁹Boies D 'Judicial Independence and the Rule of Law' (2006) 22 *Journal of Law and Policy* 57 58.

2.1 Judicial Independence and Human Rights Protection

The importance of an independent judiciary in human rights protection has been noted as the indispensable cog in the machinery for securing individual protection against states' human rights abuses.⁹⁰ Keith notes that in order to ensure that it act as a check on the potential excesses of both the executive and legislative branches, only an independent and impartial judiciary may effectively guarantee the protection of human rights.⁹¹ Meron notes that judicial independence is critical for the rule of law and thus ensures that judges who are independent of political or other pressures are able to adjudicate disputes brought before them with an eye to the guiding legal principles and without any undue influence by external sources.⁹² Abul-Ethem also notes that one of the vital ways to keep human rights safe is by preserving the prevailing role of the judiciary.⁹³

Meron also notes that judicial independence plays a key role in the protection of human rights, as it allows judges to act within the confines of the law, thus ensuring predictability of their decisions. This would be so because these decisions would be based on existing law, judicial precedent, and the unbiased application of the law to the facts in issue.⁹⁴ Abul-Ethem supports this view and states that in cases where the judiciary makes equitable decisions, such decisions set a valuable precedent for the future resolution of disputes between individuals or between the State and individuals.⁹⁵ Thus the judicial process provides for the effective implementation of the law, the protection of the rights of individuals and groups, and sets standards for the subsequent equitable enforcement of the law.⁹⁶ This will result in human rights receiving effective protection from the courts.⁹⁷

⁹⁰Nsereko DD 'The Police, Human Rights, and the Constitution' (1993) 15 *Hum. Rts. Q.* 465-468.

⁹¹Keith LC (2002) 195.

⁹²Meron T 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99:2 *The American Journal of International Law* 359 359.

⁹³Abul-Ethem F 'The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective' (2002) 26:3 *Fordham International Law Journal* 761 761.

⁹⁴Meron T (2005) 359. See also Abul-Ethem F (2002) 762.

⁹⁵Abul-Ethem F (2002) 762.

⁹⁶Abul-Ethem F (2002) 762.

⁹⁷Abul-Ethem F (2002) 762.

Abul-Ethem further notes that in a system where human rights receive effective protection from the courts, parties to a dispute are able to present evidence in an endeavor to make the court correctly understand the facts of the dispute, and consequently rule in a just manner, reinstating their rights.⁹⁸ As a result of the common opinion that an independent judiciary is the strongest guarantee for upholding the rule of law and the protection of human rights, a number of international instruments recognise the link between the independence of the judiciary and human rights. These international instruments, which are discussed in detail in this chapter, place great emphasis on the importance of an independent judiciary as one of the most essential elements for safeguarding human rights. International standards for securing judicial independence have also been put into place in order to emphasise the importance of an independent judiciary in human rights protection. These standards are also discussed in detail in this chapter.

2.2 Defining the Concept of Judicial Independence

Madhuku notes that the independence of the judiciary is a logical corollary of the principle of separation of powers in that the vesting of the judicial functions in a body of persons separate from the executive and the legislature can only have real meaning if the body of persons is truly independent.⁹⁹ Judicial independence has over the years been frequently touted as the lynchpin of a democratic society and the rule of law.¹⁰⁰ However, despite the significant emphasis on the importance of judicial independence, a concrete or consistent definition of the term has proven to be elusive. Tiede notes that part of the problem of attempting to define judicial independence is that the use of the term is amoebic, changing shape to fit the particular context in which it is used and with the question of who or what the judiciary should be “independent” from.¹⁰¹ Although judicial independence is understood to be a dynamic concept that may be defined in

⁹⁸Abul-Ethem F (2002) 762.

⁹⁹Madhuku L ‘Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa’ (2002) 46:2 *Journal of African Law* 232 232.

¹⁰⁰Simmons D (2001) 8-11.

¹⁰¹Tiede LB ‘Judicial Independence: Often Cited, Rarely Understood’ (2006) 15 *Journal of Contemporary Legal Issues* 129 130.

different ways, it is generally referred to as shorthand for the judiciary's independence from the executive and legislative branches of government.¹⁰²

Eso in providing the definition of the independence of the judiciary mainly inclined to the institutional independence of the judiciary, with the executive and legislature playing a key role in ensuring that the judiciary remains independent. He stated that:

'The concept of an independent judiciary implies, first that the powers exercised by the court in the adjudication of disputes is independent of legislative and executive power, so as to make it usurpation to attempt to exercise it either directly by legislation, as by a bill of attainder, or by vesting any part of it in a body which is not a court; secondly, that the personnel of the court are independent of the legislature and the executive as regards their appointment, removal and other conditions of service.'¹⁰³

On the other hand, Green provides a comprehensive definition of the concept of judicial independence and defines it as the capacity of the courts to perform their constitutional function free from interference by and apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.¹⁰⁴

The above definition emphasises the fact that when exercising judicial functions, judges should be free from any direct or indirect interference by the executive, any institution or any private individuals. Despite the several definitions provided for the concept of judicial independence and the complexity of the whole concept, scholars have generally agreed that the concept generally has to do with the independence of the judiciary from the executive and legislative arms of government. It should be noted that the main emphasis on judicial independence serves to ensure that there is a curtailment of any abuse by the government and hence in order to ensure that there are no violations of human rights or freedoms, the judiciary should therefore be afforded the opportunity to

¹⁰²Cross B 'Thoughts on Goldilocks and Judicial Independence Symposium: Perspectives on Judicial Independence: Accountability and Separation of Power Issues' (2003) 64 *Ohio State Law Journal* 195 196. See also Taitz JL 'The Right to Reasonable and Adequate Notice of Criminal Proceedings- An Essential Aspect of Procedural Justice' (1992) 2 *SACJ* 132 138.

¹⁰³Eso K (1998) 120.

¹⁰⁴Green G 'The Rationale and Some Aspects of Judicial Independence' (1985) 59 *Australian Law Journal* 135-162.

exercise its authority as the guardian of the constitution and protector of human rights.¹⁰⁵

As can be seen from the discussion above the notion of judicial independence derives from the doctrine of separation of powers¹⁰⁶, as advocated by Montesquieu. Montesquieu opined that if the judiciary were not independent of the legislature and the executive, the law could not be employed as a means of ensuring liberty and advancing human rights. Hence in such circumstances the law could not empower an affected citizen to challenge the lawfulness or otherwise of any legislation or executive actions that would impede a citizen's rights. Hence, in order to fully guarantee the protection of human rights, it is important that a competent, independent, and impartial tribunal has to be established in accordance with the law to guarantee the protection of human rights. This guarantee ensures that individual human and constitutional rights of a party to a dispute are decided by a neutral body, be it judicial or quasi-judicial. In this instance it is important to note that it is not enough for the judiciary, as an institution, to be independent as individual judges must be seen to be objective and impartial. Thus, the next paragraph makes a distinction between judicial independence and judicial impartiality.

2.2.1 Distinction between Judicial Independence and Judicial Impartiality

A number of jurists have opined that the concepts of judicial independence and impartiality overlap and thus can hardly be clearly distinguished.¹⁰⁷ However, there are scholars who have also opined that judicial independence and impartiality are two distinct concepts and therefore must be distinguished.¹⁰⁸ As has been already stated above, scholars have generally agreed that the concept of judicial independence generally has to do with the independence of the judiciary from the executive and legislative arms of government, the press, media, public debate, and political parties. As such judges should be free from any 'inappropriate' influence in their decisions.

¹⁰⁵Wade ECS and Bradley A.W *Constitutional and Administrative Law* (1991) 51.

¹⁰⁶The doctrine of separation of powers is discussed in detail later on in this chapter.

¹⁰⁷Treschel AH 'Curing Democracy Ills? Modern Technology and Democratic Procedures' in Council of Europe *Reflections on the Future of Democracy in Europe* (2005) 45.

¹⁰⁸Van Dijk P and van Hoof GJH *The Right of an Accused to a Fair Trial under International Law* (1998) 451.

Impartiality, on the other hand, relates to a specific case at hand. The guarantee of impartiality plays a pivotal role in the protection of an individual's rights. The concept of impartiality entails that a judge must not be biased in favour of any party to a dispute. Treschel notes that 'a judge must be free to float hither and thither between the positions of the parties and finally reach a decision at the place which, in correct application of the law and rules of jurisprudence, marks the just solution.'¹⁰⁹

The distinction between judicial independence and impartiality has been dealt with by a number of courts. In the case of *Valente v The Queen*, the Supreme Court of Canada held that:

'Although recognising the 'close relationship between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "independent", however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others particularly to the executive branch of government.'¹¹⁰

In the case of *R v Lippe*, in making a distinction between judicial independence and judicial impartiality it was stated that:

'...Judicial independence is critical to the public's perception of impartiality; judicial independence is the cornerstone, a necessary prerequisite, for judicial impartiality.'¹¹¹

The distinction between judicial independence and judicial impartiality has also been emphasised in the case of *Prosecutor v Kanyabashi* where the International Criminal Tribunal stated that:

'Judicial independence connotes the freedom from external pressures and interference. Impartiality is characterised by objectivity in balancing the legal interests at play.'¹¹²

However, it is crucial to note that despite the existence of jurisprudence that seeks to differentiate between judicial independence and impartiality, the jurisprudence of the European Court of Human Rights (ECHR) has noted that at times the distinction

¹⁰⁹Treschel AH (2005) 50.

¹¹⁰*Valente v The Queen* [1985] SCR 673, 23 CCC 3d 193 (Can.1985) at 201-202.

¹¹¹*R v Lippe* [1991] 2 SCR 114, 64 CCC 3d 513, 530.

¹¹²*Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1996 para.35.

between the two terms is complicated and not always transparent. In the case of *Holm v Sweden*¹¹³, the Court found it difficult to examine the issues of independence and impartiality separately.¹¹⁴ Similarly in the case of *Debled v Belgium*¹¹⁵, the ECHR found that it was unnecessary to examine issues of independence and impartiality separately. Another case that illustrates that the ECHR does not attach much importance to the distinction between judicial independence and impartiality is that of *Findlay v United Kingdom*. In the case of *Findlay v United Kingdom*, the Court held that:

‘The concept of independence and objective impartiality are closely linked and the court will consider them together as they relate to the present case.’¹¹⁶

It should be noted that despite the differences between judicial independence and impartiality, as noted above, this research recognises that judicial independence plays a key role in the protection of human rights and forms a prerequisite for judicial impartiality. The concept of judicial independence has two important elements: the individual independence of the judges and the institutional independence of judges. The significance and importance of these elements will be discussed below.

2.3 Individual Independence of the Judiciary

The individual independence of the judiciary entails a number of factors that help to ensure that judges can act free from the influence of any outside sources.¹¹⁷ Individual independence of judges means that judges should be free to exercise judicial functions without any fear or anticipation of retaliation or reward.¹¹⁸ It therefore means that in making their decisions judges should decide cases impartially based on the facts of the case and their understanding of the law and without any direct or indirect influence on their decisions.¹¹⁹ In performing their functions it is of paramount importance that judges

¹¹³279 EUR.Ct. H.R. (Ser. A) (1993).

¹¹⁴*Holm v Sweden* 79 EUR.Ct. H.R. (ser. A) para.30 (1993).

¹¹⁵292 Eur. Ct. H.R. (ser. A) para. 36 (1994).

¹¹⁶ *Findlay v United Kingdom*, Reports 1997-I, 263, (1997) 24 EHRR 211 para.73.

¹¹⁷Ferejohn J ‘Independent Judges, Dependent Judiciary: Explaining Judicial Independence’ (1999) 72 *Southern California Review* 353 355.

¹¹⁸Ferejohn J (1999) 355.

¹¹⁹Principle 2 of the United Nations Basic Principles which states “that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions,

should arrive at decisions in a regular as opposed to an arbitrary manner, thus ensuring that justice is dispensed and also ensuring and gaining the confidence of the general public in the whole judicial system.¹²⁰ According to Singh, the individual independence of judges consists of three elements: personal, substantive and internal independence.¹²¹

2.3.1 Personal Independence

The characteristics of personal independence of the judiciary entail that judges must have security of tenure either in the form of life-long appointments, set terms of office or a mandatory retirement age, adequate remuneration and pensions and a well-defined process for their removal.¹²² The safeguarding of the personal independence of the judiciary is important in ensuring that judges can be able to decide cases without fear or favour. This would therefore make it difficult for the executive or the legislature to dismiss judges in retaliation for unfavourable judgments.¹²³

2.3.1.1 Appointments

The appointment process of judges is crucial in safeguarding the individual independence of judges. It is mandatory that judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The appointment process should also ensure that individuals appointed to the judicial bench are of integrity and have ability and the necessary training and qualifications.¹²⁴

In terms of international law there are no binding procedures and standards for appointing judges. Although each state is left to design its own procedures and standards, such procedures should be transparent, clear and impartial. It is also crucial

improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.”

¹²⁰Kirby M (2006) 12.

¹²¹Singh MP ‘Securing the Independence of the Judiciary- The Indian Experience’ (2000) 10 *Indiana International and Comparative law Review* 245 248.

¹²²Singh MP (2000) 249.

¹²³Malleson K ‘Judicial Training and Performance Appraisal: The Problem of Judicial Independence’ (1997) 60:5 *Modern Law Review* 655 660.

¹²⁴Goredema C (2004) 105. See also Principle 10 of the UN Basic Principles on the Independence of the Judiciary; Principle A, paragraphs 4 (i) and (j) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

that appointments should be made by an independent body as is the case in most African countries, where the JSC is tasked with judicial appointments. The establishment of an independent body for judicial appointment finds support in the African Principles and Guidelines on the Right to a Fair Trial and Legal Assistance (African Principles)¹²⁵ and the Commonwealth Principles on the Accountability of and Relationship on the Three Branches of Government (Latimer House Principles).¹²⁶ An independent body, such as the JSC, is tasked with identifying and selecting individuals who will uphold the independence of the judiciary. International law also recognises that the other arms of government may make judicial appointments but favours appointments by an independent body so as to avoid partisan appointments to the judiciary.¹²⁷ Although there are no binding procedures and standards for appointing judges, it is crucial that in order to safeguard the independence of the judiciary, any method of judicial selection must safeguard against judicial appointments for improper motives.¹²⁸

2.3.1.2 Tenure and Removal

In order to secure the independence of the judiciary, appointments should ensure that the tenure of judicial officers is protected. The securing of the security of tenure of judges helps to ensure that judges discharge their duties impartially without any threat over the non-renewal of their contracts. Thus, international law prefers that non-renewable or long term security of tenure¹²⁹ are ideal for securing the independence of the judiciary and that such security of tenure should be guaranteed under domestic legislation.¹³⁰

The personal independence of the judiciary is also protected through the provision of removal procedures that are clear, and that reasons for removal must be provided.¹³¹ International law recognises that judges should be removed from office only in cases

¹²⁵See Principle A paragraph 4 (h) of the African Principles adopted in 2001.

¹²⁶Guideline II (1) of the Latimer House Principles.

¹²⁷International Commission of Jurists (ICJ) *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioner's Guide* (2004) 44.

¹²⁸Principle 10 of the United Nations Basic Principles on the Independence of the Judiciary.

¹²⁹See Guideline 11(1) of the Latimer House Principles.

¹³⁰See Principle 11 of the UN Basic Principles; Principle A para.4 (m) of the African Principles.

¹³¹International Commission of Jurists (ICJ) (2004) 54.

where there is 'serious misconduct', a disciplinary or criminal offence, or incapacity to discharge judicial functions.¹³² The process for the removal of a judge should be transparent and investigations for the removal of a judge should be conducted by an independent body so as to ensure impartiality. To ensure impartiality and transparency, a judge should be notified of the reasons for removal and should be afforded a fair hearing by an independent and impartial body.¹³³ The protection of the removal conditions of judges goes a long way in securing the independence of the judiciary.

2.3.1.3 Financial Security

Financial security of the judiciary is also crucial in maintaining individual judicial independence as it would prevent other branches of government from using threats of salary deductions to influence judges. Financial security therefore ensures that the judicial system is able to operate effectively without any undue constraints which may hamper the independence of the judiciary.¹³⁴ A number of international instruments have been put into place and these recognise the need for the judiciary to be given sufficient resources. The instruments, amongst others, include the United Nations Basic Principles on the Independence of the Judiciary (*hereinafter* UN Basic Principles)¹³⁵, the Latimer House Guidelines¹³⁶ and the Guidelines on a Right to a Fair Trial in Africa.¹³⁷

¹³²International Commission of Jurists (ICJ) (2004) 53. See also Principle 18 of the United Nations Basic Principles which provides for removal on the basis of incapacity and judicial officer's behaviour; Principle A para. 4(p) of the African Principles; Guideline V(1) para (a)(A) and (B) of the Latimer House Guidelines which include serious misconduct and incapacity to perform judicial duties as reasons for removal.

¹³³International Commission of Jurists (ICJ) (2004) 54. See also Principle 17 of the UN Basic Principles; Principle 4(q) of the African Principles; Guideline V(1) para.(a)(i) of the Latimer House Guidelines.

¹³⁴Motala Z (1995) 503-518.

¹³⁵Principle 7 of the United Nations Basic Principles on the Independence of the Judiciary states that, 'It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.'

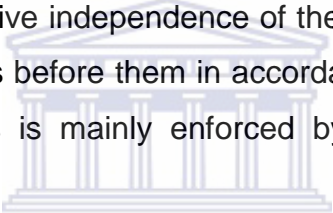
¹³⁶Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, Guideline II.2 which states that, 'Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds once voted for the judiciary by the legislature should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.'

¹³⁷Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, paragraph A, 4(h) which states that, 'States shall endow judicial bodies with adequate resources for the performance of their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation.'

2.3.2 Substantive Independence

Substantive independence of the judiciary refers to the freedom of judges to perform their judicial functions independently.¹³⁸ Substantive independence requires that the judge in his or her decision-making process is only bound by law and not by any determination or other means of influence by other parties. This applies not only *vis-à-vis* the litigants but also *vis-à-vis* the entire government.¹³⁹ The substantive independence of judges therefore requires that in the process of performing their functions judges should be free from direct or indirect influence or improper influence or pressures. Judges should therefore be in a position to make decisions based on the facts at hand, and through the proper application of the law, and hence as a result judgments are made without fear or favour.¹⁴⁰

In accordance with the substantive independence of the judiciary judges therefore have a right and duty to decide cases before them in accordance with the law, and free from any external interference. This is mainly enforced by Principle 2 of the UN Basic Principles which states that:


‘The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’¹⁴¹

The above quotation highlights the importance of the impartiality of judges in upholding the right to a fair trial. Although the concepts of independence and impartiality are separate, they both form an integral part of the way in which courts must exercise their judicial functions. This therefore means that the court cannot be perceived to be impartial if it is not perceived as independent.¹⁴² In order to give effect to the right to a fair trial, judges have a duty to ensure that they remain impartial and the State and other

¹³⁸Shetreet S and Deschenes J *Judicial Independence: The Contemporary Debate* (1985) 630.

¹³⁹Shetreet S and Deschenes J (1985) 630.

¹⁴⁰Geyh CG and Tassel EFV ‘Symposium: The Independence of the Judicial Branch in the New Republic’ (1998) 74 *Chicago-Kent Law Review* 31 34.

¹⁴¹Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁴²Okpaluba C ‘Institutional Independence and the Constitutionality of Legislation Establishing Lower Courts and Tribunals’ (2003) 28:2 *Journal of Juridical Science* 109 128.

institutions and private parties have an obligation to refrain from putting pressure on or inducing judges to rule in a certain manner, and judges have a correlative duty to conduct themselves impartially.¹⁴³ Principle 8 of the UN Basic Principles further states that 'Judges shall always conduct themselves in such a manner to preserve the dignity of their office and the impartiality and independence of the judiciary.'¹⁴⁴

2.3.3 Internal Independence

Internal independence of the judiciary means that the independence of a judge from his or her fellow judges. This is so because the independence of individual judges may be undermined not only by outside sources but also by fellow judges, particularly by senior judges using their administrative power and control.¹⁴⁵ It is important that judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of law. However, it is important to note that not all influences from senior judges should be regarded as a violation of the individual independence of judges. This is so because under common law, the decisions of superior courts must be followed by lower courts and hence the influence of superior judges' judicial decisions is therefore not objectionable. It should be noted that the internal independence of the judiciary is also protected under the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA region¹⁴⁶, and the Montreal Universal Declaration on the Independence of Justice.¹⁴⁷

¹⁴³International Commission of Jurists (2004) 26. See also Van Dijk P and van Hoof G.J.H (eds) *Theory and Practice of the European Convention on Human Rights* 2ed (1990) 336.

¹⁴⁴Principle 8 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁴⁵Russell PH 'Toward a general Theory of Judicial Independence' in Russell PH and O'Brien DM (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (2001) 7.

¹⁴⁶Article 6 reads 'In the decision-making process, any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment.'

¹⁴⁷Article 2.03 of the Declaration states that 'In the decision making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his or her judgment freely.'

2.4 Institutional Independence

The institutional independence of the judiciary requires that the judiciary should be able to function without interference from other organs of state. The notion of institutional independence requires that the judicial institution “ought not to be tied to the apron strings of the executive.”¹⁴⁸ The main idea behind securing the institutional independence of the judiciary is to ensure that the judiciary is not dependent on the executive or the legislature in its operations.¹⁴⁹ Any such dependence would therefore affect the performance of judicial duties by individual judges. Institutional independence is necessary to ensure and secure the individual independence of judges and creates an environment in which judges are able to exercise their judicial functions without fear or favour.¹⁵⁰

The notion of institutional independence of the judiciary is set out in Principle 1 of the UN Basic Principles¹⁵¹ which places a duty on all institutions to respect and observe and ensure that the institutional independence of the judiciary is guaranteed. The UN Basic Principles stipulate that the judiciary has to be independent of the other branches of government, namely, the executive and legislature, which like all other State institutions have a duty to respect and abide by judgments and decisions of the judiciary. The independence of the judiciary with regards to decision making is therefore essential for the upholding of the rule of law and human rights.

The Inter-American Commission on Human Rights in emphasising the importance of institutional independence and how it is related to other issues has stated that:

‘The requirement of the independence necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring

¹⁴⁸Eso K (1988) 121.

¹⁴⁹Okpaluba C (2003)117.

¹⁵⁰Motala Z (1995) 503-518.

¹⁵¹Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

the correct and independent performance of judicial functions, including tenure and appropriate professional training¹⁵²

The Human Rights Committee has laid down a number of requirements as being essential in securing the institutional independence of the judiciary. It has pointed out that delays in the payment of salaries and the lack of adequate security of tenure for judges have an adverse effect on the independence of the judiciary.¹⁵³ It has also considered the lack of any independent mechanism responsible for the recruitment and discipline of judges as limiting the independence of the judiciary.¹⁵⁴

International law contains a number of provisions that are related to securing the institutional independence of the judiciary. The UN Basic Principles provide that the assignment of cases to judges within the courts to which they belong is an internal matter of judicial administration.¹⁵⁵ It is important to note that the fact that allocation of cases should be an internal matter of judicial administration is to ensure that judges hear cases impartially. This seeks to avoid the control of the outcome of particular cases which could be assigned to specific judges who could potentially rule in favour of particular interests. In respect of other aspects of court administration the Montreal Universal Declaration on the Independence of Justice 1983 provides that:

'It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.'¹⁵⁶

The Beijing Statement on the Independence of the Judiciary in LAWASIA Region provides that the appointment, supervision and disciplinary control of administrative

¹⁵²Inter-American Commission on Human Rights *Report on Terrorism and Human Rights* 22 (2002) para.229.

¹⁵³Concluding Observations of the Human Rights Committee on Georgia, United Nations (UN) Document CCPR/CO/74/GEO, and para.12.

¹⁵⁴Concluding Observations of the Human Rights Committee on the Congo, United Nations Document CCPR/C/79/ADD.118, para.14.

¹⁵⁵See *Papageorgiou v Greece* 1997-VI No.54 where the European Court ruled that the adoption of a law by the parliament of Greece in which it declared that certain cases could not be examined by the courts and ordering the on-going legal proceedings to be suspended, constituted a violation of the independence of the judiciary.

¹⁵⁶Article 2.41 of the Montreal Universal Declaration on the Independence of Justice 1983.

personnel and support staff must vest in the judiciary or in a body in which the judiciary is represented and has an effective role.¹⁵⁷

The above discussion highlights how the independence of the judiciary is crucial in ensuring that judges are free from any external control in the exercise of their duties. Such independence therefore bodes well for the protection of human rights in any jurisdiction. However, it should be noted that there are fundamental prerequisites for the establishment of a fairly independent judiciary which include the observance of the principle of separation of powers between the three organs of government, and the rule of law. The importance of these shall be discussed below:

2.5 Separation of Powers

The principle of the independence of the judiciary has its origin in the doctrine of separation of powers, which states that the three arms of government, that is, the executive, the legislature and the judiciary, must be independent of each other so as to avoid the concentration of power in one organ of the state.¹⁵⁸ The principle therefore entails that at a minimum no branch of government should encroach on the powers of another branch of government and neither should a branch deprive another branch of government of the powers and resources necessary for performing its core functions and duties.¹⁵⁹

2.5.1 Origins of Separation of Powers

The doctrine of separation of powers finds its origins in the ancient world, where theories of government and government functions were first developed. This theory has over the years developed. In dealing with the doctrine of separation of powers, Aristotle in his 'Politics' identified three elements or powers in a government. He noted that there was a deliberative element which dealt with, amongst other things, affairs concerning

¹⁵⁷ Article 36 of the Beijing Statement on the Independence of the Judiciary in LAWASIA Region 1995.

¹⁵⁸ Wade ECS and Bradley AW (1991) 51. See also Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2005) 18.

¹⁵⁹ McQuoid-Mason D, O'Brien EL and Green E (eds) *Human Rights for All: Education Towards a Rights Culture* (1993) 33. See Currie I and De Waal J (2005) 18.

war and peace, the enactment of laws and the appointment of officials.¹⁶⁰ The second element focussed on the issue of public offices and dealt with the number of offices and the subjects that these offices could deal with and the tenure of the offices. The last element as noted by Aristotle dealt with the judicial system, mainly dealing with classification of the courts and the manner in which judges were appointed.¹⁶¹

The doctrine of separation of powers is also expounded on by John Locke, who was an English political theorist. In his 'The Second Treatise of Government' (1689), he envisaged a threefold classification of powers. Locke was able to draw a distinction between three types of power which mainly dealt with legislative, executive and federative powers. According to Locke, the legislative powers were supreme, and although the executive and federative powers were distinct, the former concerned with the execution of domestic law within the state and the latter with a state's security and external relations, he nevertheless took the view that "they are always united" in the hands of the same persons. It should be noted that in his classification of the separation of powers, Locke never made any mention of a separate judicial power. He stated that the proper exercise of these powers was not done through separation but on the basis of trust.¹⁶²

2.5.2 Montesquieu and Separation of Powers

The doctrine of separation of powers was further developed in the 18th century by Montesquieu, a French jurist who further contributed new ideas to the theory and is recognised as the founder of the modern theory of judicial independence.¹⁶³ Montesquieu's formulation of the doctrine of judicial independence was mainly based on the British constitution of the early 18th century as he understood it.¹⁶⁴ His contribution to political theory, "The Spirit of Laws", was the product of his observations during his travels in Europe between 1728 and 1731. He spent most of his time attending the court

¹⁶⁰ Aristotle *The Politics* (1995) 165-167.

¹⁶¹ Aristotle (1995) 165-167.

¹⁶² Locke J *Second Treatise on Government* 1690.

¹⁶³ Brooke J 'Judicial Independence—Its History in England and Wales' in Cunningham H (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 101.

¹⁶⁴ Wade ECS and Philips GG (1977) 45.

of George II and it is widely believed that his exposure to English political life had a great influence on his writing.¹⁶⁵

Montesquieu in his theory on separation of powers stated that there should be separation of powers between the three organs of state to ensure that one organ checks on the others so as to prevent abuse of power.¹⁶⁶ He stated that if this is not observed, it will be the end of everything as laws that are oppressive will be approved and this would therefore lead to tyranny and arbitrary rule.¹⁶⁷ In his exposition on the separation of powers he stated that:

'Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another... When the executive and legislative powers are united in the same person or body... There can be no liberty if the judicial power is not separated from the legislature and the executive... There would be an end of everything, if the same person or body, whether of the nobles or of the people, were to exercise all three powers.'¹⁶⁸

It is evident that according to Montesquieu the rationale underlying the separation of powers was to prevent the abuse of power and to avoid power being concentrated in an individual or group of persons.¹⁶⁹ The separation of powers ensures that those entrusted with the drafting of laws are different from those who interpret, apply and put the law into effect.¹⁷⁰

In accordance with the separation of powers doctrine it is imperative that there must be a division of the government into three organs, namely the legislature, the executive and the judiciary. These organs should be kept distinct from each other and a clear distinction has to be made as to the exact functions or powers of each organ. However, it should be noted that as a result of the complexity of the doctrine of separation of

¹⁶⁵Grospeilier J 'What would have prompted Keynes to call Montesquieu "The Real Equivalent of Adam Smith, The Greatest of the French Economists"? (2005) 19 *Student Economic Review* 3-15.

¹⁶⁶Richter M *The Political Theory of Montesquieu* (1977) 92.

¹⁶⁷Richter M (1977) 92.

¹⁶⁸Montesquieu B *The Spirit of Laws* (1989) 157.

¹⁶⁹Richter M (1977) 92.

¹⁷⁰Montesquieu B (1989) 157.

powers and the demands of the modern world, complete separation of powers is impossible in theory and in practice as it has been established that there is some overlapping of functions or powers amongst the three organs.¹⁷¹ However, it should be noted that the overlapping of powers should be in such a way that no organ of the state usurps the powers of the other organs.¹⁷² As a result the system of checks and balances plays a key role in the doctrine of separation of powers. Checks and balances seek to ensure that the organs of state perform the functions required of them.¹⁷³ Through the application of law, courts are therefore supposed to ensure that the other branches of government respect the rights of the people and do not act illegally. This is done in cases where the courts are often tasked with the duty to review the validity of legislation and the conduct of members of the executive branch of government. In order to ensure that courts carry out their duty and to fairly determine the legality of government action, courts must therefore be free from actual or perceived interference by other branches of the government.

2.5.3 Separation of Powers and International Law

The importance of the protection of the doctrine of separation of powers has received widespread recognition at the international level. The principle of separation of powers has been deemed to be the cornerstone of an independent and impartial justice system. The Special Rapporteur on the Independence of Judges and Lawyers has stated that,

¹⁷¹*In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253; 1996 (4) 744 (CC) para. 108-109.

¹⁷²See *In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253; 1996 (4) 744 (CC) para. 108-109 where it was stated that 'There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. While in the United States of America, France and the Netherlands the members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over the other, differs from one country to another. The principle of separation of powers, on one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.'

¹⁷³See *Van Rooyen and Others v The State and Others* 2002 (5) 246 (CC) para.17.

‘the separation of powers and the executive respect for such independence is a *sine quo non* for an independent and impartial judiciary to function effectively.’¹⁷⁴

The Special Rapporteur on the Independence of Judges and Lawyers has also further emphasised the importance of separation of powers and has stated that:

‘The principle of separation of powers is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine quo non* for a democratic State.’¹⁷⁵

Further, the Inter- American Court of Human Rights has also expressed the importance of the maintenance of the separation of powers principle in any democratic society. The Court has stated that: ‘One of the principle purposes of the separation of public powers is to guarantee the independence of judges and therefore under the rule of law, the independence of judges must be guaranteed...’¹⁷⁶ On the other hand, the Human Rights Committee has also made several recommendations for States to adopt legislative and other measures to ensure that there is a clear distinction between the executive and judicial branches of government so as to avoid interference in matters for which the judiciary is responsible.¹⁷⁷

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2.6 Rule of Law

The rule of law is a set of principles that has been promoted in many democracies in building democracy. The rule of law is closely linked to the concept of the modern state that seeks to address the interests of the community and the general population of its territory.¹⁷⁸ Thus, the aim is to create stable, favourable conditions for all people in the

¹⁷⁴Report of Special Rapporteurs on the Situation of Human Rights in Nigeria, UN document E/CN.4/1997/62/Add.1, para.71.

¹⁷⁵Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN document E/CN.4/1995/39, para.55.

¹⁷⁶*Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano v Peru)*, IACtHR judgment 31 January 2001, Series C No. 55, para.73 and 75.

¹⁷⁷Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add.111, and para.10. See also the Committee’s Concluding Observations on Peru CCPR/CO/70/PER, para.10; the Concluding Observations on El Salvador CCPR/C/79/Add.34, para.15.

¹⁷⁸Swiss Agency for Development Cooperation ‘The Rule of Law-Concept: Significance in Development Cooperation’

file:///C:/Users/user/Downloads/resource_en_23596.pdf (Accessed 7 April 2014).

state territory to develop. The concept of the rule of law underpins these government functions and thus seeks to prevent abuse of the state's monopoly of force.¹⁷⁹

It should be noted that although there is no uniform international definition of the rule of law, the content and priorities of the concept are largely shaped by historical change, national differences and the influence of different social interests.¹⁸⁰ However, it is agreed that the importance of the independence of the judiciary in the administration of the rule of law thus contemplates a form of government where the law is superior to, and thus binds, the government and all its officials.¹⁸¹ It is therefore necessary that the law must respect and preserve the dignity, equality and human rights of all persons.¹⁸²

It is also important that the law must establish and safeguard constitutional structures that are necessary in building a free society in which citizens have a say in shaping and enforcing the rules that govern them. The American Bar Association (ABA) notes that the law must devise and maintain systems to advise all persons of their rights, and also empower persons to fulfil just expectations and seek redress of grievances without penalty or retaliation.¹⁸³ The ABA has developed a working definition of the rule of law which is based on the following principles: a system of self-government in which all persons, including the government, are accountable under the law¹⁸⁴; a system based on fair, publicised, broadly understood stable law¹⁸⁵; a fair, robust and accessible legal process in which rights and responsibilities based in law are enforced; and diverse competent and independent lawyers and judges.¹⁸⁶

¹⁷⁹ O'Connor SD 'Vindicating the Rule of Law; The Role of the Judiciary' (2003) 2 *Chinese J. INT'L* 1 4.

¹⁸⁰ Swiss Agency for Development Cooperation 'The Rule of Law-Concept: Significance in Development Cooperation'

file:///C:/Users/user/Downloads/resource_en_23596.pdf (Accessed 7 April 2014).

¹⁸¹ American Bar Association 'The Rule of Law and an Independent Judiciary'

http://apps.americanbar.org/intlaw/committees/division_chair/section/Independent_Judiciary_White_Paper.pdf (Accessed 7 April 2013).

¹⁸² American Bar Association 'The Rule of Law and an Independent Judiciary'

http://apps.americanbar.org/intlaw/committees/division_chair/section/Independent_Judiciary_White_Paper.pdf (Accessed 7 April 2013).

¹⁸³ American Bar Association 'The Rule of Law and an Independent Judiciary'

http://apps.americanbar.org/intlaw/committees/division_chair/section/Independent_Judiciary_White_Paper.pdf (Accessed 7 April 2013).

¹⁸⁴ See also Stein R 'Rule of Law: What Does it Mean?' (2009) 18:2 *Minn J. Int'l* 293 302.

¹⁸⁵ Stein R (2009) 302.

¹⁸⁶ American Bar Association 'The Rule of Law and an Independent Judiciary'

It should be noted that the rule of law concept is of universal validity and application and a society in which the rule of law is prevalent is marked by respect for law and an effective and independent judiciary in that society.¹⁸⁷ The rule of law is therefore essential for any democratic system and should ensure that everyone is equal before the law.¹⁸⁸ The connection between the rule of law and human rights is brought out in the preamble of the Universal Declaration of Human Rights (UDHR) which emphasises the importance of human rights to be protected by the rule of law.

2.7 International Perspective on the Independence of the Judiciary and Impartiality

The judiciary plays a pivotal role in any democratic society, especially with regards to the protection of human rights. Its independence is therefore essential in the protection of human rights.¹⁸⁹ It is therefore not surprising that many efforts have been made in various domestic jurisdictions and internationally to formulate and enact rules that are designed to protect the judiciary and ensure that it performs its mandate under optimum conditions. Many of these rules have therefore become part of the constitutional law of various jurisdictions around the world as they seek to secure the judiciary from undue influence and to make it as autonomous as possible within its own area.

2.7.1 International Instruments

2.7.1.1 United Nations Standards

At the international level the milestone for the protection of the independence of the judiciary was reached in 1985 when the United Nations General Assembly adopted the Basic Principles on the Independence of the Judiciary.¹⁹⁰ These Principles, as the name suggests, list several basic principles aimed at securing the independence of the judiciary. The Principles deal with the importance of the independence of the judiciary.

http://apps.americanbar.org/intlaw/committees/division_chair/section/Independent_Judiciary_White_Paper.pdf (Accessed 7 April 2013). See also Stein R (2009) 302.

¹⁸⁷Gubbay A (2009) 2.

¹⁸⁸Feltoe G (2001) 131.

¹⁸⁹Apple J (1997) 197.

¹⁹⁰United Nations General Assembly Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Amongst the most important of the Principles is that the independence of the judiciary shall be guaranteed by states and enshrined in the Constitution of the member state. It is the duty of all governments and other institutions to respect and observe the independence of the judiciary.¹⁹¹ The Principles further stipulate that all governments have the duty to respect and observe the independence of the judiciary and to ensure that the judiciary decides matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.¹⁹² In accordance with the Principles, the judiciary is accorded jurisdiction over all issues of a judicial nature. The judiciary has exclusive jurisdiction to decide whether an issue submitted for its decision is within its competence as defined by the law.¹⁹³

In seeking to protect the judiciary from any unwarranted interference, the UN Basic Principles guarantee that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. It should be noted that this principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.¹⁹⁴ The Principles also guarantee individuals the right to be tried by ordinary courts using established legal procedures. Tribunals that do not use duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.¹⁹⁵ The Principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of parties are respected.¹⁹⁶ Each Member State to the United Nations is required to provide adequate resources to enable the judiciary to perform its functions.¹⁹⁷

¹⁹¹ Principle 1 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁹² Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁹³ Principle 3 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁹⁴ Principle 4 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁹⁵ Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁹⁶ Principle 6 of the United Nations Basic Principles on the Independence of the Judiciary.

¹⁹⁷ Principle 7 of the United Nations Basic Principles on the Independence of the Judiciary.

It should be noted that the above UN Basic Principles were not formulated as binding rules but as guides to Member States of the United Nations. These Principles seek to secure and promote the respect for and recognition of the independence of the judiciary in national legislation and practice and to advertise them to members of the executive, legislature and the general public. It is as a result thereof that many nations have incorporated most of these rules in their constitutions as advocated by the UN Basic Principles.

The United Nations in seeking to encourage Member States to promote the independence of the judiciary has also adopted Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary¹⁹⁸, and various other international instruments.¹⁹⁹ The Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary seek to encourage all Member States to adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional processes and domestic practices.²⁰⁰ The instrument also requires States to ensure that the Basic Principles are widely publicised in at least the main or official language or languages of the respective country. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and importance of the Basic Principles so that they may promote their application within the framework of the justice system.²⁰¹

¹⁹⁸ Adopted by the Economic and Social Council in Resolution 1989/60 and endorsed by the General Assembly Resolution 44/162 of 15 December 1989.

¹⁹⁹ See the United Nations Draft Resolution on the Independence of Justice (Singhvi Declaration) Adopted by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities to entrust Mr L.M. Singhvi with the preparation of a report on the independence and impartiality of the judiciary, jurors, assessors, and the independence of lawyers 1980/124. See also the United Nations Basic Principles on the Role of Lawyers-Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990).

²⁰⁰ Procedure 1 of the United Nations Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.

²⁰¹ Procedure 2 of the United Nations Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.

The United Nations has also taken various steps in seeking to protect and promote the independence of the judiciary around the world. In 1994, the United Nations appointed a Special Rapporteur (Mr. Param Cumaraswamy)²⁰² on the Independence of Judges and Lawyers as a result of the increase in the frequency of attacks on the independence of judges, lawyers and court officials and the gravity and frequency of human rights violations around the world.²⁰³ The mandate of the Special Rapporteur was to ensure and maintain the independence and impartiality of the judiciaries around the world. The Special Rapporteur on the Independence of Judges and Lawyers noted that ‘an independent judicial system is the constitutional guarantee of all human rights. Therefore the right to such a system is the right that protects all other human rights. Realisation of this right is a *sine qua non* for the realisation of all other rights.’²⁰⁴ Over the years subsequent Special Rapporteurs on the Independence of Judges and Lawyers have reaffirmed on numerous occasions that the independence of the judiciary is a core component of democracy, the rule of law and good governance.²⁰⁵

Since the establishment of the office, Special Rapporteurs have consistently adopted the position that the requirement of judicial independence is an obligation incumbent upon States as a matter of international law. They have described it as both an obligation imposed by conventions, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT), and also as a general principle of law recognised by the international community.²⁰⁶ Special Rapporteurs have also emphasised the particular importance of judicial independence

²⁰²United Nations Background Note *The Independence of the Judiciary: A Human Rights Priority* <http://www.un.org/rights/dpi1837e.htm> (Accessed 20 July 2012).

²⁰³Steyn L ‘Centrality of the Right to Fair Trial as a Human Right Norm’ (2001) 6 *Developing Human Rights Jurisprudence* 63 66.

²⁰⁴Report of Special Rapporteurs on the Independence of Judges and Lawyers, UN document E/CN.4/1995/39, para.55.

²⁰⁵Report of the Special Rapporteur on the Independence of Judges and Lawyers 25 March 2010, para.17. A/HRC/14/26.

²⁰⁶Reports of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, para.14, A/HRC/11/41. See Report of the Special Rapporteur on the Independence of Judges and lawyers, 6 February 1995, para.32, E/CN.4/1995/39 and Report of the Special Rapporteur on the Independence of Judges and Lawyers, 31 December 2003, para.28, E/CN.4/2004/60.

for the investigation, prosecution and, where appropriate, punishment of grave human rights violations.²⁰⁷

The United Nations Human Rights Council (HRC) (formerly the Commission on Human Rights) has affirmed the principle of judicial independence and its importance for the protection of human rights and fundamental freedoms. The HRC has affirmed that “an independent and impartial judiciary is a prerequisite for the protection of human rights and the application of the rule of law”²⁰⁸ and that “an independent judiciary in full conformity with applicable standards contained in international human rights instruments, is essential to the full and non-discriminatory realisation of human rights and indispensable to the democratic process.”²⁰⁹

2.7.1.2 Treaty Provisions

The United Nations has adopted various treaty norms that seek to give effect to the importance of the independence of the judiciary. The International Covenant on Civil and Political Rights (ICCPR)²¹⁰ (Zimbabwe is a state party to the covenant)²¹¹ states that:

‘All persons shall be equal before the courts and tribunal. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’²¹²

The United Nations Human Rights Committee, the body charged with supervising the implementation of the ICCPR, in General Comment 32²¹³ has provided guidance as to

²⁰⁷ See Report of the Special Rapporteur on the Independence of Judges and Lawyers, 31 December 2003, para.30, E/CN.4/2004/60.

²⁰⁸ United Nations ‘Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers’ Preamble of Human Rights Council Resolution 15/3, 30 September 2010.

²⁰⁹ Resolution 12/3, 1 October 2009, A/HRC/RES/12/3; Commission on Human Rights Resolution 2004/33, 19 April 2004, E/CN.4/RES/2004/33; Commission on Human Rights 2003/43, 23 April 2003, E/CN.4/RES/2003/43.

²¹⁰ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) OF 16 December 1966, entry into force 23 March 1976.

²¹¹ <http://www1.umn.edu/humanrts/research/ratification-zimbabwe.html> (Accessed 20 June 2012).

²¹² Article 14 of the International Covenant on Civil and Political Rights.

²¹³ General Comment 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 23 August 2007, CCPR/C/GC/32.

the scope of the rights and obligations contained in Article 14 of the Covenant. The Committee has stated that:

'The notion of a tribunal in article 14, paragraph 1 designates a body that is independent of the executive and legislative branches of government and enjoys, in specific cases, judicial independence in deciding legal matters in proceedings that are judicial in nature.'²¹⁴

Further the Human Rights Committee in General Comment 32 states that the requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, paragraph 1, is absolute and not subject to any exception.²¹⁵ The Human Rights Committee has over the years dealt with the requirement of judicial independence and has expressed concern at the failure of States to respect the obligation of judicial independence²¹⁶ and has noted instances thereof, including political interference in the judicial process by State officials.²¹⁷

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families²¹⁸ (Zimbabwe is not a signatory to this treaty)²¹⁹ also seeks to emphasise the importance of an independent judiciary in the dispensing of justice. The Convention states that:

'Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'²²⁰

²¹⁴General Comment 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 23 August 2007, CCPR/C/GC/32, and para.18.

²¹⁵General Comment 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 23 August 2007, CCPR/C/GC/32, and para.19.

²¹⁶See Azerbaijan (2002), para.14, CCPR A/57/40; Armenia (1999), para.104 CCPR A/54/40; Argentina (1990), para.155, CCPR A/45/40; Vietnam (2002), para.10, CCPR/CO/75/VNM; and Uzbekistan (2001), para.14, CCPR/CO/71/UZB.

²¹⁷See *Gonzalez del Rio v Peru*, 28 October 1992, Human Rights Committee Communication No. 263/1987, CCPR/C/46/D/263/1987.

²¹⁸Adopted by General Assembly Resolution 45/158 of 18 December 1990.

²¹⁹See <http://www1.umn.edu/humanrts/research/ratification-zimbabwe.html> (Accessed 20 June 2012).

²²⁰Article 18 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The Committee against Torture has described judicial independence as an 'essential quality for ensuring the application of the principal of legality.'²²¹ The Committee against Torture has over the years raised concerns about the compatibility of domestic arrangements with the obligation of judicial independence under the Convention against Torture in respect of several State parties, such as, Ethiopia²²², Honduras²²³, Syria²²⁴ and Yemen.²²⁵ In the light of these concerns the Committee against Torture has established the practice of recommending that domestic arrangements be reformed in accordance with relevant international standards.²²⁶

The importance of an independent judiciary is further emphasised by the Convention on the Rights of the Child (CRC).²²⁷ It should be noted that Zimbabwe has signed and ratified this treaty.²²⁸ The Convention states that:

'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'²²⁹

²²¹ Committee against Torture Consideration of Reports Submitted by State Parties under Article 19 of the Convention Nicaragua (2009), para.12, CAT/C/NIC/CO/1.

²²² Committee against Torture Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture Ethiopia (2010), para 22, CAT/C/ETH/CO/1.

²²³ Committee against Torture Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture Honduras (2009), para.10, CAT/C/HND/CO/1.

²²⁴ Committee against Torture Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture "Syria (2010), para.12, CAT/C/SYR/CO/1.

²²⁵ Committee against Torture Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture Yemen (2010), para.12, CAT/C/YEM/CO/2/Rev.1.

²²⁶ See Committee against Torture Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture Ethiopia (2010), para 22, CAT/C/ETH/CO/1 where the Committee against Torture recommended that Ethiopia had to take necessary measures to ensure the full independence and impartiality of the judiciary in the performance of its duties in conformity with international standards, notably the Basic principles on the Independence of the Judiciary. The Committee also recommended that Ethiopia should ensure that the judiciary is free from any interference, in particular from the executive branch, in law as well as in practice.

²²⁷ Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 November 1989.

²²⁸ See <http://www1.umn.edu/humanrts/research/ratification-zimbabwe.html> (Accessed 20 June 2012).

²²⁹ Article 37(d) of the Convention on the Rights of the Child.

The discussion on the above treaty provisions seeks to emphasise the importance of the independence of the judiciary on the international plane and how treaties have been adopted to ensure that States around the world incorporate and implement the specific provisions on the importance of the protection of judicial independence and how it bodes well for the protection and promotion of human rights. It should also be noted that besides the treaty provisions, other declaratory norms which are non-binding have also been adopted by the United Nations to highlight the importance of an independent judiciary in any democratic society.²³⁰

2.7.2 Other Global Standards

Various global standards have been adopted to give effect to the protection of judicial independence in various jurisdictions around the world. Included amongst these is The Bangalore Principles of Judicial Conduct.²³¹ The Bangalore Principles recognise as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and of any criminal charge. The importance of an independent and impartial judiciary in the protection of human rights is also emphasised as the courts play an essential role in upholding constitutionalism and the rule of law.²³² The Principles also emphasise the fact that judges should individually and collectively respect and honour the judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.²³³ The importance of judges to function independently is also highlighted as judges must be independent and should decide cases based on their understanding of the law, free of any extraneous influences, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.²³⁴

²³⁰See Article 10 of the Universal Declaration of Human Rights, (Adopted by General Assembly Resolution 217 A (III) of 10 December 1948); Article 9 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Adopted by General Assembly Resolution 53/144 on 8 March 1999).

²³¹Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25 November 25-26, 2002.

²³²See Preamble of the Bangalore Principles of Judicial Conduct 2002.

²³³See Value 1.6 of the Bangalore Principles of Judicial Conduct 2002.

²³⁴See Values 1.1-1.6 of The Bangalore Principles of Judicial Conduct.

The Bangalore Principles also focus on the importance of impartiality of judges in discharging their duties. Impartiality is deemed to be essential for the proper discharge of the judicial office and applies in the decision making process and the final decision of a judgment.²³⁵ It is therefore imperative that a judge should be able to perform his or her duties without fear or favour, bias or prejudice. The manner in which judges conduct themselves, both in and out of court, is important in maintaining and enhancing the confidence of the public, and therefore judges should conduct themselves in a professional manner and avoid occasions when the impartiality of a judge might be called in question.²³⁶ The values of integrity, propriety, equality and competence and diligence are identified as essential in ensuring that the judiciary remains independent, and as a result effective measures should be adopted to provide mechanisms to implement and protect the independence of the judiciary.²³⁷

In seeking to emphasise the importance of an independent judiciary, judges from various jurisdictions have adopted The Universal Charter of the Judge.²³⁸ The Charter seeks to promote the maintenance and respect for judicial independence in various jurisdictions around the world. The Charter emphasises the importance of the independence of the judiciary in the promotion of human rights and stipulates how an independent judiciary is indispensable for impartial justice, and that as a result all institutions and authorities must respect, protect and defend this independence.²³⁹ The Charter also seeks to protect judges from any external interference in the course of conducting their duties and stipulates that judges should be free from any social, economic and political pressures, and independent of other judges and the administration of the judiciary.²⁴⁰ The Charter also lays down various provisions that seek to protect the tenure of judges and also seeks to ensure that the selection and appointment of judges are carried out according to objective and transparent criteria based on proper professional qualifications.²⁴¹ In a nutshell, the sole aim of the Charter

²³⁵ See Values 2.1-2.5 of the Bangalore Principles of Judicial Conduct 2002.

²³⁶ See Values 2.1-2.5 of The Bangalore Principles of Judicial Conduct 2002.

²³⁷ See Values 3.1 -6.7 of The Bangalore Principles of Judicial Conduct 2002.

²³⁸ Approved by the International Association of Judges on 17 November 1999.

²³⁹ Article 1 of The Universal Charter of the Judge.

²⁴⁰ Article 2 of The Universal Charter of the Judge.

²⁴¹ See Articles 8 and 9 of The Universal Charter of the Judge.

is to enforce the importance of an independent judiciary in dispensing justice and how such independence should be closely guarded and protected.

2.7.3 Commonwealth Instruments

Although Zimbabwe has pulled out of the Commonwealth²⁴², there are a number of Commonwealth instruments which recognise the importance of an independent judiciary within the justice system. Zimbabwe, before it pulled out of the Commonwealth, was a signatory to the Harare Declaration²⁴³ (Harare Commonwealth Declaration) signed on 20 October 1991 by the Heads of Government of the member states of the Commonwealth. The Declaration seeks to reaffirm the commitment of member states to certain fundamental principles of good governance, including the primacy of equal rights under law and the establishment of national systems based on the rule of law and the independence of the judiciary.

In addition to the Harare Declaration, the Commonwealth also adopted the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence on 19 June 1998.²⁴⁴ The Latimer House principles articulate minimum standards for relations between parliament, the executive and the judiciary in Commonwealth countries. The Latimer House principles also deal with a wide range of issues relating to the independence of the judiciary. These issues include the importance of having appropriate independent processes for judicial appointments, providing sufficient and sustainable funding to the judiciary so that it performs its functions to the highest

²⁴²See <http://news.bbc.co.uk/2/hi/africa/3299277.stm> (Accessed 12 October 2012). Zimbabwe pulled out of the Commonwealth in 2003 after it was suspended from the Commonwealth following flawed elections held in 2002. The pulling out of Zimbabwe from the Commonwealth raises questions about the applicability of these principles in Zimbabwe. However, it should be noted that pulling out from the Commonwealth does not absolve a party from upholding the principles of the independence of the judiciary as such similar principles are contained in a number of international instruments to which Zimbabwe is party to. It is also important to note that these principles were adopted when Zimbabwe was still a member of the Commonwealth and therefore Zimbabwe has a duty to observe and uphold the principles.

²⁴³The Harare Declaration 1991.

http://ocpa.irmo.hr/resources/docs/Harare_Language_Declaration-en.pdf (Accessed 10 July 2012).

²⁴⁴Joint Colloquium on Parliamentary Supremacy and Judicial Independence towards a Commonwealth Model was held at Latimer House in the United Kingdom from 15-19 June 1998.

standards, and the need to constantly provide training for judicial officers to enhance judges' understanding of the law and the development of judicial skills.²⁴⁵

2.7.4 African Regional System

There are a number of instruments in the African Regional system that promote the independence of the judiciary. Various treaty norms exist in the African Regional system. Zimbabwe, having ratified the African Charter on Human and Peoples Rights' (ACHRP)²⁴⁶, has an obligation according to Article 26 to guarantee the independence of the courts and to allow for the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the Charter.²⁴⁷ Article 17 of the African Charter on the Rights and Welfare of the Child²⁴⁸ seeks to ensure that State parties to the treaty in the course of administration of juvenile justice should ensure that every child accused of infringing the penal law should have the matter determined as speedily as possible by an independent tribunal.

The African region also has in place specific standards on the independence of judges, lawyers and prosecutors. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa²⁴⁹ seeks to ensure that African states guarantee the independence of judicial bodies and judicial officers and that such independence is respected by the government, its agencies and authorities. The Principles also mandate

²⁴⁵See Principle IV of the Commonwealth Latimer House Principles on the Three Branches of Government 2003.

²⁴⁶Organisation of African Unity (OAU) now known as the African Union (AU) Doc.CAB/LEG/67/3 rev. 5, 21 I.L.M58 (1982) Adopted 27 June 1981 and entered into force 21 October 1986. Zimbabwe has signed and ratified the ACHPR. See http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf. (Accessed 20 June 2012).

²⁴⁷See also Article 7(1) of the African Charter which states that 'Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violations of his fundamental rights as recognised and guaranteed by conventions, law, regulations and customs in force...'

²⁴⁸Organisation of African Unity (OAU) Doc. CAB/LEG/24.9/48 (1990), entered into force November 29, 1999. Zimbabwe has ratified the African Charter on the Rights and Welfare of the Child. See http://www.africaunion.org/official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf (Accessed 20 June 2012).

²⁴⁹Adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of the AU held in Maputo from 4-12 July 2003.

Member States to ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants, and of human rights and fundamental freedoms recognised by national and international law.²⁵⁰ The Principles also seek to ensure that prosecutors and lawyers are well trained and have the appropriate education, and should be able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.²⁵¹

The African Commission in seeking to strengthen the independence of the judiciary in African countries has also passed the Resolution on the Respect and the Strengthening on the Independence of the Judiciary.²⁵² The Resolution recognises the importance and role of the judiciary in any democratic state and emphasises the need for African countries to have a strong and independent judiciary. The Resolution, amongst other issues, calls upon African countries to repeal all legislation that is inconsistent with the principle of respect for the independence of the judiciary and to refrain from taking any action which may threaten, directly or indirectly, the independence and security of judges and magistrates.

The importance and the fragility of judicial independence has been recognised in the African system in a number of reports and fact finding missions that the African Commission has published about the human rights situation in Zimbabwe. The African Commission in its mission report of 2002 expressed serious concerns about human rights abuses and the state of the judiciary in Zimbabwe. In its report the Commission noted how the judiciary had been subjected to great interference and pressure from the executive and how their conditions of service were unable to protect judges from

²⁵⁰See Principle 5B of the Principle and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa.

²⁵¹See Principle 5B of the Principle and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa.

²⁵²Passed by the African Commission at its 19th Ordinary Session held from the 26th of March to 4th of April 1996 at Ouagadougou, Burkina Faso. See <http://www.achpr.org/sessions/19th/resolutions/21/> (Accessed 10 November 2012).

political pressure.²⁵³ In its report on the fact finding mission the Commission made recommendations for Zimbabwe to adopt measures that would ensure that the appointment of judges should be done in a manner that insulates judges from the stigma of political patronage, and for the government to protect and comply with the independence of the judiciary by giving serious consideration to the application of the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.²⁵⁴

In 2005, after the alarming human rights violations perpetrated by the state and its agencies during Operation *Murambatsvina* (Clear out filth), the African Commission released a Resolution on the state of human rights²⁵⁵ and the judiciary in Zimbabwe.²⁵⁶ The Resolution expressed great concern at the massive human rights violations in the country and the continued undermining of the independence of the judiciary through the defiance of court orders, harassment and intimidation of independent judges, and the executive ouster of the jurisdiction of the courts. The Resolution sought to condemn all these actions by the Zimbabwean government and called upon the government of Zimbabwe to implement the recommendations contained in the African Commission Report of 2002, to respect and protect human rights, and to uphold the principle of separation of powers and the independence of the judiciary.

The African Commission in its jurisprudence has identified the independence of the judiciary as indispensable for the protection of human rights. Its jurisprudence on the independence of the judiciary has been extensive and clearly highlights the importance of an independent judiciary in any democratic society. In a series of its Communications, the African Commission has found that a number of countries have

²⁵³ African Commission on Human and Peoples' Rights Zimbabwe: Report on the Fact Finding Mission June 2002 DOC/OS (XXXIV)/346a.

²⁵⁴ Adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of the AU held in Maputo from 4-12 July 2003.

²⁵⁵ See also other subsequent resolutions on the human rights situation in Zimbabwe by the African Commission: Resolution 132 on the Forthcoming Election Run-off in Zimbabwe adopted at the 43rd Ordinary Session in Ezulwini, the Kingdom of Swaziland from 7-22 May 2008; Resolution 138 on the Human Rights and Humanitarian Situation in Zimbabwe adopted at the 44th Ordinary Session in Abuja in the Federal Republic of Nigeria from 10 to 24 November 2008.

²⁵⁶ African Commission on Human and Peoples' Rights Resolution 89 on the Situation of Human Rights in Zimbabwe Passed by the African Commission at its 38th Ordinary Session in Banjul, The Gambia from 21 November to 5 December 2005.

contravened Articles 7²⁵⁷ and 26²⁵⁸ of the African Charter on Human and Peoples' Rights.²⁵⁹ In its Communication in *Civil Liberties Organisation v Nigeria*²⁶⁰, the Commission found that Nigeria had violated these provisions after the military government in Nigeria had enacted a number of decrees which suspended the Constitution and ousted the jurisdiction of the courts to examine any decree promulgated after December 1983²⁶¹, and also a decree which dissolved all political parties and ousted the jurisdiction of the courts and nullified any domestic application of the African Charter.²⁶² In its Communication the Commission observed that:

'The ousting of the jurisdiction of the courts of Nigeria over any decree enacted in the past ten years and those to be subsequently enacted constitutes an attack of incalculable proportions on Article 7. The complainant refers to a few examples of decrees which violate human rights but which are now beyond review by the courts. An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights itself, it permits other violations of human rights to go unaddressed.'²⁶³

In *Constitutional Rights Project and Civil Liberties Organisations v Nigeria*²⁶⁴ the Commission also expressed the importance of upholding the independence of the judiciary and the importance of obeying court orders after the Nigerian military

²⁵⁷ Article 7 reads, 'Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proven guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. (2) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

²⁵⁸ Article 26 reads, '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.'

²⁵⁹ It should be noted that article 7 and 26 of the Africa Charter are interrelated as they both give meaning to the guarantees made in the Charter and provide for the enforcement mechanisms of the rights already identified by the Charter as worthy protection. See also *Civil Liberties Organisation v Nigeria* Communication 129/94 para.16 where the Commission elaborated on the interrelation of the two provisions.

²⁶⁰ Communication 124/94.

²⁶¹ Decree No.107 of 1993.

²⁶² Decree No.114 of 1993.

²⁶³ *Civil Liberties Organisation v Nigeria* Communication 124/94 para.14.

²⁶⁴ Communication No. 143/95 and 150/96.

government had refused to release a detainee who had been granted bail by the Court of Appeal.²⁶⁵ In its ruling the Commission noted that:

'The fact that the government refused to release Chief Abiola despite the order for his release on bail made by the Court of Appeal is a violation of Article 26 which obliges State parties to ensure the independence of the judiciary. Failing to recognise a grant of bail by the Court of Appeal militates against the independence of the judiciary.'²⁶⁶

The African Commission has also had the opportunity to further advance its jurisprudence on the importance of the independence of the judiciary in its Communication in *Centre for Free Speech v Nigeria*.²⁶⁷ The complainants were journalists who had been unlawfully arrested, detained and convicted by a Military Tribunal for reporting stories on the alleged 1995 coup attempt in Nigeria. The journalists were convicted and sentenced to various terms of imprisonment and could not appeal against their sentences because of the various decrees promulgated by the military regime that ousted the jurisdiction of the courts from hearing appeals in cases decided by a Military Tribunal. The complainants therefore asserted that Articles 6²⁶⁸ and 7 and Principle 5 of the United Nations Basic Principles²⁶⁹ had been violated. In its findings the Commission declared the complainants' trial before the Military Tribunal a violation of Articles 7 and 26 of the African Charter and Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary. The Commission stated that:

'The issue of the arraignment and trial of the journalists must be addressed here. The complainant alleges that the journalists were arraigned, tried and convicted by a special Military Tribunal, presided over by a serving military officer and whose membership also included some serving military officers. This is in violation of the provisions of article 7 of

²⁶⁵The Nigerian government through the State Security (Detention of Persons) Amended Decree No.14 (1994) had prohibited any court in Nigeria from issuing a writ *habeas corpus*, or any prerogative order for the production of any person detained under Decree No.2 (1984).

²⁶⁶*Constitutional Rights Project and Civil Liberties Organisation v Nigeria* Communication No. 143/95 and 150/96 para.30.

²⁶⁷Communication No. 206/97.

²⁶⁸Article 6 of the African Charter states that 'Every individual shall have the right to liberty and security of person. . . No one may be deprived of his freedom except for the reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained.'

²⁶⁹Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary stipulates that 'Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.'

the Charter and Principle 5 of the UN Basic Principles. it could not be said that the trial and conviction of the four journalists by a special Military Tribunal presided over by a serving military officer who is a member of the Provisional Ruling Council, [t]he body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the Charter. The above is also in contravention of article 26 of the Charter.²⁷⁰

The importance of the independence of the judiciary has also been further emphasised by the Commission in *Lawyers for Human Rights v Swaziland*.²⁷¹ In this case the complainants challenged the King's Proclamation to the Nation No.12 of 1973 which declared that King Sobhuza I had assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power were vested in him. The Proclamation also repealed the Constitution of Swaziland of 1968 which enshrined several fundamental principles of democratic governance, such as, the supremacy of the Constitution and separation of powers. The complainants argued that the Proclamation which vested all powers of the State in the King, including judicial powers and the authority to appoint and remove judges, violated Articles 7 and 26 of the Africa Charter. In ruling in favour of the complainants and emphasising the importance of separation of powers, the Commission stated that:

'By entrusting all judicial powers to the Head of State with powers to remove judges, the Proclamation of 1973 seriously undermines the independence of the judiciary in Swaziland. The main *raison d'être* of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of power amongst the three organs of government-executive, legislature and judiciary-ensure checks and balances against excesses from any of them. By concentrating the powers of all three government structures into one person, the doctrine of separation of power is subject to abuse.'²⁷²

In the end the Commission ruled that the vesting of judicial powers in the King was a violation of Article 26 of the African Charter and urged the government of Swaziland to

²⁷⁰ *Centre for Free Speech v Nigeria* Communication No. 206/97 paras. 15-16.

²⁷¹ Communication No.251/02.

²⁷² *Lawyers for Human Rights v Swaziland* Communication No.251/02 para.56.

repeal the decree as it was inconsistent with the principles of respect for the independence of the judiciary.²⁷³

The increased human rights violations in Zimbabwe have over the years seen a steady rise in the number of Communications that have been brought before the African Commission.²⁷⁴ On a number of occasions the African Commission has ruled Communications submitted against the state party of Zimbabwe to be admissible, implying that in those cases there were no effective domestic remedies for the human rights violations alleged.²⁷⁵ It is submitted that the admissibility of these complaints is an indictment of the judiciary and an indicator of how the judiciary in the country has failed to guarantee the enjoyment of human rights for the people of Zimbabwe.

Although some of the Communications are yet to be finalised, the Commission has managed to deal with a number of the complaints and has in respect of some of the complaints found the government of Zimbabwe to be in violation of Articles 7 and 26 of the African Charter. An example is highlighted in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum v Zimbabwe)*.²⁷⁶ The complainant in this case was an American citizen (Andrew Barclay Meldrum) who had been permanently resident in Zimbabwe from 1980 to 2003 and was deported after he had published an article in the *Daily News* (an independent paper that had been closed down by the government of Zimbabwe) on the internet version of the *Mail and Guardian*. As a result the complainant was charged with publishing falsehood under section 80 (1) (b) of the Access to Information and Protection of Privacy Act (AIPPA)²⁷⁷ and was found not guilty. After his acquittal, the complainant was requested to report to the Immigrations Department Investigative Unit

²⁷³ *Lawyers for Human Rights v Swaziland* Communication No.251/02 para.58.

²⁷⁴ Article 56 of the African Charter lays down a number of requirements that a communication has to meet before it can be ruled admissible.

²⁷⁵ See amongst many others *Zimbabwe Lawyers for Human Rights, Human Rights Trust of Southern Africa v The Government of Zimbabwe Forced Evictions Hopley – Porta Farm and Hatcliffe Communities* ACHPR Communication No. 314/05; *Zimbabwe Lawyers for Human Rights v The Government of Zimbabwe Muzerengwa Buhera* Communication No. 306/05; *Zimbabwe Lawyers for Human Rights, SADC Lawyers Association, Law Association of Zambia, Tanzania Law Society and Others v the Government of Zimbabwe* ACHPR case ACHPR/LPROT/COMM/ZIM/321.

²⁷⁶ Communication No. 294/04.

²⁷⁷ Act 5 of 2002.

and was served with a deportation order in terms of section 14(1)(g) of the Immigration Act.²⁷⁸ The deportation order was successfully challenged in the High Court which ordered that the complainant be allowed to stay in the country until the Supreme Court had dealt with all constitutional matters raised in the complainant's application. However, despite several court orders staying the deportation of the complainant, the complainant was defiantly deported by the government of Zimbabwe. In condemning the actions of the government and its complete disregard for the independence of the judiciary, the Commission stated that:

'It is a vital requirement in a state governed by the law that court decisions be respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by external pressure. Thus, by refusing to comply with the High Court orders, staying the deportation of Mr. Meldrum and requiring the Respondent State to produce him before the Court, the Respondent State undermined the independence of the Courts. This was a violation of article 26 of the Charter.'²⁷⁹

As a result the Commission called on the government of Zimbabwe to promote and protect the independence of the judiciary through obedience to court orders, and to rescind the deportation orders against the complainant.²⁸⁰ Meldrum was deported from Zimbabwe despite the existence of a High Court order interdicting his deportation.²⁸¹

Similarly in *Zimbabwe Human Rights NGO Forum v Zimbabwe*²⁸², the Commission ruled that the government of Zimbabwe was in violation of Articles 1 and 7 of the Africa Charter for various human rights abuses during the 2000 elections and how individuals that testified against such violence before the courts were subjected to intimidation and further violence for testifying against the ruling party. Furthermore, a general amnesty was granted against the perpetrators of such violence except for those who had

²⁷⁸Chapter 4:02.

²⁷⁹Communication No. 294/04 paras.119-120.

²⁸⁰Communication No. 294/04 para. 121.

²⁸¹*The Standard* 'Zimbabwe: Journalist, Andrew Meldrum, Deported' <http://www.afrika.no/Detailed/3560.html> (Accessed 10 November 2013).

²⁸²Communication No. 245/02.

committed specific crimes excluded under the amnesty, thus putting such individuals beyond the reach of the judiciary.

Although the African Commission has ruled in some of its Communications on the infringement of the independence of the judiciary in the country, it has also dismissed on the merits some Communications that have alleged infringement of the independence of the judiciary by the government of Zimbabwe.²⁸³ However, it is important to note that the jurisprudence of the African Commission clearly emphasises the importance of an independent judiciary in the administration of justice and how Member States should strive to protect and promote the independence of the judiciary in line with the provisions laid down in the African Charter. It is important to note that there are a number of decisions not discussed in this research where the Commission has reiterated the importance for Member States to protect and promote the independence of the judiciary.²⁸⁴

2.7.5 Other Regional Systems

2.7.5.1 Inter-American System

The importance of an independent judiciary in the administration of justice is protected and emphasised in a number of other regional human rights instruments across the world. Although these do not have a binding effect on Zimbabwe, it is important to highlight how these regions view an independent judiciary to be an important component in delivering justice. The Inter-American system contains treaty norms that seek to promote the importance of an independent judiciary. Included amongst these treaties is the American Convention on Human Rights²⁸⁵ which guarantees individuals the right to a fair trial by a competent, independent and impartial tribunal.²⁸⁶ The Inter-

²⁸³See for example *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa/ Zimbabwe* Communication No. 293/04; *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe* Communication No. 284/03.

²⁸⁴See for example *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* Communication 334/06 paras.191-204; *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine de droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania* 54/91-61/91-96/93-98/93-164/97_196/97-210/98.

²⁸⁵American Convention on Human Rights *Pact of San Jose, Costa Rica* (B-32) para.100.

²⁸⁶Article 8(1) of the American Convention on Human Rights states that 'Every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial

American system also has declaratory norms which seek to give effect to the importance of an independent judicial system. These include the American Declaration of the Rights and Duties of Man²⁸⁷ and The Inter-America Democratic Charter.²⁸⁸

In emphasising the importance of the protection of judicial independence, the Inter-American Commission of Human Rights (I-ACHR) established that:

'The guarantees necessary to ensure the correct and independent operation of the judicial branch include the mechanism whereby judges are appointed, the stability they enjoy in their appointments, and their proper professional training. In addition, the courts must also be independent of the other branches of government- and that is free from influence, threats, interference, irrespective of their origin.'²⁸⁹

In its report entitled *Democracy and Human Rights*, the I-ACHR has also expressed its views on the importance of an independent judiciary in the enforcement of fundamental human rights and freedoms and how an independent judiciary is essential in ensuring that the rule of law is upheld in any democracy. The I-ACHR has stated that:

'[T]he observance of rights and freedoms in a democracy requires a legal and institutional order in which law prevails over the will of rulers, and in which there is judicial review of the constitutionality and legality of the acts of public power, it presupposes respect for the rule of law.'²⁹⁰

The Inter-American Court of Human Rights (I-ACtHR) has provided enriching jurisprudence on the importance of preserving the independence of the judiciary in Inter-

tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any nature.'

²⁸⁷ Article XXVI states that 'Every accused person is presumed to be innocent until proved guilty. Every person accused of an offence has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.'

²⁸⁸ Article 3 of the Inter-America Democratic Charter states that 'Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms and the separation of powers and independence of the branches of government.' See also article 4 which states that "The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy.'

²⁸⁹ I-ACHR, Report on Terrorism and Human Rights, 22 October 2002, para.229. See also I-ACHR, *Democracy and Human Rights in Venezuela*, 30 December 2009, page 47, para .185.

²⁹⁰ I-ACHR *Second Report on the Situation of Human Rights in Peru* 2 June 2000, Chapter II para.1; see also I-ACHR *Situation of Human Rights in Venezuela* 23 December 2003, para.150.

American states. In the case of *Reveron Trujillo v Venezuela*,²⁹¹ the I-ACtHR emphasised the importance of the independence of the judiciary in the administration of justice and stated that:

'The principle of judicial independence constitutes one of the basic pillars of the guarantees of the due process, reason for which it shall be respected in all areas of the proceeding and before all the procedural instances in which decisions are made with regard to the person's rights. The Court has considered that the principle of judicial independence results necessary for the protection of fundamental rights, reason for which its scope shall be guaranteed even in special situations, such as the state of emergency.'²⁹²

The I-ACtHR in *Apitz-Barbera v Venezuela*²⁹³ also elaborated on the importance of preserving the independence of the judiciary. The case dealt with the removal of a number of persons from judicial office on the grounds of their purportedly having committed an "inexcusable judicial error". The I-ACtHR held in the case that the principle of judicial independence "must be guaranteed by the State both in its institutional aspect that is, regarding the judiciary as a system as well as in connection with the specific judge."²⁹⁴ In its judgment the Court further noted that:

'The purpose of such protection lies in preventing the judicial system in general and its members in particular, from finding themselves subjected to possible undue limitations in the exercise of their functions, by bodies alien to the judiciary or even by those judges with review or appellate functions.'²⁹⁵

²⁹¹Case 406-05, Report No.60/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.127 Doc4 rev.1 (2007). The case dealt with the dismissal of Mrs. Maria Cristina Reveron, a judge, who had heard a case with significant political repercussions in the country, in that the accused was the director of an important media outlet in Venezuela. The accused had on several occasions refused to appear and make a statement and as a result the judge ordered his arrest so that he could submit a signed statement before the court. The family of the accused submitted a disciplinary complaint before the Commission on the Functioning and Restructuring of the Judicial System and due to undue pressures on the Commission, the judge's order was ruled to be inexcusable and as a result was removed from her position.

²⁹²I-ACtHR, case *Maria Reveron Trujillo v Venezuela*, Judgment of 3-0 June 2009, para.68, citing Cf Habeas Corpus in Emergency Situations (Articles 27 (2), 25 (1) and 7 (6) of the American Convention on Human Rights). Advisory Opinion OC-8/87 OF 30 January 1987. (Series A No. 8) para. 30, and Judicial Guarantees in the States of Emergency (Articles 27 (2), 25 and 8 of the American Convention of Human Rights), para.20.

²⁹³Inter-Am. Ct.H.R Series C. No.182.

²⁹⁴*Apitz-Barbera et al ("First Court of Administrative Disputes") v Venezuela*, Merits, Reparations and Costs 5 August 2008 para.55, Inter-Am. Ct.H.R Series C. No.182.

²⁹⁵*Apitz-Barbera et al ("First Court of Administrative Disputes") v Venezuela*, Merits, Reparations and Costs 5 August 2008 para.55, Inter-Am. Ct.H.R Series C. No.182.

In its decision the I-ACtHR found that Venezuela had infringed the provisions of Article 8(1) of the American Convention on Human Rights in removing the judges from office.

The I-ACtHR in *Constitutional Court v Peru*²⁹⁶ case has also noted the importance of the separation of powers doctrine and how it is imperative that organs of state should be separate in order to protect and maintain the independence of the judiciary. The Court stated that,

'One of the principal purposes of the separation of public powers is to guarantee the independence of judges and, to this end the different political systems have conceived strict procedures for both their appointment and removal.'²⁹⁷

The Court in this case noted the need for States to guarantee the independence of the judiciary, and also placed emphasis on the importance of the government and other public bodies to respect and observe the independence of the judiciary.²⁹⁸

2.7.5.2 European Union

The European Union also has a number of instruments that seek to promote the independence of the judiciary for its member states. Article 47 of the Charter of Fundamental Rights of the European Union²⁹⁹ grants individuals the right to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal previously established by the law. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁰⁰ seeks to ensure that in the determination of civil rights and obligations or any criminal charge, an individual should be entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal established by law.

²⁹⁶Inter-Am.Ct. H.R Series C.No.71. The case involved the dismissal of a number of justices from the country's Constitutional Court allegedly for a ruling which would have had the effect of limiting President Alberto Fujimori's run for another consecutive term.

²⁹⁷*Constitutional Court v Peru*, Merits, Reparations and Costs, 31 January 2001, para. 73, Inter-Am.Ct. H.R Series C.No.71.

²⁹⁸*Constitutional Court v Peru*, Merits, Reparations and Costs, 31 January 2001, para. 73, Inter-Am.Ct. H.R Series C.No.71.

²⁹⁹Signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council on 7 December 2000.

³⁰⁰Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950.

The European Union also has a number of specific standards on the independence of judges, lawyers and prosecutors. A number of Recommendations have been adopted to ensure that necessary measures are taken by member states to respect, protect and promote the independence of judges. These include Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges³⁰¹ which encourages member states to promote and protect the independence of the judiciary by inserting specific provisions in their Constitutions or other legislation.³⁰² Other recommendations include Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom to exercise the profession of lawyer³⁰³ which provides for necessary measures to be taken to respect, protect and promote the freedom to exercise the profession of lawyer without discrimination and without improper interference from the authorities or the public.³⁰⁴ The European Union also has other standards that seek to promote and protect the independence of the judiciary. These include Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and Fight against Terrorism³⁰⁵ which entitles any person accused of terrorist activities to the right to a fair hearing, within a reasonable time, by an independent and impartial tribunal established by law.

The ECHR has also emphasised the importance for the maintenance and protection of the independence of the judiciary in its jurisprudence on this subject.³⁰⁶ However, it should be noted that it is beyond the scope of this study to discuss in detail the issue of

³⁰¹ Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

³⁰² Principle 1 of the Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges.

³⁰³ Adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies.

³⁰⁴ Principle 1 of Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyer. See also Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System which recommends that States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal.

³⁰⁵ Adopted by the Committee of Ministers on 11 July 2002 at the 804th Meeting of the Minister Deputies.

³⁰⁶ See amongst several other decisions *Hulki Gunes v Turkey*, Application No.28490/95, 19 June 2003, para.84; *Campbell and Fell v the United Kingdom*, Application Nos. 39665/98 and 400886/98, 9 October 2003; *Langborger v Sweden*, Application No. 1179/84, 22 June 1989; *Van de Hurk v Netherlands*, Application No.16034/90, 19 April 1994, para.45.

the independence of the judiciary in the European Human Rights System. This issue has been dealt with extensively by European authors, such as, Andenas³⁰⁷ and Malleson³⁰⁸.

2.7.5.3 Asia-Pacific

The Asia-Pacific region has the Beijing Statement of Principles on the Independence of the Judiciary in LAWASIA Region.³⁰⁹ The Beijing Statement emphasises the importance of the judiciary in any democratic society and states that the judiciary is an institution of the highest value in every society.³¹⁰ The Beijing Statement seeks to put emphasis on the importance of an independent judiciary in ensuring that individuals are guaranteed a fair and public hearing. Emphasis is also put on the importance of the judiciary to decide matters in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.³¹¹ It is imperative that for the judiciary to remain independent and in order to ensure that it functions effectively, proper appointment procedures should be put into place and the tenure of judges should be guaranteed in order to safeguard the independence of judges.³¹²

2.7.5.4 Arab States

The importance of the protection and promotion of the independence of the judiciary is a fundamental value recognised amongst Arab states. The Arab Charter on Human Rights³¹³ protects and emphasises the importance of preserving the independence of the judiciary in Member States. In this regard the Arab Charter guarantees that all

³⁰⁷ Andenas M 'A European Perspective on Judicial Independence and Accountability' (2007) 41 *International Lawyer* 1-19.

³⁰⁸ Malleson K (1997) 660.

³⁰⁹ Adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing in 1995 and adopted by the LAWASIA Council in 2001.

³¹⁰ Principle 1 of the Beijing Statement of the Principles of the Independence of the Judiciary in LAWASIA Region 1997.

³¹¹ Principle 3 of the Beijing Statement of the Principles of the Independence of the Judiciary in LAWASIA Region 1997.

³¹² Principle 4 of the Beijing Statement of the Principles of the Independence of the Judiciary in LAWASIA Region 1997.

³¹³ League of Arab States, Arab Charter on Human Rights, May 22, 2004, entered into force March 15, 2008.

individuals are equal before the courts and any tribunal. The Charter further places a duty on all Member States to guarantee the independence of the judiciary and to protect magistrates against any interference, pressure or threats.³¹⁴ Article 13 of the Charter also guarantees individuals the right to a fair trial before a competent, independent and impartial court that has been constituted by law to hear any criminal matter.

In an effort to strengthen judicial independence in Arab states, the Arab Convention on Judicial Cooperation was negotiated in 1983. In 1999 the Beirut conference organised by the Arab Centre for the Independence of the Judiciary and the Legal Profession (ACIJLP), in collaboration with the Centre for the Independence of Judges and Lawyers (CIJL), was held and resulted in the adoption of the Beirut Declaration providing for a comprehensive set of goals and standards for Arab judiciaries.³¹⁵ The Beirut Declaration covers, amongst other issues, safeguards for the judiciary, urging a series of structural and procedural guarantees of judicial independence, and measures to be adopted to ensure adequate training is provided for judiciaries in the Arab states.

2.8 International Humanitarian Law

The need to protect and promote the independence of the judiciary is also established under international humanitarian law. Common Article 3 to the four Geneva Conventions³¹⁶ states that:

'In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or

³¹⁴Article 12 of the Arab Charter on Human Rights.

³¹⁵Beirut Declaration (1999) Resolution 220 (XX), Adoption of the Beirut Declaration E/ESCWA/20/10/Rev.1

³¹⁶Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949. Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. Zimbabwe is legally bound by the obligations of the four Conventions as it has ratified the treaties.

See <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (Accessed 20 June 2012).

faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons (a) violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognised as indispensable by civilised peoples...³¹⁷

It should be noted that State practice has established the rule of fair trial guarantees as a norm of customary international law applicable in both international and non-international armed conflicts.³¹⁸ Thus the rule seeks to ensure that no individual may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. The right to fair trial is set forth in numerous military manuals³¹⁹ and the denial of a fair trial is a criminal offence under the legislation of a number of States (including Zimbabwe, South Africa and Uganda), most being applicable in both international and non-international armed conflicts.³²⁰

³¹⁷ Article 3 of the Four Geneva Conventions 1949.

³¹⁸ Robinson P 'The Right to Fair Trial in International Law with Reference to the Work of the ICTY' (2009) 3 *Berkeley J.L. INT'L. Publicist* 1 1.

³¹⁹ See amongst some countries South African LOAC Manual (1996) Presentation on the South African Approach to International Humanitarian Law, Appendix A, Chapter 4: International Humanitarian Law (the Law of Armed Conflict), National Defence Force, 1996, 40 which provides that depriving a 'protected person of the rights to a fair and regular trial' constitutes a grave breach of the 1948 Geneva Conventions. See also Kenya's LOAC Manual (1997) Law of Armed Conflict, Military Basic Course (ORS), 4 Précis, The School of Military Police, Précis No.2, p.6 which refers to common Article 3 of the Geneva Conventions and states that persons *hors de combat* "may not be sentenced without proper trial."

³²⁰ See the South African Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 under Schedule 1 part 3 (a) (vi) which states that "War Crimes" means any of the following Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following conduct against persons or property protected under the provisions of the relevant Geneva Conventions wilfully depriving a prisoner of war and other protected persons of the rights of fair and regular trial.' Schedule 1 part 3 (c) (iv) which states that 'In the case of armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions, namely, any of the following conduct committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable in non-international conflicts.' See also section 3 (1) of the Botswana Geneva Conventions Act 1970 which punishes 'any person, whatever his nationality, who, either in or outside Botswana, commits, or aids, abets or procures the commission by any person of, any such grave breach of any of the 1949 Geneva Conventions.' See also section 3 (1) of the Zimbabwe Geneva Conventions Act 36 of 1981 which punishes 'any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of any of the 1949 Geneva Conventions or the 1977 Additional Protocol.'

The importance of an independent judiciary in the administration of justice is further emphasised in the Third Geneva Convention which requires that courts judging prisoners of war offer essential guarantees of independence and impartiality.³²¹ This requirement is also emphasised in Additional Protocol II³²² and Article 75 (4) of the Protocol Additional to the Geneva Conventions which states that:

‘No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the general recognised principles of regular judicial procedure.’³²³

The requirements that courts be independent, impartial and regularly constituted are set forth in a number of military manuals of several countries around the world³²⁴ and are also contained in national legislation.³²⁵



See also section 1(1) of the Uganda Geneva Conventions Act 31 of 1964 which punishes ‘any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the 1949 Geneva Conventions.’

³²¹Article 84 of the Third Geneva Conventions relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 reads, ‘A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognised, and, in particular, the procedure of which does not afford the accused the rights and means of defence...’

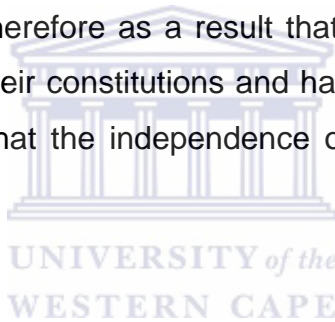
³²²Article 6 (2) of the Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 8 June 1977. The article reads ‘This article applies to the prosecution and punishment of criminal offences related to the armed conflict. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.’

³²³Article 74 (4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

³²⁴See for example the Military Manual of Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General 1999, S.65 which provides that ‘No person may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure.’ See also International Committee of the Redcross *Customary International Humanitarian Law* (2009) 352-369.

³²⁵See for example S. 8 (1) (7) of the Germany Law Introducing the International Crimes Code 2002 which reads ‘Whoever in connection with an international armed conflict or with an armed conflict not of international character: imposes on or enforces against a person protected under international humanitarian law a severe punishment, particularly the death penalty or imprisonment, without such person having been convicted by an impartial and regularly constituted court affording the judicial guarantees required under international law...’

In a nutshell, the discussion in this chapter has centred on the importance of judicial independence in human rights protection. Many national legal systems around the world recognise the importance of judicial independence in human rights protection. Thus, the principle of judicial independence and impartiality of the judiciary enjoys universal allegiance at the level of national and international legal instruments. These instruments recognise the guarantee of independent and impartial courts as a human right to a fair trial. As result, it can therefore be said that the general protection of judicial independence has attained customary international law status. Thus, this chapter has highlighted the importance of the independence of the judiciary and impartiality and how international measures have been taken in order to ensure that the independence of the judiciary is promoted and respected around the world. The emphasis on the adoption of such instruments symbolises the importance of an independent judiciary in the administration of justice. It is therefore as a result that nations around the world have adopted these principles into their constitutions and have enacted legislative and other measures in order to ensure that the independence of the judiciary is promoted and protected.



2.9 Conclusion

The judiciary has a crucial role to play in the protection and promotion of human rights in any democratic society. However, it should be noted that for this to be achieved, the judiciary should be independent of other organs of the state. Such independence will ensure that the judiciary is able to conduct its duties without any fear, favour or prejudice and also ensure the impartiality of judges in discharging their duties. In order to enforce, promote and respect the independence of the judiciary, the international community has established a number of instruments that seek to give force to the importance of an independent judiciary and impartiality in the administration of justice. Many countries around the world have incorporated these principles into their constitutions and other domestic legislation. Such incorporation has seen these countries maintain an independent judiciary which is fundamental for the protection of human rights. With this chapter having placed great emphasis on the importance of the independence of the judiciary in human rights protection, the next chapter makes a

detailed analysis of the independence of the judiciary in Zimbabwe under the Lancaster House Constitution. The chapter makes such analysis to highlight the weaknesses in the constitutional guarantees on the independence of the judiciary and how the executive has taken advantage of such weaknesses to undermine the independence of the judiciary. These challenges to the independence of the judiciary have over the years adversely affected the protection of human rights by the courts.



CHAPTER 3

THE HISTORICAL CONSTRUCTION OF THE PROTECTION OF HUMAN RIGHTS BY THE JUDICIARY IN ZIMBABWE

3 Introduction

Judicial independence is described as a yardstick of a functional judiciary.³²⁶ The concept of the independence of the judiciary not only entails independence from the executive and the legislature but also from political organs, the public or itself.³²⁷ Historically Zimbabwe had one of the most independent and well respected judiciaries across Africa.³²⁸ After the attainment of independence, the judiciary was well-known for its impartiality and independence and this was mainly reflected in its enriching jurisprudence on human rights.³²⁹ However, since the beginning of the Fast Track Land Reform Program (FTLRP) the judiciary has lost its status of being labelled as one of the most independent judiciaries in Africa. This is so because the executive has consistently interfered with the functioning and running of the courts.³³⁰ This constant interference has greatly contributed to the manner in which the present judiciary has failed to protect and promote human rights. This chapter seeks to give a historical background to the state of the judiciary in Zimbabwe and to look at the factors that have contributed to the loss of judicial independence (on the part of the current judiciary), hence leading to the judiciary's questionable jurisprudence on human rights. The chapter begins by analysing constitutional provisions relating to independence of the judiciary.

³²⁶Dumbutshena E 'The Rule of Law in a Constitutional Democracy With Particular Reference to the Zimbabwe Experience' (1989) 5:3 *SAJHR* 311 313.

³²⁷Brazier R, *Constitutional Reform: Reshaping the British Political System* (1998) 172. See also Madhuku L (2002) 232.

³²⁸Widner J and Scher D (2008) 249.

³²⁹De Bourbon A (2003) 197.

³³⁰This has been mainly done in the manner in which the executive has appointed judges mainly loyal to the ruling party and purging those perceived to be independent minded, thus, not advancing the political cause of the ruling party.

3.1 Constitutional Framework for Judicial Independence under the Lancaster House Constitution

The previous chapter has noted that independence of the judiciary is a logical corollary of the principle of the separation of powers in that the vesting of judicial functions in a body of persons separate from the executive and the legislature can only have real meaning if that body of persons is truly independent.³³¹ In order to protect the independence of the judiciary, the Lancaster House Constitution protected the principle of separation of powers, with each organ of state having distinct powers.³³² However, it should be noted that the Lancaster House Constitution provided for the partial separation of powers and as a result permitted the overlapping of powers and functions.³³³ Madhuku notes that although Zimbabwe adopted the basic framework of creating three state organs in terms of the principle of separation of powers, it did not fully embrace the strict separation of powers.³³⁴

Madhuku notes that since a number of countries pay some regard to the separation of powers, the extent to which a constitution guarantees the independence of the judiciary is usually a good measure of the seriousness with which the principle of separation of powers is regarded.³³⁵ As highlighted in there are a number of features which determine the extent of the independence of the judiciary. Madhuku notes that these features include the method of appointment of judges, the removal of judges from office, whether or not the judiciary has exclusive jurisdiction over “judicial” matters, and the question of salaries payable to judges.³³⁶ As highlighted in the previous chapter, international law identifies the above features as key components of preserving the independence of the judiciary.³³⁷ Thus, the following discussion makes an analysis of the protection of these features under the Lancaster House Constitution.

³³¹Madhuku L (2002) 232.

³³²For the distinct powers see chapters IV (Executive); V (Legislature) and VIII (Judiciary) of the Lancaster House Constitution.

³³³For Example the Lancaster House Constitution in section 84 permitted the President as a member of the executive to appoint judicial officer in Zimbabwe.

³³⁴Madhuku L *Introduction to Zimbabwean Law* (2010) 44.

³³⁵Madhuku L (2002) 232

³³⁶Madhuku L (2002) 232

³³⁷For example see the Latimer House Guidelines discussed in the previous chapter.

3.1.1 Vesting of Judicial Functions Exclusively in the Judiciary

Madhuku notes that the vesting of judicial functions would be rendered meaningless if it were possible to vest judicial functions in other bodies.³³⁸ Thus, the executive and the legislature would simply avoid the judiciary by entrusting crucial matters to sympathetic or manipulable bodies.³³⁹ Thus, the Lancaster House Constitution stipulated that the judicial authority in the country was vested in the courts.³⁴⁰ However, it should be noted that in Zimbabwe the vesting of the judicial authority in the courts was undermined by a provision allowing Parliament to vest 'adjudicating functions in a person or authority other the court.'³⁴¹ Madhuku noted that the inclusion of such a provision posed a serious threat to the independence of the judiciary as it allowed the legislature to avoid the judiciary in controversial matters by vesting judicial functions in bodies which may be less independent than the courts.³⁴²

3.1.2 Clear Provision Guaranteeing the Independence of the Judiciary

The Lancaster House Constitution, like most constitutions around the world³⁴³ expressly guaranteed the independence of the judiciary in order to maintain an independent and impartial bench. Section 79B of the Constitution stated that:

'In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any other person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.'³⁴⁴

Despite such guarantees, Madhuku argues that the wording of section 79B had some weaknesses in that it allowed a member of the judiciary to be placed under the control or direction of another, which in principle is not acceptable as a judge must be

³³⁸Madhuku L (2002) 232.

³³⁹Madhuku L (2002) 232.

³⁴⁰See Section 79(1) of the Lancaster House Constitution.

³⁴¹See Section 79(2) of the Lancaster House Constitution

³⁴²Madhuku L (2002) 233.

³⁴³See for example section 165(2) of the Constitution of South Africa; Article 128 of the Constitution of Uganda; Article 78 of the Namibian Constitution and section 118(2) of the Constitution of Lesotho amongst many other countries.

³⁴⁴Section 79B of the Lancaster House Constitution.

independent from his or her colleagues on the bench.³⁴⁵ Despite the criticism of the wording of section 79B, it should be noted that there are certain instances where the law can direct a judge to be under the control of another, especially in cases of judicial supervision. Another weakness of this section was that it did not go further to provide for a positive duty on other organs of the state to promote the independence of the judiciary, similar to other constitutions in Africa.³⁴⁶ However, it should be noted that despite the weaknesses of the section, the inclusion of this clause expressly recognised the importance of an independent judiciary in any democracy and sought to give effect to an internationally recognised standard of judicial independence. It is widely recognised that an independent and impartial judiciary bodes well for the protection of human rights in any jurisdiction.³⁴⁷ Apart from section 79B, the Lancaster House Constitution contained various other constitutional provisions that sought to give effect to the principle of judicial independence. These provisions related to the appointment, removal, remuneration and terms of conditions of judges. These will be discussed below.

3.1.3 Appointment of Judges

As highlighted in the previous chapter, the process for the appointment of judges is a key factor in guaranteeing the independence of the judiciary. Thus, where the appointment process is left entirely in the hands of politicians, there is more likelihood that judges can be appointed on the basis of political allegiance, thus creating a judiciary which is unlikely to be independent of the executive.³⁴⁸ As has been previously highlighted, although there are no set standards for judicial appointments, it is important

³⁴⁵Madhuku L (2010) 104. He argues that the country should adopt formulations used by other countries that stipulate that the courts are subject 'only to the Constitution and the law'. For example see Article 128 of the Constitution of Uganda and section 165(2) of the Constitution of Republic of South Africa.

³⁴⁶An example of a Constitution that places a positive duty for other organs of state to promote the independence of the judiciary is Article 78(3) of the Namibian Constitution which provides that '[a]ll organs of state shall accord such assistance as the courts may require to protect their independence, dignity, and effectiveness, subject to the terms of this Constitution or any other law.'

³⁴⁷Gibney M and Frankowski S (1999) vii.

³⁴⁸Madhuku L (2002) 234.

that checks and balances must be put into place to guarantee sufficient constraints on purely political appointments.³⁴⁹

The provisions relating to the appointment of judges were dealt with under section 84 of the Lancaster Constitution. The section read:

'(1) The Chief Justice, Deputy Chief Justice, Judge President and other judges of the Supreme Court and other judges of the High Court shall be appointed by the President after consultation with the Judicial Service Commission. (2) If the appointment of a Chief Justice or Judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (1) the President shall cause Parliament to be informed as soon as practicable.'

In order to ensure impartiality in the appointment process the Lancaster House Constitution therefore made it mandatory that before any appointments were made, the President had to consult with the JSC. The composition of the JSC is discussed below:

3.1.3.1 Composition of the JSC

Madhuku notes that the extent to which the appointment of judges is free from political manipulation is dependent on the independence of the Judicial Service Commission.³⁵⁰ He further notes that if the JSC is merely the President's alter ego, there is little difference, in practice, between where the President is required to act "on the advice of the Commission" and where he or she acts "after consultations with" the Commission.³⁵¹

The composition of the JSC was dealt with under section 90 of the Lancaster House Constitution. It provided that the JSC be comprised of the Chief Justice or Acting Chief Justice or the most senior Judge of the Supreme Court³⁵², the Chairman of the Public Service Commission³⁵³, the Attorney-General³⁵⁴, and not less than two or more than three other members appointed by the President³⁵⁵, of which one had to be a person who was or had been a Supreme Court or High Court Judge, a person who has been

³⁴⁹Madhuku L (2002) 234

³⁵⁰Madhuku L (2002) 238.

³⁵¹Madhuku L (2002) 238.

³⁵²Section 90(1)(a) of the Lancaster House Constitution.

³⁵³Section 90(1)(b) of the Lancaster House Constitution.

³⁵⁴Section 90(1)(c) of the Lancaster House Constitution.

³⁵⁵Section 90(1)(d) of the Lancaster House Constitution.

qualified as a legal practitioner in Zimbabwe for not less than five years or is a person possessed of such legal qualifications or experience as the President considers suitable and adequate for his appointment to the JSC. The remaining Presidential appointees had to be chosen for their ability and experience in administration or their personal qualifications or their suitability otherwise for appointment.

It should be noted that over the years the composition of the JSC had been called into question as the lack of independent representation in the Commission fuelled the view that the appointment of judges in the country was mainly premised on political considerations rather than on the integrity and performance of an individual.³⁵⁶ Virtually all the members appointed to sit on the Commission were presidential appointees. Of the six (6) members of the JSC, three (3) members were directly appointed by the President to the Commission³⁵⁷, two (2) members of the JSC were appointed to the Commission by virtue of being holders of offices to which they were appointed by the President and one (1) was directly appointed by the President to the JSC by virtue of being a member of the Public Service Commission.³⁵⁸ From the above information it is clear that all the appointments to the JSC were virtually made by the President and at face value it is also evident that the lack of independent representation in the JSC made it impossible over the years to ensure that impartiality was observed in the appointment of members of the judiciary.³⁵⁹

As noted above, in the appointment of judges under the Lancaster House Constitution, the President was not bound by the advice of the JSC. The issue of fairness and impartiality in the appointment of judges was compounded by the fact that in the appointment process the President was able to act against the advice of the JSC, and

³⁵⁶Saller K (2004) 18.

³⁵⁷Section 90(1)(d) of the Lancaster House Constitution which read, 'There shall be a Judicial Service Commission which shall consist of -(d) no less than two or more than three other members appointed, subject to the provisions of subsection (2), by the President. (2) One of the members appointed under subsection 1 (d) shall be a person who- (a) is or has been a judge of the Supreme Court or High Court; or (b) is and has not for less than five years, whether continuously or not, qualified to practice as a legal practitioner in Zimbabwe; or (c) possesses such legal qualifications and has had such legal experience as the President considers suitable and adequate for his appointment to the Judicial Service Commission.'

³⁵⁸Section 90(1)(b) of the Lancaster House Constitution which read, 'There shall be a Judicial Service Commission which shall consist of (b) the Chairman of the Public Service Commission.'

³⁵⁹Saller K (2004) 18.

once such a decision was made, the Lancaster House Constitution stated that the President had to inform Parliament.³⁶⁰ The Lancaster House Constitution in this case, however, did not provide the circumstances that would allow the President to act against the advice of the JSC and neither did it provide or prescribe the action that Parliament had to take in cases where the President acted against the advice of the JSC. It is submitted that the non-existence of any provision empowering Parliament to question the decision of the President in cases where the President acted against the JSC, granted the President a great leeway in the appointment of judges.³⁶¹ Such use of powers by the President therefore reinforced the argument that the appointment of judges was largely exposed to significant political interference.³⁶²

A number of judicial appointments, especially of judges appointed after the Fast Track Land Reform Program (FTLRP), were called into question as it was believed that some of the appointments were made solely on political grounds so as to give the ruling party, ZANU-PF, political leverage on the political scene.³⁶³ The issue of the controversial appointment of judges in Zimbabwe after the FTLRP is discussed later in this chapter.



³⁶⁰Section 84(2) of the Lancaster House Constitution stated that 'if the appointment of a Chief Justice or a judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of section 84(1), the President shall cause Parliament to be informed as soon as practicable.'

³⁶¹It is imperative that the drafters of the Constitution should have included a provision in the Constitution stating the exact powers of Parliament if such a scenario would occur, thus giving Parliament a role to play in the appointment of judges. For example the Constitution of Uganda clearly envisages the crucial role that Parliament plays in a democracy and therefore performs a huge role in the appointment of judges. Article 142(1) of the Constitution of Uganda states that '[t]he Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.' Such a scenario therefore ensures that Parliament exercises its checks and balances on the executive to ensure that there is no political interference in the appointment of judges. A number of scholars also discuss the importance of Parliament in the appointment of judges as it has to exercise its checks and balances to ensure that due process is followed. See Kendall NC 'Appointing Judges: Australian Judicial Reform Proposal in Light of Recent North American Experience' (1997) 9:2 *Bond Law Review* 175 182. See also Devlin D and MacKay W 'Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary' (2000) 28 *Alberta Law Review* 734 825-826.

³⁶²Saller K (2004) 18.

³⁶³Saller K (2004) 18.

3.1.3.2 Appointment of Acting Judges

The provisions on the appointment of acting judges under the Lancaster House Constitution posed a great threat to the independence of the judiciary, as such appointments left it open for the executive to possibly exert influence on individual judges. Section 84(3) of the Lancaster House Constitution provided for the appointment of a judge for a fixed period but there was no provision prohibiting the renewal of fixed-term appointments. Madhuku notes that the renewal of fixed-term contracts provides an incentive for some judges to toe the line with the executive and hence it is important that in order to preserve the independence of the judiciary, there is need for a constitution to prohibit the renewal of fixed-term contracts.³⁶⁴

Section 85(2) of the Lancaster House Constitution empowered the President to appoint an acting judge, *inter alia*, 'if the services of an additional judge of the High Court were required for a limited period.' The Lancaster House Constitution however did not define the scope of the limited period nor did it provide the circumstances that would warrant the appointment of an additional judge. Madhuku notes that it was also unclear whether it was the President who determined when the services of an additional judge were warranted or if it was also the President who determined the length of the "limited period".³⁶⁵ Such provision left it open for the President to abuse the institution of the 'acting judge' to make purely political appointments for limited political objectives.³⁶⁶

3.1.4 Tenure and Removal

3.1.4.1 Tenure

Madhuku is of the view that the fact that judges cannot be removed from office makes it mandatory that there must a provision for a compulsory retirement age, so as to ensure that judges can be replaced.³⁶⁷ Section 86 of the Lancaster House Constitution contained the provisions relating to tenure and remuneration of judges. Section 86(1) stated that:

³⁶⁴Madhuku L 'The Appointment Process of Judges in Zimbabwe and Its Implications for the Administration of Justice' (2006) 21 *SAPR/PL* 345 351.

³⁶⁵Madhuku L (2006) 351.

³⁶⁶Madhuku L (2006) 351

³⁶⁷Madhuku L (2002) 242.

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

Section 86(2) also stated that a judge of the Supreme Court or High Court may at any time resign from his office by notice in writing to the President. From the above discussion it is clear that the Lancaster House Constitution imposed a retirement age of seventy (70). A judge who reached the age of seventy (70) had to retire and the executive had no discretion to extend the term of office of a judge who had reached that age. However, the Lancaster House Constitution subject to a medical report being accepted by the President gave the President power to extend the retirement age of a judge who had reached the age of sixty five (65). This provision thus provided the President with an avenue to influence judicial behaviour. It left it open for the President to further terminate or extend the retirement age and could have resulted in only “good” or “loyal” judges having their terms of office extended. Such a scenario would in the long term undermine the independence of the judiciary. Madhuku supports this view and states that:

‘The power of the President lies in either accepting or rejecting the medical report, but this is a limited form of power as it is unlikely that the President may reject an otherwise sound report merely to terminate the judge’s tenure of office. However, this earlier observation by the author must be qualified in the light of recent developments in Zimbabwe. It would appear that the executive could be tempted to abuse this power, to do the unthinkable and reject a sound medical report with the sole motive of terminating a judge’s tenure of office.’³⁶⁸

The Lancaster House Constitution also went on to state that the office of a judge of the Supreme Court or the High Court could not, without his consent, be abolished during his

³⁶⁸Madhuku L (2006) 349.

tenure of office.³⁶⁹ It is submitted that the granting of tenure strengthened the independence of the judiciary in the sense that this provision sought to ensure and promote the freedom of judges in deciding cases and making of rulings that were in accordance with the rule of law and judicial discretion, even if these decisions were politically unpopular or opposed by powerful interests. Hence, the protection of tenure under the Lancaster House Constitution sought to ensure that judges would remain impartial in carrying out their judicial duties.

3.1.4.2 Removal

Madhuku notes that if a judge can be easily removed from office, it matters very little that the appointment process was rigorous and free from political manipulation. Therefore, where judges enjoy adequate security of tenure, it can offset the effects of a defective appointment system, in that once appointed, a judge is confident that it is difficult to remove him or her from office, and is free to develop an independent stance regardless of the original motivations for his appointment.³⁷⁰ As has been highlighted in the previous chapter, international standards applicable to the preservation of the independence of the judiciary place considerable emphasis on the improper removal of judges from office. Hence a judge who faces removal must be examined by an independent and impartial tribunal, and the ground for removal must either for the inability to perform judicial duties, or serious misconduct.

The removal of judges was dealt with under section 87 of the Lancaster House Constitution. The section provided that:

‘A judge of the Supreme Court or High Court may be removed from office only for inability to discharge the function of his office, whether arising from infirmity of body or mind or any other cause, or for misbehavior and shall not be so removed except in accordance with the provisions of this section.’

The Lancaster House Constitution only allowed for the removal of judges in cases where a judge became unable to discharge the functions of his office or for

³⁶⁹Section 86(3) of the Lancaster House Constitution.

³⁷⁰Madhuku L (2006) 351.

misbehaviour.³⁷¹ The Constitution stated that if the President considered that the question of removal from office of the Chief Justice ought to be investigated, the President had the power to appoint a tribunal to inquire into the matter.³⁷² In the case of a judge of the Supreme Court or a judge of the High Court other than the Chief Justice, the Chief Justice had to advise the President that the question of removal from office of the judge concerned ought to be investigated, and the President had to appoint a tribunal to inquire into the matter.³⁷³ The President could therefore not without the approval of the Chief Justice initiate the process for the removal of a judge from office. Madhuku notes that this allowed the judiciary to oversee the removal process.³⁷⁴

Any tribunal appointed to inquire in any matter relating to the removal of the Chief Justice or any judge of the Supreme Court or High Court had to inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not the judge had to be removed from office. The President was mandated to act in accordance with the recommendation.³⁷⁵ If the question of the removal of any judge from office was referred to any tribunal, the judge in question was suspended from performing the functions of his office until the President revoked the suspension or the judge was removed from office.³⁷⁶ If the question of the removal of a judge was referred to the JSC and the Commission advised that the judge had to be removed from office, the President was mandated by order under the public seal, to remove the judge from office.³⁷⁷

The issue of the removal of judges had been a controversial issue in Zimbabwe since the beginning of the FTLRP. The executive consistently undermined the independence of the judiciary by purging and forcing independently-minded judges to resign from the bench. Such forced removals were all done in contravention of the removal provisions

³⁷¹Section 87 of the Lancaster House Constitution.

³⁷²Section 87(2) of the Lancaster House Constitution.

³⁷³Section 87(3) of the Lancaster House Constitution.

³⁷⁴Madhuku L (2006) 352.

³⁷⁵Section 87(6) of the Lancaster House Constitution.

³⁷⁶Section 87(8) of the Lancaster House Constitution.

³⁷⁷Section 87(9) of the Lancaster House Constitution.

under the Lancaster House Constitution.³⁷⁸ The executive consistently undermined the independence of the judiciary in the wake of the ruling in the case of *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement in Zimbabwe*³⁷⁹, which ruled that the 2000 land invasions were unconstitutional. As a result of this decision and a series of anti-government rulings, the government began to use an array of tactics to infringe upon the independence of the judiciary. Due to political interference and intimidation several judges were forced out of office as they had been perceived to be traitors for delivering a series of anti-government decisions.³⁸⁰ These independently-minded judges were replaced by judges labelled as “party loyalists” who over the years have sought to maintain and protect the interests of the ruling party.³⁸¹ The controversy surrounding the removal and forced resignation of judges will also be discussed in detail in the latter parts of this chapter.

3.1.4.3 Remuneration

Section 88 of the Lancaster House Constitution contained the provisions relating to the remuneration of judges. The section stated that:

‘(1) There shall be charged upon and paid out of the Consolidated Revenue Fund³⁸² to a person who holds the office of or is acting as Chief Justice, Deputy Chief Justice, a judge of the Supreme Court, Judge President of the High Court or a judge of the High Court such salary and allowances as may from time to time be prescribed by or under an Act of Parliament. (2) The salaries and allowances payable to a person under subsection (1) shall not be reduced during the period he holds the office concerned or acts as holder thereof.’

Thus, the salaries of judges were charged against the Consolidated Revenue Fund, a neutral and legitimate source funded by taxpayers. The use of this source therefore

³⁷⁸Matyszak D ‘Crisis in Zimbabwe’ in Malleson K and Russell P, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (2006) 333.

³⁷⁹2000 2 ZLR 469 (SC). A more detailed analysis of the Fast Land Reform Program and associated case law is made in detail later on in this chapter.

³⁸⁰Matyszak D (2006) 333.

³⁸¹Matyszak D (2006) 333.

³⁸²This is a national account in which all state revenue such as taxes are deposited.

sought to ensure that judges were not beholden to any individual but to the state as a whole.³⁸³

The issue of the remuneration of judges was previously regulated by the Judges, Salaries, Allowances and Pensions Act³⁸⁴, which is now known as the Judicial Service Act.³⁸⁵ The purpose of the Judges, Salaries, Allowances and Pension Act was to prescribe the salaries of judges of the Supreme and High Court. The Judges, Salaries, Allowances and Pension Act gave the President the responsibility of setting and determining the remuneration of judges in the country.³⁸⁶ The Act was silent on whether the President had an obligation to consult any other body (such as the JSC or Parliament) when it came to prescribing the salaries of judges. This therefore meant that the whole process was left in the hands of the President alone. In order to secure the independence of the judiciary, it would have been proper that the Act put into place consultative measures (with the JSC or Parliament) to act as checks on the powers of the President in setting and determining the salaries of judges.³⁸⁷ The Judicial Services Act now stipulates that funds for the judicial service would consist of moneys appropriated by an Act of Parliament for salaries and allowances payable to and in

³⁸³ Magaisa A 'Judiciary Must Be Financially Independent' *New Zimbabwe* 14 May 2009 <http://blog.newzimbabwe.com/2009/05/amagaisa/judiciary-must-be-financially-independent/> (Accessed 20 February 2012).

³⁸⁴ Chapter 7:08/ Act 10 of 2006.

³⁸⁵ Chapter 7:18/ Act 10 of 2006.

³⁸⁶ Section 3(1) of the Judges Salaries, Allowances and Pensions Act which read 'There shall be paid to the Chief Justice, the judges of the Supreme Court, the Judge President of the High Court and other judges of the High Court, and to any other person or judge acting in any of those capacities, a salary at such rate as may in each class or case be fixed from time to time by the President.'

³⁸⁷ For example under the South African context the President has to take into consideration the recommendations of a number of bodies when prescribing the salaries of judges. Section 2(1) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 states that any person who holds office as a Constitutional Court judge or as a judge, whether in an acting or permanent capacity, shall in respect thereof be paid an annual salary and such allowances or benefits as determined by the President, from time to time, by notice in the Gazette. This is done after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-Bearers, established under section 2 of the Independent Commission for the Remuneration of Public Office-Bearers Act 92 of 1997; and approved by Parliament in terms of section 2(3) of the Judges' Remuneration and Conditions of Employment Act. The Independent Commission for the Remuneration of Public Bearers must, when investigating or considering the salaries, allowances or benefits of Constitutional Court judges and judges consult with the Minister and Cabinet member responsible for finance and the Chief Justice or a person designated by the Chief Justice...'

respect of members of the judicial service and recurrent administrative expenses of the judicial service.³⁸⁸

The fact that the judiciary was financially dependent on the executive and legislative arms of government clearly undermined its independence as the executive had the power, as delegated by parliament, to set the salaries of judges. The lack of financial independence on the part of the judiciary and the current crippling economic situation severely compromised the independence of the judiciary, and the executive thus took advantage of the situation to further compromise the independence of the judiciary.³⁸⁹ Seductive gifts were made to members of the judiciary (current judiciary) with the executive and the Reserve Bank splashing out on lavish gifts ranging from computers and plasma televisions to satellite dishes in order to ensure that judges remained loyal to the ruling party.³⁹⁰ In order to ensure the loyalty of the judiciary, judges were also beneficiaries from the controversial FTLRP, with the executive handing out farms to individual judges across the country.³⁹¹

The lack of financial independence on the part of the judiciary had severely compromised the independence of the judiciary. It is submitted that in order to ensure the independence of the judiciary, the financial security of judges must be constitutionally guaranteed with the political branches' financial influence reduced. Dakolias and Thachuk suggest that the financial influence of the political branches of the state over the judiciary could be reduced by making judicial budgets some fixed percentage of the national budget.³⁹² Such an arrangement would be a positive step in

³⁸⁸ See Section 20 of the Judicial Services Act which states that '(1) The funds of the Judicial Service shall consist of- (a) moneys appropriated by Act of Parliament for salaries and allowances payable to and in respect of members of the Judicial Service and the recurrent administrative expenses of the Judicial Service; and (b) any other moneys that may be payable to the Judicial Service from moneys appropriated for the purpose by an Act of Parliament; and (c) any donations, grants, bequests made to the Judicial Service and accepted by the Commission with the approval of the Minister; and (d) any other moneys that may vest in or accrue to the Judicial Service, whether in terms of this Act or otherwise..'

³⁸⁹ International Bar Association (2011) 11.

³⁹⁰ Human Rights Watch (2008) 16.

³⁹¹ Gubbay A (2009) 2.

³⁹² Dakolias M and Thachuk K 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18:2 *Wisconsin International Law Journal* 353 363.

ensuring that the political branches of the state do not exert a lot of influence over the judiciary.³⁹³

The use of seductive gifts sadly portrays how the executive has over the years since the commencement of the FTLRP consistently eroded the independence of the judiciary. This has immensely contributed to the escalation of human rights abuses and the lack of judicial protection of human rights in the country.³⁹⁴ It is imperative that the new constitutional dispensation in Zimbabwe must secure the financial independence of the judiciary in order to improve the quality of judicial protection of human rights in the country. This chapter will clearly show how the loss of judicial independence on the current judiciary has severely impacted on the judicial protection of human rights.

The above discussion depicts the protection of the independence of the judiciary under the Lancaster House Constitution. It is as a result of its weak guarantees for the independence of the judiciary and the constant interference with the judiciary by the executive that the independence of the judiciary has been affected. Such lack of independence impacted on the manner in which the current judiciary has therefore protected human rights. Taking into consideration the discussion above on the independence of the judiciary under the Lancaster House Constitution, the discussion below seeks to make a detailed historical analysis of the independence of the judiciary under the different chief justices (identified below) and how such independence has impacted on the promotion and protection of human rights.

3.2 History of Human Rights Litigation in Zimbabwe

3.2.1 Introduction

The constant interference with the judiciary has greatly contributed to the manner in which the present judiciary has failed to protect and promote human rights. This chapter

³⁹³Rosenn KS 'The Protection of Judicial Independence in Latin America' (1987) 19:1 *University of Miami International Law Review* 7 16-17. The author also describes how some Latin American Constitutions reduce the political branches' influence over the judiciary by setting judicial budgets as fixed percentages of the total national budget.

³⁹⁴Moyo G 'Corrupt Judges and Land Rights in Zimbabwe' in Transparency International *Global Corruption Report* (2007) 35.
http://archive.transparency.org/publications/gcr/gcr_2007 (Accessed 13 March 2009).

seeks to give the historical background to the state of the judiciary since independence and to look at the factors that have contributed to the loss of judicial independence (of the current judiciary), hence leading to the judiciary's questionable jurisprudence on human rights.

This part of the research seeks to address the history of human rights litigation since the attainment of independence and to give a detailed account of how the executive has constantly interfered with the judiciary, leading to the current state of affairs in the country. The research will look at the state of the judiciary from 1980-1984 (under the leadership of Fieldsend CJ). The state of the judiciary from February 1984 - 2001 under the leadership of Dumbutshena CJ and Gubbay CJ will also be looked at. Finally the research will address the state of the judiciary under the current leadership of Chidyausiku CJ. It also should be noted that due to the existence of huge volumes of case law on human rights since independence, it would therefore be impossible for this chapter to discuss all these cases. Specific attention will be given to a selected number of judgments from the various eras in order to show how the judiciary has fared in promoting and protecting human rights.

3.3. Early Beginnings-Period Immediately after the Attainment of Independence (1980-1984)

3.3.1 Contextual Background

Zimbabwe attained its independence from colonial rule in 1980. Soon after the attainment of independence the judiciary was under the leadership of Fieldsend CJ. According to De Bourbon the first five years after the attainment of independence in Zimbabwe provided very limited opportunities to apply the Declaration of Rights in Zimbabwe.³⁹⁵ This period was mainly characterised by applications dealing with detentions without trial and the state of emergency³⁹⁶ that had been declared by the Smith government on its Unilateral Declaration of Independence in November 1965. The Unilateral Declaration of Independence was extended repeatedly every six months

³⁹⁵De Bourbon A (2003) 202.

³⁹⁶Hatchard J (1993) 35.

and was kept in force by the new government for ten years. It permitted the deprivation of liberty, subject to certain conditions, under the law of Zimbabwe and hence the many applications dealing with detentions without trial during this period. As a result most of the judgments that were delivered by the courts during this period brought the judiciary in conflict with the executive. However, despite this the judiciary was able to set the foundation for human rights protection and played a crucial role in advancing the cause of human rights in the country.

3.3.2 Human Rights Jurisprudence

One of the first cases to be heard during this period dealing with human rights was the case of *Minister of Home Affairs and Others v Dabengwa and Another*.³⁹⁷ This case dealt with an application challenging the Emergency Powers Regulations (Maintenance of Law and Order)³⁹⁸ that still existed in Zimbabwe, in particular the right of persons detained without trial to have access to their lawyers. In this case prominent members of the Zimbabwe's ZAPU, namely, Dumiso Dabengwa and Lookout Masuku, had been arrested and tried for treason. The members of ZAPU were acquitted of the charge of treason, but were immediately arrested in terms of the emergency regulations. They were denied access to their lawyers as the regulations issued under the state of emergency prohibited detainees from communicating with or receiving any communication from their lawyers.³⁹⁹ As a result of this infringement, the detainees

³⁹⁷ 1982 (1) ZLR 236 (SC); 1982 (4) SA 301 (ZS).

³⁹⁸ Regulations SI/441 of 1980.

³⁹⁹ Section 43 of the Emergency Powers Regulations which read '[s]ubject to the provisions of this section, a protecting authority may by order prohibit, either absolutely or subject to such conditions as he may fix- (a) any restricted person or detained person from communicating, by word of mouth, in writing or otherwise, with or receiving any such communication from any person who is outside the restriction area or place of detention, as the case may be; (3) A protecting authority shall not prohibit a restricted person or detained person from communicating with or receiving any communication from his legal representative unless the protecting authority is of the opinion that hindrance is reasonably likely to be caused to the processes of investigation or the administration of justice if he does permit such communication. (4) Where the protecting authority has prohibited a restricted person or detained person from communicating with or receiving any communication from his legal representative the protecting authority shall, as soon as the grounds specified in subsection (3) cease to exist, notify the restricted person or detained person that he may communicate with and receive communications from his legal representative. (5) Any person who is aggrieved by the provisions of an order made under subsection (1) or any measure taken under subsection (2) may make representations thereon in writing to the Minister. (6) On receipt of any representations in terms of subsection (5) the Minister may, having regard

sought an order from the High Court to be allowed to consult with their legal representative, which was granted by McNally J. The applicants in the court a quo had contended that, because the provisions of section 43 of the Emergency Powers Regulations were in identical terms to the regulations that were in force at the date of the coming into force of the Lancaster House Constitution on 18 April 1980, they were therefore saved by section 26(3)⁴⁰⁰ of the Lancaster House Constitution which formed part of the Declaration of Rights. The applicants therefore lodged an appeal to the Supreme Court, arguing that the regulations prohibiting detainees from communicating with or receiving any communication from their lawyers was pre-existing and therefore was saved by section 26(3) of the Lancaster House Constitution. In dismissing the appeal Fieldsend CJ held that Schedule 2 to the Constitution⁴⁰¹, which set out the powers of the executive to deal with an emergency, did not form part of the Declaration of Rights, and therefore afforded separate rights that were enforceable outside the provisions of section 26 of the Lancaster House Constitution.⁴⁰² The *Dabengwa* case was a landmark decision by the Supreme Court as it was made at the time when repression in Matebeleland was at its peak and therefore was a hallmark decision by which other human rights decisions in Zimbabwe would be tested.⁴⁰³

In another landmark ruling dealing with detention under the Emergency Powers Regulation, the Supreme Court was also able to set its mark on the issue of detention without trial, thus advancing human rights protection in the country.⁴⁰⁴ The case of *Minister of Home Affairs v York*⁴⁰⁵ dealt with two farmers (York brothers) who were arrested and charged with the illegal possession of arms of war. The evidence

to the provisions of subsection (3) and (4), confirm the order made by the protecting authority or direct the protecting authority to amend the order in such manner as the Minister may specify.'

⁴⁰⁰Section 26(3) which was repealed specifically provided that laws that were in existence at the date of independence on 18 April 1980, could not be challenged under the Declaration of Rights for a period of five years. All repressive legislation introduced during the Rhodesian era was immune from challenge until 1985.

⁴⁰¹Paragraph 2(1)(a) of Schedule 2 read '(1) Where a person is detained under any law providing for preventive detention- (a) he shall be informed as soon as reasonably practicable after the commencement of the detention, and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him.'

⁴⁰²*Minister of Home Affairs and Others v Dabengwa and Another* 1982 (4) SA 301 (ZS) page 308.

⁴⁰³De Bourbon A (2003) 204.

⁴⁰⁴*Minister of Home Affairs v York and Another* 1982 2 ZLR 48 (SC).

⁴⁰⁵1982 2 ZLR 48 (SC).

submitted to the High Court for conviction of the brothers was ruled to be inadmissible as the statement that had been made by one of the accused to the police, admitting the crime, had been made as a result of police threats.⁴⁰⁶ As a result the brothers were acquitted. However, the government ordered their immediate detention. A series of applications were made to the High Court to secure the release of the brothers. Fieldsend CJ held that the executive had not acted in terms of the law, and therefore the detentions were illegal. In his judgment Fieldsend CJ, stated that:

'It is important to draw lessons from what has occurred in this case. It is vitally important that the greatest care be taken in the exercise of powers of detention in times of emergency. It has been stressed in every jurisdiction that has similar provisions how much power they give to the executive; that is why they are carefully hedged about to ensure that the freedom of the individual is preserved so far as is consistent with national good. The other reason why great care is required is that a failure to observe the requirements of the law may result in the courts having to order the release of persons who may be a danger to the state'⁴⁰⁷

It should be noted that the decision of the Court in the above case resulted in clashes between the executive and the judiciary. The then Minister of Home Affairs attacked the judiciary and accused it of dispensing 'injustice by handing down perverted pieces of judgment which smack of subverting the people's government.'⁴⁰⁸ In attacking the whole legal profession in the country, the Minister stated that:

'We are aware that certain legal practitioners are in receipt of moneys as paid hirelings, from governments hostile to our own order, in the process of seeking to destabilise, to create a state of anarchy through the inherited legal apparatus. We promise to handle such lawyers using the appropriate technology that exists in our law and order section. This should succeed in breaking up the unholy alliance between the negative bench, the reactionary legal practitioners and governments hostile to us, some of whose representatives are in this country.'⁴⁰⁹

⁴⁰⁶Gubbay A *The Light of Successive Chief Justices of Zimbabwe in Seeking to Protect Human Rights and the Rule of Law* (2001) 3.

http://www.rothschildfostertrust.com/materials/lecture_gubbay.pdf (Accessed 20 June 2012).

⁴⁰⁷*Minister of Home Affairs v York and Another* 1982 2 ZLR 48 (SC) at para. 58-59.

⁴⁰⁸Gubbay A (2001) 4.

⁴⁰⁹Zimbabwe Parliamentary Debates of House of Assembly (Hansard) col 632.

The decision of the Court also drew the attention of the then Prime Minister and now President, Robert Mugabe, who launched a scathing attack on the judiciary in Parliament on the 29th of July 1982. He stated that:

'I must say that, much as I appreciate the difficult task that our judges are faced with, and the difficult task should invoke more sympathy from this House than condemnation, the Government cannot allow the technicalities of the law to fetter its hands in what is a very difficult task before it, to preserve law and order in the country, maintain peace in the country and forge ahead to build a non-racial society. We shall therefore proceed as Government in a manner we feel is fitting, in a manner which will enable us to be in control of the situation, and some of the measures we shall take are measures which will be extra-legal.'⁴¹⁰

It should be noted that the threats by the executive to use any legal or extra-legal measures to advance its policies were alarming and clearly represented a serious threat to both the independence of the judiciary and the functioning of the country's legal system.⁴¹¹ Fieldsend CJ together with the Law Society issued various statements condemning the attacks on the legal profession. The matter was later resolved through the intervention of the then Prime Minister, Robert Mugabe, who through the Minister of Justice, issued a press release reaffirming the government's commitment to the independence of the judiciary.⁴¹²

Controversy between the executive and the judiciary was soon to follow in the case of *S v Slatter and Others*.⁴¹³ In this case nine aircraft were destroyed in an attack on the Zimbabwe Air Force Base in Gweru. Six white Air Force officers were arrested and charged with the attack. Upon their arrest the officers were subjected to torture and were refused access to their lawyers. In the Magistrate's Court, the officers were convicted of the attack solely on the basis of the signed confessions which were obtained as a result of torture. An appeal was successfully made to the High Court by the accused for their acquittal on the grounds that the confessions had been obtained

⁴¹⁰Zimbabwe Parliamentary Debates of House of Assembly (Hansard) col 925.

⁴¹¹Gubbay A (2001) 5.

⁴¹²Gubbay A (2001) 5.

⁴¹³1983 2 ZLR 144 (HC).

illegally and that the accused had been denied access to their legal representatives.⁴¹⁴ The Attorney-General appealed the decision of the High Court to the Supreme Court⁴¹⁵ on the basis that Dumbutshena JA, who had heard the matter in the High Court, had erred in his application of the law.⁴¹⁶ Beck JA in his judgment held that the Attorney-General had failed to convince the Court that Dumbutshena JA had erred in his application of the law and as a result dismissed the appeal, thus upholding the judgment of the High Court.⁴¹⁷ In response to the Supreme Court dismissing the appeal, the Minister of Home Affairs accused judges of “class bias and racism” thus further bringing the judiciary and the executive into conflict and undermining the independence of the judiciary which the executive had previously stated that the government respected.⁴¹⁸

It should be noted that during this period the courts did not only find in favour of the ordinary litigant but in favour of the state as well.⁴¹⁹ In the case of *Mandirwhe v Minister of State*⁴²⁰, a case which dealt with a man (Mandirwhe) who had been arrested by state security officers and surrendered to officials in Mozambique without any formal extradition proceedings. A writ of *habeas corpus* was sought, and the trial judge referred the matter to the Supreme Court so that it could determine the necessary measures to be adopted to protect Mr. Mandirwhe’s rights. In this case the Supreme Court declined

⁴¹⁴ *S v Slatter and Others* 1983 2 ZLR 144 (HC).

⁴¹⁵ *Attorney-General v Slatter and Others* 1984 1 ZLR 306 (SC); *S v Slatter and Others* 1984 2 SA 798 (ZS).

⁴¹⁶ The Attorney General contended that Dumbutshena JA had erred in finding that failure by members of the police force to grant the accused persons access to their legal representatives prior to confirmation proceedings in compliance with the provisions of section 2(1)(a) of the Second Schedule to and Section 13(3) of the Lancaster House Constitution which invalidated confirmation proceedings which were properly conducted in the Magistrate’s Court in terms of section 105C of the Criminal Procedure and Evidence Act and that the learned judge had misdirected himself in holding that confirming Magistrates are duty bound to inquire of the accused persons brought before them for confirmation of statements in terms of section 105C of the Criminal Procedure and Evidence Act, whether they consulted their legal representatives.

⁴¹⁷ *S v Slatter and Others* 1984 2 SA 798 (ZS) 806.

⁴¹⁸ Gubbay A (2001) 6.

⁴¹⁹ See the case of *Hewlett v Minister of Finance* 1981 ZLR 571 (SC); 1982 (1) SA 490 (ZS) which dealt with the constitutional guarantee against expropriation. The Supreme Court had to consider the issue of the repeal of a right to compensation, with the state contending that the right had not been acquired, but merely extinguished. The court found in favour of government that a distinction had to be drawn between the acquisition of rights and the extension of rights. In its ruling the court stated that since parliament had merely extinguished rights, the applicant had no right to be treated in terms of the compulsory acquisition procedures in terms of the Constitution.

⁴²⁰ 1986 (1) ZLR 1 (A); 1981 (1) SA 759 (ZA).

to exercise its jurisdiction on the grounds that the High Court still had the power to make an effective order without having any constitutional issue determined.

Overall it should be noted that during the era of Fieldsend CJ, little constitutional litigation came before the courts as a result of the impact of the then repealed section 26(3) of the Lancaster House Constitution. It is submitted that despite the threats by the executive against the judiciary, this did not stop the latter from asserting individual rights and freedoms and as a result the judiciary enhanced its reputation in the early years after the attainment of independence as a protector of human rights. This view is supported by De Bourbon who notes that the courts, especially the Supreme Court, emerged with great credit in the five years when its hands were tied by section 26(3) of the Lancaster House Constitution as it used its limited powers to enforce human rights.⁴²¹ Gubbay notes that despite the interference with the rule of law and statements that caused a threat to the independence of the judiciary, such threats were however insignificant as compared to the current events in the country that have resulted in the judiciary abrogating its role of protecting and promoting human rights.⁴²²

3.4 The Golden Period of Human Rights Litigation in Zimbabwe (1984-2001)

3.4.1 Judiciary under Chief Justice Dumbutshena

3.4.2 Contextual Background

Dumbutshena CJ was appointed at the height of the state of emergency and the Matebeleland civil war (*Gukurahundi*)⁴²³ when thousands of individuals were killed, raped and tortured by the Fifth Brigade for dissident activities.⁴²⁴ Despite the atrocities committed during the Matebeleland civil war, perpetrators of such inhumane acts were never held accountable for the human rights violations as amnesty was granted, placing

⁴²¹De Bourbon A (2003) 206.

⁴²²Gubbay A (2001) 6.

⁴²³The term '*Gukurahundi*' refers to the first rain of summer that washes away the chaff from the previous season: civilians in Matebeleland saw themselves as the rubbish that had to be washed away. See also Hatchard J (1993) 35.

⁴²⁴Bochenek M 'Compensation for Human Rights Abuses in Zimbabwe' (1994-1995) 26 *Columbia Human Rights Law Review* 483.

them beyond the reach of the courts.⁴²⁵ A commission of enquiry (Chihambakwe Commission of Enquiry) was appointed to look at the events surrounding the massacres but as of now the findings of the Commission have not been made public.⁴²⁶ Despite presiding over the judiciary during this dark period in Zimbabwean history, the judiciary under the guardianship of Dumbutshena CJ made great strides in recognising the importance of human rights protection in the country. During this period, until the commencement of the land reform, the Zimbabwean judiciary was regarded as having a strong reputation for independence and thus made a great contribution in protecting human rights.⁴²⁷ De Bourbon labels this period as the golden era of human rights litigation as the judiciary had a strong reputation for human rights protection. He states that:

'The golden period of human rights litigation in Zimbabwe where the court did not always find for the ordinary litigant, but one knew that whatever point was being raised was carefully considered, and one knew even when the court found for the state that the judgment represented the honest view of the judges who heard the matter.'⁴²⁸

3.4.3 Human Rights Jurisprudence

One of the most groundbreaking cases of the Dumbutshena CJ era dealt with the issue of torture and gave the courts the opportunity to invoke international human rights norms.⁴²⁹ The right not to be subjected to torture, one of the most important substantive rights in the Lancaster House Constitution, was protected under section 15(1). The section read; '[N]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'⁴³⁰ The case of *S v Ncube and Others*⁴³¹ dealt with

⁴²⁵Eppel E 'Gukurahundi' The Need for Truth and Reparation'in Raftopoulos B and Savage T, *Zimbabwe: Injustice and Political Reconciliation* (2004) 46.

⁴²⁶Legal Resources Foundation, *Breaking the Silence; Building True Peace: A Report into the Disturbances in Matebeleland and the Midlands 1980-1988: A Summary* (1999) 14.

⁴²⁷Widner J and Scher D (2008) 249.

⁴²⁸De Bourbon A (2003) 206.

⁴²⁹Alston P and Crawford J, *The Future of United Nations Human Rights Treaty Monitoring* (2000) 277.

⁴³⁰It should also be noted that Zimbabwe has had a troubled history on torture. It was administered during the Matebeleland atrocities and has also been presently used to suppress political dissent amongst members of the opposition supporters. It is also crucial to note that Zimbabwe has neither signed nor ratified the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁴³¹1987 2 ZLR 246 (SC); 1988 2 SA 702 (ZS).

the constitutionality of adult whipping, after three adult males had been sentenced to whipping.⁴³² It was argued in the case that the punishment of adult whipping violated the right to protection from inhuman or degrading punishment.⁴³³ Finding support in international law⁴³⁴ in the judgment of the European Court of Human Rights case of *Tyrer v United Kingdom*⁴³⁵ and various other cases which added a persuasive value⁴³⁶ towards the reasoning of the Court, Gubbay JA held that whipping of an adult offender⁴³⁷ violated the Declaration of Rights as such punishment was inhuman and degrading and therefore in conflict with section 15(1) of the Lancaster House Constitution.⁴³⁸ He stated that:

⁴³²It should be noted that corporal punishment had been a feature of the sentencing system. It was authorised for common law offences by section 314(2) (e) of the Criminal Procedure and Evidence Act Chapter 59 (Z).

⁴³³*S v Ncube and Others* 1988 (2) SA 702 (ZS) 703F.

⁴³⁴The status of international law in Zimbabwe was dealt with under section 111B of the Lancaster House Constitution which stated that 'any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the president with foreign states or organisation; (a) Is subject to approval by parliament and; (b) shall not form part of our law unless it has been incorporated into the law by or under an act of parliament.' This simply meant that Zimbabwe was not bound by international law unless the law was legislated by parliament. Unlike the South African Constitution which in section 39 mandates the courts to consider international law in interpretation of Bill of Rights and may consider the use of foreign law, there was a *lacuna* in the Lancaster House Constitution as it was silent on the use of international law in the interpretation of the Declaration of Rights. However, it should be noted that despite the non-existence of a constitutional provision dealing with the application of international law in the interpretation of the Declaration of Rights, the judiciary under the leadership of Dumbutshena CJ and Gubbay CJ set precedence on the importance of international law in interpreting the Declaration of Rights thereby advancing the protection of human rights in the country. The issue of the use of international law in the interpretation of the Constitution has been addressed with the inclusion of section 46(1) of the Constitution of Zimbabwe which expressly places an obligation on courts to consider international law in the interpretation of the Constitution.

⁴³⁵1978 2 EHRR 1 at 11 para.33.

⁴³⁶In making reference as to a possible reason why the court relied on foreign law (for persuasive value) as to whether corporal punishment per se was inhumane and degrading, Gubbay JA on page 717I-J stated that 'The answer, so it seems to me, is dependent upon the exercise of a value judgment by this court. That being so, judgments of the courts of other countries would normally be viewed with a certain degree of circumspection. Fortunately on few occasions where the issue of whether whipping is constitutionally defensible has been judicially considered, it appears to have resulted in little difference of opinion; whether imposed upon an adult person or a juvenile offender the punishment in the main has been branded as both cruel and degrading.'

⁴³⁷Section 109 of the Prisons Regulation of 1956 permitted adult whipping as a form of punishment.

⁴³⁸*S v Ncube and Others* 1988 (2) SA 702 (ZS) pp 719-721. Gubbay JA on page 702 stated that the purpose of section 15(1) was that it was a provision that embodied broad and idealistic notions of dignity, humanity and decency, against which penal measures had to be evaluated. The provision guaranteed that the power of the State to punish was exercised within the limits of civilised standards. Punishments that are therefore not compatible with the evolving standards of decency that marked the progress of a maturing society or which involved the unnecessary and wanton infliction of pain were repugnant. Adult

'The manner in which it is administered is somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practiced by almost the whole of the civilised world, being incompatible with the evolving standards of decency...it is degrading to both the punished and the punisher alike and by its very nature treats members of the human race as non-humans.'⁴³⁹

The Supreme Court under Dumbutshena CJ also played a crucial role in abolishing whipping of boys under the age of eighteen (18). The case of *S v Juvenile*⁴⁴⁰ dealt with the constitutionality of sentences of corporal punishment imposed upon juveniles in terms of the Criminal Procedure and Evidence Act.⁴⁴¹ Dumbutshena CJ in his ruling, and quoting extensively from the *S v Ncube and Others*⁴⁴² case, held that the practice of juvenile whipping was unconstitutional and was in conflict with section 15(1) of the Lancaster House Constitution. In passing judgment and emphasising the importance of international law in interpreting issues of human rights and how authorities from other jurisdiction influenced the court's decision, Dumbutshena CJ stated that:

'Zimbabwe has a Constitution with a justiciable Bill of Rights. One of its provisions prohibits torture, or inhuman or degrading punishment or other such treatment. It is now possible for an accused person sentenced to a whipping to challenge the constitutionality of the punishment in terms of section 15(1) of the Constitution. An added advantage is that the courts of this country are free to import into the interpretation of section 15(1) interpretations of similar provisions in international and regional human rights instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights. In the end international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched.'⁴⁴³

whipping was described as a barbaric, inherent brutal and cruel and stripped the recipient of all dignity and respect.

⁴³⁹ *S v Ncube and Others* 1988 (2) SA 702 (ZS) 722A-B.

⁴⁴⁰ 1989 (2) ZLR 61 (SC); 1990 (4) SA 151 (ZS).

⁴⁴¹ See section 330 of Chap, 59 (Z).

⁴⁴² *S v Ncube and Others* 1988 (2) SA 702 (ZS) 721H-722D.

⁴⁴³ *S v Juvenile* 1990 (4) SA 151 (ZS) 155G-155I.

The above statement shows how the courts mostly relied on international law in the interpretation of the Declaration of Rights despite the fact that the Lancaster House Constitution had no provision expressly permitting courts to do so. This shows how the courts before the start of the FTLRP, used to consistently give a broad and benevolent interpretation to the provisions in the Constitution on human rights and fundamental freedoms. It is in this regard that Dumbutshena CJ, thus, ruled juvenile whipping to be unconstitutional and inconsistent with section 15(1) of the Lancaster House Constitution.⁴⁴⁴

The decision of the Supreme Court in *S v Juvenile*⁴⁴⁵ triggered a response from the government as it showed signs of unhappiness with the decision.⁴⁴⁶ In a reflection of the previous clashes between the judiciary and the executive under the reign of Fieldsend CJ, Parliament proceeded to amend the Constitution and added a derogation that expressly allowed for juvenile whipping to be administered to boys under the age of eighteen. Amendment number 11⁴⁴⁷ resulted in the inclusion of section 15(3) which read:

'No moderate corporal punishment inflicted (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone in *loco parentis* or in whom are vested any of the powers of his parent or guardian; or (b) in the execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of section 15(1) on the ground that it is inhuman or degrading.'

It is submitted that the amendment of the Constitution to expressly allow for whipping of boys under the age of eighteen, showed the intolerance that the government had towards the judiciary. The decision clearly showed how far the executive had gone over the years to undermine the courts which had endeavoured to set standards for constitutional conduct by the state.⁴⁴⁸ It is submitted that the amendment should

⁴⁴⁴ *S v Juvenile* 1990 (4)SA 151 (ZS) 163H-J.

⁴⁴⁵ 1989 (2) ZLR 61 (SC); 1990 (4) SA 151 (ZS).

⁴⁴⁶ Madhuku L (2010) 124.

⁴⁴⁷ Act 30 of 1990.

⁴⁴⁸ Zimbabwe Lawyers for Human Rights 'Amendments to the Constitution of Zimbabwe: A Constant Assault on Democracy and Constitutionalism'

therefore have been attacked before its inclusion in the Constitution and should have been read as not being part of the Constitution as it sought to legalise conduct that the courts had expressly stated was inconsistent with section 15(1) of the Lancaster House Constitution. Although Parliament in Zimbabwe has not incorporated the Convention on the Rights of the Child (CRC)⁴⁴⁹ as part of national law, it can be argued that the inclusion of section 15(3) into the Lancaster House Constitution was in violation of the CRC⁴⁵⁰ read together with CRC General Comment number 8 which seeks to abolish corporal punishment. It is submitted that due to the fact that the Zimbabwean government has signed and ratified the CRC without any reservations⁴⁵¹ it should have been held accountable for violation of its international law obligations.

<http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf> (Accessed 20 February 2012).

⁴⁴⁹General Assembly resolution 44/25 of 20 November 1989 Zimbabwe signed the CRC on the 8th of March 1990 and ratified the convention on 11 September 1990.

⁴⁵⁰See the following articles although they do not refer explicitly to corporal punishment, however, the articles prohibit the use of all forms of physical violence or mental violence against children which means that corporal punishment and other cruel or degrading forms of punishment are forms of violence and therefore States must take appropriate legislative measures, administrative, social and educational to eliminate them. See Article 19(1) of the CRC reads 'State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents(s), legal guardian(s) or any other person who has the care of the child. (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.' See Article 28(2) which reads 'State parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present convention' and Article 37 which states that 'State parties shall ensure that (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances; (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to prompt decision on any such action.'

⁴⁵¹See Convention on the Rights of the Child, New York, 20 November 1989.

http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-11&chapter=4&lang=en (Accessed 1 June 2012).

Despite the setback of Parliament reversing the judgment of the Supreme Court, with the inclusion of section 15(3), the Supreme Court under Dumbutshena CJ also made a great contribution to advancing human rights in the country by outlawing other forms of punishment and sought reliance on international law in deciding most human rights cases in the country. Dumbutshena CJ set a benchmark for the exact role that the judiciary had to play in protecting human rights irrespective of the fact that he presided over a judiciary characterised by political upheavals in Matebeleland⁴⁵² and efforts by Parliament to counter judicial decisions by amending the Constitution. Dumbutshena CJ retired, before he reached the age of retirement, in April 1990.⁴⁵³

3.4.4 Judiciary under the Leadership of Chief Justice Gubbay (1990-2001)

Gubbay CJ was appointed as Chief Justice after the retirement of Dumbutshena CJ. The judiciary at this time was also known for its strong reputation of independence and its strong reliance on principles of international law in interpreting and applying human rights principles. As a result Gubbay described this era as a fulfilling one, as the increased awareness by legal practitioners of the scope and impact of the Declaration of Rights enabled the courts to create sound human rights jurisprudence in the country.⁴⁵⁴

One of the first major cases to come to the courts under the reign of Gubbay CJ era dealt with a challenge to the conditions in the condemned prisoners' section of a maximum security prison.⁴⁵⁵ In this case the applicant and two other accused persons had been convicted in the High Court of murder and sentenced to death.⁴⁵⁶ The applicant was incarcerated in the condemned prisoners' section of the maximum security prison and in terms of section 110 of the Prisons Act⁴⁵⁷ was confined in a cell.

⁴⁵²Biti T 'The Judiciary, the Executive and the Rule of Law in Zimbabwe' in Mugwera S.K Olukoshi A.O and Wohlgemuth L *Towards a New Partnership with Africa: Challenges and Opportunities* (1998) 74.

⁴⁵³Gubbay A (2001) 8.

⁴⁵⁴Gubbay A (2001) 9.

⁴⁵⁵*Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1991 1 ZLR 105 (SC); 1992 (2) SA 56 (ZS).

⁴⁵⁶*Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 (ZS) 56G-H.

⁴⁵⁷Chapter 21 (Z).

Initially the applicant was allowed virtually unrestricted access to the exercise yard during daylight hours until 16:00. However, this situation was altered as attempts had been made to forcibly effect the release from lawful custody of the applicant and his co-accused and to remove them from Zimbabwe. Stricter measures which were deemed essential were implemented by the Director of Prisons which reduced the period of the applicant's access to the exercise yard to half an hour on weekdays only and during weekends and public holidays the applicant was confined throughout in a tiny, windowless cell.⁴⁵⁸

The applicant applied directly to the Supreme Court under section 24(1) of the Lancaster House Constitution alleging that the periods during which he was confined to his cell, both on weekdays and weekends, were so excessive as to amount to a violation of his right not to be subjected to inhuman treatment, protected under section 15(1) of the Lancaster House Constitution.⁴⁵⁹ Gubbay CJ in delivering his judgment noted that despite the fact that the Court had to exercise judicial restraint in its handling of this case as prison officials had to be accorded latitude and understanding in the administration of prison affairs, the Court had a duty to take cognisance of a valid claim that a prison regulation offended a fundamental constitutional protection, and it was therefore the responsibility of the Court to enforce the constitutional rights of all persons.⁴⁶⁰ As had been the norm in the Gubbay CJ era, careful consideration was given to how other jurisdictions around the world dealt with cases involving prisoners' rights and such judgments added a persuasive value to the decision of the Court.⁴⁶¹

⁴⁵⁸ *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 (ZS) 57A.

⁴⁵⁹ *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 (ZS) 57B-C.

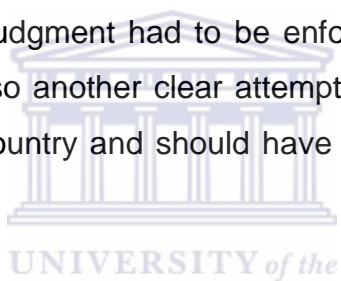
⁴⁶⁰ *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 (ZS) 60G-I.-61A.

⁴⁶¹ See for example amongst other quoted cases *Sunil Batra v Delhi Administration* (1979) 1 SCR 392 (Supreme Court of India), where Desai J, in delivering his judgment laid down the following broad principles: In the first place, it was not open to debate that prisoners were not wholly deprived of their fundamental rights and no iron curtain could be drawn between a prison and the Constitution. Secondly, prisoners were entitled to all constitutional rights, save those inevitably lost as an incident of confinement. Thirdly, conviction for a crime did not reduce the prisoner into a non-person, whose rights were subject to the whim of the supervising administration. Finally, the Court had to strike a just balance between the dehumanising prison atmosphere on the one hand and the preservation of internal order and discipline, the maintenance of institutional security, and the rehabilitation of prisoners, on the other hand. See also *Sobhraj v Superintendent, Central Jail, Tihar, New Delhi* (1979) 1 SCR 512 (Supreme Court of India)

Gubbay CJ in holding that the incarceration of the applicant with limited exercise periods violated his constitutional rights, stated that:

'In my opinion, to deprive the applicant of access to fresh air, sunlight and the ability to exercise properly for a period of twenty three and a half hours per day, by holding him in a confined space, is virtually to treat him as a non-human. I think it is repugnant to the attitude of contemporary society. The emphasis must always be on man's basic dignity, on civilised precepts and on flexibility and improvement in standards of decency as society progresses and matures.'⁴⁶²

Gubbay CJ ordered that the applicant be allowed to exercise in the open air, every weekday, for one hour in the morning and one hour in the afternoon, and that the applicant be allowed to exercise in the open air every Saturday, Sunday and public holiday for a minimum of one hour.⁴⁶³ Despite the ruling of the Court, the Director of Prisons initially declined to enforce the judgment until the intervention of the Minister of Justice who directed that the judgment had to be enforced.⁴⁶⁴ It is submitted that the actions of the Director were also another clear attempt to frustrate and undermine the authority of the courts in the country and should have been prosecuted for violating a court order.



The protection of the rights of prisoners was also greatly advanced under the leadership of Gubbay CJ, when the Supreme Court in the case of *S v Masitere*⁴⁶⁵ decided that solitary confinement and reduced diet as punishments imposed by the courts were no longer permissible. In this case the applicant was convicted of house-breaking with intent to steal and theft by the Provincial Magistrate in Masvingo. As a result of a catalogue of previous convictions the applicant was sentenced to serve a term of three years' imprisonment with labour, and a suspended sentence of three years'

where Krishna J stated that 'Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this Court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law. Then the parrot-cry of discipline will not deter, of security will not scare, of discretion will not dissuade, the judicial process. For if Courts "cave in" when great rights are gouged (out) within the sound-proof, sight proof precincts of prison houses, where, often, dissenters and minorities are caged, Bastilles will be re-enacted... Therefore we affirm that imprisonment does not spell farewell to fundamental rights...'

⁴⁶² *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 (ZS) 65H.

⁴⁶³ *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 (ZS) 66B.

⁴⁶⁴ Gubbay A (2001) 9.

⁴⁶⁵ 1990 (2) ZLR 289 (SC); 1991 (1) SA 821 (ZS).

imprisonment with labour imposed by the High Court upon his last conviction was brought into effect by the Provisional Magistrate. Further, the Provincial Magistrate ordered that the first and last fortnights of the applicant's term of imprisonment be spent in solitary confinement and on a spare diet.⁴⁶⁶

The case was brought before the Supreme Court after leave to prosecute a criminal appeal in person both against conviction and sentence in terms of section 10⁴⁶⁷ of the Supreme Court Act.⁴⁶⁸ The appeal was dismissed, with Korsah JA ruling that the appeal lacked merit. However, Korsah JA proceeded to look at the constitutionality of the issue of the imposition of additional punishments of solitary confinement and spare diet. The learned judge stated that although the imposition of solitary confinement and reduced diet had not specifically been declared unconstitutional as being forms of torture or inhuman and degrading punishment, and as such struck by section 15 of the Lancaster House Constitution, such punishments by virtue of their inhuman and degrading nature and the element of torture entailed, were patently unconstitutional.⁴⁶⁹ In his ruling Korsah JA, in agreement with the Attorney-General to whom the matter had been referred, stated that these forms of punishment were reminiscent of the Dark Ages and were therefore in contravention of section 15 of the Lancaster House Constitution and therefore unconstitutional.⁴⁷⁰ The Supreme Court should be commended for advancing the rights of incarcerated persons, thus ensuring that the dignity of prisoners was upheld.

The Supreme Court also enhanced its status as a guardian of rights by delivering one of its landmark judgments dealing also with prisoner's rights. The case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General Zimbabwe and*

⁴⁶⁶ *S v Masitere* 1991 (1) SA 821 (ZS) 822A.

⁴⁶⁷ Section 10 reads 'When an appeal against conviction in a criminal case, other than an appeal from the judgment of the High Court, has been noted to the Supreme Court, the Attorney-General may, at any time before the hearing of the appeal, give notice to the registrar of the Supreme Court that he does not for reasons stated by him support the conviction, whereupon a judge of the Supreme Court in chambers may allow the appeal and quash the conviction without hearing arguments from the parties or their legal representatives and without their appearing before him.'

⁴⁶⁸ [Chapter 7:13] Act No. 10 of 2006. Formerly Act 28 of 1981.

⁴⁶⁹ *S v Masitere* 1991 (1) SA 821 (ZS) 822B-D.

⁴⁷⁰ *S v Masitere* 1991 (1) SA 821 (ZS) 822E-G.

*Others*⁴⁷¹ concerned a challenge to the constitutionality of delays in carrying out sentences of the death penalty. The applicant in this case sought an order preventing the execution of four prisoners who had been sentenced to death in February 1987 and November 1988, on the grounds that, by March 1993 when it was proposed that the four be executed, their executions had been rendered unconstitutional in that the dehumanising factor of prolonged delay between the dates of their being sentenced and the date of their proposed execution, viewed in conjunction with the harsh and degrading conditions under which they had been confined, contravened section 15(1) of the Lancaster House Constitution.⁴⁷²

Gubbay CJ in his judgment, after seeking guidance from international courts, international jurisprudence and various other foreign jurisdictions, such as India⁴⁷³, ruled that prolonged delays in the execution of a death sentence were unconstitutional as it was in violation of section 15(1) of the Lancaster House Constitution. In his judgment he emphasised the importance of preserving the dignity of prisoners. Quoting extensively from previous cases dealt with by the courts in Zimbabwe in relation to prisoners' rights, the learned judge emphasised how humanness and the dignity of the individual are the hallmarks of civilised laws and that justice had to be done in accordance with constitutional mandates.⁴⁷⁴ The decision of the Supreme Court has greatly advanced

⁴⁷¹1993 (1) ZLR 241 (SC); 1993 (4) SA 239 (ZS); 1993 (2) SACR 432 (ZS).

⁴⁷²*Catholic Commission for Peace and Justice in Zimbabwe v Attorney-General Zimbabwe and Others* 1993 (4) SA 239 (ZS) 243A-G.

⁴⁷³See *Soering v United Kingdom* European Court of Human Rights, Series A, Vol161, Judgment of 7 July 1989; 28 ILM 198, p.106; *Ediga Anamma v State Andhra Pradesh* (1974) 3 SCR 329; *Rajendra Prasad v State of Uttar Pradesh* (1979) 3 SCR 78.

⁴⁷⁴See *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Another* 1992 (2) SA 56 9ZS at 61B-62E where it was stated 'It cannot be doubted that prison walls do not keep out fundamental rights and protection. Prisoners are not, by mere reason of a conviction, denuded of all the rights they otherwise possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication. Thus, a prisoner who has been sentenced to death does not forfeit the protection afforded in section 15 (1) of the Lancaster House Constitution in respect of his treatment while under confinement.' See also *S v Ncube*, *S v Tshuma*; *S v Ndhlovu* 1988 (2) SA 702 (ZS) at 717B-D where Gubbay CJ emphasised the importance of the dignity of the individual by stating that, 'I have expressed the view that Section 15 (1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment for treatment of the individual be exercised within the ambit of civilised standards...'

and enriched human rights jurisprudence with regards to delays in executions and has received recognition in the Privy Council for its advancement of human rights.⁴⁷⁵

Once again the judgment brought the judiciary and the executive into conflict as clashes witnessed during the era of Fieldsend CJ resurfaced, with the President and the Attorney-General publicly criticising the judgment of the Court. They stated that it was illogical to mark prolonged delay in carrying out a sentence of death as inhuman or degrading, as by its very nature it lengthened the life of the condemned prisoner, an occurrence that he would desire, and did not shorten it.⁴⁷⁶ In a clear disregard of the judgment and in manner undermining the authority of the courts, the Zimbabwe legislature enacted Amendment number 13⁴⁷⁷ which reversed the effect of the judgment of the Supreme Court and sought to legalise such conduct. It is submitted that the constant rebuke of the judiciary and the use of constant amendments to subvert the will of the courts, showed the manner in which the executive has over the years been prepared to frustrate the judiciary in its quest to promote and protect human rights.⁴⁷⁸

⁴⁷⁵ See *Pratt v Attorney General for Jamaica* (1993) 4 All ER P.769 (PC).

⁴⁷⁶ Gubbay A (2001) 10.

⁴⁷⁷ Section 2 of Act 9 of 1993 introduced article 15(5) which read 'Delay in execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be a contravention of section 15(1).'

⁴⁷⁸ The Constitution of Zimbabwe has been amended nineteen (19) times since the attainment of independence, with most of the amendments either in response to judicial pronouncements and some in violation of fundamental freedoms. Examples of such amendments amongst others (already discussed in this chapter) include Constitutional Amendment (No.14) which amended section 22 of the Constitution (which had been interpreted by the Supreme Court in the case of *Rattigan and Others v Chief Immigration Officer and Others* 1994 (2) ZLR 54 (SC); 1995 (2) SA 182 (ZS) so as to allow the foreign husband of a Zimbabwean citizen to reside permanently in the country and engage in employment or other gainful activity) so as to grant neither foreign husbands nor foreign wives of citizens, residence as of right in Zimbabwe by virtue of marriage. The executive has used constant amendments and the unreasonable utilisation of the Presidential Pardon to undermine the judiciary in Zimbabwe. In terms of section 31 of the Constitution, the President has a right to grant a pardon, amnesty or clemency to convicted prisoners. There is no set criterion upon which this power is exercised and in the absence of such, abuse has been inevitable. The President has over the years been using this pardon to free those from his political party or members of the Central Intelligence Organisation (CIO), convicted of serious politically motivated crimes. An example is that of Patrick Kombayi, who contested as an opposition political candidate for the City of Gweru constituency in the 1990 General Election. During the run up to the election, indications showed that he would defeat his opponent the then Vice President, Simon Muzenda. As a result violence broke out in the city of Gweru, which culminated in the almost fatal shooting of Kombayi, by a member of the CIO. Two men were ultimately convicted of the shooting and sentenced to long terms of imprisonment by a magistrate's court. Their appeal to the Supreme Court was dismissed and within a day of the order, the President published a Presidential Proclamation pardoning the two convicted criminals.

In criticising the amendment to the Lancaster House Constitution as a result of the above judgment, Saller notes that the conduct of the state in this instance totally extinguished the fundamental right that existed before the amendment together with the remedy that individuals had been afforded by the court.⁴⁷⁹ Gubbay also argues that the essence of a Constitution is that it should, among other things, lay down the rules of conduct for organs of state. Parliament, which is established and exists in terms of the Constitution, should be subordinate to it. It should not be able to change the constitution whenever it suits it to do so and diminish or dilute the scope of a fundamental right or protection after it had been defined by the judiciary.⁴⁸⁰

The attacks on the judiciary by the executive and its branches did not, however, deter the courts in the country from protecting human rights. Further clashes were also witnessed between the executive and the judiciary, in the case of *Elliot v Commissioner of Police*⁴⁸¹ where the Supreme Court struck down section 10(1)(c) of the National Registration Act⁴⁸² which authorised a police officer to demand the production of an identity document⁴⁸³, and to arrest any individual, registered in terms of the Act, found in a public place without such a document on his or her person. In this case the applicant, a lawyer had departed from his office to attend a lunch-time keep fit class and was accosted by police officers who demanded that he produce his identity document. The applicant was arrested and later discharged without charge after providing reasons for not having his identity document on his person. Despite this, the applicant brought an application in terms of section 24(1) of the Lancaster House Constitution which advanced that section 10(1)(c) of the Act constituted a restriction upon the constitutional right to freedom of movement of all persons.⁴⁸⁴

⁴⁷⁹Saller K (2004) 11.

⁴⁸⁰Gubbay A (2001) 13. See also for example of Article 25(1) of the Namibian Constitution which states that 'no repeal or amendment of any provision is permitted insofar as it "diminishes or detracts from the fundamental rights and freedoms contained in the Constitution and no such purported repeal or amendment shall be valid or have any force or effect.'

⁴⁸¹1998 (1) SA 21 (ZS).

⁴⁸²Chapter 10:17. Act 13 of 1976.

⁴⁸³Section 10(1)(c) of the National Registration Act made it an offence for anyone registered thereunder to be found without his or her identity document on his or her person unless specifically exempted.

⁴⁸⁴*Elliot v Commissioner of Police* 1998 (1) SA 21 (ZS) 23C-E.

In his judgment Gubbay CJ stated that the provision was unconstitutional as it allowed for the random stoppage of movement of a person for the purpose of a spot check and therefore such stoppage interfered with the guaranteed right to freedom of movement.⁴⁸⁵ Gubbay CJ stated that 'there was respectable authority supportive of the proposition that a random stoppage of a person authorised by law, however brief it may be and for whatever purpose, is a detention and interferes with the right of freedom of movement.'⁴⁸⁶ In response to the judgment and in comments greatly undermining the authority of the judiciary, the police publicly condemned the judgment on the basis that the Supreme Court had made their work impossible as the inability to seek the production of the identity document prevented the police from identifying unlawful immigrants and criminals who were evading the law to the detriment of the country's well-being.⁴⁸⁷

The constant stand-off between the judiciary and the executive which dated back to the time of Fieldsend CJ escalated to new heights in the late 1990s with the executive showing a clear disregard for the judicial institution, thus undermining its authority as the guardian of the law in the country. This period also saw the emergence of the MDC, which emerged as a serious political threat to the ruling party ZANU-PF.⁴⁸⁸ Since independence in 1980 Zimbabwe had been ruled by ZANU-PF and there were no real challenges from a viable opposition in the country. This situation changed, with profound consequences, in February 2000, when the government's proposed new Constitution for the country was rejected in a nationwide referendum. Thus, the rejection of the proposed Constitution and the emergence of the MDC in the late 1990s and its newly imposed political threat saw new levels of violence across the country and with the executive consistently rebuking members of the judiciary for a series of judgments that the executive perceived to be anti-government.⁴⁸⁹

⁴⁸⁵ *Elliot v Commissioner of Police* 1998 (1) SA 21 (ZS) 27A.

⁴⁸⁶ *Elliot v Commissioner of Police* 1998 (1) SA 21 (ZS) at 241-J and the court cited inter alia the following judgments *R v Hufsky* (1988) 32 CRR (SC) and *Delaware v Prouse* 440 US 648 (1979).

⁴⁸⁷ Gubbay A (2001) 10.

⁴⁸⁸ Matyszak D (2006) 332.

⁴⁸⁹ Maclean SJ 'Mugabe at War: The Political Economy of Conflict in Zimbabwe' (2002) 23:3 *Third World Quarterly* 513-528.

The period of the late 1990s and early 2000s saw an unprecedented assault on the rule of law by the executive. The clear disregard of the law and most importantly the authority of the judiciary is brought to the fore in the case of *Chavunduka v Minister of Home Affairs*.⁴⁹⁰ This case dealt with the arrest, detention, interrogation and torture of two journalists by the military police over an article published about an alleged coup plot by certain army officers. The journalists were brutally tortured and held for over a week by army officers before being placed in the custody of the police. No public statements were made by the President, nor the Commissioner of Police, condemning the action of the army in violating the law.⁴⁹¹ The President, however, issued a public statement that the journalists had forfeited their right to legal protection by having acted in a blatantly dishonest manner. The Commissioner of Police also stated that they had not intervened because the nature of the enquiry involved highly sensitive matters of national security. Criminal charges were laid by the journalists against the perpetrators of their illegal detention and torture.⁴⁹²

As a result of the lack of co-operation from the police and the Attorney-General in investigating the allegation of torture, an order was sought and granted by the Supreme Court for the police and the Attorney-General to institute a comprehensive and diligent investigation of the offences committed with a view to the prosecution of all persons against whom there was a reasonable suspicion of complicity.⁴⁹³ In granting the order Gubbay CJ in his judgment stated that:

'The entitlement of every person to the protection of the law, which is proclaimed in section 18 (1) of the Constitution, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator (provided the investigation so warrants) and the bringing of him or her to trial before a court of competent jurisdiction.. [M]embers of the Police Force may not refuse to perform a duty imposed upon them by the law of the land.'⁴⁹⁴

⁴⁹⁰ 2000 (1) ZLR 552 (SC); 2004 (4) SA 1 (ZS).

⁴⁹¹ Gubbay A (2001) 14.

⁴⁹² Gubbay A (2001) 14.

⁴⁹³ *Chavunduka v Minister of Home Affairs* 2000 (1) ZLR 522 (SC).

⁴⁹⁴ *Chavunduka v Minister of Home Affairs* 2000 (1) ZLR 522 (SC) at 421-422.

Gubbay notes that despite the existence of the court order, the police still continued to ignore the order and bring the offenders to justice, thus compromising justice and promoting the culture of impunity in the country.⁴⁹⁵ It should be noted that to date no investigations have been conducted on the alleged torture of the two journalists, one of whom passed away allegedly partly due to the torture inflicted by the state officials.⁴⁹⁶

It should also be noted that since the emergence of the MDC on the political scene and the commencement of the FTLRP entrenched the culture of impunity. Gross human rights violations have been committed in the country with impunity thus exacerbating the human rights situation in the country.⁴⁹⁷ Most of the human rights violations have been committed against supporters of the opposition party (MDC) who over the years have been kidnapped, tortured, assaulted and killed as a result of their support for the opposition party.⁴⁹⁸ These human rights violations have been done with impunity, with even the President granting such perpetrators immunity from prosecution. Just like the clemency order issued to grant immunity to those implicated in the *Gukurahundi* atrocities, the President has over the years granted perpetrators of human rights violations immunity from prosecution. An example is that of the Presidential Clemency Order No. 1 of 2000 issued under the Presidential Powers (Temporary Measures) Act⁴⁹⁹ which granted amnesty to those who had kidnapped, tortured and assaulted and burnt people's houses and other possessions as a way of politically intimidating them in the run-up to the 2000 elections.⁵⁰⁰ The amnesty was targeted at those who had been arrested and were facing trial for serious offences, and most of whom were supporters of the ruling party who had committed the offences against members of the opposition party. Gubbay CJ notes how the levels of impunity rose in the country as a result of the amnesty and states that the amnesty created an impression that political violence could

⁴⁹⁵Gubbay A (2001) 14.

⁴⁹⁶The Redress Trust *Zimbabwe: The Face of Torture and Organised Violence* (2005) 6.

⁴⁹⁷Research and Advocacy Unit *Putting it Right: Addressing Human Rights Violations against Zimbabwean Women* (2009) 4. See also Hammar A, Raftopoulos B and Jensen S *Zimbabwe Unfinished Business: Rethinking Land, State and Nation in the Context of Crisis* (2003) 10.

⁴⁹⁸Gubbay A (2001) 13.

⁴⁹⁹Chapter 10:20.

⁵⁰⁰Gauntlett J *Zimbabwe: 'The War on Law'* Paper delivered at a seminar presented by the Human Rights Lawyers Association, the Administrative Law Bar Association (2009) 8.
<http://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp44-47.pdf> (Accessed 22 June 2012).

be condoned with those responsible going unpunished.⁵⁰¹ It is submitted that the granting of the amnesty also represented a lost chance of justice in the country and the possibility of breaking the cycle of impunity which even to this day is still the order of the day in Zimbabwe.

3.4.4.1 Land Cases

The conflict between the executive and the judiciary under the leadership of Gubbay CJ escalated at the start of the FTLRP and the various court rulings concerning the farm invasions of February 2000. Land reform has been a major volatile issue in Zimbabwe since the attainment of independence.⁵⁰² Historically, land reform in Zimbabwe started after the Lancaster House Agreement in 1979 and was done in an effort to equitably distribute land between the disenfranchised black population in Zimbabwe and the white minority.⁵⁰³ However, no meaningful land redistribution could take place under the Lancaster House Agreement and the government was obligated under the Constitution to acquire land on a willing seller-willing buyer basis during the first ten years of independence, after which a two-thirds majority vote in parliament could overturn it.⁵⁰⁴

As a result of the slow nature of the land reform process, the government enacted a number of statutes and amended the Constitution in order to speed up the process of land acquisition and resettlement. Constitutional Amendment Number 11 was enacted to allow for the acquisition of land for resettlement, including utilised land, buildings, and improvements to land, whereas previously only utilised land could be acquired for resettlement. In 1990, the Land Acquisition Act (LAA)⁵⁰⁵ was enacted to allow for the purchase of land at government set prices without right of appeal. The effect of the LAA was to enable government to acquire any land for resettlement purposes and to require

⁵⁰¹Gubbay A (2001)13.

⁵⁰²Van Horn A 'Redefining 'Property: The Constitutional Battle Over Land Redistribution in Zimbabwe' (1994) 38:2 *Journal of African Law* 144-172.

⁵⁰³Lebert T 'An Introduction to land and Agrarian Reform in Zimbabwe' in Rosset P Patel R and Courville M (eds) *Promised Land: Competing Visions for Agrarian Reform* (2006) 45.

⁵⁰⁴Lebert T (2006) 46.

⁵⁰⁵Act No.5 of 1992.

“fair” compensation to be paid within a reasonable time, thus removing the ‘willing-seller, willing buyer’ clause of the Lancaster House Agreement.⁵⁰⁶

Efforts to speed up the land reform process in the country still remained futile, as the process was slow, cumbersome and expensive largely because of the commercial farmers’ resistance to make land available for land reform.⁵⁰⁷ The slow nature of the land reform process resulted in land occupations by the impatient landless people. The political threat imposed by the emergence of the MDC⁵⁰⁸, and the absence of international support for land reform (after the Tony Blair British Government had refused to advance the process of land reform, in effect revoking Britain’s obligations as per the Lancaster House Agreement in which the British government had agreed to finance land reform), led to the launching of the FTLRP in 2000.⁵⁰⁹ The FTLRP is discussed below.

3.4.4.2 Fast Track Land Reform Program (FTLRP)

The FTLRP program, launched in July 2000, was designed to be undertaken in an accelerated manner with reliance on domestic financing. Thomas notes that the main objectives of the program were: to speed up the identification of land for compulsory acquisition; accelerating the planning and demarcation of acquired land and settler emplacement of this land; provision of limited basic infrastructure (such as, boreholes, dip tanks and access roads) and farmer support services (such as, tillage and agriculture inputs); and the provision of secondary infrastructure such as, schools, clinics and rural service centres, as soon as resources became available.⁵¹⁰

⁵⁰⁶Lebert T (2006) 45.

⁵⁰⁷Lebert T (2006) 48.

⁵⁰⁸Moyo G (2007) 35. The author states how because of the decline in the economy, the emergence of the MDC proved to be a political threat as ZANU-PF was in danger of losing support as the MDC had attracted a considerable following and posed a threat to the ruling party’s hold on power. To counter this, ZANU-PF exploited the hunger for the land felt by millions of black peasants to launch a populist, ‘fast track’ land reform programme.

⁵⁰⁹Moyo S and Matondi P ‘The Politics of Land Reform in Zimbabwe’ in Baregu B and Landsberg C *From Cape to Cairo: Southern Africa’s Evolving Security Challenges* (2003) 84-89.

⁵¹⁰Thomas NH ‘Land Reform in Zimbabwe’ (2003) 24:2 *Third World Quarterly* 691 669.

In order to facilitate the FTLRP, Amendment Number 16⁵¹¹ was introduced and it empowered the government to acquire commercial farms and to pay compensation for any improvements carried out on the farms. The amendment also shifted the obligation of paying compensation for agricultural land compulsorily acquired, to the former colonial master, Britain, thus absolving the Zimbabwean government from paying compensation for any acquired land.⁵¹² It should be noted that the inclusion of this provision resulted in the loss by Zimbabweans of the constitutional right to claim any compensation for agricultural land forcibly acquired for resettlement.⁵¹³ The launch of the FTLRP resulted in the expropriation of a number of farms across the country, with several families being resettled on these acquired farms. Several court applications were made challenging the invasions, thus bringing the judiciary further into conflict with the executive.

3.4.4.3 Legal Challenges to the FTLRP

The constitutionality of the FTLRP was challenged in the case of *Commercial Farmers Union (CFU) v Minister of Lands, Agriculture and Resettlement*.⁵¹⁴ The case sought to challenge the manner and approach with which the FTLRP was launched. An interdict was granted by the Supreme Court, barring further land acquisitions by the government on the grounds that the FTLRP was unconstitutional as it was carried out in a violent and haphazard manner. In his judgment Gubbay CJ stated that:

'Wicked things have been done, and continue to be done. They must be stopped.
Common law crimes have been, and are being committed with impunity. Laws made by

⁵¹¹ Act 5 of 2000.

⁵¹² Section 16A(2) of the Lancaster House Constitution stated that '(i) the former colonial master has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and (ii) if the former colonial master fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.'

⁵¹³ Saller K (2004) 69.

⁵¹⁴ 2000 (2) ZLR 469 (SC); 2001 (2) SA 925 (ZS). See also a series of cases from Southern African Development Community Tribunal (SADCT) which also ruled that the FTLRP was unconstitutional as it violated the right to property protected in the Constitution; *Mike Campell (PTY) Limited v The Republic of Zimbabwe* (2/07) [2007] SADCT 1, *Campell v Republic of Zimbabwe* (SADC (T) 03/2009) [2009 SADCT 1 (5 June 2009) and *Mike Campell (Pty) Ltd v Republic of Zimbabwe* (2/2007) [2008 SADCT (28 November 2008)].

Parliament have been flouted by the government. The activities of the last nine months must be condemned.⁵¹⁵

The court also went further to state that:

'The settling of people on the farms had been entirely haphazard and unlawful. A network of organisations, operating with the complete disregard of the law, has been allowed to take over from the government. War Veterans, villagers and unemployed town people have simply moved onto farms. They have been supported, encouraged, transported and financed by party officials, public servants, the Central Intelligence Organisation (CIO) and the Army. The rule of law has been overthrown in the commercial farming areas and farmers and farm workers on occupied farms have been denied the protection of the law.'⁵¹⁶

In his judgment Gubbay CJ noted that there was no actual dispute regarding the land reform program since it was necessary and essential for the future peace and prosperity of Zimbabwe, and hence resettlement had to be carried out in conformity with the law that governed land resettlement in the country.⁵¹⁷ It was therefore important for government to put into place a program of land reform that complied with the Constitution so as to ensure that resettlement was carried out lawfully.⁵¹⁸ The Commissioner of Police, Augustine Chihuri, was instructed by the Court to enforce the court order and to disregard any instruction from any person holding executive power that countered the ejection order. However, the court order was ignored and the Commissioner later appealed against the judgment of the Court, arguing that the police were not in possession of sufficient resources that would enable them to implement the court order.⁵¹⁹ Gubbay notes that the non-compliance with the court order showed how the executive viewed the land issue as a political issue rather than a legal issue and

⁵¹⁵ *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 943E-F.

⁵¹⁶ *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 940B-D.

⁵¹⁷ *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 938E.

⁵¹⁸ *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 938H.

⁵¹⁹ *Commissioner of Police v Commercial Farmers Union* HC 3985/2000 (Unreported).

hence the non-compliance with the ruling thus vitiating the principle of equality before the law.⁵²⁰

The Supreme Court judgment prompted the government to enact new legislation, the Rural Land Occupiers (Protection from Eviction) Act, which was “fast tracked” through parliament in order to counter the court judgment.⁵²¹ The main purpose of the Act was to protect from eviction for a period of twelve months (originally it was a period of six months) individuals who had occupied land up to February 2001 without following proper procedures.⁵²² The promulgation of the Act also resulted in the suspension of applications by the land owners for court orders for the eviction of settlers from all farms. The Act also protected all settlers (invaders) against criminal and civil liability for occupation of properties and any damage caused to the properties.⁵²³

3.4.4.4 Public Attacks and Forced Resignations

The judgment of the Supreme Court in the *Commercial Farmers Union (CFU) v Minister of Lands, Agriculture and Resettlement*⁵²⁴ heightened tensions that existed between the executive and the judiciary and had been evident since the attainment of independence. Public attacks and rebukes of members of the judiciary reached their peak during this period with members of the executive and war veterans attacking the judiciary for its attitude towards the FTLRP.

The judgment in the CFU case drew the ire of the ruling party and party supporters against the judges who had handed down judgment in the case. The Court ruling was deemed to be an embarrassment and undermined government’s ability to rule and address the land imbalances that existed since the attainment of independence.⁵²⁵ A campaign was therefore launched to get rid of judges “under the guise that these judges were remnants of the racist governmental institutions of the former colonial regime and

⁵²⁰Gubbay A (2001) 15.

⁵²¹Chapter 20:26/Act 13 of 2001.

⁵²²Section 3 of the Rural Occupiers (Protection from Eviction) Act.

⁵²³Section 3(2) of the Rural Occupiers (Protection from Eviction) Act.

⁵²⁴2000 2 ZLR 469 (SC).

⁵²⁵Matyszak D (2006) 338.

were therefore against the land reform process in Zimbabwe.”⁵²⁶ At the forefront of the attacks on the judges were government officials, ruling party parliamentarians and ministers, party youth, the current Chief Justice⁵²⁷, and members of the Zimbabwe National Liberation War Veterans Association (ZNLWVA).⁵²⁸ The war veterans invaded the Supreme Court and threatened violence against certain individual judges and pressured them to resign; with some success, as Gubbay CJ was forced to retire prematurely in March 2001 after the ruling in the CFU case.⁵²⁹ Gubbay CJ was accused of being in favour of white landowners and was asked by the Minister of Justice, Patrick Chinamasa, to step down since the government could no longer guarantee his security.⁵³⁰ It should be noted that no condemnation of such attacks was made by the government showing clearly that they did not support the decision of the Court.

A number of other independently-minded judges have also been forced to resign and flee the country after being subjected to threats of violence and intimidation. Paradza J, a serving High Court Judge, was arrested in his chambers and charged with obstructing the course of justice in that he had tried to influence another judge of the High Court, Cheda J, to release the passport of a business associate who had been remanded on bail.⁵³¹ Paradza J was charged in the alternative with contravening section 360(2) of the

⁵²⁶ Martin R ‘The Rule of Law in Zimbabwe’ (2006) 95:384 *The Commonwealth Journal of International Affairs* 239-253 251. See also Harold-Barry D *Zimbabwe: The Past is the Future* (2004) 205.

⁵²⁷ See for example in the case of *Minister of Lands v Paliouras* 2001 (2) ZLR 22 (S) para 27H-28A where in his minority judgment Chidyausiku CJ questioned and criticised the judgment in *the Commercial Farmers Union* case (discussed above).

⁵²⁸ The [t]hen Minister of Information Jonathan Moyo publicly spearheaded a campaign accusing the Supreme Court judges, in particular, Gubbay CJ, of being biased in favour of white land owners at the expense of the landless majority and called for Gubbay CJ to resign. President Robert Mugabe who was also publicly involved in the attack on the judges and in disowning the courts stated that “the courts can do what they want. They are not the courts for our people and we shall not even be defending ourselves in the courts.” On the other hand War Veterans invaded the Supreme Court where judges were about to hear a constitutional application brought by the CFU, and shouted political slogans, stood on chairs, benches and tables in a show of absolute contempt of the courts. The current Chief Justice Chidyausiku (then the Judge President) in a case pitting judge against judge joined the public attacks on the Supreme Court and Gubbay CJ by accusing Gubbay CJ of bias in favour of white commercial farmers. For more see Compagnon D *Tragedy: Robert Mugabe and the Collapse of Zimbabwe* (2011) 154.

⁵²⁹ Human Rights Watch (2008) 14.

⁵³⁰ Human Rights Watch (2008) 14.

⁵³¹ *Paradza v Minister of Justice, Legal and Parliamentary Affairs* (68/03) [2003] ZWSC 46, SC 46/03 (16 September 2003).

Available at <http://www.saflii.org.za/zw/cases/ZWSC/2003/46.html> (24 April 2012).

Criminal Procedure and Evidence Act⁵³², in that he had incited two other judges to contravene section 4(a) of the Prevention of Corruption Act.⁵³³ In its ruling, the Supreme Court held that the actions of the government were unconstitutional and held that the arrest of Paradza J in his chambers was in violation of the right to protection of personal liberty and equal protection before the law.⁵³⁴ The charges against Paradza J were later dropped in February 2004 after it had been announced that a tribunal consisting of Supreme Court judges from Malawi, Zambia and Tanzania had been appointed to inquire into the conduct of Paradza J. The Tribunal stood down in April 2004 after Paradza J had challenged the appointment of the Tribunal justices in the Supreme Court.⁵³⁵ Paradza J was later in 2006 convicted for corruption and sentenced to three (3) years in jail. However, he did not serve the sentence as he escaped from the country before the sentence was imposed.⁵³⁶

Other cases of judges who have been forced to retire prematurely also include Chatikobo J, who retired after he had made a ruling in favour of the registration of a radio station⁵³⁷ and was labelled by the then Minister of Information and Publicity, Jonathan Moyo, as a “night judge dispensing justice in the middle of the night.”⁵³⁸ The judgment in this case was later deemed invalid after the President issued a presidential decree that sought to ban the radio station.⁵³⁹ Ibrahim J, Devittie J and McNally J were all forced into resignation after threats of violence had been made against them.⁵⁴⁰

⁵³²Chapter 8:07.

⁵³³34 of 1985/Chapter 9:16. Section 4(a) of the Act states that ‘If a public officer in the course of his employment as such (a) does anything that is contrary to or is inconsistent with his duty as a public officer for the purpose of showing favour or disfavour to any person, he shall be guilty of an offence and liable to a fine not exceeding three thousand dollars or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.’

⁵³⁴*Paradza v Minister of Justice, Legal and Parliamentary Affairs* (68/03) [2003] ZWSC 46, SC 46/03.

⁵³⁵*Paradza v Chirwa and Others* SC Case No31/04 [2005] ZWSC 25; SC25/05.

Available at <http://www.saflii.org.za/zw/cases/ZWSC/2005/25.html> (Accessed 24 April 2012).

⁵³⁶Southern African Litigation Centre ‘Judging Judges: The Case of Zimbabwe’s Justice Paradza.’

www.southernafricanlitigationcentre.org/download/6/65 (Accessed 15 March 2012).

⁵³⁷*Capital Radio v Minister of Information, Posts and Telecommunication* 2000 (2) ZLR 243 (SC). In the case Capitol Radio challenged the constitutionality of section 27 of the Broadcasting Act (prior to the enactment of the Broadcasting Services Act, broadcasting was legally the monopoly of the state as it prohibited private broadcasting in Zimbabwe). The section was deemed to be unconstitutional as it was in violation of section 20 of the Constitution which guaranteed the right to freedom of expression.

⁵³⁸International Council of Advocates and Barristers *The State of Justice in Zimbabwe* (2004) 52.

⁵³⁹Electoral Institute for the Sustainability of Democracy in Africa ‘Zimbabwe: Broadcasting Media’ <http://www.eisa.org.za/WEF/zimmedia3.htm> (Accessed 10 June 2009).

⁵⁴⁰International Council of Advocates and Barristers (2004) 52.

Mujuru J, the former Judge President of the Administrative Court, was also forced to quit the bench after the government had made threats to investigate him following a decision in the case of *Associated Newspapers of Zimbabwe Private Limited v The Minister for Information and Publicity in the President's Office and Others*⁵⁴¹ where he had ruled in favour of the registration of an independent daily newspaper that the government had banned through the use of draconian legislation.⁵⁴²

It should be noted that the public attacks on the judiciary and the forced removal of independently-minded judges clearly showed a blatant and contemptuous disrespect for the process of the Constitution which guaranteed judicial independence.⁵⁴³ The personal attacks and intimidation aimed at the judges also showed how the personal safety of judges was put at risk. Although, the author appreciates the fact that the judicial institution is not beyond criticism⁵⁴⁴, it is however important to note that judges should not be subjected to government intimidation in the hope that they become more compliant and rule in favour of the executive.⁵⁴⁵ Any criticism of judges should therefore be legitimate and should arise from what is done in the discharge of the judicial duty.⁵⁴⁶ It should be noted that lack of official condemnation of the actions of the war veterans and the unjustified and unreasonable attacks on the judiciary undermined the crucial role that the judiciary plays in enforcing the law and upholding the Constitution.⁵⁴⁷ The

⁵⁴¹ *Associated Newspapers of Zimbabwe v The Minister of Information and Publicity in the President's Office* [2003] ZCWSC 20; 20/03 (11 September 2003).

Available at <http://www.saflii.org/zw/cases/ZWSC/2003/20.html> (Accessed 24 June 2012).

⁵⁴² The Government of Zimbabwe has used draconian legislation in ensuring that independent media does not operate in the country and private radio stations have been prohibited from broadcasting in Zimbabwe. Through this it has put into place stringiest laws in that any journalists seeking to work in the country should be registered with the Zimbabwe Media Commission whilst any private stations should also be registered with the Zimbabwe Broadcasting Authority Board. The carrying out of any activities without registration is criminalised. See The Access to Information and Protection of Privacy Act 1 of 2002; The Broadcasting Services Act 3 of 2001.

⁵⁴³ Goredema C, 'Whither Judicial Independence in Zimbabwe?' in Raftopoulos B and Savage T *Zimbabwe: Injustice and Political Reconciliation* (2004) 103.

⁵⁴⁴ Addo MK, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (2000) 11-16. See also Barendt EM *Freedom of Speech* (2005) 322.

⁵⁴⁵ Kosar D *Media and Criticism of Judges: Road to Perdition or Genuine Check Upon the Judiciary* (2007) 4-8.

⁵⁴⁶ Bright S 'Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?' (1997) 72 *New York University Law Review* 308 308.

⁵⁴⁷ Goredema C (2004) 101-103.

executive has systematically eroded the independence of the judiciary in Zimbabwe through intimidation, harassment and physical assault of judicial personnel.

Despite attempts by the executive to undermine the judiciary during the era of Gubbay CJ, the judiciary under his guardianship stood steadfastly strong against any executive interference. This can be mainly seen in its rich jurisprudence that advanced human rights protection and promotion in the country.⁵⁴⁸ De Bourbon notes that the nation should be proud of the reputation that the judiciary, in particular the Supreme Court, achieved in this period as most of the judgments of the Court are constantly and regularly referred to in South Africa and other countries, including by the Privy Council. The judiciary under the leadership of Gubbay CJ should be greatly commended for advancing human rights in Zimbabwe and also for leaving an indelible mark on the exact role that the judiciary should play with regards to human rights protection.

3.4.4.5 Chidyausiku CJ Upholds Fast Track Land Reform Programme

Following the forced resignation of a number of judges, a number of judges were appointed to the Supreme Court.⁵⁴⁹ One of the first cases to be heard by the Supreme Court under the leadership of Chidyausiku CJ was that of the *Minister of Lands, Agriculture and Rural Resettlement v Commercial Farmers Union* (CFU).⁵⁵⁰ In this case the Minister of Lands sought to overturn an interdict that had been previously issued in the case of *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement*⁵⁵¹ (by the Gubbay bench) in which the Court had ordered a stop to farm

⁵⁴⁸See also amongst other cases *S v Mushayandebvu* 1992 (2) ZLR 62 (SC); *S v Marutsi* 1990 (2) ZLR 370 (SC) where the right to legal representation has been emphasised by the courts; *In re Munhumeso and Others* 1994 (1) ZLR 49 (SC) 56; 1995 (1) SA 551 (ZS) 557; *Retrofit (Pty) Ltd v PTC and Another* 1995 (2) ZLR 199 (SC) 212-213 where the right of freedom of expression in section 20 of the Constitution has been emphasised by the Supreme Court to be one of the most fundamentally important rights.

⁵⁴⁹It should be noted that at the time the judgment was delivered Chidyausiku CJ had been confirmed as the new Chief Justice and government had appointed three new judges to the Supreme Court after some efforts to force resignation of all judges failed. As a result the composition of the court in this case was made up the Chief Justice and the three newly appointed judges, and one of the older existing judges of the Supreme Court.

⁵⁵⁰2001 (2) ZLR 457 (S).

⁵⁵¹*Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2000 (2) ZLR 469 (SC).

invasions as they were unlawful and in violation of the owners' constitutional rights.⁵⁵² Prior to this case, an application had been made, and dismissed, for the recusal of Chidyausiku CJ as the CFU questioned the impartiality of the Chief Justice because of his close association with the ruling party and also because of his previous statements endorsing the government's land policy.⁵⁵³ The newly reconstituted Supreme Court overturned the interdict that had been initially granted by Gubbay CJ outlawing farm invasions in the country

In his ruling Chidyausiku CJ (in whose judgment the three other newly appointed judges of the Supreme Court concurred) was of the view that the government had complied with the Supreme Court order that had required it to put in place a proper program of land reform that complied with the Constitution.⁵⁵⁴ The new Chidyausiku bench was of the view that government had taken sufficient steps to restore the rule of law as regards commercial farms and that the rule of law did not require a totally crime free environment but a determination of whether the government had taken adequate measures to enforce law and order.⁵⁵⁵ This view was stated despite the fact that the CFU had presented detailed evidence of the turmoil on the farms and that the rule of law had not been restored with farmers being evicted and prevented unlawfully from conducting their operations.⁵⁵⁶

In a dissenting judgment in the same case Ebrahim J (the only judge from the previous Gubbay bench to hear the matter as other senior judges from the Gubbay era, such as, Sandura J, Muchechetere J and McNally J were excluded from the hearing)⁵⁵⁷ was of

⁵⁵²CFU alleged that they were being improperly treated because of their race in contravention of section 23 of the Lancaster House Constitution; they were being denied protection of the law and equality before the law under section 18 of the Lancaster House Constitution.

⁵⁵³See CNN.Com "Court Backs Zimbabwean Land Seizures" 4 December 2001 <http://edition.cnn.com/2001/WORLD/africa/12/04/zimbabwe.ruling/index.html> (Accessed 5 April 2014) which states that the Chief Justice refused to recuse himself and cited that the CFU and its advocate simply disliked his political background.

⁵⁵⁴*Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union* 2001 (2) ZLR 457 (S).

⁵⁵⁵*Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union* 2001 (2) ZLR 457 (S).

⁵⁵⁶Moyo G (2007) 37.

⁵⁵⁷Human Rights Watch (2008) 15. It should be noted that with the ascendancy of Chidyausiku CJ, there was a significant change in the method of allocation of cases to the judges. Previously cases had been assigned by the Registrar of Court on a roaster basis. This system was halted by Chidyausiku CJ, then as the Judge President and took direct charge of the allocation of cases. It therefore makes sense in this case as to why a number of the judges from the Gubbay bench were excluded from hearing the matter.

the view that the rule of law had not been restored in the occupied farms and that the government had not come up with a lawful programme of land reform.⁵⁵⁸ Ebrahim J added that the most important aspect that had to be considered was whether the program was being implemented lawfully and in accordance with the legally stipulated processes.

Madhuku notes that the fact that this case was heard by different members of the Supreme Court made the outcome of the case predictable.⁵⁵⁹ Madhuku further states that the deliberately calculated appointment process ensured that government was able to achieve a composition of the Supreme Court which not only shared its political beliefs but was prepared to give an interpretation of the law which implemented those beliefs.⁵⁶⁰ Critics of this judgment state that the ruling by Chidyausiku CJ was heavily predicated upon political expediency rather than on the law as evidence existed that violence on commercial farms was on the increase and little or nothing had been done to stem that violence.⁵⁶¹ Mapfumo notes that in his judgment Chidyausiku CJ confined his role only to seeing if the procedures were followed but not to marry that to the factual circumstances on the ground.⁵⁶² Thus, there was a clear divergence from the approach earlier adopted by Gubbay CJ, and thus the approach adopted by Chidyausiku CJ evoked the perception that the judiciary was rubber-stamping executive lawlessness.⁵⁶³

3.4.4.6 Ouster of Jurisdiction of the Courts Over Land Issues

In an effort to ensure that no court challenges could be made with regards to the FTLRP, the government enacted Constitutional Amendment Number 17⁵⁶⁴ which ousted

⁵⁵⁸ *Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union* 2001 (2) ZLR 457 (S) 490F-491B.

⁵⁵⁹ Madhuku (2006) 362.

⁵⁶⁰ Madhuku (2006) 362

⁵⁶¹ Human Rights Forum Zimbabwe: 'Complying with the Abuja Agreement: Two Month Report' <http://www.hrforumzim.com/reports/abuja2/abuja207.htm> (Accessed 10 January 2012). See also Moyo G (2007) 37.

⁵⁶² Mapfumo T (2005) 35.

⁵⁶³ Mapfumo T (2005) 35.

⁵⁶⁴ Act 5 of 2005.

entirely the jurisdiction of the courts over cases of acquisition of land by the state. This was stated in section 16B(3)(a) of the Lancaster House Constitution which stated that:

‘the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2) (a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2) (b), that is to say, a person having any right or interest in the land- (a) shall not apply to court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.’⁵⁶⁵

This amendment was enacted despite the Constitution stipulating the requirements to be met by a law which provided for compulsory acquisition of property. These requirements include the fact that any compulsory acquisition had to be effected for public purposes specified in section 16(1) of the Lancaster House Constitution; the law under which the property acquired must afford the owner reasonable notice of the acquisition; the law must provide for fair compensation; and the law must afford the owner an opportunity to have disputes over the acquisition settled by a court.⁵⁶⁶

The inclusion of section 16B into the Lancaster House Constitution nullified all rights that land owners possessed before the enactment of the amendment. The amendment also infringed on the enjoyment of the rights mentioned above as it removed the right to notice to be given to landowners, the right to compensation except for improvements to their land, and the right to approach a court. It should be noted that the provision was contrary to the national and international law in relation to the right to property⁵⁶⁷ and

⁵⁶⁵Section 2 of Act 5 of 2005.

⁵⁶⁶Section 16(1)(a-f) of the Lancaster House Constitution.

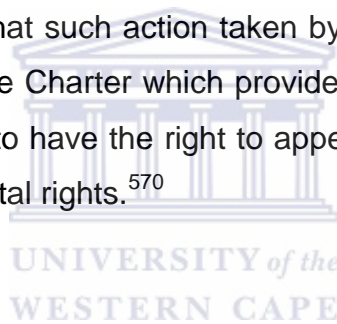
⁵⁶⁷Section 18(1) of the Lancaster House Constitution stated ‘that everyone is entitled to the protection of the law and section 18(9) further guarantees everyone the right to have disputes over civil rights decided, after a fair hearing, by an independent and impartial court or tribunal.’

⁵⁶⁷Article 14 of the African Charter on Human and Peoples’ Rights, to which Zimbabwe is a state party, states that ‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.’ The new property clause in the Lancaster House Constitution arbitrarily deprived landowners of their property in that deprivation may be effected without reason at the whim of any state official. This clearly contradicted the principles of international law.

also rendered impotent national and international protection of the fundamental rights to protection of the law and a fair hearing.⁵⁶⁸

Furthermore, the amendment infringed international instruments, such as, the African Charter on Human and Peoples' Rights (ACHPR), and the ICCPR, which grant all individuals the right to have their dispute heard by a competent court. The amendment also violated the principles of maintaining and promoting an independent judicial system as well as the doctrine of separation of powers as it prevented the judiciary from acting as a necessary check on the actions of the executive and parliament and directly undermined the rule of law doctrine in Zimbabwe.⁵⁶⁹

The issue dealing with the ousting of the jurisdiction of the courts has been dealt with on several occasions by the African Commission on Human and Peoples' Rights. The Commission has pronounced that such action taken by members of the executive is in direct violation of Article 7 of the Charter which provides for the rights of all individuals to have their cause heard and to have the right to appeal to competent national organs against acts violating fundamental rights.⁵⁷⁰



⁵⁶⁸Section 18(1) of the Lancaster House Constitution stated that 'everyone is entitled to the protection of the law' and section 18(9) further guaranteed everyone the right to have disputes over civil rights decided, after a fair hearing, by an independent and impartial court or tribunal. Article 7(1) of the African Charter on Human and Peoples' Rights states: 'Every individual shall have the right to have his cause heard. This comprises: (a) the right to appeal to competent national organs against acts of violation his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.' Article 14(1) of the International Covenant on Civil and Political Rights, to which Zimbabwe is a state party, states that 'In determination of his rights and obligations in a suit t law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.' The amendment therefore took away these rights as the section expressly removed the issue of land from the jurisdiction of the courts.

⁵⁶⁹Zimbabwe Lawyers for Human Rights (2009) 2.

⁵⁷⁰See *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication No.245. (2002) where a clemency order exonerating perpetrators of politically motivated crimes prevented the complainant from having recourse for crimes. The Commission held that such a state of affairs resulted in a situation where the judiciary could no longer provide a check on the executive branch of government and that in order for the rule of law to be upheld, individuals whose rights had been infringed had to have an effective remedy. See also *Constitutional Rights Project, Civil Liberties Organisation and Media Agenda v Nigeria* Communication No. 140/94, 141/94, 145/95 (1999), a case which dealt with ouster clauses preventing Nigerian courts from hearing cases brought by publishers contesting the search and seizure of their premises. In this case the Commission held that such a state of affairs would result in a legal situation where the judiciary could no longer provide a check on the executive, which was an important component of any constitutional democracy.

3.4.4.6.1 Legal Challenge to the Ousting of the Jurisdiction of the Courts on Land Issues

Chidyausiku CJ and other members of the current bench have also made several other questionable rulings upholding the legality of the land reform programme and the amendments to the Constitution removing the jurisdiction of the courts from hearing any cases dealing with the challenges to the land reform. A prime example is the case of *Mike Campell (Pty) Ltd and Another v Minister of National Security Responsible for Land Reform and Resettlement*.⁵⁷¹ In this case the applicants were owners of a farm which had been compulsorily acquired as being necessary for implementation of the land reform program. In challenging the acquisition of the farm, the applicant contended that the enactment of the Constitution of Zimbabwe Amendment 17, which introduced section 16B into the Constitution, and the acquisition of agricultural land belonging to the applicant, violated the Declaration of Rights in relation to the rights protected under sections 11 (contained in the Preamble of the Declaration), 16(1) (the right not have private property compulsorily acquired without the authority of law), 18(1) (the right to protection of the law), 18(9) (the right to a fair hearing and determination of civil rights or obligations by an impartial court of law, and 23(1) (the right not to be treated in a discriminatory manner on the grounds of race and colour).⁵⁷² The applicants contended that the amendment was null and void as it was inconsistent with the essential features of the Lancaster House Constitution with regards to the right to due process and protection afforded to every citizen in Zimbabwe.⁵⁷³

The newly constituted Supreme Court bench, led by Chidyausiku CJ, delivered its judgment on January 22, 2008, and dismissed Campbell's challenge to the constitutional validity of Amendment 17 and the compulsory acquisition of land for resettlement in Zimbabwe.⁵⁷⁴ The Court was of the view that race was not an issue in

⁵⁷¹Supreme Court Case No. 124/06- 2008 ZWSC 1 (22 January 2008).

Available at <http://www.saflii.org.za/zw/cases/ZWSC/2008/1.html> (22 June 2012).

⁵⁷²*Mike Campell v Minister for National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1.

⁵⁷³*Mike Campell v Minister for National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1.

⁵⁷⁴*Mike Campell v Minister of National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1.

the compulsory acquisition of farms because neither the relevant provisions of section 16B⁵⁷⁵ of the Constitution nor the gazetted provisions relating to land acquisition made any specific reference to race or colour.⁵⁷⁶ In his reasoning in dismissing the application, Malaba JA, also stated that the Government of Zimbabwe had an inherent right to compulsorily acquire property and that Parliament had the power to change the Constitution of Zimbabwe in accordance with section 52 of the Lancaster House Constitution.⁵⁷⁷ Malaba JA further noted that in clear and unambiguous language the Legislature in the proper exercise of its powers had ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of section 16B(2)(a) of the Constitution could have been sought.⁵⁷⁸ In support of the intention of the legislature, Malaba JA reasoned that the legislature had unquestionably stated that in the enactment of a fundamental law any acquisitions of farms could not be challenged in any court of law and hence this view had to be respected. The Court thus viewed the application by Mike Campell as an abuse of the right to protection of law as it sought to challenge the lawful acquisition of farms.⁵⁷⁹

It should be noted that the ouster of the jurisdiction of the courts to hear land cases clearly undermined the rights of the applicants as stated above.⁵⁸⁰ The implications for

⁵⁷⁵ Zimbabwe Lawyers for Human Rights in 2005 filed a complaint with the African Commission on Human and Peoples Rights on the constitutional validity of Amendment No. 17. See *Zimbabwe Lawyers for Human Rights, SADC Lawyers Association, Law Association of Zambia, Tanzania Law Society and Others v The Government of Zimbabwe* ACHPR case ACHPR/LPROT/CPMM/ZIM/321. This was a joint petition of law societies and law based organisations within the SADC region and beyond focusing on the constitutional validity of Amendment No. 17.

⁵⁷⁶ *Mike Campell v Minister of National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1.

⁵⁷⁷ Section 52 of the Lancaster House Constitution stated that '(1) Parliament may amend, add or repeal any of the provisions of this Constitution: Provided that, except as provided in subsection (6), no law shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms.'

⁵⁷⁸ *Mike Campell v Minister for National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1.

⁵⁷⁹ *Mike Campell v Minister for National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1.

⁵⁸⁰ It should be noted that in a challenge to the SADC-Tribunal, in the case of *Mike Campell (Pty) Ltd v Republic of Zimbabwe* (2/2007) [2008 SADCT (28 November 2008)], it was held that the ouster of the jurisdiction of the courts was in breach of Articles 4(c) and 6(2) of the SADC Treaty. The SADC Tribunal directed the government to take all necessary measures, through its agents, to protect the possession, occupation, and ownership of the lands of the applicants and to take all appropriate measures to ensure that no action was taken, pursuant to amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those, by the applicants.

human rights brought about by the Amendment are quite clear in that the Amendment broadened the range of limitations on the right to property. The failure of the Court to critically analyse the implications of the Amendment for human rights indicates the manner in which the current judiciary has sought to rubber-stamp executive decisions in order to legitimise arbitrary actions of the executive.⁵⁸¹

3.5 The of Decline of the Rule of Law and Judicial Protection of Human Rights

3.5.1 Judiciary under the Leadership of Chief Justice Chidyausiku (2001)

3.5.1.1 Contextual Background

The Chidyausiku bench, which now consists entirely of new judges, has existed in a highly charged political setting in the country, where the emergence of the MDC and the launch of the FTLRP have resulted in an increase in human rights violations and the decline of the rule of law.⁵⁸² As a result of the highly charged political setting the judiciary has lost its status of being regarded as one of the independent judiciaries in Africa. The executive has consistently eroded the independence of the judiciary in the manner in which it has purged independently-minded judges and appointing to the bench judges that are loyal to the ruling party, and in the manner it has controlled the economic activities of the judiciary, thus ensuring that judges will always remain loyal to it.⁵⁸³ Such interference has greatly impacted on the manner in which the current judiciary has abrogated its role in protecting and promoting human rights.⁵⁸⁴

Since the launch of the FTLRP, where independently-minded judges have been purged as a result of a series of anti-government judgments, efforts have been made by the executive to mould a pliant judiciary that would protect the interests of the state.⁵⁸⁵ Because the appointment process of judges has been subjected to significant political

⁵⁸¹Mapfumo T (2005) 38.

⁵⁸²African Commission on Human and Peoples' Rights *Shadow Report on Zimbabwe: Human Rights in Crisis* (2007) 3-16.

⁵⁸³Institute of War and Peace Reporting 'Mugabe Moulds a Pliant Judiciary' (2008) <http://iwpr.net/report-news/mugabe-moulds-pliant-judiciary> (Accessed 20 March 2012).

⁵⁸⁴Institute of War and Peace Reporting 'Mugabe Moulds a Pliant Judiciary' (2008) <http://iwpr.net/report-news/mugabe-moulds-pliant-judiciary> (Accessed 20 March 2012).

⁵⁸⁵Institute of War and Peace Reporting 'Mugabe Moulds a Pliant Judiciary' (2008) <http://iwpr.net/report-news/mugabe-moulds-pliant-judiciary> (Accessed 20 March 2012).

interference⁵⁸⁶, judges deemed to be, “party loyalists” such as, Garwe J, Malaba J, Cheda J and Gowora J, have been appointed onto the bench.⁵⁸⁷

One of the most controversial appointments after the launch of the FTLRP was the appointment of Chidyausiku CJ at the height of land invasions, after the forced resignation of Gubbay CJ.⁵⁸⁸ Chidyausiku CJ has always been widely perceived as a government supporter. Before his appointment Chidyausiku CJ had previously chaired the 1999-2000 Constitutional Commission and had also served as a Deputy Minister for Justice (Under the ZANU-PF government) from 1980 until his appointment as Attorney General in 1982.⁵⁸⁹ He was appointed to be the Chief Justice directly from the High Court over the heads of other more experienced Supreme Court judges, including Gillespie J (who later resigned and went into exile after Gubbay’s resignation) and Chatikobo J (who came under pressure for ruling in favour of a private radio station).⁵⁹⁰ His appointment as Chief Justice came as a surprise to many in the legal fraternity. His appointment to the bench strengthened the view that the appointment of judges is subject to political interference, with judges not being appointed on merit but merely on political grounds.

As mentioned earlier, in order to ensure the loyalty of judges, including that of the Chief Justice, the government has allocated to these judges land seized under its controversial FTLRP.⁵⁹¹ The Chief Justice and several judges have benefitted from the land reform program.⁵⁹² The prevailing economic climate in the country has also resulted in the executive making serious inroads on the independence of the judiciary. In order to ensure the loyalty of judges, the executive has taken advantage of the economic situation in the country by splashing seductive gifts on members of the

⁵⁸⁶Saller K (2004)18.

⁵⁸⁷Institute of War and Peace Reporting ‘Mugabe Moulds a Pliant Judiciary’ (2008) <http://iwpr.net/report-news/mugabe-moulds-pliant-judiciary> (Accessed 20 March 2012). (2008).

⁵⁸⁸International Council of Advocates and Barristers (2004), 50.

⁵⁸⁹Chikuhwa J, *A Crisis of Governance; Zimbabwe* (2004) 251.

⁵⁹⁰Compagnon D (2011) 157.

⁵⁹¹Bar Human Rights Committee *A Place in the Sun: Zimbabwe Report on the State of the Rule of Law after the Global Political Agreement of September 2008* (2010) 18. http://www.advocatenzonderegrenzen.nl/media/Zimbabwe_A_Place_in_the_Sun.pdf (Accessed 12 April 2012).

⁵⁹²Gubbay A (2009) 2.

judiciary. The Governor of the Reserve Bank of Zimbabwe (RBZ) has (in violation of the constitutional provisions on the remuneration of judges)⁵⁹³ donated a fleet of vehicles, generators, plasma screen televisions sets and full satellite dishes⁵⁹⁴ to current judges under the guise of improving their conditions of service and salaries that have over the years been rendered insignificant as a result of the economic crisis in the country.

The economic crisis in the country has had a serious impact on the administration of justice in the country, with the judiciary being under-resourced, thus promoting corruption amongst members of the judiciary.⁵⁹⁵ The use of seductive gifts has resulted in the executive gaining full support of the judiciary. This is so because members of the judiciary now owe their loyalty to the executive and have been moulded into a pliant judiciary that has endorsed executive lawlessness. This has greatly impacted on the independence of the judiciary, and the actions of the RBZ and the executive have been calculated to subject members of the judiciary to the mercy of the other branches of the state especially the executive branch. It is submitted that judges in the country have been turned into instruments of tyranny as they have abrogated their role of acting as a tool for social justice.

The economic situation has severely compromised the independence of the judiciary, a situation that was admitted by Chidyausiku CJ, in that it has resulted in courts being under-resourced, thus promoting corruption in the judicial system.⁵⁹⁶ The lack of

⁵⁹³As mentioned earlier, section 88(1) and (2) of the Lancaster House Constitution dealt with the Remuneration of judges in Zimbabwe and stated that 'There shall be charged upon and paid out by the Consolidated Revenue Fund to a person who holds the office of or is acting as Chief Justice, Deputy Chief Justice, a judge of the Supreme Court, Judge President of the High Court or a judge of the High Court such a salary and allowances as may from time to time be prescribed by or under an Act of Parliament (2) The salaries and allowance payable to a person under subsection (1) shall not be reduced during the period he holds the office concerned or acts as holder thereof.' The section clearly stipulated that the remuneration of judges was levied against the Consolidated Revenue Fund and paying judges from this source clearly meant that judges were beholden to no single individual but to the state as a whole. As a potential litigant the Reserve Bank, the donations by the Governor of the Reserve Bank, clearly compromised the judiciary and lowered its estimation in the eyes of the public. The actions of the Governor of the Reserve Bank were clearly in contravention of section 88(1) and (2) of the Constitution, as no judge should receive any payment for his judicial work except as provided under the necessary legislation.

⁵⁹⁴Goredema C (2004) 105.

⁵⁹⁵*The Zimbabwe Situation* 'Chief Justice Admits Judiciary is Corrupt' 5 April 2012. <http://www.zimbabwesituation.org/?p=32426>. (Accessed 8 April 2012).

⁵⁹⁶*The Zimbabwe Situation* 'Chief Justice Admits Judiciary is Corrupt' 5 April 2012. <http://www.zimbabwesituation.org/?p=32426>. In light of the rampant corruption in the judicial system, the

resources on the part of the judiciary has been further exacerbated by the fact that the judiciary does not have an independent budgetary allocation from the Treasury as the judiciary's financial and administrative needs are financed through the Ministry of Justice budget allocations. The lack of financial autonomy and independence has negatively impacted on the independence of the judiciary. It should be noted that positive legislative steps had been taken to secure the financial independence of the judiciary with the enactment of the Judicial Services Act.⁵⁹⁷ The Act seeks to guarantee financial and administrative independence of the judiciary from the executive in order to ensure that the judiciary is no longer reliant on the executive for financing.⁵⁹⁸ The enactment of the Act is a positive development in seeking to protect the independence of the judiciary.⁵⁹⁹

The control by the executive of the financial autonomy of the courts (before the enactment of the Judicial Services Act) resulted in the loss of judicial independence. The reliance by judges on executive funding has over the years seen judges owing their loyalty to the executive, thus also protecting executive interests over the interest of the ordinary citizens. This has severely impacted on the ability to protect and promote human rights by the current members of the judiciary. This is mainly seen in a number of cases discussed below.

judiciary has as January 2012 adopted a Judicial Code of Conduct to regulate judges and other judicial officers to prevent corruption and will guide judicial officer on acceptable and unacceptable conduct. For more see

<http://www.zim.gov.zw/index.php/forums/3369-judiciary-adopts-code-of-conduct-> (Accessed 8 June 2012).

⁵⁹⁷ Act 10 of 2006.

⁵⁹⁸ The Act in section 3 establishes the Judicial Service which is responsible for amongst other issues, fixing by means of service regulations conditions of service of its members. Section 20 of the Act establishes the Funds of Judicial Service and states that '(1)The funds of the Judicial Service shall consist of- (a) moneys appropriated by Act of Parliament for salaries and allowances payable and in respect of members of the Judicial Service and the recurrent administrative expenses of the Judicial Service; and (b) any other moneys that may be payable to the Judicial Service from moneys appropriated for the purpose by Act of Parliament; and (c) any donations, grants bequests made to the Judicial Service and accepted by the Commission with the approval of the Minister; and (d) any other moneys that may vest in or accrues to the Judicial Service, whether in terms of this Act or otherwise.'

⁵⁹⁹ In his opening address of the 2012 Legal year, Malaba J, noted that there has been marked improvement in the funding of the courts since the Judicial Service Commission gained control of the budget for the Judicial Service through the enactment of the Judicial Service Act. For more see <http://www.thezimbabwean.co.uk/news/zimbabwe/55944/court-watch-12012-opening-of.html> (Accessed 20 May 2012).

3.5.2 Human Rights Jurisprudence

The fact that post-2000 judicial appointments were made in circumstances where political considerations were the primary motivation for the executive's choice of a judicial appointee, and as such these judges have been conscious of the reasons for their appointment and have had a tendency to toe the line of the government in politically sensitive cases.⁶⁰⁰ Such approach has thus seen a departure from the approach of the judicial appointments before 2000. Although these judicial appointments were made by the President, judges did not assume office on the conditional basis of some 'understanding' about a political mission.⁶⁰¹ As discussed above, they clearly pursued an independent line of decision-making, even in matter where they risked being labelled anti-government.⁶⁰² Thus, the Chidyausiku bench in its jurisprudence has tended to toe the line of the government as seen with the land reform cases and other cases that are discussed below:

3.5.2.1 Election Cases

Madhuku note that with the launch of the FTLRP, it became a norm for the newly appointed judges to take a majority position in support of government's preferences, whilst the remnants of the old bench would reach a different conclusion.⁶⁰³ It should be noted that the period of the FTLRP also saw the rise of the MDC and as such the party was viewed as trying to reverse the gains of independence.⁶⁰⁴ Thus, the emergence of the MDC posed a great threat to ZANU-PF remaining in power, and therefore the government on the eve of the 2002 elections enacted legislation that tilted the elections in its favour.

The Citizenship of Zimbabwe Amendment Act⁶⁰⁵, which was enacted before the 2002 presidential elections, had the effect of taking away Zimbabwean citizenship from a

⁶⁰⁰Madhuku (2006) 361.

⁶⁰¹Madhuku L (2006) 361.

⁶⁰²Madhuku L (2006) 361.

⁶⁰³Madhuku L (2006) 361.

⁶⁰⁴Madhuku L (2006) 361.

⁶⁰⁵Act 12 of 2001.

substantial number of white Zimbabweans.⁶⁰⁶ Madhuku notes that although at face value the amendment had the laudable intention of effectively implementing the long-standing constitutional intention to abolish dual citizenship under the Lancaster House Constitution, the real intention of the framers was to disenfranchise mostly the white section of the Zimbabwean population whose block support for the opposition (MDC) presidential candidate was undisputable.⁶⁰⁷

Madhuku notes that considering the difficulties of renouncing foreign citizenship, a number of white Zimbabweans automatically chose not to be Zimbabwean citizens.⁶⁰⁸ As a result their names were removed from the voter's roll by the Registrar-General, thus removing their right to vote. However, it should be noted that Schedule 3 of the Lancaster House Constitution did not restrict the right to vote to citizens only, but also accorded that right to any Zimbabwean who since the 31st of December 1985 had been regarded by virtue of a written law as permanently resident in Zimbabwe. Thus the MDC launched a legal challenge to argue that the white Zimbabweans affected by the amendment were still entitled to vote as permanent residents. In the case of *Registrar General of Elections v Morgan Tsvangirai*⁶⁰⁹, Chidyausiku CJ, with the concurrence of the three other newly appointed judges, made a ruling to the effect that a person who ceased to be a citizen of Zimbabwe also ceased to be a voter by operation of the law and thus could not acquire the status of being a 'permanent resident' within the contemplation of Schedule 3. However, Sandura JA disagreed with the majority and held that such a person could become a permanent resident and remain entitled to vote.

Madhuku notes that the pattern of reasoning in this electoral case cannot be divorced from the manner in which the judges were appointed.⁶¹⁰ He further notes that the newly

⁶⁰⁶ See section 9(7) of the Citizenship of Zimbabwe Amendment Act 12 of 2001 which stated that 'a citizen of Zimbabwe of full age... at the commencement of the Citizenship of Zimbabwe Amendment Act, 2001, is also a citizen of a foreign Country... shall cease to be a citizen of Zimbabwe six months after that date, unless, before the expiry of that period, he has effectively renounced his foreign citizenship in accordance with the law of that foreign country and has made a declaration confirming such renunciation in the form of manner prescribed.' It should be noted that this amendment was announced on the 6th of January 2002, six months before the commencement of the Amendment Act.

⁶⁰⁷ Madhuku L (2006) 364.

⁶⁰⁸ Madhuku L (2006) 364.

⁶⁰⁹ SC 12/2002. <http://www.zimlil.org/zw/judgment/supreme-court/2002/12> (Accessed 6 April 2014).

⁶¹⁰ Madhuku L (2006) 369.

appointed judges saw themselves as being in place to defend a certain set of political values and beliefs and thus this greatly hampered the administration of justice in Zimbabwe.⁶¹¹ Thus, there is need for judges to be impartial as impartiality is an essential component of the delivery of justice.

3.5.2.1.1 Other Electoral Cases

The attitude of the post-2000 judicial bench towards sensitive political cases has been characterised by delays to such cases, thus resulting in the denial of justice. Such approach has been different to that adopted under the leadership of Gubbay CJ, which recognised the need for the speedy resolution of human rights cases.

However, in a number of highly important electoral cases, the current bench has not given recognition to the principle of the speedy resolution of human rights cases, and such delays have been used to avoid deciding human rights cases deemed to be politically sensitive. One such example is the case of *Tsvangirai v Registrar General of Elections and Others*⁶¹², where the litigant contended that the Electoral Act (Modification) Notice⁶¹³, published three days before the 2002 Presidential election by the President, violated his rights to protection of law and freedom of expression as envisaged by the Lancaster House Constitution. The matter was heard a day before the 2002 elections (8th of March 2002). The Court reserved judgment and only handed it down on the 4th of April 2002 and dismissed the case on the basis that Tsvangirai lacked *locus standi*.

Delays in the administration of justice by the current bench can also be seen in a number of electoral petition cases launched by the MDC in the aftermath of the 2000 Parliamentary elections. After these elections, the MDC filed 37 electoral petitions averring widespread violence and intimidation, amongst several other electoral irregularities.⁶¹⁴ At the time of the next Parliamentary elections in 2005, nineteen petitions had been heard but not completed whilst those on appeal to the Supreme

⁶¹¹ Madhuku L (2006) 369.

⁶¹² SC 20/2002.

⁶¹³ Statutory Instrument 41D of 2002.

⁶¹⁴ International Council of Advocates and Barristers (2004) 73.

Court had not been heard.⁶¹⁵ Chidyausiku CJ blamed the delays in these cases on the litigants, whom he labelled as non-cooperative and constantly postponed cases; and as such the interest of the parties in the cases had waned.⁶¹⁶ Mapfumo notes that the assertion by Chidyausiku CJ is at complete variance with the role of the court in ensuring the speedy resolution of cases whether or not the interest of the parties had waned.⁶¹⁷ He further states that the court thus has discretion to grant or refuse a postponement and had the powers to compel litigants to meet certain deadlines and ensure the speedy resolution of cases.⁶¹⁸ As such these election cases show the failure of the current bench to achieve human rights for litigants using delaying tactics to circumvent decisions on the merits.⁶¹⁹

3.5.2.2 The Denial of the Right to Vote to Zimbabweans in the Diaspora

The right to vote is one of the fundamental rights in a democratic society that empowers citizens to influence governmental decision-making and to safeguard their human rights and is described as a badge of “dignity and personhood”.⁶²⁰ As a result a number of international instruments have been put into place in order to assert and attach importance to this right. These instruments include the Universal Declaration of Human Rights (UDHR)⁶²¹, the International Covenant on Civil and Political Rights (ICCPR)⁶²², and regional human instruments, such as, the African Charter on Human and Peoples’

⁶¹⁵Mapfumo T (2005) 25.

⁶¹⁶*Daily Mirror* ‘Judiciary Blames MDC for Delays in Poll Cases’ January 11 2005. http://www.zimbabwesituation.com/jan12_2005.html#link15 (Accessed 7 April 2014).

⁶¹⁷Mapfumo T (2005) 25.

⁶¹⁸Mapfumo T (2005) 25.

⁶¹⁹Mapfumo T (2005) 25.

⁶²⁰*August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) para.17.

⁶²¹The Universal Declaration of Human Rights in Article 21 states that ‘(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right to equal access to public service in his country. (3) The will of the people shall be on the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’

⁶²²Article 25 of the ICCPR codifies the right to vote. It states that ‘Every citizen shall have the right and the opportunity, without any of the distinction mentioned in article 2 and without unreasonable restrictions (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the elections; (c) To have access, on general terms of equality, to public service in his country.’

Rights (ACHPR)⁶²³, the Inter-American Convention on Human Rights (ACHR)⁶²⁴, and Protocol One of the European Convention on Human Rights (ECHR).⁶²⁵

The right to vote was constitutionally protected under the Lancaster House Constitution. Section 23A of the Lancaster House Constitution provided that every adult citizen shall have the right to vote in referendums and elections for any legislative body established under the Constitution.⁶²⁶ However, the Constitution was silent on whether the right to vote extended to citizens of Zimbabwe who resided outside the country. The casting of external votes is however regulated in Part XIV of the Electoral Act.⁶²⁷ The Act makes reference to postal voting but does not make any provision for voting at any of the Zimbabwean diplomatic missions around the world. The Act provides for the provision of external voting to a limited category of individuals. Thus, section 71(1) of the Electoral Act states that:

'When an election is to take place in a constituency, a voter ordinarily resident in Zimbabwe who is resident in that constituency, or was, within twelve months preceding the polling day or first polling day, as the case may be, fixed in relation to that constituency resident therein and has good reason to believe that he or she will be absent from the constituency or unable to attend at the polling station for reason being (a) on duty as a member of a disciplined force or as an electoral officer or monitor; or (b) absent from Zimbabwe in the service of Government of Zimbabwe; or (c) a spouse of a person referred to in paragraph (a) or (b) may apply to the Chief Elections Officer for a postal ballot paper: Provided that applications for postal ballot papers by members of a

⁶²³The African Charter does not explicitly recognise the right to vote as a means of political participation. However, Article 13 of the African Charter states 'Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. (2) Every citizen shall have the right equal access to the public service of his country.'

⁶²⁴Article 23 of the ACHR states that (1) 'Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country. (2) The laws may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.'

⁶²⁵Article 3 of Protocol One of ECHR states that 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

⁶²⁶Section 23A(2) of the Lancaster House Constitution.

⁶²⁷Act No. 25 of 2004/Chapter 2:13.

disciplined force may be made to the Chief Elections Officer through their commanding officers' ⁶²⁸

The economic and political problems that Zimbabwe has experienced since the launch of the FTLRP have seen millions of Zimbabweans emigrating to various countries around the world in search of better opportunities. With the increasing number of individuals emigrating to other countries around the world there have been increasing calls and demands by Zimbabweans in the diaspora for external voting arrangements to be extended to them so that they could also exercise their constitutionally protected right. As a result an application was made in the Supreme Court to grant Zimbabweans living outside the country the right to vote.

The case of the *Diaspora Action Group (DVAG) v The Minister of Justice and Parliamentary Affairs*⁶²⁹ concerns the legal challenge to extend voting rights to Zimbabweans living outside the country. The applicants in this case were Zimbabwean citizens legally resident in the United Kingdom, but not employed by the government who argued that their exclusion from voting was unconstitutional as the Electoral Act was discriminatory to the extent that it permitted certain citizens to vote externally whilst excluding others. The applicants also argued that the denial of the right to vote was a curtailment of their right to freedom of expression and as a result the government of Zimbabwe was committed to full participation of its citizens in the political and electoral processes by virtue of being party to the ACHPR and that as a member of the Southern African Development Community (SADC), it was bound by the SADC Principles and Guidelines Governing Democratic Elections.⁶³⁰ In opposing the application, the Minister of Justice argued that the political and economic situation currently prevailing in the country could not allow for external voting to be extended to citizens residing outside the country as a result of practical and logistical problems. The Minister also further contended that the opposition parties would also have an unfair political playing field as

⁶²⁸Section 71(1) of the Electoral Act.

⁶²⁹Supreme Court Case No SC 22/05. (Unreported).

⁶³⁰The SADC Principles in section 2 state that 'SADC Member States shall adhere to the following principles in the conduct of democratic elections: 2.1.1 Full participation of citizens in the Electoral Process.' However, it should be noted that the SADC Principles are silent on the issue of whether the full participation of citizens includes those living abroad.

members of the ruling party were banned from most of the countries that most Zimbabweans were resident in.⁶³¹

Chidyausiku CJ in his judgment ruled that the case that had been brought by the DVAG had no merit and dismissed the case without providing any reasons. The failure to provide reasons for the judgment is an indicator of the attitude that the judiciary has adopted towards human rights litigation in the country especially in matters relating to the accountability of government. It is submitted that the failure to provide reasons in this case enforces the view that since the launch of the FTLRP, the judiciary has premised its reasoning and decisions mainly on political rather than on legal considerations and it has failed to remain independent of the national politics of the day. As a result public confidence in the judiciary has diminished over the years as it has been corrupted and therefore has over the years sought to shield arbitrary executive actions.⁶³² Persuasive authority on the importance of judges to provide reasons for their decisions is found in the South African case of *Moleka v The State*⁶³³ where Bosielo JA, in quoting the Retired Australian Chief Justice Henry Gibbs states that:

'The citizens of a modern democracy are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation-and the public- should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view..'

Bosielo JA also notes that giving reasons for decisions is critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds.⁶³⁴ It is therefore imperative that judges should provide reasons for their decisions in order to ensure that

⁶³¹ *Diaspora Action Group v Minister of Justice and Parliamentary Affairs* Supreme Court Case No SC 22/05. (Unreported).

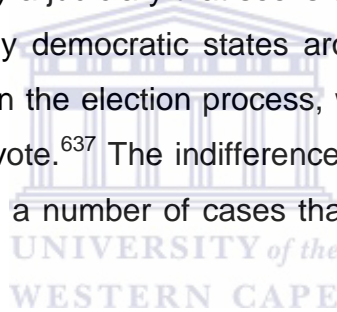
⁶³² Mapfumo T (2005) 40.

⁶³³ 2012 (1) SACR 431 para.13.

⁶³⁴ *Moleka v The State* 2012 (1) SACR 431 para. 12. See also *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) 92 (CC) para. 15 where the Constitutional Court whilst dealing with a failure by a judicial officer to give reasons for a judicial decision stated that: 'Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.'

the reasoning provided is sound and free from any external interference or considerations.

It is also important to note that the legal approach adopted by the Supreme Court of Zimbabwe on the issue of external voting stands in stark contrast to the approach taken by the South African judiciary. In a decision in the Pretoria High Court and later confirmed unanimously by the Constitutional Court, the Constitutional Court ruled that South Africans living abroad had the right to vote if they were registered, thus ruling section 33 of the South African Electoral Act⁶³⁵ as unconstitutional as it unfairly restricted the right to cast special votes while abroad to a very narrow class of citizens.⁶³⁶ O'Regan J stated that the right to vote has a symbolic and democratic value and those that were registered could not be limited by unconstitutional and invalid limitations. This indicates clearly a judiciary that seeks to protect and make advances in the field of human rights. Many democratic states around the world allow their non-resident citizens to participate in the election process, which shows the symbolic value and importance of the right to vote.⁶³⁷ The indifference of the current judiciary towards political cases is also shown in a number of cases that have been brought before the courts.⁶³⁸



3.5.2.3 Operation *Murambatsvina* and Eviction Cases

It is without doubt and unquestionable that every human being irrespective of colour, ethnicity, social status, religion, or political affiliation, among others, has inherent human rights, which rights have been acknowledged as universal, inalienable, interdependent

⁶³⁵ Act 73 of 1998.

⁶³⁶ *Ritcher v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 (3) SA 615 (CC). See also *The A Party, Andrew Pepperell v The Minister for Home Affairs, Electoral Commission and the Director General, Department of Home Affairs* 2009 (3) SA 649 (CC); 2009 (6) BCLR 611 (CC).

⁶³⁷ Electoral reforms of 1997 in Botswana allow non-resident citizens to participate in regular elections. The same also applies for Namibia which has since 1989 made it possible for non-resident citizens to vote in parliamentary and presidential elections. In America under the Overseas Absentee Voting Rights Act of 1975 allows its citizens living outside the country to actively participate in all its elections.

⁶³⁸ See *Movement for Democratic Change (MDC) and Another v Chairperson of the Zimbabwean Electoral Commission (ZEC)* E/P 24/08 [2008] ZWHHC 1 (14 April 2008) where the Court ruled that delays of up to 17 days in releasing Presidential election results were justifiable, despite that the results of the Parliamentary election held at the same time with the Presidential election were released only 2 days after the election. Available at <http://www.zimlil.org/zw/judgment/supreme-court> (Accessed 26 June 2012).

and indivisible. These rights are essential to mankind and as such human rights have become for every individual person an entitlement.⁶³⁹ The launch of Operation *Murambatsvina* (clear or remove the filth) in 2005 resulted in the massive violation of citizens' legally protected rights, particularly socio-economic rights. It should be noted that socio-economic rights were not protected under the Lancaster House Constitution.⁶⁴⁰ It is submitted that the absence of justiciable socio-economic rights in the Constitution can be said to have compounded the inability of the judiciary to protect such rights in Zimbabwe. However, it is the attitude of the judiciary towards cases dealing with socio-economic rights that clearly depicts the unwillingness of the courts to overturn arbitrary executive actions. This is mainly shown in a number of cases that sought to challenge the legality of Operation *Murambatsvina* in 2005.

Operation *Murambatsvina* was launched in 2005. The operation was mainly targetted at the removal of informal settlements in all major urban and peri-urban areas in the country.⁶⁴¹ The aim of the government in launching this operation was to arrest disorderly urbanisation and to clamp down on illegal economic activities that had become a major characteristic of all urban areas in Zimbabwe.⁶⁴² The operation was conducted with brutality, torture, beatings, killings, and the demolition of all informal

⁶³⁹English K and Stapleton A, *Human Rights Handbook* (1999) 1.

⁶⁴⁰It should be noted that although socio-economic rights were not constitutionally protected in Zimbabwe (under the Lancaster House Constitution), a legal framework was put into place by parliament to give effect to the protection of socio-economic rights. Examples of legislation amongst others which seek to give effect to the protection of socio-economic rights included, The Public Service Pensions Scheme governed by the State Services (Pensions) Act Chapter 16:06 which is a contributory pension scheme which provides for the payment of pensions, gratuities and other benefits to or in respect of persons employed by the State on retirement, discharge, resignation, death or termination of service. The National Social Security Authority Act of 1989 Chapter 17:04 established National Social Security Association (NSSA), a parastatal tasked with implementing and administering social security services to the nation. The Social Welfare Assistance Act Chapter 17:06 where limited public assistance is provided by the Department of Social Welfare to destitute persons incapable of work and to persons aged 65 or older or with a disability. The Social Welfare Assistance Act also makes provision for the placement of the needy and vulnerable elder persons in homes where they receive social assistance through government grants as well as other assistance from Non-Governmental Organisations.

⁶⁴¹Tibaijuka AM *Report on the Fact Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the U.N Special Envoy on Human Settlement Issues in Zimbabwe* (2005) 12.

⁶⁴²Tibaijuka AM (2005) 12. On the other hand it is believed that the operation was launched as a political tactic to get rid of urban voters who supported the opposition MDC party as the party had established its political stronghold in urban areas across the country.

structures.⁶⁴³ No prior consultations were held with the affected communities as the state haphazardly dispatched members of the army and police that oversaw the bulldozing, smashing and burning of structures that housed thousands of poor urban dwellers. Thousands of citizens, including women and children, were left stranded without protection, alternative accommodation, access to adequate water, sanitation and health care, and food.⁶⁴⁴ The manner in which the operation was conducted violated international law on forced evictions.⁶⁴⁵ No adequate notice was also given to affected individuals on the launch of the operation and neither were individuals given the time to regularise such legal structures as required under national law.⁶⁴⁶

The legality of the operation was challenged without success as the courts sought to maintain and protect executive lawlessness. The case of *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development and Others*⁶⁴⁷ dealt with an urgent application seeking a provisional order that the residents of Hatcliffe Extension be allowed to return to their stands, and that they not be forcibly evicted from there, and a final order declaring that their forced eviction was unlawful. The basis of the application was that the Zimbabwean government had violated the Regional, Town and Country Planning Act by giving zero to three days notice to its citizens before the

⁶⁴³Centre for Housing Rights and Evictions *Operation Murambatsvina: Unlawful Forced Evictions; Crimes against Humanity; and Cruel Inhuman or Degrading Treatment of the Poorest of the Poor: Submission to the African Commission on Human and Peoples' Rights 41st Session by Centre on Housing Rights and Evictions (COHRE)* (2007) 3.

⁶⁴⁴Tibaijuka AM (2005) 31-45.

⁶⁴⁵For guidelines to be followed in terms of forced evictions see Committee on Economic, Social and Cultural Rights General Comment 7 Forced Evictions, and the Right to Adequate Housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997). See also decisions of the African Commission in the case of *Social and Economic Rights Action Centre and Centre for Economic and Social Rights (SERAC) –Nigeria v Nigeria* African Commission on Human and Peoples' Rights Decision 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights – Nigeria* (27 May 2002), Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, Done at the 31st Ordinary Session of the African Commission held from 2nd to 16th May 2002 in Pretoria, South Africa.

⁶⁴⁶See the Regional Town and Country Planning Act Chapter 29:12 in particular sections 27 and section 35(2). Section 27 gives owners of properties that have not been regularised the time to effect the regularisation of such properties or to find an alternative place to reside in or operate from. The Act affords individuals to make applications to local authorities to have such informal properties regularised. Section 35 gives local authorities the power to remove, demolish or alter any existing building or stop any operations with or without payment of compensation. Before such removals or demolitions can be conducted, the local authority is required to serve written notice upon the owner of the development or any person to be affected by the proposed action.

⁶⁴⁷Harare High Court Case 2467/05 (Unreported).

demolition of their homes and businesses.⁶⁴⁸ The short to non-existent time span between notice and demolition further deprived citizens of their right to petition the courts against the decision or to apply for a permit.⁶⁴⁹ The denial of due process, thus, violated the Lancaster House Constitution.⁶⁵⁰

Karwi J in his judgment ruled that the evictions were lawful and stated that a reasonable notice period had been given to the residents and that the residents were in breach of their lease agreements that they had entered into with the Ministry of Local Government by erecting unapproved structures. Karwi J reasoned that the public policy considerations for the destruction of the illegal structures far outweighed the interests of individuals who were in contravention of the law.⁶⁵¹ It is clear from this decision that the ruling left the human rights of individuals exposed to violation as the lack of consideration of human rights issues in this case rubber-stamped the actions of the executive. It is submitted that it would have been appropriate in this case for the judge to enforce the obligation of the Zimbabwean government under its own domestic legislation, to give owners of property that have not been regularised the time to effect the regularisation of such properties and the time to find an alternative place to reside or operate from. Sadly, no alternative accommodation was provided and neither were the individuals afforded time to find alternative accommodation, and they were thus forcibly evicted. It is submitted that since Zimbabwe has signed and ratified the International Covenant on Economic and Cultural Rights (ICESCR), the forced evictions were also in violation of its obligations under international law which obliges States to use “all appropriate means” to promote the right to adequate housing and to refrain from forced evictions without the provision of adequate protection.⁶⁵²

⁶⁴⁸ See section 32(3) of the Regional, Town and Country Planning Act which states that local authorities must wait at least thirty days after giving notice to demolish unregulated structures.

⁶⁴⁹ Section 38(1) of the Regional, Town and Country Planning Act guarantees all citizens the right to appeal the local planning authority's decision and apply for a permit within one month of receiving notice.

⁶⁵⁰ See section 16 of the Lancaster House Constitution which protected citizens from deprivation of property without due process of law.

⁶⁵¹ *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development and Others* Harare High Court Case 2467/05 (Unreported).

⁶⁵² Article 11 of the ICESCR states that, ‘The State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right, recognising, to this effect the essential importance of

Ironically, whilst ruling that the evictions were lawful the learned judge in his judgment went on to state that:

'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 applicants that a lot of people have obviously been displaced and appear to have nowhere to go. Many have been sleeping in the open and in the cold weather. Many school 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 re-establish themselves. A few days notice was not adequate in my view.'⁶⁵³

The above statement by the judge in acknowledging that the forced evictions resulted in the violation of rights and his failure to use the law to protect such rights is also indicative of the attitude that the judiciary has adopted in human rights litigation in terms of rubber-stamping executive actions. It is mind boggling as to why the judge in this case would note that human rights violations occurred and not protect such rights. The clear disregard of the judge to notice that Operation *Murambatsvina* was clearly carried out in a manner that violated national law and international law governing evictions clearly indicates a lack of impartiality. It is submitted that the lack of human rights protection has contributed to the loss of trust and confidence by the public as human rights have continued to be violated with impunity with the judiciary rubber-stamping executive lawlessness.

Another case that sought to challenge the legality of Operation Murambatsvina was that of the *Batsirai Children's Care (BCC) v The Minister of Local Government, Public Works and Urban Development and Others*.⁶⁵⁴ In this case the BCC was an orphanage that

international co-operation based on free consent.' Although not binding, General Comment 7 also lays down guidelines to be followed in cases of evictions. See Committee on Economic, Social and Cultural Rights General Comment 7 Forced Evictions, and the Right to Adequate Housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997). See also Article 17 (1) of the International Covenant on Civil and Political Rights (Zimbabwe has signed and ratified the treaty) which compliments the right not to be forcibly evicted without adequate protection.

⁶⁵³ *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development and Others* Harare High Court Case 2467/05 (Unreported).

⁶⁵⁴ Harare High Court Case No. 2566/05 (Unreported). The case was a similar application to that of the *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development*

looked after children, including those that had been orphaned by the HIV/AIDS pandemic. The orphanage was closed down after the infrastructure was demolished by members of the Zimbabwe Republic Police (ZRP). Children and staff were left homeless. As a result an urgent application was filed for a spoliation order seeking that BCC be allowed to return to its property and carry on its business. Hlatshwayo J continuously postponed the case and thus failed to grant the applicants a provisional spoliation order that would allow BCC to continue providing the services it rendered to the orphaned children. The continuous postponing of the case was done irrespective of the fact that the applicants had filed an urgent application averring that their rights had been violated. Thus, the use of delay tactics in this case clearly reveals the lack of independence of the judicial system and the lack of impartiality of the judge to deliver a judgment that would be deemed to be against the ideologies of the government.

The judiciary has adopted a passive attitude towards human rights, thus failing to protect citizens from arbitrary decisions of the executive.⁶⁵⁵ This aspect is emphasised by the former Under-Secretary-General of the United Nations, Anna Kajumulo Tibaijuka, who visited Zimbabwe to assess the impact of Operation *Murambatsvina* on human rights. She states that:

'There is a general concern that the High Court's failure to safeguard the right of the victims of the Operation reaffirms the argument that the Zimbabwean judiciary has generally failed to act and be seen to act as custodians of human rights in Zimbabwe and that there has been a regrettable failure by members of the bench to remain independent from the national and local politics of the day. The general view among many stakeholders is that this has had a severe impact on the rule of law and the administration of justice, and has caused the ordinary person on the street to lose faith in achievement justice through legal channels.'⁶⁵⁶

and Others Harare High Court Case 2467/05 (Unreported) which sought to aver the violation of rights stipulated under that case.

⁶⁵⁵See also other cases relating to Operation Murambatsvina that were dismissed by the courts *Antony Shumba v Officer in Charge, Norton Police Station, Commissioner of Police, Minister of Home Affairs, City of Harare and Minister of Local Government, Public Works and Urban Development* Norton Magistrate Court Case No 376/05 (Unreported); *Felistus Chinyuku and other Residents of Porta Farm v The Minister of Local Government and Urban Development* HC No 3225/05 (Unreported).

⁶⁵⁶Tibaijuka AM (2005) 62.

The failure of the judiciary to hold the executive accountable for violating international law principles on evictions also indicates that the current bench has failed to apply principles of international law in trying to arrive at reasonable and sound judgments in both cases discussed above.⁶⁵⁷ The failure of the courts to seek guidance from international law clearly shows a clear departure from the judiciary under Gubbay CJ which relied greatly on international law in advancing the cause of human rights in the country. The fact that the judiciary allowed such evictions to be carried out without the provision of any alternative accommodation, is deemed to be a foreign concept in South Africa as the judiciary there has over the years outlawed evictions without the provision of any alternative shelter.⁶⁵⁸

3.5.2.4 Torture and Enforced Disappearance

The indifference of the current judiciary in handling human rights cases has also been brought to the fore in several cases that have been brought before the courts relating to torture and the enforced disappearance of supporters of the opposition party and human rights defenders. It should be noted that historically Zimbabwe has had a troubled history of torture as the current government has been intolerant of individuals with different political ideologies.⁶⁵⁹ This is so despite the fact that the use of torture was outlawed under the Lancaster House Constitution⁶⁶⁰ and various other international law instruments.⁶⁶¹ Several cases of torture have been brought before the courts and most of the allegations of the use of torture have been mainly levelled against the police

⁶⁵⁷As stated earlier that although no constitutional provision exists giving the courts the opportunity to refer to international law in the interpretation of the Declaration of Rights, it would have been ideal in this case to make use of international law in interpreting the Declaration of Rights, thus holding the State accountable to its international obligation since it has signed and ratified the ICESCR and the ICCPR.

⁶⁵⁸See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* Case CCT 22/08 [2009] ZACC 16; *Minister of Public Works v Kyalami Ridge Association* 2001 (3) SA 1151 (CC).

⁶⁵⁹African Human Rights Commission (2007) 27.

⁶⁶⁰Section 15(1) of the Lancaster House Constitution stated that 'no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'

⁶⁶¹Article 5 of UDHR which states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'; Article 7 of the ICCPR which reads 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'; Article 5 of the ACHPR which states 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel or degrading punishment and treatment shall be prohibited.'

force, which has been used to suppress opposition supporters, lawyers⁶⁶², as well as human rights defenders who have been arrested and tortured for speaking out against human rights abuses in the country.⁶⁶³ However, judicial indifference towards human rights cases and the attitude of the Attorney-General (AG) in handling cases alleging torture have severely compromised access to justice in the country.⁶⁶⁴

One of the groundbreaking cases of torture that has been handled by the current judiciary is that of *Jestina Mukoko v The Commissioner- General of Police and Others*.⁶⁶⁵ In this case Jestina Mukoko, a human rights activist, was abducted from her home in the early hours of the morning on the 3rd of December 2008. For days she was assaulted on the soles of her feet and beaten with rubber truncheons. Her whereabouts remained unknown until her appearance in court on the 24th of December 2008. During the period of her disappearance the police had publicly professed ignorance of her whereabouts. She was charged with contravening section 24(a) of the Criminal Law (Codification and Reform) Act⁶⁶⁶ for allegedly recruiting or attempting to recruit individuals for training in banditry, insurgency, sabotage or terrorism.

The legal representatives of Jestina Mukoko made a number of concerted efforts for her to be released on bail, but on several occasions such requests were denied by the courts.⁶⁶⁷ She continued to mount a protracted legal battle to secure her freedom

⁶⁶²The continued abuse of lawyers handling human rights cases in the country has been done in violation of United Nations Basic Principles on the Role of Lawyers and the Legal Practitioners Act of Zimbabwe 1981 which states that 'legal practitioners are entitled to represent their clients without fear of being harassed and intimidated by the authorities.'

⁶⁶³Amnesty International USA *Torture, ill-Treatment and the Denial of Medical Care Zimbabwe* July 2007 <http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR460192007> (Accessed 19 March 2010).

⁶⁶⁴The impartiality of the AG has been called into question because he has publicly declared his support for ZANU-PF. This has raised several questions on the capability of the AG to independently prosecute human rights violators and bringing them to justice. See *The Zimbabwe Times* 'New AG Openly Declares Support for ZANU-PF'

<http://www.thezimbabwetimes.com/?p=9859> (Accessed 30 March 2012).

⁶⁶⁵Supreme Court Case No. 293/09 [2009] ZWSC 1 (14 January 2009).

Available at <http://www.saflii.org.za/zw/cases/ZWSC/2009/1.html> (Accessed 26 June 2012).

⁶⁶⁶Act 23 of 2004.

⁶⁶⁷See *S v Mukoko* Case No. HC B88/09 at <http://www.zimlil.org/zw/judgment/harare-high-court/2009/24> (Accessed 26 June 2012) where Chitakunye J denied Jestina Mukoko bail as he was of the view that she had to go through the initial remand hearing so that the Magistrate before whom she had initially appeared could determine whether there was a legal justification to place her on remand. Efforts were also made in vain in the Supreme Court for the release of Jestina Mukoko. See also *Mukoko v Commissioner General of Police and Others* Supreme Court Case No. 293/08 [2009] ZWSC 1 (14 January 2009) where an application was made on her behalf seeking an order to depart from the

through several applications in the Magistrates Courts, High Court and Supreme Court until she was granted bail in May 2009 and finally her acquittal by the Supreme Court on 28 September 2009.⁶⁶⁸ Jestina Mukoko was acquitted by the Supreme Court on the basis that several of her constitutional rights, the right to personal liberty, freedom from inhuman and degrading treatment at the hands of state agents , and the right to protection of the law, had been violated.⁶⁶⁹

Although the Supreme Court should be commended in this case for finally protecting her rights, it is surprising that it took the court a lengthy period of time to find that her rights had been violated. To make matters worse, the violations were done with impunity with the court failing to condemn the actions of the perpetrators and to recommend that such perpetrators be taken to task and prosecuted for the human rights violations.⁶⁷⁰ In criticising the delays of the court in upholding Mukoko's rights, Magaisa

Supreme Court Rules in regard to set down of a Constitutional Court application made in terms of section 24(1) of the Lancaster House so that the court could hear the case on an urgent basis. The application was dismissed by Chidyausiku CJ as he stated that the application was fatally defective as it did not comply with section 24 of the Lancaster House Constitution. Chidyausiku CJ in his reasoning stated that section 24 of the Lancaster House Constitution was peremptory and therefore the court did not have discretion to condone departure from compliance with it. A document released by the Zimbabwe Lawyers for Human Rights clearly depicts the number of cases that were filed with the courts and the attitude of the courts and the state towards the handling of the *Jestina Mukoko* case and that of other human rights defenders. In the *Jestina Mukoko v The Commissioner General of the Police and another HC Case No.7169/08* (Unreported) an application was filed with the Harare High Court requesting the court to grant her the right to seek medical treatment. The court granted the order but State officials refused to comply with the court order. As a result a further urgent High Court case was filed in an effort to make sure that medical treatment was granted to Jestina Mukoko and several other human rights activists arrested on similar charges. (*HC Case No. 03/09*). The High Court in this case dismissed the application and refused to hear the matter on the basis that the medical affidavits filed together with the application were ones used in criminal cases, and not civil, and so the papers were not in order. The Judge ordered that fresh medical affidavits be filed, an issue which, according to ZHLR lawyers, was sorted out within an hour only to find later that the judge was unreachable.

www.zimbabwewatch.org/.../ZLHR%20Abductions%2009-01-06%20timeline1.doc (Accessed 10 January 2009)

⁶⁶⁸International Federation for Human Rights 'Stay of prosecution in favour of Ms Mukoko' 2 October 2009 <http://www.fidh.org/Stay-of-prosecution-in-favour-of-Ms-Jestina> (Accessed 10 January 2012).

⁶⁶⁹International Federation for Human Rights 'Stay of prosecution in favour of Ms Mukoko' 2 October 2009 <http://www.fidh.org/Stay-of-prosecution-in-favour-of-Ms-Jestina> (Accessed 10 January 2012).

⁶⁷⁰For example see the South African case of *Mthembu v S* 2008 (2) SACR 407 (SCA) para.39 where Cachalia JA (Supreme Court) recommended that members of the police be prosecuted after they had used torture to extract evidence from the chief State witness to implicate the applicant in a number of serious crimes that he had committed. Cachalia JA in his judgment stated that 'What has happened in this case is most regrettable. The appellant, who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have not only failed to investigate the case properly by not following elementary procedures relating to the conduct of the

states that “if the court was certain that there was a violation of rights, then those rights should have been protected from the first day the accused was brought before the court.”⁶⁷¹ The failure of the court to condemn the state and its agents and to hold them liable for such human rights violations indicates how the culture of impunity has become deeply entrenched in the country and has contributed greatly to the continued violation of human rights. The indifference of the courts towards cases dealing with torture is also shown in a number of cases where individuals have sought justice without success from the courts.⁶⁷² Thus, the failure of the courts to protect such rights has sent out a message that the state is above the law and therefore cannot be held accountable for any human rights violations in the country.

3.6 Non-Enforcement of Court Orders

Zimbabwe has over the years had an endemic problem with regards to the enforcement of judicial orders with the executive and its agents constantly flouting court orders.⁶⁷³ Since the formation of the Government of National Unity in 2009, positive developments have been noted in the manner in which the current judiciary has handled human rights cases. However, despite several judicial pronouncements, the police and the executive have continuously violated court orders. Perhaps what is more worrying is that the judiciary has been silent on such actions by the executive and its agents. Such silence has again compromised the rule of law in the country as no one has been held accountable for any violation of court orders.

identification parade, but have also by torturing Ramseroop and probably also Zamani Mhlango and Sithembiso Ngcobo, themselves committed serious crimes of a most egregious kind. They have treated the law with contempt and must be held accountable for their actions.’

⁶⁷¹ Magaisa A ‘Mukoko Case and the Rule of Law in Zimbabwe’ *The Zimbabwe Standard*, 3 October 2009. <http://www.thestandard.co.zw/opinion/21625-mukoko-case-and-the-rule-of-law-in-zimbabwe.html> (Accessed 10 March 2012).

⁶⁷² See *Kenneth Simon Marimba v the Commissioner General of Police* High Court Case No.6903/08 (Unreported) where an urgent application seeking the release of a human rights defender was subjected to lengthy delays with the file being shuffled amongst several judges as most of the judges refused to hear the matter. See further Zimbabwe Lawyers for Human Rights *A Plea to SADC Leaders: Do Not Tolerate or Fuel the Impunity of those who seek to violate the SADC Treaty and the Zimbabwe Global Political Agreement for Political Ends* <http://www.sokwanele.com/thisiszimbabwe/archives/3120> (Accessed 10 March 2012).

⁶⁷³ Zimbabwe Human Rights NGO Forum *Revisiting The Commonwealth and Zimbabwe: What is to be done? An Assessment of Zimbabwe’s Performance since its Withdrawal from the Commonwealth* (2007) 14.

A number of cases exist where the defiance of court orders has resulted in the further violation of citizens' rights. In the case of *Fidelis Charamba and Others v The Minister of Home Affairs and Others*⁶⁷⁴ an order declaring the release of the applicants in this case was ignored by the police. In the following cases *Killiana Takawira and Tsitsi Gonzo v The Commissioner General of Police and Others*; *Adrison Shadreck Manyere v The Minister of Home Affairs and Others*⁶⁷⁵; *Enita Zinyemba v The Minister of Home Affairs and Another*⁶⁷⁶, the police were ordered by the courts to do everything possible to determine the whereabouts of the abducted people and to investigate their abductions. According to ZLHR there was no action by the police and the victims remained incarcerated with their abductors roaming free.⁶⁷⁷ The defiance of court orders is also observed in the cases relating to the abduction of Jestina Mukoko. Court orders to release Mukoko for medical treatment were continuously violated by the police.⁶⁷⁸ The continued defiance of court orders mainly by the police has seen the country descend into a state of lawlessness with the police being a law unto themselves.⁶⁷⁹

The lack of judicial protection of human rights by the current judiciary has been a major cause of concern. This is so because judicial indifference towards human rights cases has resulted in increased impunity in the country. The current judiciary has been corrupted and its failure to protect human rights has been evident in the way it has handled human rights cases. De Bourbon notes that the present composition of the judiciary bodes ill for human rights in the country⁶⁸⁰ as human rights violations are still the order of the day in the country.⁶⁸¹ It is therefore imperative that a new approach

⁶⁷⁴High Court Case No.6420/08 (Unreported).

⁶⁷⁵High Court Case No.7127/08 (Unreported).

⁶⁷⁶High Court Case No.7128/08 (Unreported).

⁶⁷⁷Zimbabwe Lawyers for Human Rights 'Abductions Timeline'

www.zimbabwewatch.org/.../ZLHR%20Abductions%2009-01-06%20timeline1.doc (Accessed 10 March 20012)

⁶⁷⁸See *Jestina Mukoko v The Commissioner-General of Police* (HC 7169/08) (Unreported); *Jestina Mukoko and 31 Others v The Commissioner General of Police and Another* High Court Case No.7166/08 (Unreported).

⁶⁷⁹See a report by the International Bar Association that depicts how the police have continuously defied court orders in the country thus exacerbating the human rights situation in the country. International Bar Association *Partisan Policing: An Obstacle to Human Rights and Democracy in Zimbabwe* (2007) 7-57.

⁶⁸⁰De Bourbon A (2003) 217.

⁶⁸¹Human Rights Watch "False Dawn" *The Power-Sharing Government's Failure to Deliver Human Rights Improvements* (2009) 1-20.

<http://www.hrw.org/sites/default/files/reports/zimbabwe0809web.pdf> (Accessed March 2012).

should be adopted in order to address the human rights situation in the country and to ensure that all judges abide by their judicial oath to protect the Constitution and the rule of law.

3.7 Conclusion

The discussion in this chapter has revealed a historical picture of the judicial protection of human rights in Zimbabwe since the attainment of independence. From the early beginnings, up to before the commencement of the FTLRP, the judiciary served with great distinction despite certain instances where clashes were witnessed between the executive and the judiciary and such actions of the executive sought to undermine the independence and authority of the courts in the country. However, despite constant clashes with the executive, this did not deter the courts from upholding the Constitution and the rule of law, thus ensuring that human rights were protected. However, the case has not been the same since the launch of the FTLRP, where independently-minded judges have been purged after a series of judgments perceived to be against government policies. The courts have been packed with pliant judges who have in various decisions endorsed executive lawlessness, thus abrogating their role to promote and protect human rights. In order to maintain the loyalty of judges, seductive gifts have been used by the executive to ensure that judges champion the cause of the executive. This has resulted in the loss of independence on the part of the judiciary and has contributed to the continued escalation of human rights violations.

Thus, the next chapter undertakes a comparative analysis of the judicial systems of Uganda, South Africa and Canada. The purpose of the comparative analysis is to establish how these jurisdictions have adopted international law principles in protecting the independence of the judiciary and how such independence has contributed to the domestic promotion and protection of human rights by the respective judiciaries. The comparative study will recommend that Zimbabwe could also adopt the same measures to improve the respect for judicial independence which will subsequently lead to an improvement in the promotion and protection of human rights.

Chapter 4

ENLARGING THE SCOPE OF HUMAN RIGHTS OBSERVANCE BY THE JUDICIARY: A CONTEMPORARY COMPARATIVE ANALYSIS OF THE ZIMBABWEAN, UGANDAN, SOUTH AFRICAN AND CANADIAN JUDICIAL SYSTEMS

4 Introduction

The previous chapter has highlighted the importance of the independence of the judiciary and how international law strives to ensure that States around the world adopt domestic measures to promote and protect the independence of the judiciary. As has been noted in this research, there is no doubt that the independence of the judiciary is fundamental to the effective protection of human rights. Thus, countries, such as, Uganda, South Africa and Canada, have adopted these international practices and have incorporated them into their domestic law. The realisation of the importance of human rights protection has thus necessitated the adoption of these principles that seek to promote and protect the independence of the judiciary. This chapter therefore seeks to make a survey of how three countries have implemented these international principles into their domestic law and how this has impacted on their promotion and protection of human rights. Such information is of great value to inform the situation in Zimbabwe on how it can improve its human rights protection.

Over the years the Zimbabwean judiciary has adopted an approach of disregarding the observance of human rights largely due to political pressure and has lowered its compliance with international human rights obligations. Such lowered compliance has thus had a severe impact on the human rights situation in the country. An analysis of the cost-effect of the lack of protection of human rights from Uganda's experience establishes that the disregard of human rights, especially by developing countries, may not be a plausible agenda. The benefits of human rights observance are illustrated by Uganda's efforts to reform amidst prevailing challenges. Also it should be noted that there exist better examples of human rights observance, such as in the case of South Africa, and further best practices can be obtained from Canada. Therefore, as a result

the author believes that in order to improve the human rights situation and the judicial protection of human rights in Zimbabwe, the country could follow the examples of Uganda, South Africa and Canada on how best to establish a strong judiciary so as to improve human rights protection. The reason why these three countries were chosen is because in South Africa, despite it being a developing country, the post-apartheid judiciary has set a tremendous example on the exact role that the judiciary ought to play in the protection of human rights. Its independence has thus greatly enhanced its ability to promote and protect human rights. Uganda, as a developing country, provides a great example of the consequences of the lack of promotion and protection of human rights and how the lack of an independent judiciary greatly impacts on efforts to promote and protect human rights. The Ugandan situation therefore enforces the belief that an independent judiciary is vital for human rights protection. Canada can thus be used as a best practices example for the protection of the independence of the judiciary and the judicial protection of human rights.

4.1 Uganda

4.1.1 Introduction

It should be noted that Uganda is a prime example in Africa that could greatly inform the situation in Zimbabwe on the consequences of the lack of promotion and protection of human rights, and how the lack of an independent judiciary greatly impacts on efforts to promote and protect human rights. According to the International Bar Association, Uganda has a post-colonial history that has been marred by civil war, economic decline, social disintegration and human rights violations.⁶⁸² Mapfumo notes that the political landscape in Uganda has influenced the judiciary's character, its independence and the ability to protect human rights.⁶⁸³ Onyango notes that during the colonial era, the judiciary was an extension of the British Crown and as such the judiciary was not independent, which greatly affected the protection of human rights in Uganda.⁶⁸⁴ Under

⁶⁸²International Bar Association *Judicial Independence Undermined: A Report on Uganda* (2007) 12.

⁶⁸³Mapfumo T (2005) 43.

⁶⁸⁴Oloka-Onyango J 'Judicial Power and Constitutionalism in Africa: A Historical Perspective' in Mamdani M and Oloka-Onyango J (eds) *Uganda: Studies in Living Conditions, Popular Movements and Constitutionalism* (1994) 470.

the leadership of Milton Obote who assumed power in 1966 after ousting Sir Edward Muteesa II, the independence of the judiciary was not assured.⁶⁸⁵ In order to consolidate his rule Obote suspended the 1962 Constitution, abolished kingdoms and consolidated his control over the military by eliminating several rivals.⁶⁸⁶ As a result of consolidating his rule, Obote openly undermined the judiciary and hence also undermined the protection of human rights.⁶⁸⁷

The first regime of Milton Obote was brought to an end in 1971 when General Idi Amin took over power in a coup.⁶⁸⁸ The Idi Amin era was a total dictatorship characterised by widespread human rights violations.⁶⁸⁹ The judiciary was not independent and some members of the judiciary were victims of human rights violations.⁶⁹⁰ Idi Amin lasted in power for eight years and he was overthrown in 1979.⁶⁹¹ Elections were held in 1980 and ushered in the second rule of Milton Obote.⁶⁹² Milton Obote's government was overthrown in 1985, with Tito Okello Lutwa assuming power. He was later overthrown in a coup in 1986 with Yoweri Museveni taking over.⁶⁹³ Okoth notes that during all the regimes in Uganda, the rule of law was suspended with a series of crimes being committed against civilians by both the state and non-state actors. Thus, the various governments subjected Ugandans to systematic violations of human rights which included arbitrary arrest and detention, extrajudicial killings and torture.⁶⁹⁴

After many years of lack of independence, attempts were made prior to 1995 to improve the state of the judiciary and secure its independence. In 1994 the Ugandan judiciary was praised for its independence after the acquittal of a former Minister in the Obote

⁶⁸⁵Tumwine-Mukumbwa G 'Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa' in Oloka-Onyango J *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* (2001) 287.

⁶⁸⁶Mutibwa PM *Uganda since Independence: A Story of Unfulfilled Hopes* (1992) 42-64.

⁶⁸⁷See the case of *Grace Ibingira v Uganda* (1966) E.A 306 as one of the examples where the authority of the judiciary was undermined under the Milton Obote era.

⁶⁸⁸Mutibwa PM (1992) 78-96.

⁶⁸⁹Oloka-Onyango J (1994) 488.

⁶⁹⁰Kalyegira T 'Fronasa's Role in Ben Kiwanuka's Murder.'

<http://www.musevenimustgo.com/index.php?id=NEWS&newsid=98> (Accessed 23 September 2013).

⁶⁹¹Nayega PFB 'The Overthrowing of Idi Amin: An Analysis of the War' (1984) 31:3 *Africa Today* 69-71.

⁶⁹²Mutibwa PM (1992) 78-96.

⁶⁹³Allen T and Vlassernroot K 'Introduction' in Allen T and Vlassenroot K (eds) *The Lord's Resistance Army: Myth and Reality* (2010) 7.

⁶⁹⁴Okoth PG 'The Military in Transition to Democracy in Uganda' in Langseth P, Katorobo J, Brett E and Munene J (eds) *Uganda: Landmarks in Rebuilding a Nation* (1997) 258-265.

administration on the capital charge of treason.⁶⁹⁵ Such decision was viewed as a sign that the Ugandan judiciary enjoyed a reasonably unfettered degree of independence from the executive. Because of the bad state of the judiciary after years of conflict and instability, attempts were made to build up the judicial system so as to attract foreign investment.⁶⁹⁶ Although efforts pre-1995 were made to interfere with the judiciary, the courts still managed to uphold human rights issues⁶⁹⁷ despite some instances where the Museveni government refused to comply with court judgments. Mapfumo notes that since 1995 the Ugandan judiciary has changed its approach towards human rights and has become more robust as a result of constitutional provisions that have given the judiciary space for activism.⁶⁹⁸ However, such activism has not advanced far enough to ensure that the judiciary is the surest guarantor of human rights as at times the judiciary has been intimidated and influenced to make decisions that support the ideology of the executive.⁶⁹⁹ Unfortunately the same fate has also befallen the judiciary in Zimbabwe and the rubber-stamping of executive decisions has been made at the expense of human rights.

4.2 Courts and Human Rights Protection in Uganda

After many years of conflict, the realisation of the importance of human rights protection resulted in the Constitution of the Republic of Uganda⁷⁰⁰ putting into place the institutional framework for human rights protection that recognises the need for establishing a socio-economic and political order based on the principles of unity,

⁶⁹⁵ Ellett RL *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda* (2008) 226.

⁶⁹⁶ Widner J *Building the Rule of Law* 1ed (2001) 153.

⁶⁹⁷ See the case of *Ssempebwa v Attorney General* Constitutional 1 of 1987 where Ssempebwa obtained judgment against the National Resistance Movement (NRM) based on a claim against the former Obote government for wrongful arrest and imprisonment and attempted to have the judgment executed. After failing to retrieve payment from the government, Ssempebwa filed for a writ of mandamus to compel payment by the government.

⁶⁹⁸ Mapfumo T (2005) 44.

⁶⁹⁹ Kibalama E 'Opening up a cul-de-sac: The State of Constitutionalism in Uganda in 2002' in Jjuuko F *Constitutionalism in East Africa: Progress, Challenges and Perspectives in 2002* (2005) 9.

⁷⁰⁰ See also Article 2 of the Constitution of Uganda which affirms the supremacy of the Constitution. Article 2 states that '(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. (2) If any other law or custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom, shall to the extent of the inconsistency, be void.'

equality, democracy, freedom, social justice and progress.⁷⁰¹ The National Objectives and Directive Principles of State Policy emphasise the protection of human rights by the State and the need for the State to respect institutions charged with the promotion and protection of human rights.⁷⁰² Chapter four of the Constitution of Uganda contains a Bill of Rights that encompasses civil and political rights, economic⁷⁰³, social and cultural rights and environmental rights.

Furthermore, Article 50 of the Constitution deals with the enforcement of the rights protected under the Constitution and most significantly provides for public interest litigation so as to increase access to justice in Uganda.⁷⁰⁴

In order to ensure that the judiciary is responsible for the protection of human rights, the Constitution of the Republic of Uganda established a court structure headed by the Supreme Court of Uganda.⁷⁰⁵ The judiciary is headed by the Chief Justice who is responsible for the administration and supervision of all courts in Uganda. Judicial power in Uganda is derived from the people and the Constitution states that such power shall be exercised by the courts established under the Constitution in the name of the people and in conformity with the laws and with the values, norms and aspirations of the people.⁷⁰⁶

4.2.1 Independence of the Judiciary

In order to ensure that courts discharge their duties without any fear or favour, the independence of the judiciary is protected under the Constitution of Uganda. Thus, article 128 of the Constitution states that:

⁷⁰¹Preamble of the Constitution of Uganda.

⁷⁰²See the Constitution of Uganda. It should be noted that the Constitution of Uganda besides the judiciary also establishes constitutional mechanisms to safeguard human rights and the rule of law. These include the Uganda Human Rights Commission (Article 52 of the Constitution) and The Inspectorate of Government (Article 223 of the Constitution).

⁷⁰³See Article 40 of the Constitution of Uganda.

⁷⁰⁴Article 50 of the Constitution of Uganda states that '(1) any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation. (2) Any person or organisation may bring an action against the violation of another person's or group's rights. (3) Any person aggrieved by any decision of the court may appeal to the appropriate court. (4) Parliament shall make laws for the enforcement of the rights and freedoms under this Chapter.'

⁷⁰⁵See Article 129 of the Constitution of Uganda.

⁷⁰⁶Article 126(1) of the Constitution of Uganda.

‘(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority. (2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions. (3) All organs and agencies of the State shall accord the courts such assistance as may be required to ensure the effectiveness of the courts. (4) A person exercising judicial powers shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.’

The Constitution of Uganda emphasises the need for members of the judiciary to be independent of the other branches of the state. The independence and impartiality of the judiciary is thus seen as crucial in the protection and promotion of human rights. For the courts to remain impartial and exercise their functions without any fear or favour it is crucial that their independence should be secured. As has been discussed previously, key to securing the independence of the judiciary are the appointment processes, the provision of fixed security of tenure and adequate remuneration. These are discussed below.

4.2.2 Appointment of Judges

In order to ensure that impartiality is observed in the appointment of judges, the Ugandan Constitution puts into place appointment mechanisms that seek to maintain impartiality in judicial appointments. Article 142 of the Constitution of Uganda states that:

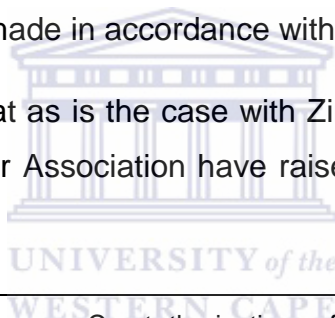
‘(1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court shall be appointed by the President acting on the advice of the Judicial Service Commission and with the approval of Parliament.’

The important role played by the JSC⁷⁰⁷ in the appointment process is once again highlighted in the Constitution.⁷⁰⁸ In order to ensure that appointments are carried out

⁷⁰⁷Article 146 of the Constitution of Uganda states that ‘(1) There shall be a Judicial Service Commission. (2) The Judicial Service Commission shall, subject to clause (3) of this article, consist of the following persons who shall be appointed by the President with the approval of Parliament- (a) a chairperson and a deputy chairperson who shall be persons qualified to be appointed as justices of the Supreme Court, other than the Chief Justice, the Deputy Chief Justice and the Principal Judge; (b) one person nominated by the Public Service Commission; (c) two advocates of not less than fifteen years’ standing nominated by the Uganda Law Society; (d) one judge of the Supreme Court nominated by the President in

impartially, the President is bound by the advice of the JSC. The Ugandan JSC is most notable for the fact that the Chief Justice is not chair of the Commission.⁷⁰⁹ Ellett notes that the make-up of the JSC is far more extensive and more detailed in its layout.⁷¹⁰ The Constitution of the Republic of Uganda also specifies that a person is not qualified to be appointed as a member of the JSC unless the person is of high moral character and proven integrity.⁷¹¹ However, Ellett notes that the composition of the JSC is dominated by Presidential appointments with the exception of the two advocates appointed by the Uganda Law Society.⁷¹² Despite concerns about its composition it is plausible that the President in Uganda appoints judges on the advice of the JSC. More importantly the Constitution also gives Parliament, as representative of the populace, a say in the appointment of judges. It is submitted that such role is important in that it ensures that checks are conducted on the President so as to ensure that there is no abuse of power and that appointments are not made in accordance with political considerations.

However, it should be noted that as is the case with Zimbabwe, investigative reports in Uganda by the International Bar Association have raised concerns about the influence



consultation with the judges of the Supreme Court, the justices of Appeal and judges of the High Court; and (e) two members of the public, who shall not be lawyers, nominated by the President.'

⁷⁰⁸See also Article 143 of the Constitution of Uganda which deals with the qualification for judicial appointments. The article states that '(1) A person shall be qualified as- (a) Chief Justice, if he or she has served as a justice of the Supreme Court of Uganda or a court having similar jurisdiction or has practised as an advocate for a period not less than twenty years before a court having unlimited jurisdiction in civil and criminal matters; (b) Deputy Chief Justice or Principal Judge, if he or she has served as a justice of the Supreme Court or as a justice of Appeal or as a judge of the High Court or a court of similar jurisdiction to such a court or has practised as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters; (c) a justice of the Supreme Court if he or she has served as a justice of Appeal or a judge of the High Court or a court of similar jurisdiction to such a court or has practised as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters; (d) a justice of Appeal, if he or she has served as a judge of the High Court or a court having similar or higher jurisdiction or has practised as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters or is a distinguished jurist and an advocate of not less than ten years' standing; (e) a judge of the High Court, if he or she has been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practised as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters.'

⁷⁰⁹Hatchard J, Ndulo M and Slinn P (2004) 152 who suggests that this is because in the past there were concerns that previous incumbents had apparently improperly influenced judicial appointments and hence this led to the 1995 Constitution excluding the Chief Justice from the Commission.

⁷¹⁰Ellett RL (2008) 226. See also Article 146 of the Constitution of Uganda for the composition of the JSC.

⁷¹¹See Article 146(5) of the Constitution of Uganda.

⁷¹²Ellett RL (2008) 226.

of political considerations in the appointment process.⁷¹³ The Uganda Judicial Officers Association (UJOA) has also raised concerns about the influence of political considerations in judicial appointments.⁷¹⁴ More recently, the re-appointment of Odoki CJ as Chief Justice of Uganda has been challenged before the Constitutional Court after allegations have been levelled against the President for disregarding the advice of the JSC in re-appointing Odoki CJ as Chief Justice.⁷¹⁵ Such actions by the President in disregarding the advice of the JSC do not augur well for the independence of the judiciary. Despite this, Freedom House notes that generally the higher courts in Uganda have a tradition of independence, whilst the magistrates often succumb to political and economic pressure.⁷¹⁶

4.2.3 Tenure of Office of Judicial Officers

4.2.3.1 Security of Tenure

In order to secure the independence of the judiciary, the Constitution of Uganda protects the tenure of office of judicial officers. Thus, Article 144 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 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.'

⁷¹³International Bar Association (2007) 33.

⁷¹⁴International Bar Association (2007) 33.

⁷¹⁵See *Saturday Monitor* 'MP Karuhanga Goes to Court over Odoki's Reappointment' 28 July 2013. <http://www.monitor.co.ug/News/National/MP-Karuhanga-goes-to-court-over-Odoki-s-reappointment/-/688334/1928596/-/mpvukh/-/index.html> (Accessed 21 September 2013).

⁷¹⁶Freedom House *Countries at the Crossroads 2012: Uganda* (2012) 10. <http://www.freedomhouse.org/sites/default/files/Uganda%20-%20FINAL.pdf>.

The re-appointment of Odoki CJ⁷¹⁷ who had reached the age of retirement has opened a huge debate about the issue of tenure in Uganda. Sebatindira notes that lack of fixed tenure under the Constitution poses a great threat to the independence of the judiciary in Uganda.⁷¹⁸ He also notes that the position of the Chief Justice as the head of the judiciary makes him responsible for the administration and supervision of all courts in Uganda and he thus issues orders and directions to the courts necessary for the proper an efficient administration of justice. Therefore, in cases where the Chief Justice serves, for example, under a two year contract or can be removed any time by the President, such measures are bound to interfere with the independence of the judiciary.⁷¹⁹ Such a move therefore makes it possible for the Chief Justice to be susceptible to political pressure or intimidation, thus seriously compromising the independence of the judiciary.

4.2.4 Removal of Judges

In accordance with Article 144(2) a judicial officer may be removed from office only for inability to perform the functions of the judicial office, misbehaviour or misconduct, and incompetence.⁷²⁰ The JSC or the Cabinet have the responsibility of referring to the President if a question arises that a judge should be removed from office.⁷²¹ If such a

⁷¹⁷The re-appointment of Odoki CJ was made in accordance with Article 142(2) of the Constitution of Uganda. Article 142(2) states that 'Where- (a) the office of a justice of the Supreme Court or a justice of Appeal or a judge of the High Court is vacant; (b) a justice of the Supreme Court or justice of Appeal or a judge of the High Court is for any reason unable to perform the functions of his or her office; or (c) the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires, the President may, acting on the advice of the Judicial Service Commission, appoint a person qualified for appointment as a justice of the Supreme Court or a Justice of Appeal or a judge of the High Court to act as such a justice or judge even though that person has attained the age prescribed for retirement in respect of that office. Article 142(3) also states that "a person appointed under clause (2) of this article to act as a justice of the Supreme Court, a justice of Appeal or a judge of the High Court shall continue to act for the period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is earlier.'

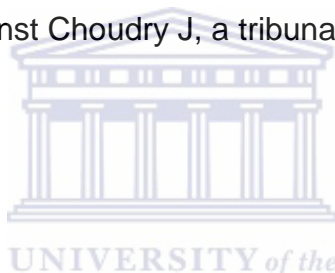
⁷¹⁸Sebatindira R 'How Will We Achieve Judicial Independence in this Country?' August 14 2013. <http://mobile.monitor.co.ug/Oped/How+will+we+achieve+judicial+independence/-/691272/1947070/-/format/xhtml/-/r13mtd/-/index.html> (Accessed 23 September 2013).

⁷¹⁹Sebatindira R 'How Will We Achieve Judicial Independence in this Country?' August 14 2013. <http://mobile.monitor.co.ug/Oped/How+will+we+achieve+judicial+independence/-/691272/1947070/-/format/xhtml/-/r13mtd/-/index.html> (Accessed 23 September 2013).

⁷²⁰See Article 144(2)(a)-(c) of the Constitution of Uganda.

⁷²¹See Article 144(4) of the Constitution of Uganda.

scenario arises the President is mandated to appoint a tribunal to look into the matter.⁷²² Once the tribunal is formed to look at the question of the removal of a judge, such judge is placed on suspension.⁷²³ A judge is removed from office if the tribunal recommends to the President that such judge should be removed.⁷²⁴ However, the suspension is only lifted if the tribunal recommends that the judge should not be removed from office.⁷²⁵ Recently there have been calls by the Ugandan Law Society for the removal of Choudry J as judge of the High Court of Uganda.⁷²⁶ Such calls have been premised on the fact that evidence has emerged that Choudry J was struck off the Roll of Solicitors in the United Kingdom.⁷²⁷ As such his fitness to hold the office of a judge of the High Court has been called into question. A petition has also been submitted to the Constitutional Court seeking orders for the appointment of a Tribunal to investigate the question of the appointment and removal of Choudry J. Although the JSC has noted that a *prima facie* case has been established against Choudry J, a tribunal is yet to be established.⁷²⁸



⁷²² Article 144(4) states that '[t]he President shall then appoint a tribunal consisting of- (a) in the case of the Chief Justice, the Deputy Chief Justice or the Principal Judge, five persons who are or have been justices of the Supreme Court or who are or have been judges of a court of similar jurisdiction of at least twenty years' standing; or (b) in the case of a justice of the Supreme Court or a justice of Appeal, three persons who are or have been justices of the Supreme Court or who are or have been judges of a court of similar jurisdiction or who are advocates of at least fifteen years' standing; or (c) in the case of a judge of the High Court, three persons who are or have held office as judges of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from such court or who are advocates of at least ten years' standing.' As is the case under the Constitution of Zimbabwe the powers of the President to solely appoint a tribunal in this case are a threat to the independence of the judiciary as

⁷²³ Article 144(5) of the Constitution of Uganda.

⁷²⁴ Article 144(3) of the Constitution of Uganda

⁷²⁵ Article 144(6) of the Constitution of Uganda.

⁷²⁶ Uganda Law Society 'Statement on the Judgment Delivered by Justice Choudry in *HCCS 179 of 2002 Beleke Kayira Peter and 400 Others v Attorney General and 2 Others*' 29 March 2013.

<http://www.uls.or.ug/uploads/ULS%20Statement%20on%20Hon.%20Justice%20Choudry%27s%20Judgment-20130403-180333.pdf> (Accessed 24 September 2013).

⁷²⁷ Uganda Law Society 'Statement on the Judgment Delivered by Justice Choudry in *HCCS 179 of 2002 Beleke Kayira Peter and 400 Others v Attorney General and 2 Others*' 29 March 2013.

<http://www.uls.or.ug/uploads/ULS%20Statement%20on%20Hon.%20Justice%20Choudry%27s%20Judgment-20130403-180333.pdf> (Accessed 24 September 2013).

⁷²⁸ Uganda Law Society 'Statement on the Judgment Delivered by Justice Choudry in *HCCS 179 of 2002 Beleke Kayira Peter and 400 Others v Attorney General and 2 Others*' 29 March 2013.

<http://www.uls.or.ug/uploads/ULS%20Statement%20on%20Hon.%20Justice%20Choudry%27s%20Judgment-20130403-180333.pdf> (Accessed 24 September 2013).

4.2.5 Remuneration of Judges

In accordance with the Constitution of the Republic of Uganda, the administrative expenses of the judiciary, including salaries, allowances, gratuities and pensions, are charged to the Consolidated Fund.⁷²⁹ The Constitution also goes further to provide that the judiciary is self-accounting and may deal with the Ministry responsible for finance in relation to its finances.⁷³⁰ In order to secure the financial independence of judges, the Constitution also stipulates that the salaries, allowances, privileges and retirement benefits of a judicial officer or any person exercising judicial power shall not be varied to his or her disadvantage.⁷³¹ Ellet notes that members of the Ugandan judiciary are some of the best paid civil servants, not only within Uganda, but also within the region.⁷³² However, despite this assertion by Ellet, there have been a number of reports of allegations of corruption amongst members of the judiciary which has threatened the independence of judges.⁷³³ In April 2013 proposals were made by the Ministry of Justice to increase the salaries of judges so as to ward off cases of corruption within the judiciary.⁷³⁴

On the issue of funding of the courts in Uganda, the International Bar Association notes that the severe lack of funding has impacted on the administration of justice in Uganda.⁷³⁵ The International Bar Association (IBA) notes that severe cuts have been made in the judiciary's budget which has had negative consequences for the independence of the judiciary. The lack of financial independence has whittled down the independence of the judiciary as an institution. The International Bar Association also notes that the lack of financial independence has reduced the judiciary to a position akin to that of a 'beggar going cup in hand' to the executive and legislator in order to be able

⁷²⁹ Article 128(5) of the Constitution of Uganda.

⁷³⁰ Article 128(6) of the Constitution of Uganda.

⁷³¹ Article 128(7) of the Constitution of Uganda.

⁷³² Ellett RL (2008) 240.

⁷³³ *Daily Monitor* 'In Uganda, the Judiciary Administer Injustice Instead' 1 September 2013 <http://www.monitor.co.ug/Magazines/ThoughtIdeas/In-Uganda--the-Judiciary-administer-injustice-instead/-/689844/1974578/-/a6fdsrz/-/index.html> (Accessed 24 September 2013).

⁷³⁴ *The Daily Monitor* 'Judges to Earn Above Shs25m' 27 April 2013. <http://www.monitor.co.ug/News/National/Judges-to-earn-above-Shs25m/-/688334/1759822/-/1360lhhz/-/index.html> (Accessed 23 September 2013).

⁷³⁵ International Bar Association (2007) 32.

to perform its constitutional duty.⁷³⁶ The lack of adequate funding has left the independence of the judiciary exposed and has thus impacted on the administration of justice in Uganda.

4.2.6 Human Rights Protection in Uganda

It should be noted as discussed earlier that efforts have been made to secure the independence of the judiciary and also the promotion and protection of human rights. Such independence has resulted in courts being able to protect the fundamental rights and freedoms in the Constitution. However, as Kibalama notes, the judiciary has at times been intimidated and influenced to make decisions that rubber-stamp executive excesses at the expense of human rights.⁷³⁷

The judiciary in Uganda has been commended for its approach to public interest litigation. This approach is in stark contrast to the approach that was adopted by the judiciary in Zimbabwe under the Lancaster House Constitution. Ellett notes that over the years Uganda has had several public interest litigation success stories and these are attributable to the Ugandan Constitution.⁷³⁸ In the case of *Environmental Action Network Limited (TEAN) v Attorney-General*⁷³⁹ the High Court allowed litigation by an NGO on behalf of non-smokers and such litigation was based on the fact that smoking in public places was a violation of the right to a clean and healthy environment. In the same case the Court, *inter alia*, declared that in public interest litigation there was no requirement for *locus standi*.

With regards to public interest litigation in the case of *Greenwatch v Attorney-General and Another*⁷⁴⁰ the Court held that ‘any concerned person or organisation may bring a public interest action on behalf of groups or individual members of the country even if that group or individual was not aware that his fundamental rights or freedoms were being violated pursuant to article 50 of the Constitution.’⁷⁴¹ The case upheld the

⁷³⁶International Bar Association (2007) 32.

⁷³⁷Kibalama E (2005) 9.

⁷³⁸See article 50 of the Constitution of Uganda. See also Ellett R.L (2008) 458.

⁷³⁹2001 LLR 2 (HCU).

⁷⁴⁰2003 1 EA 87.

⁷⁴¹*Greenwatch v Attorney General and Another* 2003 1 EA 87

justiciability of the right to a healthy environment. However, despite the generous approach of the courts towards public interest litigation, there are some cases that have been rejected by the courts on the issue of standing.⁷⁴² With its decision in *Rwanyarare v Attorney-General*, the Ugandan judiciary has been criticised for its frequent use of procedural issues and legal technicalities⁷⁴³ as an easy way to dismiss petitions, and as a result undermined efforts to enforce human rights in the courts. Gloppen also notes that:

'A particular approach to balancing judicial autonomy with self-restraint, and avoid crossing the boundaries of policy and politics, emerged in the Constitutional Court during this period. Whenever possible the court cautiously avoided a conflict with either the executive or the legislature, and for years, technicalities and controversies rather than meritorious issues marked its judgments. This is particularly noteworthy in light of the emphasis in the 1995 Constitution on the administration of substantive justice without undue regard to technicalities.'⁷⁴⁴

The Ugandan judiciary's approach towards the handling of election cases has been criticised as seeking to protect the interests of the ruling party and has thus endorsed electoral fraud at the expense of the rights of other political parties. These are the same allegations that the MDC in Zimbabwe has levelled against the judiciary for its persistent stance to endorse fraud in elections thus defeating the will of the people. For example, in *Kizza Besigye v Yoweri Kaguta Museveni*⁷⁴⁵ the majority of the Court, despite finding a number of electoral flaws⁷⁴⁶, ruled that such flaws were not substantial enough to vitiate the election. However, in a dissenting judgment Tsekooko J and Oder J ruled that the electoral malpractices had substantially affected the outcome and that the election

⁷⁴²*Rwanyarare v Attorney General* Constitutional Petition No. 11 of 1997 where the court made a decision not to accept an action (alleging that political rights had been infringed) brought on behalf of an unnamed group of persons. The court stated that it could not be sure that all members were knowledgeable about, or in support of the action.

⁷⁴³This has been done in accordance with Article 126 of the Constitution of Uganda states that '(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles... (e) Substantive justice shall be administered without undue regard to technicalities.'

⁷⁴⁴Gloppen S 'Public Interest Litigation, Social Rights and Public Policy' in Dani A and De Haan A *Inclusive States: Social Policy and Structural Inequalities* (2007) 15.

⁷⁴⁵Supreme Court of Uganda Presidential Petition NO. 2/2001.

⁷⁴⁶Such flaws ranged from procedural problems concerning voting without voters cards, chasing polling agents from polling stations, voting more than once, underage voting, intimidation and abduction of Besigye's supporters and deployment of the military.

had to be annulled. In the *Kizza Besigye v Yoweri Kaguta Museveni* case, there were allegations that a number of the judges were intimidated to rule in favour of Museveni.⁷⁴⁷ Another case that highlights the attitude of the judiciary towards political cases is that of *Kizza Besigye v Yoweri Museveni and Electoral Commission*.⁷⁴⁸ In this case Besigye sought to challenge the results of the 2006 election. Just like the decision in 2001, the Supreme Court found that although there were serious irregularities in the election process, the results had not been substantially affected by such irregularities.

However, despite the “disappointing” judgments in the presidential election cases, the judiciary in Uganda has delivered some promising decisions with regards to election cases. In the case of *Amama Mbabazi and Electoral Commission v Garuga James*⁷⁴⁹, the Court found that a number of electoral malpractices had substantially affected the election. On appeal the Court of Appeal in upholding the decision of the High, held that there was overwhelming violence, intimidation and a sectarian campaign that had substantially affected the outcome of the elections and thus warranted nullification of the results.⁷⁵⁰ However, the handling of such election matters drew the ire of President Museveni, who directly attacked the judiciary and expressed a lack of confidence in the institution with regards to electoral cases.⁷⁵¹

Despite its mixed decisions in the electoral cases, the Ugandan judiciary has made a positive contribution to protecting human rights. It has delivered a number of judgments that have sought to protect the fundamental rights and freedoms of the Ugandan people.⁷⁵² With regards to human rights issues in the country, Human Rights Watch has

⁷⁴⁷ *All Africa* ‘Uganda: Judges Changed Besigye Petition Ruling After Coup Threats’ 31 July 2001. <http://allafrica.com/stories/200107310058.html> (Accessed 25 September 2013).

⁷⁴⁸ Presidential Election Petition No.1 of 2006 (SCU) [2005] 1 EA 20.

⁷⁴⁹ *Musinguzi Garuga James v Amama Mbabazi and Electoral Commission* Election petition Appeal No.12 of 2002.

⁷⁵⁰ Appeal from High Court Election Petition No. HCT- 05- CV-EPA-0003 of 2001.

⁷⁵¹ Kibalama E (2005) 34.

⁷⁵² See for example the following cases: *Attorney General v Salvatori Abuki and Another* Constitutional Appeal 1/1998 where corporal punishment was found to be repugnant to the protection of human dignity. See also *Uganda Women Lawyers and 5 Others v Attorney General* Uganda Constitutional Court Petition No.2 of 2003 where the Court found that certain provisions of the Divorce Act were in contravention of the Constitution. See also the case of *Law and Advocacy for Women Uganda v Attorney General* 2007 Uganda Constitutional Court Petitions Nos. 13/05 and 05/06 where court found that section 154 of the Penal Code Act to be unconstitutional in that it treated married men differently from married women. According to section 154, a married man committed no adultery with an unmarried woman, and made it

noted that there have been ongoing threats to freedom of expression, assembly and association.⁷⁵³ Human Rights Watch also notes that there have been recent cases where the violation of human rights by security forces has been done with impunity especially with regards to the killings and deaths during protests in 2009 and 2011⁷⁵⁴.

4.3 Challenges to the Independence of the Judiciary in Uganda

There are still many challenges that the judiciary in Uganda is still facing. The biggest challenge, as is the case in Zimbabwe, has been assaults on the independence of the judiciary by the executive arm of government.⁷⁵⁵ The International Bar Association also notes that political interference in the work of the judiciary has been a major threat to judicial independence. The judiciary has been subjected to constant attacks from the executive especially with regards to decisions that are contrary to the ideologies of the executive.⁷⁵⁶

The independence of the judiciary in Uganda has over the years been interfered with by the executive on a number of occasions. The lifting of the ban on parties in Uganda saw the arrest and incarceration of opposition leader Kizza Besigye and other members of the People's Redemption Army (PRA)⁷⁵⁷ on trumped up charges. The granting of bail to Kizza Besigye saw the military laying siege to the courts to re-arrest Kizza Besigye in

an offence for a married woman to have sex with any man whether married or not. See also *Charles Onyango Obbo and Andrew Mujuni Mwenda v Attorney General* Supreme Court of Uganda Constitutional Appeal No.2 of 2002 where the Supreme Court found that the provision of the Penal Code criminalising publishing of falsehoods was not demonstrably justifiable in a democratic society.

⁷⁵³The challenge to upholding the rights to freedom of assembly and association dates back to pre-1995 which was characterised by banning of political activities since the constitutional provisions on political systems institutionalised the Movement as the only legal system of political organisation.

⁷⁵⁴Human Rights Watch 'Dispatches: In Uganda Killers of Protesters Remain Free' September 2013.

<http://www.hrw.org/news/2013/09/09/dispatches-uganda-killers-protesters-remain-free>

(Accessed 23 September 2013).

⁷⁵⁵Oloka-Onyango J 1994) 470.

⁷⁵⁶Examples include where the Constitutional Court handed down a judgment ruling that the Referendum (Political Systems) Act of 2000 was unconstitutional in *Paul K Ssemogerere and Another v Attorney General* Constitutional Petition No.3 of 2000 on the basis that Parliament had violated procedural rules in the course of enacting the law. The decision of the Constitutional Court was criticised by President Museveni. The criticism inspired a demonstration and led to public calls by the Chief Justice for the government and Ugandans to respect the independence of the courts and to let the courts to function without intimidation, and urged the judges to continue working normally as per their judicial oath.

⁷⁵⁷The existence of this army is contentious as Kizza Besigye after his arrest in 2005 denied any links with the PRA and its existence.

defiance of a court order that had granted him bail.⁷⁵⁸ As a result gun-wielding government security operatives invaded the High Court premises, assaulted legal practitioners and re-arrested treason suspects released on bail, and had them arraigned before military courts.⁷⁵⁹ The proceedings before the General Court Martial were ruled to be illegal by the Constitutional Court and subsequent court orders for the release of Kizza Besigye were ignored by the executive, thus contributing to the undermining of the independence of the judiciary in Uganda.⁷⁶⁰ Byaruhanga notes that the interference by the executive with the independence of the judiciary has undermined the rate of democracy in Uganda and that if that interference does not stop, democracy will remain a nightmare in the country.⁷⁶¹

4.4 Summary

It should be noted that although the judiciary has over the years faced great challenges to its independence (most of which are similar to the challenges faced by the judiciary in Zimbabwe), it has shown marked improvement in its role in respect of human rights protection. Ellett notes that the courts have been provided with an arena for debate on important political issues and disputes, rights protection and on matters of substantial public interest.⁷⁶² He adds that in the Ugandan judiciary there has emerged a culture, of radical judges who have chosen to exercise their leadership on the bench and others who have exercised their leadership on and off the bench.⁷⁶³ He notes that despite the existence of such judges, a number of judges have adopted a timid approach and a concern for personal survival rather than a selfless concern for the institutional well-being of the judiciary as a whole.⁷⁶⁴ Mapfumo also states that there are times where the

⁷⁵⁸Mulumba BD 'Uganda on the Eve of 50: The Legitimacy Challenge Aid, Autocrats, Plunder and Independence-erajinx' (2011) 50 *African Institute of South Africa Briefing* 1 4.

⁷⁵⁹International Bar Association (2007) 24.

⁷⁶⁰International Bar Association (2007) 24.

⁷⁶¹Byaruhanga J *Democracy in Uganda after 50 Years of Independence; Acknowledgement of the Problem and Possible Solutions* (2013) 13.

[http://www.academia.edu/4452589/Democracy in Uganda after 50 years of Independence Acknowledgement of the Problem and Possible Solutions](http://www.academia.edu/4452589/Democracy_in_Uganda_after_50_years_of_Independence_Acknowledgement_of_the_Problem_and_Possible_Solutions) (Accessed 26 September 2013).

⁷⁶²Ellett RL (2008) 497.

⁷⁶³Ellett RL (2008) 498.

⁷⁶⁴Ellett RL (2008) 498.

judges have censored themselves rather than acting as a check against executive excesses in human rights issues⁷⁶⁵.

However, there is general agreement that considering the difficult socio-economic conditions of Uganda, the judiciary has come a long way and has made some impact in the field of human rights. An example has thus been set for Zimbabwe, on how it is possible to promote and protect human rights despite the existence of threats to the independence of the judiciary. However, it should be noted that for the judiciary in Uganda to attain the best practices in human rights protection, it is crucial that it remains independent. Such independence is critical to human rights protection and enhancing democracy. As a result, the Ugandan judiciary may emulate the positive example that has been set by the South African judiciary in terms of human rights protection.⁷⁶⁶

4.5 South Africa

4.5.1 Introduction

In a developing country, the post-apartheid judiciary in South Africa has set tremendous examples on the exact role that the judiciary ought to play in the protection of human rights. The adoption of a human rights based approach by the post-apartheid judiciary is in stark contrast to the lack of protection of human rights under the apartheid system. The adoption of the 1996 Constitution has resulted in the improvement of the judicial protection of human rights in South Africa. This has been premised on the fact that the Constitution of the Republic of South Africa has made efforts to provide safeguards to protect the independence of the judiciary. As a result the Constitution of the Republic of South Africa has gained fame across the world as a strong and liberal document due to its numerous safeguards that have been put into place to protect the independence of the judiciary. These safeguards offer best practices for the protection of judicial

⁷⁶⁵Mapfumo T (2005) 52-53.

⁷⁶⁶There have been cases where the Ugandan courts have referred to South African courts in interpreting constitutional provisions. See for example *Attorney-General v Susan Kigula and Others* (Constitutional Appeal No.3 of 2006 where the Court sought guidance from the *S v Makwanyane* 1995 (3) SA 391 case in dealing with a challenge to the death penalty in Uganda.

independence and human rights and offer informative value to other nations that are undertaking constitutional reforms.

4.5.2 Judicial Independence under Apartheid

The judiciary under the apartheid regime was subject to great manipulation by the government despite assurances by the government that judicial independence was being maintained.⁷⁶⁷ Bruce and Gordon note that while formal structures existed guaranteeing the independence of the judiciary, and whilst the judiciary had a history of independence, close inspection of the judiciary, however, revealed that it was not truly independent.⁷⁶⁸ As a result the judiciary was unable to curb abuses of power by other branches of government. Instead of holding the government accountable for its human rights abuses, the judiciary under apartheid repeatedly upheld discriminatory and repressive legislation. As a result members of the judiciary were deemed to be obedient servants of the repressive legislature rather than impartial and objective arbiters and dispensers of justice, stepping in to protect the individual citizen from legislative and executive excesses.⁷⁶⁹ Therefore, the administration of oppressive laws by the judiciary contributed to the diminished esteem that ordinary people had for institutions set up to administer justice.⁷⁷⁰

Under the apartheid regime political factors played a crucial role in the appointment of judges. Candidates for judicial appointments were mostly drawn from the ranks of senior counsel and such individuals were mostly white.⁷⁷¹ With the commencement of the process for political change in 1990, the judiciary under the apartheid regime was

⁷⁶⁷ Marcus G 'Respect for the Courts: Myth and Reality' (1985) 1:3 *South African Journal on Human Rights* 236.-244.

⁷⁶⁸ Gordon A and Bruce D 'Transformation and the Independence of the Judiciary in South Africa' in Centre for the Study of Violence and Reconciliation *After the Transition, Justice, the Judiciary and the Respect for the Law in South Africa* (2007) 10. <http://www.csvr.org.za/docs/transition/3.pdf> (Accessed 30 September 2013).

⁷⁶⁹ Cowling MG 'Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premises' (1987) 3 2 *South African Journal of Human Rights* 177-201.

⁷⁷⁰ Dysenhaus D *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) 61.

⁷⁷¹ Davis DM *Judicial Appointments in South Africa* Middle Temple and SA Conference: Judicial Independence December 2010. <http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp40-43.pdf> (Accessed 25 September 2012).

exclusively white with the only exception of Mohamed J who was appointed in 1991 and became the first black judge to be appointed.⁷⁷² Kentridge also noted that the process for identifying potential candidates and their selection was always shrouded in controversy.⁷⁷³ As a result a number of judicial appointments to the Supreme Court and other courts were made solely on the basis of the political views and connection/s of the appointees.⁷⁷⁴

Since the South African Constitution was modelled on the Westminster tradition of parliamentary sovereignty, there were no significant judicial constraints on Parliament as the courts were subservient to Parliament. As a result courts could only declare an Act invalid if it had not been passed in accordance with the procedures for passing legislation that had been laid down in the Constitution.⁷⁷⁵ The supremacy of Parliament during the apartheid era was also shown through the passing of the High Court of Parliament Act in 1952 which sought to entrench parliamentary sovereignty, thus giving Parliament the power to overrule decisions of the courts.⁷⁷⁶ The High Court of Parliament Act came to be after the Appeal Court had ruled that the passing of the Separate Representation of Voters Act of 1951 (which sought to strip the voting rights of coloured people in the Cape Province) was invalid because a two-thirds majority in a joint sitting of both houses of Parliament was needed in order to change the entrenched clauses of the Constitution.⁷⁷⁷

The fact that apartheid judges were responsible for the implementation of repressive laws has raised debate as to the exact role that the judges had to play under the apartheid system. Dugard was of the view that judges under the apartheid era were simply obliged to apply the law on the statute book and were not to blame for their unfair nature.⁷⁷⁸ However, Dugard also noted that apartheid judges adopted an excessively

⁷⁷²Moerane MTK 'The Meaning of Transformation of the Judiciary in the New South African Context' (2003) 120 *South African Law Journal* 709 712. Moerane also notes that by 27th April 1994 the judiciary was still predominantly white and male, with the exception of three black males and one female white.

⁷⁷³Kentridge S 'Telling the Truth About the Law' (1982) 99 *South African Law Journal* 648 652.

⁷⁷⁴Kentridge S (1982) 652.

⁷⁷⁵De Waal J and Currie I (2005) 3.

⁷⁷⁶Witz L *Apartheid's Festival: Contesting South Africa's National Pasts* (2003) 134.

⁷⁷⁷*Harris v Minister of Interior* 1952 (2) SA 428 (A).

⁷⁷⁸Dugard J 'Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* 181 183.

'positivistic or literal approach' towards the interpretation of statutes.⁷⁷⁹ As a result judges regarded themselves as merely 'declaring' the law rather than implementing a creative role in statutory interpretation. On the other hand, Van der Westhuizen opines that judges had to act as activists and as a result they had the chance of refusing to apply blatantly unfair laws and had to utilise spaces for discretion to rule in favour of human rights.⁷⁸⁰ Van der Westhuizen notes that:

'In the absence of a constitution as supreme law, the dilemma for apartheid judges was where to find any concrete or more or less objective higher law or guiding principle to override unfair laws- in natural justice, international law, the principles of common law, the principles of natural justice, or simply one's own subjective views of fairness and justice.'⁷⁸¹

However, despite the controversy surrounding the exact role that judges had to fulfil under the apartheid regime, some judges did their best to ameliorate the harshness of legislation by enlightened judgments.⁷⁸² These judges spoke out against the apartheid system and its repressive laws. They spoke out against the system extra-judicially and in court which contributed in effecting change in South Africa and the ending of the apartheid regime. Despite some of the judges speaking out against the system, the majority of judges chose to remain silent.⁷⁸³

With the effects of deprivation under the apartheid regime, came the struggle to bring to an end the oppressive regime. The struggle for freedom resulted in negotiations for a new democratic South Africa. The democratic South Africa saw the adoption of the Interim Constitution of 1993⁷⁸⁴ and later the Final Constitution in 1996.⁷⁸⁵ The new legal

⁷⁷⁹The Constitution of South Africa has done away with this approach and in section 39 (2) expressly states that '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.'

⁷⁸⁰Van der Westhuizen J 'A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy' (2008) 8 *African Human Rights Journal* 251 254.

⁷⁸¹Van der Westhuizen J (2008) 254

⁷⁸²Mason K 'Should Judges Speak Out?' JCA Colloquium, Uluru 9 April 2001.

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason_090401 (13 September 2013).

⁷⁸³Cameron E, Davis D and Marcus GJ 'The Administration of Justice, Law Reform and Jurisprudence' 1993 in *Annual Survey of South African Law* 791 795.

⁷⁸⁴Act 200 of 1993.

⁷⁸⁵Constitution of South Africa 1996.

order in South Africa therefore seeks to innovate social, political and legal structures that would be radically different to those of the past history.⁷⁸⁶ Thus, the adoption of the 1996 Constitution has ushered in a new legal order for South Africa with the Constitution becoming the supreme law.⁷⁸⁷ The Constitution as the supreme law empowers a court when deciding any constitutional matter within its powers to declare invalid any law or conduct that is inconsistent with the Constitution.⁷⁸⁸ The vision of the Constitution is clearly spelt out in the preamble and section 1 of the Constitution which contains the founding values.⁷⁸⁹ Thus, the founding values emphasise the importance of the advancement of human rights and freedoms in South Africa.⁷⁹⁰

4.5.3 Judicial Independence in Post- Apartheid South Africa

4.5.3.1 Judicial Authority

Rautenbach and Malherbe note that the independence of the courts is a consequence of the separation of powers⁷⁹¹ and as a result a number of constitutions around the world contain provisions that protect the independence of the courts. Section 165(1) thus provides that 'the judicial authority of the Republic is vested in the courts.' Section 165(2) of the Constitution provides for the independence of the courts. It reiterates that the courts "are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice". The Constitution also prohibits any interference with the functioning of the judiciary.⁷⁹² It also mandates

⁷⁸⁶De Waal J and Currie I (2005) 1.

⁷⁸⁷Section 2 of the Constitution of South Africa provides that 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.'

⁷⁸⁸Section 172(1)(a) of the Constitution of South Africa.

⁷⁸⁹Section 1 of the Constitution of South Africa states that '[t]he Republic of South is one, sovereign democratic state founded on the following values (a) human dignity, the achievement of equality and the advancement of human rights and freedoms,(b) Non-racialism and non-sexism (c) Supremacy of the Constitution and the rule of law (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

⁷⁹⁰See Section 1(a) of the Constitution of South Africa. In terms of the protection of human rights see also Chapter 2 of the Constitution which contains the Bill of Rights.

⁷⁹¹Rautenbach IM and Malherbe EFJ *Constitutional Law* 6ed (2012) 165. See also *De Lange v Smuts NO* 1998 7 BCLR 779 (CC), 1998 3 SA 785 (CC) paras. 60 70-72; *South Africa Association of Personal Injury Lawyers v Heath* 2001 1 BCLR 77 (CC), 2001 1 SA 883 (CC) paras.25 and 26.

⁷⁹²Section 165(3) of the Constitution of South Africa.

organs of State to put into place legislative and any other measures that must assist and protect the independence of the judiciary.⁷⁹³

The Constitution also puts into place a court structure with a hierarchy.⁷⁹⁴ At the apex is the Constitutional Court which is the highest court in all constitutional matters.⁷⁹⁵ The Constitution also established the Supreme Court of Appeal which is the highest court of appeal in all matters other than constitutional matters.⁷⁹⁶ High Courts⁷⁹⁷ and Magistrates' Courts⁷⁹⁸ are also established by the Constitution. The Constitution also establishes other courts whose jurisdiction is determined in terms of an Act of parliament, including any court of a status similar either to the High Courts or the Magistrates' Courts.⁷⁹⁹ Apart from establishing the court structure, the Constitution also establishes specific guarantees that seek to protect the independence of the judiciary. These guarantees shall be discussed below.

4.5.3.2 Appointment of Judicial Officers and the Issue of Transformation

According to Gordon and Bruce, the Constitution contains various provisions that facilitate the appointment of diverse and well qualified individuals in an open and democratic process.⁸⁰⁰ Thus, section 174(1) of the Constitution stipulates that any person who is properly qualified and is fit and proper may be appointed as a judge in the country. However, consideration has to be given to ensure that any appointments reflect broadly the racial and gender composition of South Africa.⁸⁰¹ Section 9(2) of the Constitution also contains a general affirmative action provision which seeks to promote the achievement of equality and protect and promote individuals disadvantaged by unfair discrimination. These provisions therefore seek to address the challenges of the past, and section 174(1) in particular seeks to change the face of the courts and

⁷⁹³Section 165(4) of the Constitution of the South Africa

⁷⁹⁴Section 166 of the Constitution of South Africa.

⁷⁹⁵Section 167(3) (a) of the Constitution of South Africa. However, section 3 of Constitution Amendment 17 of 2013 changes this position and extends the jurisdiction of the Constitutional Court to be the highest court in all matters.

⁷⁹⁶Sections 166 and 168 of the Constitution of South Africa.

⁷⁹⁷Sections 166 and 169 of the Constitution of South Africa.

⁷⁹⁸Sections 166 and 170 of the Constitution of South Africa.

⁷⁹⁹See section 166(e) of the Constitution of South Africa.

⁸⁰⁰Gordon A and Bruce D (2007) 10.

⁸⁰¹Section 174(2) of the Constitution of South Africa.

promote the appointment of more blacks and women (especially black women) in order to ensure that the judiciary reflects the racial demographics of South Africa.

Wesson and Du Plessis note that the issue of transformation does not carry a single meaning as it incorporates issues, such as, the manner in which judges are appointed, the demographics of the judiciary, the underlying attitudes of the judiciary, accountability of the judiciary, and the embracement of efficiency and access to justice.⁸⁰² However, it should be noted that the issue of transformation in the post-apartheid era has raised great concern in South Africa. Concerns have been voiced about the slow pace of transformation and accusations have also been made that white male candidates are being overlooked for judicial appointments in favour of black candidates.⁸⁰³

Gordon and Bruce, who agree on the need for a representative judiciary, have expressed the fear that efforts that are being made in seeking to transform the judiciary could undermine the independence of the judiciary. Due to the apartheid legacy, the authors express great concern about the limited number of black, coloured and Indian legal practitioners who have the necessary skills and qualifications for appointment to the bench.⁸⁰⁴ Thus, they are critical of the JSC and believe that the JSC has not adequately met the challenge of transformation and has thus mainly focussed more on race and gender than on legal competence when making judicial appointments.⁸⁰⁵ Such accusations have also resulted in the resignation of Izak Smuts, a JSC member, who has launched a scathing attack on the JSC on the manner in which competent, well qualified independently-minded white male candidates have been overlooked for judicial appointments in favour of less qualified black or women candidates.⁸⁰⁶

Although it is important that the issue of transformation needs to be addressed in South Africa, it is crucial that this is not done in a manner that will compromise the

⁸⁰²Wesson M and Du Plessis M *The Transformation of the Judiciary* (2008) 10.
http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf (Accessed 30 September 2013).

⁸⁰³Gordon A and Bruce D (2007) 47.

⁸⁰⁴Gordon A and Bruce D (2007) 47.

⁸⁰⁵Gordon A and Bruce D (2007) 47

⁸⁰⁶*Mail and Guardian* 'JSC's Izak Smuts Resigns After Transformation Row' 12 April 2013
<http://mg.co.za/article/2013-04-12-izak-smuts-resigns-after-transformation-row> (Accessed 12 October 2013).

independence of the judiciary. The current focus of appointments mainly based on race rather than competence can thus have long-term effects on the independence of the judiciary in South Africa. The exclusion of independently-minded judges from other racial groups might therefore result in the judiciary being packed with pliant judges that will seek to serve the interests of their masters. It is therefore crucial that this issue of transformation must be tackled in a manner that will enhance the independence of the judiciary rather than undermine it. As Budlender notes, great care has to be taken in the appointment of judges and not create a perception that white males are overlooked for judicial appointments.⁸⁰⁷ Budlender notes that if such a perception is created, the judiciary will be weakened.⁸⁰⁸

4.5.3.2.1 Appointment Process

According to section 174(3) of the Constitution, the President, after consulting the JSC and leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice.⁸⁰⁹ The President after consulting the JSC also appoints the President and Deputy President of the Supreme Court of Appeal.⁸¹⁰ In both instances the President is not bound by the decision of the JSC but does not need to consult leaders of parties in the National Assembly with regards to the Supreme Court of Appeal appointments. With regards to the appointment of other judges of the Constitutional Court, they are appointed by the President after consulting the Chief Justice and leaders of parties represented in the National Assembly.⁸¹¹

However, with appointments of other judges of the Constitutional Court the JSC must prepare a list of nominees with three names more than the number of appointments to be made.⁸¹² The list has to be submitted to the President who may make appointments from the list and must with reasons advise the JSC if any of the nominees are

⁸⁰⁷Budlender G 'Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa' (2005) 4 *SALJ* 715 723.

⁸⁰⁸Budlender G (2005) 723.

⁸⁰⁹Section 174(3) of the Constitution.

⁸¹⁰Section 174(3) of the Constitution.

⁸¹¹Section 174(4) of the Constitution.

⁸¹²Section 174(4)(a) of the Constitution.

unacceptable for appointment and if any appointment remains to be made.⁸¹³ If such a scenario arises the JSC must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.⁸¹⁴ All other judges are appointed by the President on the advice of the JSC.⁸¹⁵

In order to ensure that the judicial appointment process is transparent in South Africa, the Constitution establishes the JSC. The JSC consists of the Chief Justice, the President of the Supreme Court of Appeal, one Judge President, the Minister of Justice, two practising advocates, two practising attorneys, one law teacher, six members of the National Assembly (three of whom must be members of the opposition), four delegates to the National Council of Provinces, and four persons designated by the President after consultation with the leaders of all parties in the National Assembly.⁸¹⁶

Appointment procedures have also been put into place to ensure that there is transparency and accountability in the appointment process.⁸¹⁷ The procedure to be followed for judicial appointments is outlined in the Government Gazette.⁸¹⁸ In cases where a vacancy occurs on the Constitutional Court, the JSC has the role of announcing and soliciting written nominations in order to fill that vacancy.⁸¹⁹ Letters of nomination with the candidates' written acceptances are given to the "screening committee", an ad hoc sub-committee of the JSC, which prepares a shortlist of the candidates.⁸²⁰ A shortlist must be prepared and must include all candidates who qualify for appointment.⁸²¹ Once the JSC approves the shortlist, the names of nominees are published.⁸²² Interested parties are called to submit comments and then after that the JSC conducts public interviews of each nominee.⁸²³ After these interviews the Commission deliberates privately and, based on consensus or majority vote, selects

⁸¹³Section 174(4)(b) of the Constitution.

⁸¹⁴Section 174(4)(c) of the Constitution.

⁸¹⁵Section 174(6) of the Constitution.

⁸¹⁶Section 178(1) of the Constitution.

⁸¹⁷Calland R *Anatomy of South Africa: Who Holds the Power?* (2008) 218

⁸¹⁸Government Notice R.423, Government Gazette No.24596

⁸¹⁹Section 2(b) of the Government Notice R.423, Government Gazette No. 24596 of 2003.

⁸²⁰Section 2(c) of the Government Notice R.423, Government Gazette No. 24596 of 2003.

⁸²¹Section 3(e) of the Government Notice R.423, Government Gazette No. 24596 of 2003.

⁸²²Section 3(g) of the Government Notice R.423, Government Gazette No. 24596 of 2003.

⁸²³Section 3(i) of the Government Notice R.423, Government Gazette No. 24596 of 2003.

candidates for recommendation⁸²⁴ The JSC also has a duty to inform the President of its recommendations, and explain the reasons for choosing each candidate. The list of recommendations is also publicly announced.⁸²⁵ From the above it can be noted that the South African appointment process provides transparency. The selection process in South Africa thus provides many lessons for other countries on the importance of transparency in the process of judicial appointment.

From the discussion above it is clear that the JSC thus plays a crucial role in the appointment of judges by naming judges of the Constitutional Court, and also when appointing other judges of all courts, the President must do so “on the advice” of the JSC. The JSC thus provides a broadly based selection panel for appointments to the judiciary. However, although there have been complaints about the large membership of the Commission, it has allowed for the representation of different interest groups making it imperative for candidates to “win wide support from across the different groups” in order to be appointed to the bench.⁸²⁶ Great concern has also been expressed about the large number of political representatives and Presidential appointees on the Commission. It should be noted that the same complaints have been made in the case/s of Zimbabwe and Uganda. Calland notes that the large number of political representatives has given the ruling party a veto power.⁸²⁷ Fears have also been raised about the large number of political representatives on the JSC and that such could jeopardise its independence.⁸²⁸

The Constitutional Court has dispelled the notion that the independence of the JSC might be jeopardised by the political control of the Commission. In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*⁸²⁹ the Constitutional Court stated that ‘in many countries in which there is an independent judiciary and a separation of powers, judicial appointments are either

⁸²⁴Section 3(k) of the Government Notice R.423, Government Gazette No. 24596 of 2003.

⁸²⁵Section 3(m) and (n) of the Government Notice R.423, Government Gazette No. 24596 of 2003.

⁸²⁶Magaisa A ‘Reforming Constitutional Appointments: The Judiciary’
<http://www.dfzim.com/blog/?p=383> (Accessed 15 October 2013).

⁸²⁷Calland R *Anatomy of South Africa: Who Holds the Power?* (2008) 218.

⁸²⁸Olivier M and Baloro J ‘Towards a Legitimate South African Judiciary: Transformation, Independence and the Promotion of the Democracy and Human Rights (2001) 26:1 *Journal for Juridical Science* 31 36.

⁸²⁹1996 (4) SA 744 para. 123.

made by the executive or Parliament or by both.’ The key to the separation of powers and judicial independence according to the Court is that the judiciary should enforce the law impartially and should be independent of both the executive and the legislature.⁸³⁰ The Constitutional Court was also of the view that the ‘JSC provides a broadly based selection panel for appointments to the judiciary and also provides a check and balance power of the executive to make such appointments.’⁸³¹

Gordon and Bruce have highlighted that the lack of clear standards for assessing the suitability and competence of candidates has increased concerns about the JSC’s motivations in appointing judges.⁸³² This is so because the Constitution requires only that judges are “appropriately qualified” and “fit and proper persons”⁸³³ and does not include more specific guidelines. Although Moerane notes that the JSC considers a variety of factors which include the candidate’s ability to perform judicial functions, commitment to constitutional values and the symbolic value of appointment⁸³⁴, the way in which the JSC has assessed and weighed such factors has been deemed to be not entirely clear and has thus led to questions being asked about the quality of its nominations.⁸³⁵ Concerns about the JSC’s standards and motivations for appointing judges have recently resulted in the Helen Suzman Foundation taking the JSC to court to seek clarity over the procedure and decision-making process regarding nominations for judicial office.⁸³⁶

Calls have been made for possible reforms to the JSC as concerns have been raised about the JSC’s standards and motivations for appointing judges and the presence of a large number of political representatives on the Commission. Gordon and Bruce note that although political influence on judicial appointments is not necessarily a threat to

⁸³⁰ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 para. 123.

⁸³¹ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 para. 124.

⁸³² Gordon A and Bruce D (2007) 51.

⁸³³ Section 174(1) of the Constitution.

⁸³⁴ Moerane M (2003) 713-714.

⁸³⁵ Gordon A and Bruce D (2007) 50-51.

⁸³⁶ *Business Day Live* ‘JSC Taken to Court over Judicial Appointments’ 10 June 2013 <http://www.bdlive.co.za/national/law/2013/06/10/jsc-taken-to-court-over-judicial-appointments> (Accessed 30 September 2013).

judicial independence, concerns about the influence of the ruling party in the appointment process are legitimate and must inform the debate about judicial appointments.⁸³⁷ Budlender notes that:

'The Constitution requires that the government have the self-confidence and courage to appoint people who will read the law honestly and independently, within the framework of a commitment to the transformation goals of the Constitution. The result will, on occasion, be judgments which the government finds uncomfortable and annoying. That is part of the commitment to accountable democratic government.'⁸³⁸

In order to protect and maintain the independence of the judiciary, it is crucial that the government must demonstrate its dedication to building a democratic state that prioritises the protection of human rights. As such the government must be willing to appoint judges who will impartially and fairly handle cases brought before the courts.⁸³⁹ Although concerns have been expressed over the JSC, it cannot be denied that the body has played a crucial role in the appointment of independent judges that have contributed to the cause of human rights in South Africa. Although the JSC has been facing major challenges in the appointment of judges, the body has largely remained independent and efforts have also been made to ensure that its appointment processes are transparent and free from any external influences.

4.5.3.3 Security of Tenure

Section 176 of the Constitution of South Africa provides for the security of tenure of judicial officers. According to section 176(1) a Constitutional Court judge holds office for a non-renewable term of 12 years or until they attain the age of 70. This is, however, dependent on whichever scenario occurs first. Section 4 of the Judges' Remuneration and Conditions of Employment Act⁸⁴⁰ provides that a Constitutional Court judge, whose 12 year term of office expires or who reaches the age of 70 before completing 15 years

⁸³⁷ Gordon A and Bruce D (2007) 51.

⁸³⁸ Budlender G (2005) 723.

⁸³⁹ Gordon A and Bruce D (2007) 51.

⁸⁴⁰ Act 47 of 2001.

of active service, must continue in office until the completion of 15 years of active service or until that judge attains the age of 75, whichever is sooner.⁸⁴¹

Section 8 of the Judges' Remuneration and Conditions of Employment Act, which was ruled to be unconstitutional⁸⁴², permitted the extension of the term of office of the Chief Justice. It allowed a Chief Justice, whose 12 year term was about to expire in the Constitutional Court and who would have completed 15 years of active service, to remain as Chief Justice at the request of and for a period determined by the President.

According to section 176(2) other judges hold office until they are discharged from active service in terms of an Act of Parliament. Judicial officers from other courts retire at the age of 70 if they have completed 10 years of active service. If they attain the age of 70 having not completed 10 years of service, a judge may continue to perform their functions until they complete the 10 years of service.⁸⁴³ The Judges Remuneration and Conditions of Employment Act also stipulates that a judicial officer who has attained 65 years and has completed 15 years of active service is given the discretion of writing to the Minister of Justice motivating why they should be discharged from active service.⁸⁴⁴ In order to secure the security of tenure of judges, the Constitution stipulates that salaries, allowances and benefits of judges may not be reduced.⁸⁴⁵ The remuneration of judges is determined by the President by proclamation in the Gazette.⁸⁴⁶ Such proclamation must be tabled in Parliament and lapses if Parliament rejects it during the same session of Parliament.⁸⁴⁷ In setting the remuneration of judges, the President is thus legally guided in terms of the Judges Remuneration and Conditions of Employment

⁸⁴¹ See section 4(1) and (2) of the Judges Remuneration and Conditions of Employment Act.

⁸⁴² See the case of *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 para.68 and 69 where an attempt to extend the term of office of Sandile Ngcobo was ruled to be unconstitutional. The Constitutional Court declared section 8(a) of the Judges' Remuneration and Conditions of Employment Act to be unconstitutional as it allowed the President to usurp the power of Parliament in extending the office of a judge and also violated the independence of the judiciary.

⁸⁴³ Section 3(2)(a) of the Judges' Remuneration and Conditions of Employment Act.

⁸⁴⁴ Section 3(2)(b) of the Judges Remuneration and Conditions of Employment Act.

⁸⁴⁵ Section 176(3) of the Constitution.

⁸⁴⁶ Section 2(1) of the Judges Remuneration and Conditions of Employment Act.

⁸⁴⁷ Section 2(3)(b) of the Judges Remuneration and Conditions of Employment Act.

Act by an independent commission set up under the Independent Commission for the Remuneration of Public Office Bearers Act.⁸⁴⁸

4.5.3.4 Removal of Judges

The Constitution of South Africa stipulates that a judicial officer may only be removed from office before their retirement on grounds of incapacity, gross incompetence or gross misconduct.⁸⁴⁹ A judge can be removed if the JSC finds he or she suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. A judge can also be removed from office if the National Assembly calls for him or her to be removed and such resolution must be adopted with a supporting vote of at least two-thirds of its members.⁸⁵⁰ In accordance with section 177(2), the President must remove a judge from office upon the adoption of a resolution calling for a judge to be removed.

It should be noted that recently in South Africa a tribunal was appointed to hear charges of misconduct that have been levelled against Hlophe J after several Constitutional Court judges alleged that Hlophe J had sought to unduly influence them in a corruption case against President Jacob Zuma.⁸⁵¹ However, the tribunal's legitimacy has been questioned following, *inter alia*, the request by Jafta J and Nkabinde J that they be given a chance to review the decision of the tribunal that had dismissed a preliminary issue they had raised stating that there was no valid complaint before the tribunal to be investigated.⁸⁵² The conduct of the two Constitutional Court judges has as a result thrown their credibility and public trust into question and calls have been made for them to come clean on the Hlophe issue.⁸⁵³

⁸⁴⁸ Act 92 of 1997.

⁸⁴⁹ Section 177(1)(a) of the Constitution.

⁸⁵⁰ Section 177(1)(b) of the Constitution.

⁸⁵¹ *Mail and Guardian* 'Mogoeng: SA Shouldn't panic Over Hlophe Tribunal' 10 October 2013.

<http://mg.co.za/article/2013-10-10-mogoeng-south-africans-shouldnt-panic-over-hlophe-tribunal> (Accessed 15 October 2013).

⁸⁵² *Mail and Guardian* 'Mogoeng: SA Shouldn't panic Over Hlophe Tribunal' 10 October 2013.

<http://mg.co.za/article/2013-10-10-mogoeng-south-africans-shouldnt-panic-over-hlophe-tribunal> (Accessed 15 October 2013).

⁸⁵³ Zille H 'Hlophe and the ConCourt; Our Judges Must Come Clean' 9 October 2013.

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=415685&sn=Detail&pid=71619> (Accessed 10 October 2013).

4.5.3.5 Importance of Judicial independence

The importance of the independence of the judiciary in any democracy has been well articulated in a number of cases in South Africa.⁸⁵⁴ In the *De Lange v Smuts* case, the Constitutional Court articulated that 'the independence of the judiciary is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.'⁸⁵⁵ The Constitutional Court in the same case also stated that the minimum criteria for judicial independence included security of tenure, financial security and institutional independence.⁸⁵⁶

The Constitutional Court has also been called upon to decide whether the performance of non-judicial functions by a judge can impact on the independence of the judiciary. In the case of *South African Association of Personal Injury Lawyers v Heath*⁸⁵⁷, the Constitutional Court was called on to consider whether the appointment of a judge to head the Special Investigation Unit (SIU), a unit designed to investigate serious malpractice in the administration of state institutions, state assets and public money, would undermine the separation of powers.⁸⁵⁸ Although the Court recognised that judges at times could carry out non-judicial functions that would not interfere with the separation of powers, it stated that certain functions were so far removed from the judicial function, that allowing judges to carry out such functions would compromise the separation that must exist between the judiciary and other branches of the state.⁸⁵⁹ The

⁸⁵⁴See *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC)* para.123 where the Court stated that 'an essential part of the separation of powers is that there is an independent judiciary. The mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with judicial independence... What is crucial to the doctrine of separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive.' See also *President of the republic of South Africa and others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)*. See also *Van Rooyen v The State 2005 (5) SA 246 (CC)* para.18 where the Court addressed the issue of institutional independence and emphasised that the Constitution 'not only recognises that courts are independent and impartial, but also provides important institutional protection for courts.'

⁸⁵⁵1998 (3) SA 785 (CC) para.59.

⁸⁵⁶*De Lange v Smuts* 1998 (3) SA 785 (CC) para. 70.

⁸⁵⁷2001 (1) SA 833 (CC).

⁸⁵⁸*South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 833 (CC) para.1

⁸⁵⁹*South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 833 (CC) paras. 34-35.

Constitutional Court thus decided that appointing a judge as the head of the SIU would impact on the separation of powers as the functions of the head of the SIU were also ordinarily performed by the police, members of the National Prosecuting Authority or the state attorney. Such functions were, according to the Court, inconsistent with the judicial functions as ordinarily understood in South Africa.⁸⁶⁰ More importantly the Court noted that it was important in order to ascertain whether a particular function was incompatible with the judicial office, to assess facts on a case by case basis. The Court stated that a court had to look at:

'Whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary.'⁸⁶¹

Gordon and Bruce state that the Court in this instance emphasised the need to protect the separation of powers and judicial independence and as such these must always inform any functions that a judge performs.⁸⁶²

4.5.3.6 Challenges to Judicial Independence in South Africa

Since the advent of democracy in South Africa, the courts have remained largely independent and have been free to render judgments that conflict with the ideologies of the executive. However, despite this there have been reported instances that have raised a number of questions about the commitment of the current government to the protection and promotion of the independence of the judiciary.⁸⁶³ Thus, tensions between the executive and the judiciary have been brewing. One prime example is the statement issued by the African National Congress Executive Committee which was believed to undermine the independence of the judiciary. The statement read:

⁸⁶⁰ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 833 (CC) para. 39.

⁸⁶¹ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 833 (CC) para. 31.

⁸⁶² Gordon A and Bruce D (2007) 27.

⁸⁶³ See Hulme D and Pete S 'Vox Populi? Vox Humbug- Rising Tension Between the South African Executive and Judiciary Considered in Historical Context- Part One' (2012) 15:5 *PER/PELJ* 16 19-29.

'We face the continuing and important challenge to work for the transformation of the judiciary... We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in the struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic system as a whole.'⁸⁶⁴

The statement by the ANC was broadly criticised as it is believed that it reflected the ANC's desire to have a compliant judiciary that would not interfere with government policies.⁸⁶⁵ Gordon and Bruce note that the tensions between the governing party and the judiciary are not unique to South Africa and as a result tension is bound to occur between the judiciary and other branches of government since the judiciary has the power to review and declare invalid government actions.⁸⁶⁶

4.5.3.6.1 Non-Enforcement of Judicial Orders

Despite the threats by government against the independence of the judiciary, it is generally agreed that government has continued to some extent to abide by judicial decisions that have conflicted with government policies. Although the South African government has upheld the independence of the judiciary, it has however been slow and inefficient in abiding by a number of court decisions. AfriMap notes that there is no evidence that the executive has over the years attempted to interfere with and influence the outcome of cases and neither is there evidence of deliberate non-compliance with judicial orders. Such non-compliance has been mainly attributed to bureaucratic and administrative inefficiencies.⁸⁶⁷ However, Roos, on the other hand, notes that situations have arisen where the executive branch of the state has often wilfully failed to comply

⁸⁶⁴ African National Congress 'Statement of the National Executive Committee on the Occasion of the 93th Anniversary of the ANC- 8 January 2005' <http://www.sahistory.org.za/archive/january-8th-statements-statement-national-executive-committee-occasion-93th-anniversary-anc-> (Accessed 30 September 2013).

⁸⁶⁵ Gordon A and Bruce D (2007) 32-33.

⁸⁶⁶ Gordon A and Bruce D (2007) 32-33.

⁸⁶⁷ AfriMap and Open Society Foundation for South Africa *South Africa: Justice Sector and the Rule of Law* (2005) 31. <http://www.afri-map.org/english/images/report/Law%20report.pdf> (Accessed 10 October 2013).

with court orders or has at times dragged its feet in implementing certain court orders.⁸⁶⁸ With specific reference to the Eastern Cape⁸⁶⁹, Roos notes that the non-compliance with judicial orders has reached unacceptable levels and has described it as an imminent constitutional crisis.⁸⁷⁰ As a result of the non-enforcement of judicial orders successful litigants are often left without any recourse and thus questions about the effectiveness of the legal system have arisen.⁸⁷¹

The executive in South Africa has also been guilty of the non-compliance and inadequate compliance with court orders in a number of high profile cases that have come before the Constitutional Court. Examples include *The Government of the Republic of South Africa and Others v Grootboom and Others*⁸⁷² case where the decision of the Court was partially fulfilled by the government.⁸⁷³ Another example includes the *In re Minister of Health and Others v Treatment Action Campaign and Others*⁸⁷⁴ case where the Treatment Action Campaign repeatedly complained that the government had only partially complied with the Constitutional Court order to make the anti-retroviral drug Nevirapine available in public hospitals to reduce the risk of HIV

⁸⁶⁸Roos R 'Executive Disregard of Court Orders: Enforcing Judgments against the State' (2006) 123 *South African Law Journal* 744-765. See also Plasket C 'Administrative Justice and Social Assistance' (2003) 120 *SALJ* 494 518.

⁸⁶⁹See *Vumazonke v MEC for Social Development, Eastern Cape* 2005 (6) SA 229 para.18-21 where the Court ordered that copies of its judgment be served on various persons, including the Chairperson of the Human Rights Commission and Public Service Commission, in order that they might investigate the disfunctionality in a certain provincial department's conduct 'with a view' to proposing concrete steps to ensure that it begins to comply with its constitutional and legal obligations and ceases to infringe fundamental rights on the present grand scale'. See also other cases such as *Somyani v Member of the Executive Council for Welfare, Eastern Cape and Another* (Case No.1141/01) where Froneman J commented on the high numbers of cases on the court roll dealing with the failure of the Department of Welfare to do their work. For similar comments see *Mahambehla v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE); *Permanent Secretary of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA).

⁸⁷⁰Roos R (2006) 744.

⁸⁷¹However, it should be noted that in line with the State Liability Act 20 of 1957 government property can be attached in cases where there is non-enforcement of judgments awarding damages, but an order of execution against State owned property cannot be carried out unless a final order sounding in money has not been satisfied.

⁸⁷²2001 (1) SA 46 (CC) a case where the Constitutional Court called for the revision of the national housing policy to provide temporary relief for those most desperately in need.

⁸⁷³Pillay K 'Implementing Grootboom' (2002) 3 *ESR Review*.

http://webcache.googleusercontent.com/search?q=cache:eMf_n6WSRSEJ:www.escri-net.org/usr_doc/Kameshni_Pillay/Implementing_Grootboom.doc+&cd=1&hl=en&ct=clnk&gl=za (Accessed 23 October 2013).

⁸⁷⁴2002 (5) SA 717 (CC) where the Constitutional Court ordered the government to provide antiretroviral drugs in public hospitals to reduce mother-to-child HIV/AIDS transmission.

transmission from mother to child. The non-compliance by the executive with a number of court decisions can be seen as a threat to the independence of the judiciary as such non-enforcement undermines the authority of the courts. Although the extent of the non-enforcement of court decisions cannot be equated to that in Zimbabwe, such actions pose a danger to the overall justice system and leave victims of abuses with no available avenues to address any violation of fundamental rights and freedoms.

4.5.4 Human Rights Cases

In spite of some attempts by the executive to undermine the independence of the judiciary, and the challenge of transformation, it is submitted that the South African judiciary has remained independent and has been able to assert its independence in cases where the executive has tried to make changes within the judicial system. Gordon and Bruce note that not only does the judiciary enjoy formal guarantees of institutional independence, security of tenure and financial security, but the judiciary has also benefited from judges who are willing to defend and fight for judicial independence.⁸⁷⁵ As a result of its protected status of being independent, it is not surprising that South African courts have set great examples to other African countries and around the world on how human rights protection can thrive if the judiciary is independent. However, it should be noted that it is not possible in this chapter to do justice to the human rights jurisprudence from the courts. There are many decisions in which courts, especially the Constitutional Court, have handed down decisions protecting human rights and most of these decisions have been implemented by government, especially those cases where the government has been ordered to amend laws.⁸⁷⁶ There also exist a number of human rights decisions that have advanced the protection of civil and political rights in South Africa.⁸⁷⁷ The same has also occurred with regard to socio-economic rights.⁸⁷⁸

⁸⁷⁵Gordon A & Bruce D (2007) 55.

⁸⁷⁶See for example *National Coalition for Gays and Lesbians Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

⁸⁷⁷See amongst several cases *S v Makwanyane* 1995 (3) SA 391 (CC) which dealt with abolition of death penalty; *Mohamed v President of Republic of South Africa* 2001 (7) BCLR 685 which emphasises the right to life. Several cases exist that seek to uphold the right to equality and non-discrimination on the basis of sexual orientation- *Langmaat v Minister of Safety and Security* 1998 (3) SA 312 (T); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) and *Satchwell v President of the*

4.6 Summary

The South African judiciary has set a great example on the continent on the best practices with regards to the protection of human rights. The protection of human rights by the judiciary in South Africa can thus be largely attributed to its independence and to the presence of independently-minded judges who have not shied away from protecting and guarding jealously their independence in the event of threats from the executive. The human rights jurisprudence from the South African judiciary is enriching and as a developing country South Africa has set a trend that other countries ought to aspire to achieve. Thus, the challenge remains for the judiciary in Zimbabwe to closely guard its independence and protect human rights. However, as has been highlighted at the beginning of this chapter, further best practices with regards to the independence of the judiciary can be obtained from Canada. Canada with one of the most effective best practices around the world, can crucially inform the situation in Zimbabwe on how best to protect the independence of the judiciary and improve human rights protection.

4.7 Canada

4.7.1 Introduction

Canada as a developed nation stands as the epitome of judicial independence and the protection of human rights.⁸⁷⁹ As a developed country Canada provides the best

Republic of South Africa 2004 (1) BCLR 1 (CC); Equality rights of women have recognised in *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC).

⁸⁷⁸See amongst many cases *Ex Parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) which dealt with the justiciability of socio-economic rights; *Government of South Africa v Grootboom* which dealt with the right to access to adequate housing; See for example other cases such as the *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA). See also *Residents of Joe Slovo, Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC); *Minister of Public Works v Kyalami Environmental Ridge Association* 2001 (3) SA 1151 (CC); *Blue Moonlight Properties v The Occupiers of Saratoga Avenue and Others* 2009 (1) SA 470 (W) which deal with the provision temporary shelter in cases of eviction; Cases dealing with the right to health see *Minister of Health and Other v Treatment Action Campaign and Others* 2002 (5) SA 703 (CC) where the Court ordered government to provide anti-retroviral drugs to pregnant mothers; *Van Biljon v Minister of Correctional Services* where the Constitutional Court ordered the Department of Correctional Services to supply prisoners with anti-retroviral medication.

⁸⁷⁹UL-Haq U *Judicial Independence in Light of the basic Principles on the Independence of the Judiciary: Who has the Right Idea?* Paper for the Comparative Law Seminar Course at the Shepard Broad Law Centre (2010) 27.

practices for the protection of the independence of the judiciary and has a comprehensive and well-established structure for guaranteeing the independence of the judiciary and the rule of law. Binnie notes that although in Canada judicial independence has been characterised as an unwritten constitutional principle, there are however constitutional sources that emphasise the importance of the independence of the judiciary.⁸⁸⁰ The independence and impartiality of the judiciary has also been noted to be important in a federal system. Since Canada is a federation, with a constitutional division of powers between the federal and provincial governments, it has been noted that it is crucial that the courts must be independent arbiters of jurisdictional disputes between the two levels of government.⁸⁸¹ This idea has been clearly emphasised by the former Canadian Chief Justice, Brian Dickson, who stated that:

'Canada is a federal country with a constitutional distribution of powers between federal and provincial governments. As in other federal countries, there is need for an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of separation of powers.'⁸⁸²

It is therefore crucial that courts must be truly independent of the federal and provincial governments for them to be able to resolve any disputes that might arise between the two levels of government. The importance of the independence of the judiciary in Canada can also be attributed to the Canadian Charter of Rights and Freedoms⁸⁸³ which gives the courts the role of defending civil liberties and freedoms against government intrusion.⁸⁸⁴

Binnie notes that while judicial independence in Canada benefits from a variety of institutional and legal safeguards, the strongest barrier to improper influences is a legal and political culture in which the public simply does not tolerate actual or perceived

http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=ubaid_ul_haq (Accessed 23 September 2013)

⁸⁸⁰Binnie I *Judicial Independence in Canada* Paper Submitted on Behalf of the Supreme Court of Canada (2011) 2.

http://www.venice.coe.int/WCCJ/Rio/Papers/CAN_Binnie_E.pdf (Accessed 21 September 2013).

⁸⁸¹*The Queen v Beauregard* (1986) 2 S.C.R. 56 para. 27.

⁸⁸²*Beauregard v Canada* (1986) 2 S.C.R 56 30 D.L.R. 4th 481, 493 (Can.1986).

⁸⁸³Enacted as Schedule B to Canada Act 1982.

⁸⁸⁴Morton F.L *Law, Politics and the Judicial Process in Canada* 3ed (2002) 611

transgressions.⁸⁸⁵ It should be noted that this has been one of the key factors that has affected judicial independence in Zimbabwe as there has been no political will to ensure that the independence of the judiciary is protected. As a result of its independence the Canadian judiciary has over the years become one of the leading judiciaries well-renowned for its independence and the protection of human rights. It has thus set a great example for other judiciaries around the world on how an independent judiciary is essential for the protection of human rights.

The importance of the independence of the judiciary has also found emphasis in the jurisprudence of the Canadian courts. The concept of judicial independence in Canada has been defined in the *Valente v The Queen* case.⁸⁸⁶ In this case the Court noted that:

‘Judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.’

The Court in *The Queen v Valente*⁸⁸⁷ also went further to identify security of tenure, financial security and administrative independence as key characteristics of the independence of the judiciary. The importance for the protection of the independence of the judiciary has also been emphasised in the case of *The Queen v Beauregard*⁸⁸⁸, where Dickson J stated that “the role of courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system”. Russell also shares the view that the adjudication of disputes by an impartial and independent judiciary must be regarded as an inherent requirement of political society.⁸⁸⁹

⁸⁸⁵Binnie I (2011) 2.

⁸⁸⁶(1985) 2 S.C.R 673 para.687.

⁸⁸⁷*Valente v The Queen* (1985) 2 S.C.R. 673 para.31

⁸⁸⁸(1986) 2 S.C.R. 56 para.30.

⁸⁸⁹Russell P *The Judiciary in Canada: The Third Branch of Government* (1987) 21. See also *Mackeigan v Hickman* (1989) 2 S.C.R 796.

4.8 Canadian Court System

According to the Canadian Judicial Council there are different levels and types of courts in Canada. These courts differ in their jurisdiction and such courts are grouped into provincial⁸⁹⁰ and federal courts⁸⁹¹. Binnie notes that the bedrock of the Canadian judicial system lies in the provincial superior courts whose jurisdiction covers both criminal and civil cases.⁸⁹² The superior courts reflect Canada's federal structure and the various governments of the provinces in Canada have the responsibility for providing administrative support to these courts.⁸⁹³ However, the federal government is responsible for the appointment and remuneration of judges of the superior courts.⁸⁹⁴ Hogg also notes that superior courts are responsible for the administration of all provincial, federal and constitutional laws and as a result constitutional litigation often begins in provincial superior courts.⁸⁹⁵

At the top of the Canadian judicial system is the Supreme Court of Canada which is the final court of appeal in the Canadian justice system. Its decisions are binding upon all lower courts in Canada and it hears appeals from within and throughout Canada. Its broad jurisdiction was granted in terms of section 101 of the Constitution Act, 1867, which allowed Parliament to create a general court of appeal for Canada.

4.9 Judicial Appointments in Canada

4.9.1 Historical Background of Judicial Appointments in Canada

Russell and Ziegel in their study of the federal appointment process in Canada from 1984 to 1988 noted that a huge number of judges appointed had a partisan political

⁸⁹⁰ Examples of Provincial Courts include the Superior Courts and Provincial Courts. Superior Courts are the highest level of courts in provinces and territories. Judges of the Superior Court are appointed by the federal government and judges of the Provincial Courts are appointed by the provincial government.

⁸⁹¹ Examples of Federal Courts include the Federal Court; Federal Court of Appeal; Specialised Federal Courts (Tax Court of Canada and Court Martial Appeal Court of Canada) and the Supreme Court of Canada.

⁸⁹² Binnie I (2011) 4.

⁸⁹³ See Constitution Act, 1867 (U.K), 30 and 31 Vict. c.3 reprinted in R.S.C. 1985, App. II, No.5, ss.92 (14), 96 and 100.

⁸⁹⁴ See Constitution Act, 1867 (U.K), 30 and 31 Vict. c.3 reprinted in R.S.C. 1985, App. II, No.5, ss.92 (14), 96 and 100.

⁸⁹⁵ Hogg PW *Constitutional Law of Canada* 5ed (2007) 7.

connection to the party in power.⁸⁹⁶ Hogg also notes that before 2004, no great detail was publicly known about the federal judicial appointments.⁸⁹⁷ As a result of the criticism of the political influence in the appointment process, reforms have been made to ensure that there is transparency in the appointment process. In order to investigate the issue of partisan appointment, the Canadian Bar Association established the Committee on the Appointment of Judges in Canada which found widespread dissatisfaction with the method of judicial selection and appointments.⁸⁹⁸ Investigations by the Committee found that political considerations played a great role in judicial appointments and as a result the system was not designed to select the best potential judges.⁸⁹⁹ Although the quality of the Canadian judiciary remained good, the Canadian Bar Association made a number of recommendations that sought to improve the appointment process and ensure that the best quality of individuals were appointed as federal judges and thus reduce the role of political patronage in the appointment process.⁹⁰⁰

4.9.2 Methods of Appointment of Judges

Section 96 of the Constitution Act⁹⁰¹ provides that the Governor General has the responsibility of appointing judges of the Superior, District, and County Courts in each Province. The Governor in Council appoints judges of the Supreme Court and Federal Court by letters of patent under the Great Seal.⁹⁰² Any person who has been a judge of a superior court of a province and has been a barrister or advocate for at least ten years standing at the bar of a province qualifies to be appointed as a Supreme Court judge.⁹⁰³ The Supreme Court Act requires that at least three judges must come from the province

⁸⁹⁶Riddell T Hausegger L and Hennigar M 'Evaluating Federally Appointed Judges in Canada: Analysing the Controversy' (2012) 50 *Osgoode Hall Law Journal* 403 406-407.

⁸⁹⁷Hogg PW 'Appointment of Justice Marshall Rothstein to the Supreme Court of Canada' (2006) 44 *Osgoode Hall L.J* 527 528.

⁸⁹⁸Canadian Bar Association *Federal Judicial Appointment Process* (2005) 3.

<http://www.cba.org/cba/submissions/pdf/05-43-eng.pdf> (Accessed 21 September 2013).

⁸⁹⁹Canadian Bar Association (2005) 3. .

⁹⁰⁰Canadian Bar Association (2005) 3.

⁹⁰¹1867.

⁹⁰²Section 4(2) of the Supreme Court Act R.S.C. 1985, c. S-26 and section 5 (4) of the Federal Court Act R.S.C. 1985, c. F-7.

⁹⁰³Section 5(5) of the Supreme Court Act R.S.C. 1985, c. S-26.

of Quebec (which is a civil law jurisdiction).⁹⁰⁴ Binnie notes that in addition to the statutory requirements for the appointment of Supreme Court judges, there has been a longstanding practice that seeks to ensure regional diversity in the Court.⁹⁰⁵ The Governor in Council (federal executive) is given the duty of appointing judges to the Supreme Court. The Prime Minister and Minister of Justice are involved in the selection of Supreme Court judges.⁹⁰⁶ A tradition has been established that before any appointments are made to the Supreme Court, the executive consults with Chief Justices and Attorney/s-General of the provinces as well as senior members of the legal profession.⁹⁰⁷ Any appointments of Supreme Court judges are not ratified by Parliament.

Informal changes to the appointment process of Supreme Court judges were made in 2005 in order to ensure that appointments became more transparent and consultative.⁹⁰⁸ Traditionally the Minister of Justice would assess the merit of potential candidates based on professional ability, personal characteristics and diversity.⁹⁰⁹ The Minister of Justice would then discuss the potential appointees with the Prime Minister who (after consultation with other members of the Federal Cabinet) would recommend one candidate to the Governor in Council.⁹¹⁰ However, in 2005, federal policy led to the establishment of an advisory committee whose task was to consider candidates identified through the Minister of Justice's consultations with various stakeholders, and to provide names to the Minister of any potential appointees.⁹¹¹ The advisory committee was composed of representatives from the federal Parliament, the judiciary, provinces, legal organisations, and the general public.⁹¹² The Minister of Justice would then advise the Prime Minister who was then expected to recommend an individual for appointment. Binnie notes that this process was used in the appointment of Rothstein J, with the

⁹⁰⁴Section 5 of the Supreme Court Act R.S.C., 1985, c.S-26.

⁹⁰⁵Binnie I (2011) 19.

⁹⁰⁶Hogg PW (2007) 8.

⁹⁰⁷Department of Justice *Proposal for the Reform of the Supreme Court of Canada Appointment Process* (2005) 10.

⁹⁰⁸Binnie I (2011) 20.

⁹⁰⁹Ziegel J 'A New Era in the Selection of Supreme Court Judges?' (2006) 44:3 *Osgoode Hall L.J* 547-555.

⁹¹⁰Binnie I (2011) 20.

⁹¹¹Department of Justice (2005) 10.

⁹¹²Binnie I (2013) 21.

whole process being televised.⁹¹³ Although controversial appointments have made to the Supreme Court of Canada, there is a general satisfaction that individuals appointed to the Supreme Court are qualified.⁹¹⁴

With regards to the appointment of Federal Court judges, the Federal Court Act deals with the statutory qualifications of Federal Court judges.⁹¹⁵ The Office of the Commissioner for Federal Judicial Affairs⁹¹⁶ has the overall responsibility for the administration of the appointment process of judges on behalf of the Minister of Justice. In the selection of candidates for appointment as Federal judges, the Office of the Commissioner for Federal Judicial Affairs has a list of factors that are taken into consideration.⁹¹⁷

Prospective candidates who wish to be appointed as judges of the Federal Court apply in writing to the Commissioner for Federal Judicial Affairs. Applicants are then requested to complete a “personal history form” which provides data for subsequent assessment or comment. Members of the legal community and other interested individuals can make nominations for appointment to the Federal Court.⁹¹⁸

Marshall notes that with regards to the appointment of the Chief Justice, judges of the Supreme Court and the Chief Justice of the Federal Courts, no statutory requirements exist for consultation or public ratification.⁹¹⁹ However, judges of the Federal Court, other than those who are judges of the superior courts of provinces or territories, are

⁹¹³It should be noted that however the same procedure was not used in 2008 for the appointment Cromwell J, who was appointed without a Committee hearing suggesting that the federal policy adopted in 2006 was not binding on the federal government.

⁹¹⁴Binnie I (2011) 21

⁹¹⁵Section 5(5)(a)-(c) of the Federal Court Act R.S.C. 1985, c. F-7. Which states that ‘(a) any person who is or has been a judge of a superior, county or district court; or (b) a barrister or advocate of at least ten years standing at the bar of a province; or (c) any person who has, for an aggregate of at least ten years, been a barrister or advocate at the bar of any province; and after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held in pursuant to a law of Canada or a province.’

⁹¹⁶The Office of the Commissioner for Federal Judicial Affairs was established in 1978 to safeguard the independence of the judiciary. See <http://www.fja-cmf.gc.ca/home-accueil/index-eng.html> (Accessed 21 September 2013).

⁹¹⁷See Office of the Commissioner for Federal Judicial Affairs Canada Assessment Criteria, Candidates for Federal Judicial Appointment.

⁹¹⁸See Office of the Commissioner for Federal Judicial Affairs Canada Assessment Criteria, Candidates for Federal Judicial Appointment.

⁹¹⁹Marshall D.T *Judicial Conduct and Accountability* (1995) 41.

assessed by an Advisory Committee on Judicial Appointments.⁹²⁰ Candidates from the superior courts of provinces and territories are considered for elevation to higher judicial office subject to consultations by the Minister of Justice.⁹²¹

The Advisory Committees on Judicial Appointments⁹²² are established in all Canadian provinces and each committee consists of eight members (previously seven). Candidates who are lawyers are assessed by the Regional Advisory Committee on Judicial Appointments whilst candidates who are provincial court judges are not assessed by the Committees. The Committees have the responsibility of assessing lawyer candidates on the basis of two categories which are “recommended” or “unable to recommend” for appointment. With respect to lawyer appointments the Committee conducts extensive consultations within the legal and non-legal communities and Committee decisions are normally arrived at through a consensus. However, in cases where consensus cannot be reached a vote is always taken. After consultations have been conducted the Prime Minister is responsible for making recommendations to the Cabinet for the appointment of the Chief Justice of the Federal Court (and also the Chief Justice and judges of the Supreme Court as discussed earlier) on the basis of investigations and consultations made by the Minister of Justice.⁹²³ With regards to other judges of the Federal Court, the Minister of Justice is responsible for making recommendations to Cabinet on the basis of assessments or comments by the advisory committee and consultations with senior members of the judiciary and the bar, and with the appropriate provincial or territorial Attorney-General or Minister of Justice.⁹²⁴

Despite the previous controversies regarding the appointment process of judges in Canada, Friedland notes that the federal system of appointments has shown a marked

⁹²⁰See Office of the Commissioner for Federal Judicial Affairs Canada Assessment Criteria, Candidates for Federal Judicial Appointment.

⁹²¹Department of Justice (2005) 10.

⁹²²The composition of the Judicial Advisory Committees consists of (a) a nominee of the provincial or territorial society; (b) a nominee of the provincial or territorial branch of the Canadian Bar Association; (c) a judge nominated by the Chief Justice or senior judge of the province or territory; (d) a nominee of the provincial Attorney General or territorial Minister of Justice; (e) a nominee of the law enforcement community; and (f) three nominees of the federal Minister of Justice representing the general public.

⁹²³See Office of the Commissioner for Federal Judicial Affairs Canada Assessment Criteria, Candidates for Federal Judicial Appointment.

⁹²⁴See Office of the Commissioner for Federal Judicial Affairs Canada Assessment Criteria, Candidates for Federal Judicial Appointment.

improvement over the past few decades with the setting up of an Advisory Committee on Judicial Appointments in all provinces and territories.⁹²⁵ Miller is of the belief that federally appointed judges are now being selected more for their legal merits than on political considerations.⁹²⁶ However, despite these changes Ul-Haq notes that what is more worrying about the judicial appointments is that the Canadian Constitution seems to leave the appointment process in the hands of the executive. Ul-Haq notes that the unwritten convention that allows the Prime Minister to confirm the appointment of judges unchallenged has doused the flame of judicial independence and has created tumult in the ideals of federalism.⁹²⁷ Binnie, however, believes that the courts in Canada, especially the Supreme Court, enjoy a high level of independence despite the federal government being ultimately responsible for the administration, financing and appointment of judges.⁹²⁸

4.10 Tenure and Remuneration of Judges

4.10.1 Tenure

The security of tenure of federally appointed judges is protected in section 99 of the Constitution Act.⁹²⁹ Section 99(1) of the Constitution Act provides that “judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on the address of the Senate and House of Commons”. The tenure of judges is protected under section 99(2) of the Constitution Act which imposes a mandatory retirement age of seventy-five years.

With regards to the removal of judges, the Judges Act⁹³⁰ established the Canadian Judicial Council (these judicial councils were created in most provinces to investigate and inquire into complaints against provincial court judges) which is made up of the Chief Justice of Canada, the Chief Justice and any senior associate chief justices and

⁹²⁵Friedland ML *A Place Apart: Judicial Independence and Accountability in Canada Report Prepared for the Canadian Judicial Council* (1995) 254.

⁹²⁶Miller MC ‘A Comparison of the Judicial Role in the United States and in Canada’ (1998) 22 *Suffolk Transnational Law Review* 1 9.

⁹²⁷Ul-Haq U (2010) 16.

⁹²⁸Binnie I (2011) 34.

⁹²⁹1867.

⁹³⁰R.S.C 1985 c.J1.

associate chief justice of each superior court, and the Chief Justice of the Court Martial Appeal Court of Canada.⁹³¹ The Judicial Council is mandated with receiving complaints and investigating such complaints, and may direct a committee to conduct an inquiry to determine whether a judge has become “incapacitated or disabled from the due execution of the office of judge” by reason of age, infirmity, misconduct or failure in the due execution of the office.⁹³² Following the inquiry into the removal of a judge, the Judicial Council is mandated with considering the report and recommendations of the Inquiry Committee. The Judicial Council has the role of recommending whether a judge should be removed from office for any of the reasons stated in the Judges Act. With regards to the removal of judges the Canadian Judicial Council in 2008 found Matlow J to be unfit for judicial office after a case of misconduct was reported against him.⁹³³ Prefontaine also states that in 1996 a Canadian Federal Court judge in Quebec was removed from office after passing insensitive remarks about women and Jews.⁹³⁴

4.10.2 Remuneration

Section 100 of the Constitution Act imposes the duty on Parliament of fixing the salaries, allowances and pensions of federally appointed judges. The remuneration of federally appointed judges is also established under the Judges Act. Section 9 of the Judges Act fixes the salaries of the Chief Justice of Canada and other judges of the Supreme Court of Canada. Section 10 of the Judges Act also deals with salaries of judges of the Federal Courts. Pursuant to section 25 of the Judges Act, the salaries of judges are adjusted annually to reflect fluctuations in the economy. The Judges Act also mandates the Judicial Compensation and Benefits Commission to submit reports every four years to the Minister of Justice regarding the adequacy of judicial remuneration.⁹³⁵ The Commission’s report is tabled in the House of Commons, but there is no requirement that Parliament adopts its recommendations.⁹³⁶ In addition to their annual

⁹³¹Section 59(1) of the Judges Act

⁹³²Section 65(2) of the Judges Act.

⁹³³*The Star.com* ‘Crusading Judge Unfit for Office, Probe Finds’ 30 May 2008.
http://www.thestar.com/news/gta/2008/05/30/crusading_judge_unfit_for_office_probe_finds.html
(Accessed 13 October 2013).

⁹³⁴Prefontaine DC and Lee J (1998) 10-11.

⁹³⁵See Section 26(1) of the Judges Act.

⁹³⁶See section 26(6) of the Judges Act.

salaries, Supreme Court judges also receive an allowance for incidental and representational expenses, health and dental care, life insurance, accidental death benefits and a pension.⁹³⁷ Thus, as a result judges in Canada are excellently paid and this has contributed to ensuring that the judiciary is not susceptible to any corrupt activities.

Binnie notes that the question of remuneration of judges in Canada has led to litigation, with specific reference to the provincial courts which are created by provincial statutes and have no constitutional status.⁹³⁸ Economic difficulties in the 1990s led to the reduction of salaries of provincial court judges in Canada. As a result fears of a threat to the independence of the judiciary were raised and the Supreme Court of Canada was as a result required to establish a framework for decision-making on the remuneration of provincial court judges consistent with preserving their financial security.⁹³⁹ In its ruling, the Supreme Court found that judicial salaries could be reduced or frozen but not without recourse to an independent effective and objective commission.⁹⁴⁰ Bennie notes that the effectiveness criterion prohibited governments from making decisions with respect to judicial salaries before receiving the commission's report.⁹⁴¹ The Supreme Court also stipulated that the system that required judges to negotiate their salaries and benefits with the executive could lead to the perception of a lack of independence.⁹⁴² In fixing the salaries of judges of the Provincial Courts, the Supreme Court noted that judicial salaries could not fall below a minimum level as there was risk that judges would adjudicate in a certain manner in order to secure higher salaries from the executive or the legislature.⁹⁴³

⁹³⁷ See section 27(1) and (6) of the Judges Act.

⁹³⁸ Binnie I (2011) 23.

⁹³⁹ *Remuneration Reference re Remuneration of Judges of the Provincial Court* (1997) 3 S.C.R 3.

⁹⁴⁰ *Remuneration Reference re Remuneration of Judges of the Provincial Court* (1997) 3 S.C.R 3. Para.147.

⁹⁴¹ Binnie I (2011) 23.

⁹⁴² *Remuneration Reference re Remuneration of Judges of the Provincial Court* (1997) 3 S.C.R 3. Para.186.

⁹⁴³ *Remuneration Reference re Remuneration of Judges of the Provincial Court* (1997) 3 S.C.R 3. Para.192.

4.11 Extra-Judicial Activities and Immunity

In order to ensure that the judiciary in Canada is not compromised, ethical principles have been put into place to protect the integrity of the judiciary when judges carry out extra-judicial activities.⁹⁴⁴ The Ethical Principles recommend that judges avoid any activities that may pose a threat to the independence of the judiciary and risks compromising the impartiality of the judiciary.⁹⁴⁵ Judges in Canada can serve as directors of civil and charitable organisations, but are discouraged from involving themselves in fundraising activities for these organisations.⁹⁴⁶ More significantly judges are prohibited from engaging in any political activities so as to ensure their impartiality.⁹⁴⁷ Judges in Canada also enjoy immunity from civil liability for actions taken in the performance of their judicial duties.⁹⁴⁸

4.12 Courts and Human Rights

As Binnie notes, the independence of the judiciary in Canada is a fundamental constitutional principle. The Canadian Constitution has put into place mechanisms to ensure that the independence of the judiciary is protected. Binnie also believes that the Supreme Court of Canada and judges in the country enjoy a high level of independence and such protection is in line with the demands of international law. Such independence has contributed to the judicial activism of the Canadian courts, especially the Supreme Court with regards to the human rights protected under the Charter of Rights and Freedoms.

As in the case of South Africa, there is no space to do justice to the jurisprudence from the courts in Canada on human rights. As a result of its independence Canadian courts, in particular the Supreme Court, have made a significant impact in the promotion and

⁹⁴⁴See Canadian Judicial Council 'Ethical Principles for Judges' (1998) 32.

http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf (Accessed 23 September 2013).

⁹⁴⁵See Canadian Judicial Council (1998) 34.

⁹⁴⁶See Canadian Judicial Council (1998) 34.

⁹⁴⁷See Canadian Judicial Council (1998) 29.

⁹⁴⁸See *Shaw v Trudel* (1988) 53 D.L.R (4th) 491 (C.A. Man) where the Court of Appeal held that provincial court judges are immune from civil liability for actions taken in execution of their functions. See also *Morier v Rivard* (1985) 2 S.C.R 716.

protection of human rights.⁹⁴⁹ Cases dealing with socio-economic rights, such as, the rights to housing⁹⁵⁰, health⁹⁵¹ and the right to an adequate standard of living and social security⁹⁵² have also been brought before the Canadian courts.

Canadian courts have thus made a concerted effort in fostering the domestic protection of human rights. The courts have established the best practises on the protection of judicial independence and subsequently the promotion and protection of human rights. Its best practises are an example to many nations striving to secure the independence of the judiciary and human rights protection. Just like the South African judicial system in Africa, the Canadian system stands at the apex of judicial independence and human rights protection and has thus set great standards that countries like Zimbabwe that

⁹⁴⁹See *Kindler v Canada* 1992 (6) CRR (2d) 193 SC. Para. 241 which provided persuasive value in the case *S v Makwanyane*, where the Supreme Court ruled that capital punishment constituted a serious impairment of human dignity; see *Vriend v Alberta* (1998) 1 S.C.R. 493 where the Supreme Court read in the word "sexual orientation" into prohibited grounds of discrimination covered under the Alberta Individual's Rights Protection Act; see *Eldridge v British Columbia (A.G)* (1997) 3 S.C.R. 624 where hospitals and other public institutions have been required to change their procedures to ensure the equality or rights of disabled persons; *Halpern v Canada (A.G)* (2003) 225 D.L.R (4th) 529 where it was ruled that same sex couples have the right to marry; *M v N* (1999) 2 S.C.R. 3 where laws denying gays and lesbians benefits available to those in heterosexual spousal relationships were found to deny the right to equal benefit of the law; *Malhe v Alberta* (1990) 1 S.C.R 342 where provincial governments have been required to provide minority languages in schools; *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 S.C.R 3 where the Supreme Court upheld the decision of the trial court after the judge had found that the provincial government had failed to prioritise its obligations as required under section of the Charter and ordered the province to undertake its best efforts to provide school facilities and programs to protect the education rights of minorities.

⁹⁵⁰See for example *Sparks v Dartmouth/ Halifax County Regional Housing Authority* (1993) 119 NSR (2d) (NS CA). In this case Irma Sparks, a black single mother of two challenged the exclusion of public housing tenants from security of tenure provisions as a violation of equality rights, after being issued an eviction order with no reasons given and one (rather than three) months' notice to vacate. The Nova Scotia Court of Appeal found that public housing residents were disproportionately single mothers, black and poor and that their exclusion from provincial residential tenancies legislation constituted adverse effect discrimination on the grounds of race, sex, marital status and poverty.

⁹⁵¹*Chaoulli v Quebec* (2005) 1 S.C.R 791. The case challenged the ban under Quebec health and hospital insurance legislation, on private health insurance and funding. The claimants argued that the ban violated their rights to life, liberty and security as it rendered the provision of private health services uneconomical and forced them to wait for services within an over-burdened public system. The Supreme Court agreed with the claimant's views and that the lengthy waiting times for treatment within the public system, the prohibition on private insurance violated the rights to life and security of person.

⁹⁵²See the *Falkiner v Ontario (Ministry of Community and Social Services)* (2002) 212 DLR (4th) 633 (Ont CA). In this case the Ontario Court of Appeal struck down the province's 'spouse in the house' rule as discriminatory against single mothers and social assistance recipients. This was so because the rule treated single mothers living with a man as if they were spouses for the purposes of eligibility for social assistance. This therefore had an effect of either reducing their benefits or disentitling them from assistance altogether, based on the income of the man with whom they were residing. The Court found that the policy denied single mothers on social assistance the ability to cohabit with men in the early stages of a relationship without becoming financially dependent.

have recently gone through constitutional reform could follow. The adoption of such standards will without doubt bode well for the improvement of the independence of the judiciary and future protection of human rights.

4.13 Conclusion

As been highlighted in this chapter an independent judiciary is mandatory for any effective protection of human rights. Countries, such as, Uganda albeit faced with challenges in securing judicial independence have realised the severe effects that are associated with the lack of human rights protection. Thus, it has made efforts to improve the state of the judiciary which has also subsequently led to the improvement of human rights in the country. Although in some cases the judiciary has exercised restraint, there is still room for improvement in the protection of human rights. South Africa and Canada have provided the best practises with regards to protecting judicial independence. It is no surprise therefore that these jurisdictions thrive with regards to human rights protection. As a result they offer best practises that can be adopted by Zimbabwe in order to improve the independence of the judiciary and its protection of human rights. In order to improve the human rights situation in the country the Constitution of Zimbabwe has made it a priority to introduce a number of reforms that seek to improve the state of the judiciary in the country. Such reforms seek to promote and protect the independence of the judiciary and the promotion and protection of human rights. As a result the next chapter seeks to make an analysis of the judicial reforms under the new constitutional dispensation in Zimbabwe and to show whether such reforms will suffice in improving the state of judicial independence. Where weaknesses or gaps are identified, this research, with the aid of the best practices discussed in this chapter, offers suggestions on how best to improve the protection of judicial independence in Zimbabwe, which will subsequently improve the judicial protection of human rights.

CHAPTER 5

CONSTITUTIONAL REFORM AS A LEGAL MECHANISM TO STRENGTHENING JUDICIAL INDEPENDENCE AND CONTEMPORARY HUMAN RIGHTS PROTECTION IN ZIMBABWE

5 Introduction

The independence of the judiciary has been emphasised in this thesis, as being crucial in the protection and promotion of human rights in any democratic society.⁹⁵³ The judiciary therefore plays an important role in ensuring that the rights of individuals are protected. However, as discussed in previous chapters, this has not been the case in Zimbabwe. Due to the loss of its independence, the judiciary has over the years abrogated its role with regards to the protection and promotion of human rights. A new Constitution has been adopted in Zimbabwe, to address amongst other issues the improvement of the independence of the judiciary which would resultantly bode well for the protection and promotion of human rights. The purpose of this chapter is therefore to look at the new constitutional dispensation and analyse whether it bodes well for the independence of the judiciary and human rights protection. The chapter will establish the importance of a constitution in democratic society and also deal with the history of constitution making in Zimbabwe and the factors that have necessitated the need for constitutional reform in the country. Lastly the chapter will review the legal significance of the new constitutional dispensation on the independence of the judiciary and its impact on the future of human rights protection, more significantly by the judiciary.

5.1 Constitutions and Constitution Making

The topics of the constitution and constitution making have raised a number of contentious views over the years. Contentious views have been expressed as to what exactly the main purpose of the constitution is or whether the constitution should solely

⁹⁵³Dumbutshena E, 'The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwe Experience' (1989) 5:3 *South African Journal of Human Rights* 311 313.

deal with government power or have various other purposes?⁹⁵⁴ Contentious views have also been expressed as to how constitutions should be made. A brief discussion of what the constitution is will be conducted and this chapter will provide an in-depth discussion on what the constitution making process entails and shall also focus on the constitution making process in Zimbabwe.

5.1.1 What should a Constitution do?

A number of scholarly views have been expressed as to exactly what the constitution should do. Mohamed CJ (Former Chief Justice of South Africa) has opined that:

'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between government and the governed, it is a 'mirror of the national soul', the identification of the ideals and aspirations of the nation, the articulation of the values binding its people and disciplining its government'.⁹⁵⁵

On the other hand, other scholars believe that it is important that a constitution should reflect not only the history of the nation but should also mirror the interests and aspirations of its people with regards to how they wish to be governed.⁹⁵⁶ This view is also supported by Madhuku who states that:

'The content of a Constitution must be determined by the political experience of the people in the country. People must have a sense of the meaning of what they are putting in there. So you cannot just get a Constitution from the library. The Constitution must come from the spirit and the hearts of the people'.⁹⁵⁷

The view expressed by Madhuku lays down a transformative vision for a nation's future and marks a decisive break with the past, and is an important view that is reflected in various constitutions around the world. An example of such a constitution is that of South Africa, which brought to an end the institution of apartheid. The Constitution of

⁹⁵⁴ Hatchard J 'The Constitution of Zimbabwe: Towards a Model for Africa?' (1991) 35:1-2 *Journal of African Law* 79 101.

⁹⁵⁵ Hatchard J (1991) 101.

⁹⁵⁶ Madhuku L 'Constitution Making in Zimbabwe' SAPES Seminar Series, National Constitutional Assembly March 11, 2010.

<http://www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec> (Accessed 7 March 2013).

⁹⁵⁷ Madhuku L 'Constitution Making in Zimbabwe' SAPES Seminar Series, National Constitutional Assembly March 11, 2010.

<http://www.kubatana.net/html/archive/demgg/100311inzwa.asp?spec> (Accessed 7 March 2013).

South Africa in its Preamble states that it “recognises the injustices of the past and seeks to honour those who suffered for justice and freedom in our land and also to heal the divisions of the past.”⁹⁵⁸ As a result the Constitution of South Africa has adopted multiple safeguards to guard against the repeat of the past.

It is crucial that a constitution must not simply include a collection of rules and institutional arrangements regarding the use of state power, but should also place limits on the use of such power. Therefore, it is essential that the powers of government should be legally limited. The extent to which the Constitution of Zimbabwe seeks to limit government power shall be addressed later in this chapter. Besides dealing with the issue of regulating powers, it should be noted that the Constitution of Zimbabwe does identify the ideals and aspirations of the nation and also enunciates the values binding on its people and the government.⁹⁵⁹

5.1.2 Constitution Making

With regards to the issue of constitution making, constitutional law scholars generally agree that constitutional reform processes within a particular country are often in response to broad challenges of peace building, reconciliation, inclusion and socio-economic development.⁹⁶⁰ This view is further supported by Elster, one of the leading scholars in constitution making, who states that:

‘New constitutions almost always are written in the wake of a crisis or exceptional circumstances of some sort. These range from socio-economic crisis, revolution, regime collapses (or fear of it), defeat in war (and resultant military occupation), the creation of a new state, and liberation from colonial rule.’⁹⁶¹

It is important to note that in the drafting of a constitution, an appropriate procedure for constitution making should be put in place as superimposed constitutional formulae, or constitutional arrangements that do not address the real causes of discontent, are sure

⁹⁵⁸ Preamble of the Constitution of South Africa.

⁹⁵⁹ See the Preamble of the Constitution of Zimbabwe.

⁹⁶⁰ Benomar J ‘Constitution Making After Conflict’ (2004) 15:2 *Journal of Democracy* 81-95 81.

⁹⁶¹ Elster J ‘Forces and Mechanisms of the Constitution-making Process’ (1995) 45:2 *Duke Law Journal* 364-96 371.

to generate their own legitimacy crises.⁹⁶² Great suspicion is also drawn to the constitution making process as significant individuals and groups can be created to capture the process in the service of their own interests. Elster notes that constitution making demands impartiality and far-sighted reasoning and that the drafting of a constitution should be made by a constitution making body that is motivated by conceptions of a broader longer-term public interest.⁹⁶³ Elster also notes that although it is difficult to constitute an assembly that will be partly motivated by reason and public interest rather than narrower conceptions of interest, it is possible to do so. He adds that some members of the assembly can be motivated by a broader interest at least some of the time.⁹⁶⁴

Elster is of the view that the main challenge to constitution making is to ensure that an assembly is constituted and also to ensure that it will not be duly influenced by narrow conceptions of self-interest.⁹⁶⁵ He recommends that the constitution should be drafted by a specialised assembly and not by the ordinary legislature as the legislature is more likely to be influenced by group and institutional self-interest.⁹⁶⁶ This view has received considerable support amongst many scholars. Miller notes that specialised assemblies offer a higher degree of popular legitimacy as compared to an ordinary legislature.⁹⁶⁷ However, it should be noted that other scholars have challenged the view of constitutional assemblies being the appropriate bodies for drafting constitutions. Arato opines that parliamentary constitution making is more ideal and can ensure the legitimacy of the constitutional product.⁹⁶⁸ On the other hand, Partlett argues that constitutional assemblies can be inferior to ordinary legislatures as politicians can easily control a constitutional assembly and that this may lead to the drafting of constitutions

⁹⁶²Van der Vyer J 'Constitutional Options for Post-Apartheid South Africa' (1991) 40 *Emory Law Journal* 745 822. See also Benomar J (2004) 82.

⁹⁶³Elster J (1995) 396.

⁹⁶⁴Elster J (1995) 379-380.

⁹⁶⁵Elster J (1995) 394.

⁹⁶⁶Elster J (1995) 395.

⁹⁶⁷Miller LE 'Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future', in Miller LE (eds) *Framing the State in Times of Transition: Case Studies in Constitution-Making* (2010) 612.

⁹⁶⁸Arato A *Civil Society, Constitution and Legitimacy* (2000) 255.

that are authoritarian or democratically weak.⁹⁶⁹ Although there is much debate on which method is best for constitution making, it is submitted that the process must be left in the hands of a constitutional assembly. This is so because constitutional assemblies are less likely to be partisan and thus give more authenticity to the drafting process.

The constitution making process should be reflective of the broader society. In order to ensure that the constitution is thus reflective, all stakeholders involved in the constitution making (led by a constitutional assembly) process must be able to participate and have their views heard.⁹⁷⁰ Participatory constitution making is mainly based on the idea that democratic constitutions should be created and adopted through democratic processes.⁹⁷¹ Participation is deemed to foster political dialogue, empowering the people and is said to improve the quality of the final constitution product.⁹⁷² However Moehler expresses a significant view on the issue of participatory constitution making and states that:

'Participation is beneficial if citizens are well informed, involvement is meaningful, cleavages outcross one another, civil society is robust and pluralistic, and institutions are tailored to fit circumstances and parties and other representative institutions are well developed. If these fortuitous circumstances are absent, participation can be harmful for democracy.'⁹⁷³

Moehler also expressed the view that participatory a constitution making process might be a difficult process to implement especially in a situation of protracted, deep political conflict where the resolution of the conflict demands far more than a constitutional settlement through participation.⁹⁷⁴ Landau also expresses great concern about the idea of participatory constitution making and states that many mechanisms of popular participation may easily be manipulated by political forces. Referenda and similar

⁹⁶⁹Partlett W 'Making Constitutions Matter: The Dangers of Constitutional Politics in Current Post-Authoritarian Constitution-Making' (2012) 38:1 *Brooklyn Journal of International Law* 193 200-203.

⁹⁷⁰Miller L.E (2010) 636.

⁹⁷¹Banks M 'Participatory Constitution Making in Post Conflict States' 2007 *ASIL Proceedings* 138.

⁹⁷²Banks AM 'Expanding Participation in Constitution Making: Challenges and Opportunities' (2008) 49 *WM and Mary L. REV* 1043 1050.

⁹⁷³Moehler D *Distrusting Democrats: Outcomes of Participatory Constitution Making* (2008) 22.

⁹⁷⁴Moehler D (2008) 22.

devices, for example may rarely be effective as external constraints on constitution makers because popular political leaders can easily gain support for their programs on a simple up or down vote.⁹⁷⁵

Despite the concerns expressed on the issue of participatory constitution making, it should be noted that it has become an emerging norm of customary international law.⁹⁷⁶

As such, a number of mechanisms have been put into place to act as guiding principles that need to be followed in the drafting of a new constitution in order to strengthen and give legitimacy to the drafting process. These guiding principles include issues, such as, the preparatory phase, awareness raising and consultative phase, content deliberation and drafting phase, and the adoption and implementation phase.⁹⁷⁷ These principles are important in the drafting of a constitution and since constitutional reform is an important vehicle on the road to democratic consolidation, the principles enable parties involved in the drafting process to be better prepared and to actively participate in the drafting process.⁹⁷⁸

5.2 Background to Constitution Making in Zimbabwe

5.2.1 Lancaster House Constitution

The Lancaster House Constitution was adopted at independence in 1980.⁹⁷⁹ It came as a product of negotiations between the British government, the then Rhodesian government led by Ian Smith, (then Prime Minister) and nationalist politicians from the liberation movements at the Lancaster House negotiations in 1979 in London.⁹⁸⁰ The

⁹⁷⁵ Landau D 'Constitution-Making Gone Wrong' (2013) 64:5 *Alabama Law Review* 923 925-927.

⁹⁷⁶ Franck TM 'The Emerging Right to Democratic Governance' (1992) 86:1 *AM. J. INT'L L* 46 47.

⁹⁷⁷ See the United Nations Guidance Note to the Secretary General 'United Nations Assistance to Constitution-Making Process 2009'

http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf (Accessed 20 March 2013).

⁹⁷⁸ See the United Nations Guidance Note to the Secretary General 'United Nations Assistance to Constitution-Making Process 2009'

http://www.unrol.org/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf (Accessed 20 March 2013).

⁹⁷⁹ De Bourbon A (2003) 221.

⁹⁸⁰ See <http://www.amnesty.ie/amnesty/live/irish/action/article.asp?id=3806&page=3332>. (Accessed 07-March 2013). The liberation movements involved during the negotiations included members of the Patriotic Front (PF), consisting of the Zimbabwe African Peoples Union (ZAPU) and Zimbabwe African National Union (ZANU).

Lancaster House Constitution was agreed as part of the ceasefire agreements and various pre-independence arrangements and as such lacked legitimacy in the eyes of many Zimbabweans as it lacked popular participation.⁹⁸¹ The dissatisfaction with the Lancaster House Constitution was clearly portrayed by Ndulo who states that:

'The Lancaster House Constitution failed to serve as a framework for local political and economic actors to negotiate the transformation from a colonial state with great economic disparities to a more equitable Zimbabwe, largely because it contained entrenched provisions, which ensured certain policies could not be changed until a specified time. As a result, the basic structure of Zimbabwean society, especially as it related to land ownership, remained the same.'⁹⁸²

Ndulo also notes that with the increase in public protest regarding government corruption and its failure to improve the lives of ordinary Zimbabweans, the government as a result became undemocratic and authoritarian, increasing centralised power in its attempt to stay in office.⁹⁸³ This was mainly done through the constant amendment of the Constitution which was amended nineteen times (19) after independence. Most of the amendments were made in a largely piecemeal manner and without any comprehensive national constitutional reform strategy.⁹⁸⁴ A number of the amendments had the cumulative effect of increasing the powers of a powerful, executive presidency.⁹⁸⁵ Ncube notes that the amendments that entrenched presidential powers

⁹⁸¹ Ndulo M 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order' in Miller L.E (eds) *Framing the State in Times of Transition: Case Studies in Constitution-Making* (2010) 181.

⁹⁸² Ndulo M (2010) 182.

⁹⁸³ Ndulo M (2010) 182.

⁹⁸⁴ For an article on the amendments in the Constitution of Zimbabwe see Zimbabwe Lawyers for Human Rights 'Amendments to the Constitution of Zimbabwe: A Constant Assault on Democracy and Constitutionalism'

<http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf> (Accessed 20 March 2013).

⁹⁸⁵ It should be noted that initially the Lancaster House Constitution introduced a parliamentary system of government with a bicameral Parliament and a non-executive presidency. Executive authority was vested in the Prime Minister and his or her Cabinet. The Constitution included provisions, such as the protection of property rights amongst other rights. Crucial to the amendments with regards to the Constitution of Zimbabwe is Constitution of Zimbabwe Amendment Act 23 of 1987- Commonly referred to as Constitutional Amendment No.7 which provided for a presidential system of government and stated that the President was to be directly elected and to have increased powers, while the Prime Minister took on a subordinate role. The Senate was abolished but later reintroduced in 2005. The same amendment made provision for presidential powers (temporary measures) that gave the President rule-making ability equal to that of the legislature. Several other amendments have taken place over the years, with most of them

made the country's judiciary and legislature unequal partners of the executive arm of government. This is so because the President over the years had the ability to significantly influence the legislative branch of the state through the power to make appointments to the senate; and to dissolve Parliament should it pass a vote of no confidence in the President.⁹⁸⁶ On the other hand, the judicial branch was subject to control by the executive as the President had control over the appointment and removal of judges, commissioners, chiefs of security services and other public figures.⁹⁸⁷

Ndulo also opines that as a result of the constant amendments to the Lancaster House Constitution, Zimbabwe became a highly centralised system of governance with excessive state control of all aspects of human endeavour, coupled with limited capacity to govern.⁹⁸⁸ In a bid to stay in power, the government, through constitutional amendments and other laws, managed to excessively regulate civil society, and weaken institutions of state and civil society. This resulted in an unprecedented economic decline.⁹⁸⁹ As a result of the inadequacies of the Lancaster House Constitution, mostly brought about as a result of its undemocratic origins and constant amendment, there was general consensus for the adoption of a home-grown constitution for the people of Zimbabwe that would be democratic in its creation and content. The desire to adopt a democratic constitution and to limit the powers of the President resulted in the formation of the National Constitutional Assembly (NCA) in 1997 which publicly led the calls for the adoption of a new constitution that would reflect the democratic views of the people of Zimbabwe.⁹⁹⁰ However, the efforts of the NCA were frustrated by the government, which later established the Constitutional Commission in 1999 to lead the process of constitutional reform in the country.⁹⁹¹

watering down the enjoyment of fundamental rights and freedoms for the people of Zimbabwe. See also Hatchard J (1991) 83.

⁹⁸⁶Ncube N 'Constitutionalism, Democracy and Political Practice in Zimbabwe' in Mandaza I and Sachikonye L (eds) *The One Party State and Democracy: The Zimbabwe Debate* (1991) 171.

⁹⁸⁷Ncube N (1991) 171.

⁹⁸⁸Ndulo M (2010) 182

⁹⁸⁹Ndulo M (2010) 182.

⁹⁹⁰Hatchard J (2001) 210.

⁹⁹¹Hatchard J (2001) 210.

5.2.2 Constitutional Commission Draft Constitution

The Constitutional Commission was set up on the 26th of April 1999, and was charged with the responsibility of initiating a process of constitutional review and to present a new constitution before 30 November 1999.⁹⁹² The tight schedule afforded to the Constitutional Commission to submit the draft constitution raised fears that the President was intent on pushing his own constitutional and political agenda.⁹⁹³ The Constitutional Commission was made up of 400 members, with most of the members largely from the ruling party and others from a cross-section of society. The Constitutional Commission was chaired by the then High Court Judge Godfrey Chidyausiku (now the Chief Justice). The composition of the Commission was called into question, as it was mainly dominated by members of the ruling party, and as a result a number of individuals associated with the NCA refused to participate in what they perceived to be a fundamentally flawed process.⁹⁹⁴

The mandate of the Constitutional Commission was to afford the people of Zimbabwe the opportunity to author and found their constitution enshrining freedom, democracy, transparency and good governance. Hatchard notes that in an effort to make the process participatory, the Constitutional Commission developed an outreach programme.⁹⁹⁵ Public meetings were held nationally, with commissioners sent to various provinces of the country in order to ascertain the views of the people with regards to the contents of the constitution. Extensive consultations were held with the people of Zimbabwe, with the participants expressing great unhappiness with the constitutional amendments which entrenched the powers of the executive presidency and thus linked the Constitution to the country's growing political and economic crisis.⁹⁹⁶

Despite the short time-frame that had been given to the Constitutional Commission to submit the draft to the President, the Commission was able to submit the Draft

⁹⁹²The Constitutional Commission was appointed under the Zimbabwe Statutory Instrument 138A of 1999.

⁹⁹³Hatchard J (2001) 210.

⁹⁹⁴Hatchard J (2001) 211.

⁹⁹⁵Hatchard J (2001) 211.

⁹⁹⁶Doorman SR 'NGOs and the Constitutional Debate in Zimbabwe: From Inclusion to Exclusion' (2003) 29:4 *Journal of Southern African Studies* 845 850.

Constitution within the specified time.⁹⁹⁷ Hatchard notes that the draft that was submitted to the President was a progressive and impressive document that formed the basis for a new constitutional order in Zimbabwe. This was so because the draft contained a comprehensive Bill of Rights as compared to the Lancaster House Constitution, and limited a President to two terms in office, and placed strict limits on the number of government ministers.⁹⁹⁸ However, despite such recommendations the President was dissatisfied with the Constitutional Commission's draft and used his powers over the Commission to publish in the Government Gazette a "Corrections and Clarifications" document that made significant changes to the Constitutional Commission's draft. Key amongst the corrections to the draft was the provision for the compulsory acquisition of agricultural land for re-settlement without compensation. Hatchard notes that the Constitutional Commission was never consulted on the changes to the Draft Constitution and as a result the subsequent referendum was held on the basis of the Constitutional Commission's draft as amended by the "Corrections and Clarifications."⁹⁹⁹ As a result of the many flaws associated with the draft, the Constitutional Commission Draft Constitution was rejected in a referendum held in February 2000.¹⁰⁰⁰

In criticising the actions of the President, Hatchard notes that it is imperative that constitution making should never be a matter for the President or government but should rather involve the people themselves who must be involved in the formulation and adoption of a constitution.¹⁰⁰¹ Hence Zimbabwe in drafting the new constitution learnt from the example of Uganda and its Guidelines on Constitutional Issues which stated that:

⁹⁹⁷ Hatchard J (2001) 213.

⁹⁹⁸ Hatchard J (2001) 213.

⁹⁹⁹ Hatchard J (2001) 213.

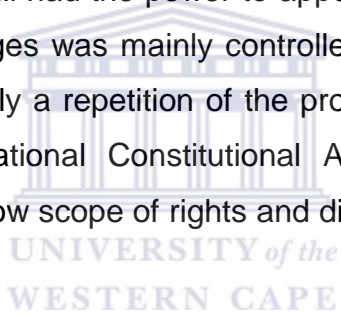
¹⁰⁰⁰ See Electoral Institute for Sustainable Democracy in Africa 'Zimbabwe: Constitutional Referendum in Zimbabwe' <http://www.eisa.org.za/WEP/zim2000pottie.htm> (Accessed 21 March 2013).

¹⁰⁰¹ Hatchard J (2001) 215.

'The people themselves must be involved in the formulation and adoption of their Constitution because.... A Constitution imposed on the people by force cannot be the basis of a stable and peaceful Government of the people'¹⁰⁰²

All stakeholders in the constitution making process were given the opportunity to bring forward their views and ideas so as to avoid the imposition of a document that would not reflect the views of the people. Hence this explains the main reason why the Constitutional Commission's draft was rejected in 2000, as it was a document that the President wanted to impose on the people of Zimbabwe and did not reflect their views.

The National Constitutional Assembly noted that the Constitutional Commission Draft Constitution failed to ensure the independence of the judiciary.¹⁰⁰³ Similar to the Kariba Draft (discussed below) there were no improvements on the Lancaster House Constitution as the President still had the power to appoint judges and the JSC and the process for the removal of judges was mainly controlled by the President. As a result the draft Constitution was mainly a repetition of the provisions of the Lancaster House Constitution. Further, the National Constitutional Assembly noted that the Draft Constitution provided for a narrow scope of rights and did not protect some fundamental rights and freedoms.¹⁰⁰⁴



5.2.3 Kariba Draft Constitution

Following the rejection of the Constitutional Commission draft in 2000, the constitutional reform process was revived by government in September 2007 when members of ZANU-PF and the two MDC formations unilaterally negotiated and produced a document known as the 'Kariba Draft Constitution'. Once again the people of Zimbabwe were denied the opportunity to have their views heard as the draft was made solely by

¹⁰⁰²Uganda Constitutional Commission *Guidelines on Constitutional Issues* (1991) 1.

¹⁰⁰³National Constitutional Assembly *The Shortcomings of the Kariba Draft Constitution* (2009) 6.
http://www.kubatana.net/docs/demgg/nca_shortcomings_kariba_draft_090415.pdf (Accessed 21 April 2013).

¹⁰⁰⁴National Constitutional Assembly 'Proposed Draft: Constitution of Zimbabwe'
http://www.mgi.org.za/resources/local-government-database/by-country/zimbabwe/constitution/Zimbabwe_draft_constitution.pdf (Accessed 23 October 2013). The National Constitutional Assembly notes that rights such as the right to education, the right of workers to strike, the right to health and full gender equality were some of the rights not protected in the Declaration of Rights.

members of the political parties stated above.¹⁰⁰⁵ As the National Constitutional Assembly notes, the Kariba Draft was mainly a mirror image of the Constitutional Commission Draft Constitution. The Kariba Draft was essentially a replication of the shortcomings of the Constitutional Commission draft which sought to mainly entrench executive authority in the country.¹⁰⁰⁶ It is important to note that the Kariba Draft was never adopted but was annexed to the Global Political Agreement (GPA) of September 2008, raising fears that it would form the basis for future constitutional reform in the country.

5.2.4 The Constitution Select Parliamentary Committee (COPAC) on the New Constitution of Zimbabwe

5.2.4.1 Background to the COPAC Process

In an effort to improve the political, economic, and human rights situation in Zimbabwe, in 2009 the country engaged in a constitution making process led by a Constitution Select Parliamentary Committee (COPAC) on the New Constitution.¹⁰⁰⁷ The need for the adoption of a new constitution was clearly reflected in the GPA¹⁰⁰⁸ where the political parties affirmed the urgent need to improve the political, economic and human rights situation in the country:

'We, the Parties to this Agreement; Concerned about the recent challenges that we have faced as a country and the multiple threats to the well-being of our people and, therefore, determined to resolve these permanently...; Committing ourselves to putting our people and our country first by arresting the fall in living standards and reversing the decline of our economy; Respecting the rights of all Zimbabweans regardless of political affiliation...'¹⁰⁰⁹

¹⁰⁰⁵ National Constitutional Assembly (2009) 1.

¹⁰⁰⁶ National Constitutional Assembly (2009) 2.

¹⁰⁰⁷ COPAC was inaugurated in April 2009. It consisted of 25 parliamentarians selected to reflect parliament's gender balance with 11 members of MDC-T, 10 ZANU-PF members, 3 MDC-N members and 1 representative from the traditional chiefs.

¹⁰⁰⁸ The Global Political Agreement (GPA) was signed in September 2008 by the three political parties represented in parliament- the Zimbabwe African National Union-Patriotic Front (ZANU-PF) led by Robert Mugabe, and the two formations of the Movement for Democratic Change (MDC), namely the MDC-T led by Morgan Tsvangirai and then MDC- M led by Arthur Mutambara, now known as the MDC-N and led by Welshman Ncube.

¹⁰⁰⁹ Preamble of the Zimbabwe Global Political Agreement September 2008.

The adoption of a new democratic constitution is key to solving many of the problems that have blighted the country since the commencement of the Land Reform Program in 2000. It should also be noted that the adoption of a new constitution was one of the key requirements of the GPA of 2008. The GPA spelt out the procedure for the drafting of a new constitution to replace the Lancaster House Constitution, which was viewed to be deficient in various aspects, most notable being the governmental imbalance that resulted from the frequent amendments to the Constitution.¹⁰¹⁰

The GPA in article 6 provided that:

‘Acknowledging that it is the fundamental right and duty of the Zimbabwean people to make a constitution by themselves and for themselves; Aware that the process of making this constitution must be owned and driven by the people and must be inclusive and democratic; Recognising that the current Constitution of Zimbabwe made at the Lancaster House Conference, London (1979) was primarily to transfer power from the colonial authority to the people of Zimbabwe; Acknowledging the draft Constitution that the Parties signed and agreed to in Kariba on the 30th of September 2007; Determined to create conditions for our people to write a constitution for themselves; and Mindful of the need to ensure that the new Constitution deepens our democratic values and principles and the protection of the equality of all citizens, particularly the enhancement of full citizenship and equality of women.’¹⁰¹¹

Article 6.1 of the GPA also provided that:

‘The Parties hereby agree: (a) that they shall set up a Select Committee of Parliament composed of representatives of the Parties whose terms of reference shall be as follows: (i) to set up such subcommittees chaired by a member of Parliament and composed of members of Parliament and representatives of Civil Society as may be necessary to assist the Select Committee in performing its mandate herein; (ii) to hold such public hearings and such consultations as it may deem necessary in the process of public consultation over the making of a new constitution for Zimbabwe; (iii) to convene an all Stakeholders Conference to consult stakeholders on their representation in sub-

¹⁰¹⁰ Zimbabwe Lawyers for Human Rights ‘Amendments to the Constitution of Zimbabwe: A Constant Assault on Democracy and Constitutionalism’ <http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf> (Accessed 20 March 2013).

¹⁰¹¹ Article 6 of the Zimbabwe Global Political Agreement (GPA).

committees referred to above and such related matters as may assist the committee in its work; (iv) to table its draft Constitution to a 2nd All Stakeholders Conference; and (v) to report to Parliament on its recommendations over the content of a New Constitution for Zimbabwe; (b) That the draft Constitution recommended by the Select Committee shall be submitted to a referendum...¹⁰¹²

In accordance with the guidelines laid down in the GPA, COPAC convened the First All Stakeholders Conference in July 2009. The conference brought together representatives of civil society organisations, political parties and other groups for the purpose of identifying issues that should be covered in the new constitution.¹⁰¹³ As a result seventeen (17) thematic areas were identified during the conference and these had to be used in collecting the views of Zimbabweans on what should be reflected in the new constitution.¹⁰¹⁴ The government should be commended for advocating for broad participation in the constitution making process so as to ensure that the new Constitution would reflect the views and needs of the people of Zimbabwe. Following the conference, an Outreach Programme started in June 2010 and concluded in October 2010. According to the COPAC website a total of 4 821 meetings were held in all 1 950 wards in the country, and with people in the diaspora contributing to the process.¹⁰¹⁵

Thematic Committees were established during the Outreach process and these committees were responsible for the collection of data nationwide. The Thematic committees were also responsible for the identification of common issues and classifying views submitted during the Outreach Programme. The data collected was used in the drafting of the new Constitution by the three (3) Principal Drafters¹⁰¹⁶, who were assisted by seventeen (17) technical experts under the instruction of the Select

¹⁰¹²Article 6.1 of the Zimbabwe Global Political Agreement (GPA).

¹⁰¹³See COPAC Select Committee 'First Stakeholders' Conference'
http://www.copac.org.zw/index.php?option=com_content&view=article&id=81:all-stakeholders-conference&catid=40:constitution-timeline-category&Itemid=152 (Accessed 20 March 2013).

¹⁰¹⁴Included amongst some of the thematic areas are issues relating to the Founding Principles of the new Constitution, Systems of Government, Citizenship and Bill of Rights and Traditional Institutions and Customs.

¹⁰¹⁵See COPAC Select Committee 'Outreach: Foreword to National Statistical Report'
http://www.copac.org.zw/index.php?option=com_content&view=section&layout=blog&id=8&Itemid=282 (Accessed 21 March 2013).

¹⁰¹⁶The three Principal Drafters of the new Constitution were Justice Moses Chinhengo, Priscilla Madzonga and Brian Crozier.

Committee.¹⁰¹⁷ With the finalisation of the drafting process, the Second All Stakeholders Conference was held in October 2012, with the conference seeking to bring together representatives of different stakeholders to review and make recommendations on the Draft Constitution. The Draft Constitution was later presented and approved by Parliament in February 2013, passed by the people of Zimbabwe in a referendum held on the 16th of March 2013¹⁰¹⁸ and assented to by the President in May 2013.¹⁰¹⁹

Although the referendum on the new Constitution was held, various challenges throughout the whole constitution making process were experienced, thus raising doubt as to whether the whole process would come to fruition. Constant bickering between the political parties involved in the constitution making process was the order of the day. Disagreements with regards to the status of the Kariba Draft, and funding and allowances for COPAC members led to the whole process being delayed for over a year.¹⁰²⁰ The public consultation process was characterised by chaos with frequent violence between supporters of the different political parties hindering effective participation in the constitution making process.¹⁰²¹ Constant bickering between the political parties was also seen in differences as to the exact contents of the new constitution and the frequent disruption of constitutional reform meetings held by the opposition parties.¹⁰²²

In addition the drafting process was also characterised by chaos, with ZANU-PF accusing the Principal Drafters of siding with the MDC by importing issues that had not been expressed during the Outreach Programme.¹⁰²³ ZANU-PF wanted the COPAC

¹⁰¹⁷ See COPAC Select Committee 'First Stakeholders' Conference'

http://www.copac.org.zw/index.php?option=com_content&view=article&id=81:all-stakeholders-conference&catid=40:constitution-timeline-category&Itemid=152 (Accessed 20 March 2013).

¹⁰¹⁸ *Global Legal Monitor* 'Draft New Constitution Approved in Referendum'

http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403527_text (Accessed 20 March 2013).

¹⁰¹⁹ *Reuters* 'Mugabe Signs Zimbabwe Constitution Paving Way for Vote' 22 May 2013.

<http://www.reuters.com/article/2013/05/22/us-zimbabwe-constitution-idUSBRE94L0RT20130522> (Accessed 23 September 2013).

¹⁰²⁰ International Bar Association (2011) 20.

¹⁰²¹ *Newsday Zimbabwe* 'Violence Rocks Rescheduled COPAC Meetings' 1 November 2010.

<https://www.newsday.co.zw/2010/11/01/2010-11-01-violence-rocks-rescheduled-copac-meetings/> (Accessed 15 June 2012).

¹⁰²² *Newsday Zimbabwe* 'Violence Rocks Rescheduled COPAC Meetings' 1 November 2010.

¹⁰²³ *The Herald* 'Storm Brews over COPAC Drafters Capability' 19 December 2011.

Draft Constitution to be amended to include more executive powers for the President, rejection of dual citizenship and devolution of power, and the retention of control of the voters roll in the office of the Registrar-General. As a result ZANU-PF unilaterally came up with a draft seeking to amend the Draft Constitution and demanded the inclusion of a number of provisions, such as, the restoration of presidential powers into the COPAC Draft Constitution.¹⁰²⁴ The dispute between the parties was later referred to the Southern African Development Community (SADC) and then resolved by the Cabinet Committee where a revised draft of the Constitution was adopted by COPAC.¹⁰²⁵ It is submitted that ZANU-PF's objection to some of the provisions in the Draft Constitution compromised the role of COPAC in the drafting process and this led to some of their demands being resolved without the input of Zimbabweans. This in a way ensured that the views of Zimbabweans were not fully brought out in the Constitution of Zimbabwe.

It should be noted that the adoption of the new constitution marked a new beginning for the people of Zimbabwe, especially taking into consideration the political, economic and social problems that the nation had experienced for the past decade. Despite the fact that an overwhelming number of Zimbabweans voted for the adoption of the Constitution of Zimbabwe, key questions still arise as to whether the adoption of the Constitution will result in a change of fortune for a nation that has been bedevilled with serious problems for the past decade. Perhaps more important to this research, is the key question as to whether the judicial reforms that have taken place under the Constitution can lead to an improvement with regards to protection and promotion of the independence of the judiciary, which will subsequently bode well for the judicial protection of human rights in the country. This is the key question that this research seeks to address, and to look at the significance of these reforms and how they will better serve the nation in improving the judicial protection of human rights.

http://www.herald.co.zw/index.php?option=com_content&view=article&id=29430:storm-brews-over-copac-drafters-capability&catid=37:top-stories&Itemid=130#.UYt6zJEbuVM (Accessed 8 April 2013).

¹⁰²⁴For more of the changes done by ZANU-PF on the COPAC Draft Constitution see Crisis Zimbabwe Coalition 'ZANU-PF's Amendments to the COPAC draft Constitution'

http://www.crisiszimbabwe.org/index.php?option=com_content&view=article&id=1348%3Azanu-pfs-amendments-to-the-copac-draft-constitution&catid=47%3Anews&Itemid=187 (Accessed 12 March 2013).

¹⁰²⁵*The Herald* 'COPAC adopts Revised Draft' 01 February 2013.

http://www.herald.co.zw/index.php?option=com_content&view=article&id=65561:copac-adopts-revised-draft&catid=37:top-stories&Itemid=130#.UYt8Q5EbuVM (Accessed 13 March 2013).

5.3 Constitution of Zimbabwe and Reforms

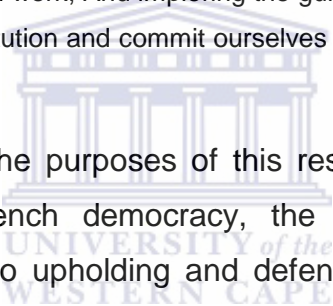
5.3.1 Introduction

The importance of an independent judiciary in the protection of human rights has been consistently emphasised in this research. It is therefore without doubt that this research has advocated for an independent judiciary in Zimbabwe, so as to improve the protection and promotion of human rights. The lack of an independent judiciary in the country has significantly contributed to the continued violation of human rights with impunity. It was therefore important that the issues relating to the independence of the judiciary and the protection of human rights were adequately addressed in the Constitution of Zimbabwe in order to get rid of the past and start building a new Zimbabwe based on fundamental values, such as, upholding of the rule of law, separation of powers, judicial independence, and the protection and upholding of fundamental rights and freedoms. Although the main focus of this section will be on judicial reforms, an analysis of fundamental values, such as, the founding values and core values of the doctrine of constitutionalism, such as, the rule of law, protection of rights under the Bill of Rights, and the separation of powers, shall be made first as they are crucial to the establishment of an independent judiciary and the protection of human rights by an independent and impartial judiciary. The section will then proceed to analyse the judicial reforms which are crucial to the improvement of the judicial protection of human rights in the country.

5.3.2 Preamble of the Constitution of Zimbabwe

The Constitution of Zimbabwe, unlike the Lancaster House Constitution, contains a Preamble which acknowledges the diversity and common values of the people of Zimbabwe. The Preamble begins by acknowledging the ownership of the Constitution by the people of Zimbabwe, recognises the nation's history, and seeks to emphasise national cohesion. It seeks to distinguish from the past so as to build a democratic nation founded on the values of transparency, equality, freedom, fairness and the dignity of hard work. The Preamble states that:

'We the people of Zimbabwe, United in our diversity by our common desire for freedom, justice and equality, and our heroic resistance to colonialism, racism and all forms of domination and oppression, Exalting and extolling the brave men and women who sacrificed their lives during the Chimurenga/Umvukela and national struggles, Honouring our forebears and compatriots who toiled for the progress of our country, Recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law, Reaffirming our commitment to *upholding and defending fundamental human rights and freedoms*, Acknowledging the richness of our natural resources, Celebrating the vibrancy of our traditions and cultures, Determined to overcome all challenges and obstacles that impede our progress, Cherishing freedom, equality, peace, justice, tolerance, prosperity and patriotism in search of new frontiers under a common destiny, Acknowledging the supremacy of Almighty God, in whose hands our future lies, Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work, And imploring the guidance and support of Almighty God, hereby make this Constitution and commit ourselves to it as the fundamental law of our beloved land.'



Perhaps more importantly for the purposes of this research, the Preamble expressly recognises the need to entrench democracy, the rule of law, good and open governance, and commitment to upholding and defending fundamental human rights and freedoms. This marks a significant departure from the Lancaster House Constitution, in that there was a realisation on the part of all the stakeholders involved in the drafting of the Constitution of the need to move away from the past which has mainly been characterised by lawlessness and human rights abuses, to a new beginning that will enshrine fundamental values, such as, the rule of law and the upholding and protection of fundamental values and freedoms. It should be noted that the Preamble of the Constitution was drafted along similar lines to the Preamble of the Constitution of South Africa. The Preamble of the South African Constitution attempts to heal the divisions of the past, seeks to address the injustices and divisions of apartheid, and lay the foundations of a democratic and open society.¹⁰²⁷ Most importantly the

¹⁰²⁶Preamble of the Constitution of Zimbabwe 2013. Emphasis added.

¹⁰²⁷See also the Preamble of Constitution of Uganda which recalls the history of the country that has been characterised by political and constitutional instability and commits itself to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, freedom, social justice and progress'

Preamble of the South African Constitution places democracy and a culture based on human rights as foundational to the South African political order.

5.3.3 Founding Principles

It is important to note that the founding principles of the Constitution were one of the seventeen thematic areas which were used to collect views from Zimbabweans on what should be included in the Constitution.¹⁰²⁸ Many constitutions around the world contain underlying principles which are fundamental to the entire constitutional structure. It is important to note that since a constitution usually reflects the sins and misfortunes of the past, the founding principles should therefore be framed in a manner that seeks to overcome the past. Founding principles in a constitution are of great importance as they clearly express the core values on which a nation is founded. Further, founding principles are of importance as they act as a guide in the interpretation of the constitution¹⁰²⁹ and reflect the aspirations of the nation and hope for the future. Thus, section 3 of the Constitution unlike the Lancaster House Constitution provides information and explains the founding principles that the Constitution is based on and emphasises the supremacy of the constitution and human rights protection as founding values of the Constitution.¹⁰³⁰

5.4 Doctrine of Constitutionalism

Over the years constitutional scholars have struggled to produce a clear-cut definition of “constitutionalism” as many have confused it with the notion of a constitution. However, modern day scholars have stated that there is more to the definition than the mere attempt to limit government arbitrariness as the concept today encompasses the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such government should be able to operate

¹⁰²⁸ http://www.copac.org.zw/index.php?option=com_content&view=article&id=81:all-stakeholders-conference&catid=40:constitution-timeline-category&Itemid=152%27 (Accessed 15 April 2013).

¹⁰²⁹ Hoexter C *Administrative Law in South Africa* (2007) 18.

¹⁰³⁰ See section 3 of the Constitution of Zimbabwe which states that: ‘(1) Zimbabwe is founded on respect for the following values and principles (a) supremacy of the Constitution; (b) the rule of law; (c) fundamental human rights and freedoms; (d) the nation’s diverse cultural, religious and traditional values; (e) recognition of the inherent dignity and worth of each human being; (f) recognition of the equality of all human beings; (g) gender equality; (h) good governance; and recognition and respect for the liberation struggle.’

efficiently within its constitutional limits.¹⁰³¹ As such the main emphasis behind the doctrine of constitutionalism is to restrict what government can do and how they should go about what they are authorised to do.¹⁰³²

Constitutionalism thus elevates the constitution to the level of being the supreme law of the country and hence any conduct that would be inconsistent with it would be deemed to be invalid. Maranga notes that for the concept of constitutionalism to be effective, it requires compliance with legislative and executive statutes that specify performance, powers and limitations.¹⁰³³ As a result of the limitation of powers, good governance emerges, thus putting constitutional limits to the power of the government.¹⁰³⁴ As a result, constitutionalism contains certain core contents of values that are required to ensure the control of state power. These core contents of values include, amongst other issues, the supremacy of the constitution, observance of the rule of law, respect for human rights and freedoms, observance of separation of powers, independence of the judiciary, and judicial review. These core contents of the doctrine of constitutionalism shall be discussed below with specific reference to the Constitution of Zimbabwe, as they play a crucial role in ensuring that judicial protection of human rights is improved in Zimbabwe. However, it should be noted that there will be a more specific focus on the judicial reforms that seek to improve the judicial protection of human rights in the country.

5.4.1 Supremacy of the Constitution

The Constitution of Zimbabwe in section 3 emphasises the supremacy of the Constitution. Section 3 states that:

‘(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. (2) the obligations imposed by this Constitution are binding on every person, natural or juristic, including the

¹⁰³¹Nwabueze B.O *Constitutionalism in Emergent States* (1973) 1. See also Gloppen S (1997) 43.

¹⁰³²Linington G (2012) 63.

¹⁰³³Maranga K ‘A Contextual and Comparative Analysis of Constitutionalism and Political Culture on Elections: Kenya and Zimbabwe’ (2011) 1:1 *Journal of Global Affairs and Public Policy* 1-14 3.

¹⁰³⁴Maranga K (2011) 3-4.

State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.¹⁰³⁵

Similarly section 3 of the Lancaster House Constitution provided that:

'This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.'¹⁰³⁶

The supremacy clause in the Constitution of Zimbabwe has been extended from that in the Lancaster House Constitution. The current supremacy clause has been drafted along similar lines to the supremacy clause in the South African Constitution and the Ugandan Constitution.¹⁰³⁷ The Constitution of Zimbabwe also imposes an obligation on all persons and state institutions to respect and fulfil the constitutional obligations. The clause is therefore significant in that it places the Constitution as the supreme law and as a result binds all branches of the state; and any law that is not consistent with the Constitution has no force of law.¹⁰³⁸

Currie and De Waal note that the doctrine of constitutional supremacy will mean little if the provisions of the constitution are not justiciable.¹⁰³⁹ Thus, for a supreme constitution to be effective the judiciary must have the power to enforce it.¹⁰⁴⁰ Section 175(6)(a) of the Constitution of Zimbabwe provides that any court that has jurisdiction to hear any constitutional matter, 'must declare any law or conduct that is inconsistent with the Constitution as invalid to the extent of the inconsistency.' However, it should be noted that such an order will have no force unless confirmed by the Constitutional Court.¹⁰⁴¹ Another important factor in ensuring that the supremacy of the constitution is maintained is through the obeying of court orders.¹⁰⁴² Thus, section 164(3) of the Constitution of

¹⁰³⁵Section 3 of the Constitution of Zimbabwe.

¹⁰³⁶Section 3 of the Lancaster House Constitution.

¹⁰³⁷Section 2 of the South African Constitution states that 'This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' See also section 237 of the Constitution of South Africa which states that 'All Constitutional obligations must be performed diligently and without delay.' See also Article 2 of the Constitution of Uganda which confirms the supremacy of the Constitution.

¹⁰³⁸See for example *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para.62.

¹⁰³⁹Currie I and De Waal J (2005) 9.

¹⁰⁴⁰Currie I and De Waal J (2005) 9.

¹⁰⁴¹Section 175 (1) of the Constitution of Zimbabwe.

¹⁰⁴²Currie I and De Waal J (2005) 9.

Zimbabwe states that ‘an order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.’¹⁰⁴³ The section therefore seeks to bind other arms of government and to ensure that the obligations imposed by the Constitution are fulfilled.

The unique status of the Constitution as the supreme law in the country is further enforced by section 328 which guarantees the Constitution exceptional protection against random amendments by Parliament. Taking into account the fact that Parliament through directives from the executive had over the years constantly amended the Lancaster House Constitution, most of which were in direct violation of fundamental rights and freedoms, the inclusion of section 328 therefore seeks to protect the supremacy of the Constitution. Section 328 provides special procedures that must be followed when passing legislation to amend any provisions of the Constitution. It states that:

‘(2) An Act of Parliament that amends this Constitution must do so in express terms. (3) A Constitutional Bill may not be presented in the Senate or national Assembly in terms of section 131 unless the Speaker has given at least ninety days’ notice in the Gazette of the precise terms of the Bill. (4) Immediately after the Speaker has given notice of a Constitutional Bill in terms of subsection (3), Parliament must invite members of the public to express their views on the proposed Bill in public meetings and through written submissions, and must convene meetings and provide facilities to enable the public to do so. (5) A Constitutional Bill must be passed, at its last reading in the National Assembly and the Senate, by the affirmative votes of two thirds of the membership of each House. (6) Where a Constitutional Bill seeks to amend any provision of Chapter 4 (Declaration of Rights) or Chapter 16 (Agricultural Land)- (a) within three months after it has been passed by the National Assembly and the Senate in accordance with subsection (5), it must be submitted to a national referendum; and (b) if it is approved by a majority of the voters at the referendum, the Speaker of the National Assembly must cause it to be submitted without delay to the President, who must assent and sign it forthwith...’¹⁰⁴⁴

¹⁰⁴³ See also section 167(3) of the Constitution of Zimbabwe which also gives the courts the powers to test the constitutionality of any Act of Parliament. Section 167 (3) states that ‘The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional , and must confirm any order of constitutional invalidity made by another court before that order has any force.’

¹⁰⁴⁴ Section 328 of the Constitution of Zimbabwe

Although this section was drafted along similar lines to section 52 of the Lancaster Constitution¹⁰⁴⁵, its importance is to ensure that the supremacy of the Constitution is respected and also to ensure that proper procedures are followed in making any amendments to the Constitution especially taking into consideration that Parliament has made previous amendments to the Lancaster House Constitution in response to various unfavourable judicial decisions.¹⁰⁴⁶

The Constitution, unlike the Lancaster House Constitution, also includes special unique measures for amending the Bill of Rights and issues related to agricultural land. This perhaps could be attributed to the realisation of the importance of a Bill of Rights in any democratic society and also the importance of protecting such rights since the country has over the years had a bad track record with regards to the protection and promotion of human rights. The importance of agricultural land, bearing in mind the past history of the country with regards to land issues, is also noted and hence the special measures put into place to entrench the provisions relating to agricultural land in the country. The entrenchment of the Bill of Rights is a positive measure that has been introduced by the Constitution and as such ensures that the Bill of Rights is respected and that any amendments to it should therefore be approved by the people of Zimbabwe who over the years have borne the brunt of the abuse of their fundamental rights and freedoms.¹⁰⁴⁷

The supremacy of the Constitution is worth emphasising as a fundamental principle of the Constitution as it seeks to establish a constitutional state in which there is respect for the Constitution by all the branches of the State. As has been discussed earlier, the government of Zimbabwe, especially the executive and the legislature, have over the years shown little respect for the Constitution through its constant amendments thereof.

¹⁰⁴⁵Section 52 of the Lancaster House Constitution stated that '(1) Parliament may amend, add or repeal any of the provisions of this Constitution: provided that, except as provided in subsection (6), no law shall be deemed to amend, add to or repeal any provision of this Constitution..'

¹⁰⁴⁶See for example the case of *S v Juvenile* 1989 (2) ZLR 61 (S).

¹⁰⁴⁷Other jurisdictions also contain constitutional provisions that seek to entrench their constitution. For example section 74 of the Constitution of South Africa states that the Constitution is entrenched and prescribes multiple entrenchment methods that must be followed when passing legislation to amend its provisions. Different majority votes in the National Assembly and in the National Council of Provinces apply in the case of different provisions of the Constitution. These methods are therefore meant at protecting the contents of the Constitution and the Bill of Rights.

As noted earlier most of these amendments resulted in the infringement of fundamental human rights and freedoms and also sought to extend and protect the interests of the ruling party. It is thus that as a result during the COPAC outreach process, a majority of Zimbabweans called for the inclusion of the supremacy clause so as to ensure that the obligations imposed by the Constitution are fulfilled.¹⁰⁴⁸

It can also be argued that the drafters of the Constitution were guided by past events, where the executive and legislative arms of government constantly flouted constitutional provisions and hence placed themselves above the Constitution by not fulfilling constitutional obligations. The inclusion of this clause is imperative and will auger well for the protection of human rights in the country. It should be seen as a positive development in the Constitution as it seeks to ensure that the Constitution is respected by the government.

5.4.2 Rule of Law

The Constitution also places the rule of law as one of the founding principles in the Constitution. Currie and De Waal argue, with respect to the Constitution of South Africa, that the inclusion of the rule of law in the founding provisions bolsters the idea of constitutionalism.¹⁰⁴⁹ As discussed earlier, the rule of law is essential for safeguarding civil liberties and for the maintenance of social order. The basic premise behind the rule of law is to ensure that the relationship that exists between the state and individuals is governed by a set of rules rather than an individual or group of individuals, and that such rules should be enforced by impartial courts in accordance with fair procedures.¹⁰⁵⁰ It should also be noted that the rule of law is important in that it calls for both individuals and government to recognise the law's supremacy.¹⁰⁵¹ This therefore means that various organs of state must obey the law¹⁰⁵² and that there must always be

¹⁰⁴⁸COPAC 'Statistical Analysis with Narratives- Outreach Reports Version 1-Founding Principles' http://www.copac.org.zw/index.php?option=com_phocadownload&view=category&id=8:outreach-reports-version-1&Itemid=280 (Accessed 09 April 2013).

¹⁰⁴⁹Currie I and De Waal J (2005) 10.

¹⁰⁵⁰Dicey AV *An Introduction to the Study of the Law of the Constitution* 10ed (1959) xcvi-cl. See also Elster J (1995) 368-95.

¹⁰⁵¹Elster J (1995) 368-95,

¹⁰⁵²See *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement, Zimbabwe* 2001 (2) SA 925 (ZS) where the importance of obeying the rule of law is emphasised. In response to an

a law authorising all state actions.¹⁰⁵³ Currie and De Waal also note that the rule of law has both procedural and substantive components so that both the executive and parliament cannot in the course of their duties act capriciously or arbitrarily¹⁰⁵⁴ and that the government must respect the individual's basic rights.¹⁰⁵⁵

Zimbabwe's history in terms of the rule of law has been characterised by major setbacks ranging from the erosion of the Bill of Rights, to disregard of judicial decisions by the executive arm of the state, a violent and haphazard land reform program and the enactment of repressive laws that have resulted in the infringement of fundamental human rights and freedoms. The inclusion of the rule of law as a founding principle in the Constitution should therefore serve as an important reminder to government of its importance and how the rule of law is crucial in assuring success and stability in the country. It should also serve as a reminder of the past history of the country as to how

argument that the issues of land redistribution and the rule of law, 'must be looked at from a political point of view', the Court stated that: 'Of course, it is fundamentally true that the land issue is a political question. It is equally true that the political method of resolving that question is by enacting laws. The Government has done so. It has enacted, and amended, the Land Acquisition Act. It has then failed to obey its own law. That is the point at which, with respect, the Attorney-General and the Commissioner of Police have gone astray. The Courts are doing no more than to insist that the State complies with the law. The procedures under the Land Acquisition Act have been flouted. The Act was not made by the Courts. It was made by the State.' See also *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para. 88 where the Court questioned but did not decide whether the common-law presumption of interpretation that the state is not bound by its own enactments, except by express words or by necessary implication and the correct approach to such an argument in the light of the provisions of the Constitution.

¹⁰⁵³Currie I and De Waal J (2005) 11.

¹⁰⁵⁴Currie I and De Waal J (2005) 13 give an example where a non-judicial officer is given the power to order someone to be detained. Lack of independence may therefore result in arbitrary decision-making. An example with regards to Zimbabwe is that of Roy Bennet (former MDC-T Member of Parliament) who allegedly in May 2004 pushed the Minister of Justice Patrick Chinamasa (ZANU-PF Member of Parliament), to the floor during a heated exchange in parliament. Under the Zimbabwe's Privileges, Immunities and Powers of Parliament Chapter 2:08 which empowers parliament to sit as a court and to award and execute punishments for specific offences which also include assaulting a member of parliament, a five person parliamentary committee (consisting of 3 ZANU PF and 2 MDC members) was tasked with reviewing the conduct of Roy Bennet. The committee recommended a sentence of 15 months' imprisonment with hard labour, with three months suspended for good behaviour and the recommendations were adopted by the committee and parliament although voting was split over party lines. From the above it can be deduced that there was lack of independence and impartiality on the part of the committee tasked with investigating Roy Bennet's conduct as the committee was weighted in favour of ZANU-PF and was also passed by a parliament which at that time was dominated by ZANU-PF, with the injured party Patrick Chinamasa voting in favour of the recommendations on sentence contrary to the principles of disinterested administration of justice. Such a decision by the Parliament of Zimbabwe can therefore be viewed to have been arbitrary as the procedure that was used to convict Roy Bennet did not conform to the standards of a fair trial.

¹⁰⁵⁵Currie I and De Waal J (2005) 12-13.

the decline of the rule of law has significantly contributed to the political and economic problems that have plagued the country. It is therefore crucial that government should adhere to the rule of law in order to ensure that the law is applied indiscriminately irrespective of race, sex, religion or political persuasion. It is submitted that the adherence to the rule of law is therefore crucial to the improvement and advancement of the human rights situation in the country and also for the respect of the independence of the judiciary.

5.4.3 Good Governance

The Constitution also identifies good governance as one of the founding principles. Section 3(2) of the Constitution states that:

'The principles of good governance, which bind the State and all institutions and agencies of government at every level, include- (a) multi-party democratic political system; (b) an electoral system... (c) the orderly transfer of power following elections; (d) respect for the rights of all political parties; (e) observance of the principle of separation of powers; (f) respect for the people of Zimbabwe, from whom the authority to govern is derived; (g) transparency, justice, accountability and responsiveness; (h) the fostering of national unity, peace and stability, with due regard to diversity of languages, customary practices and traditions...'

Although there is no precise definition of "good governance", the term has over the years been deemed to include various aspects, which include issues, such as, the respect for human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, and an efficient and effective public sector.¹⁰⁵⁶ Good governance requires that public institutions should conduct public affairs and manage public resources and also guarantee the realisation of human rights in a manner that is free from abuse and corruption and with due regard for the rule of law. The former Commission of the United Nations in 2000 identified the key attributes of good governance as transparency, responsibility, accountability, participation, and responsiveness to the needs of the

¹⁰⁵⁶Gisselquist RM *Good Governance as a Concept and Why This Matters for Development Policy* (2012) 2-3. Working Paper NO.2012/30.
http://www.wider.unu.edu/publications/working-papers/2012/en_GB/wp2012-030/ (Accessed 27 September 2013).

people.¹⁰⁵⁷ The inclusion of good governance as a founding value under the Constitution seeks to establish a constitutional arrangement that will provide important safeguards in ensuring public accountability, responsiveness to the electorate and participation in governance.

5.4.4 Bill of Rights

5.4.4.1 Introduction

A Bill of Rights is an essential pillar of constitutionalism as it contains provisions that guarantee the protection of human rights and fundamental freedoms. A Bill of Rights provides the standard against which governmental conduct is judged with regards to safeguarding fundamental rights and freedoms.¹⁰⁵⁸ Liebenberg notes that a Bill of Rights provides a powerful mechanism for civil society, communities and independent commissions to hold public, and in appropriate circumstances, private actors accountable for human rights violations or abuses.¹⁰⁵⁹ Besides providing effective mechanisms of redress for human rights violations, a Bill of Rights should also function to deepen democracy, and to enhance social and economic development which is responsive to the needs and views of the populace. As a result it is important that a Bill of Rights should contain provisions that seek to respond to the past and to address its injustices, and also lay a foundation based on the commitments of the new society that is being constructed.¹⁰⁶⁰

5.4.4.2 Declaration of Rights under the Constitution

The crisis of governance in Zimbabwe over the years has largely been about lack of respect for human rights. The human rights situation in Zimbabwe has over the past decade descended into a crisis largely due to government actions coupled with the failure of the Lancaster House Constitution to provide for a comprehensive Declaration

¹⁰⁵⁷ Commission on Human Rights Resolution 2000/64 The Role of Good Governance in the Promotion of Human Rights, 27 April 2000, E/CN.4/RES/2000/64, <http://www.refworld.org/cgi-bin/txis/vtx/rwmain?docid=3b00f28414> (Accessed 16 April 2013).

¹⁰⁵⁸ Currie I and De Waal J (2005) 23.

¹⁰⁵⁹ Liebenberg S 'Reflections on Drafting a Bill of Rights: A South African Perspective' in Kersting N (eds) *Constitution in Transition: Academic Inputs for New Constitution in Zimbabwe* (2009) 21.

¹⁰⁶⁰ Teitel R *Transitional Justice* (2000) 200.

of Rights with strong mechanisms to ensure the enforcement of the rights enshrined. The Declaration of Rights under the Lancaster House Constitution provided for a narrow set of rights. The Declaration of Rights, modelled, on the European Convention of Human Rights (ECHR)¹⁰⁶¹, did not guarantee the protection of all human rights and fundamental freedoms. The Declaration of Rights made reference to the protection and promotion of civil and political liberties but did not make any provision for the protection of socio-economic rights.¹⁰⁶² The constant amendments to the Declaration of Rights progressively watered down the enjoyment of rights.¹⁰⁶³ The enactment of repressive legislation also weakened a number of rights protected under the Declaration of Rights and the state sought to use the vague and wide concept of “public interest” in order to justify state actions.¹⁰⁶⁴ As a result during the consultative process there were calls by a majority of Zimbabweans for a comprehensive justiciable Declaration of Rights with strong enforcement mechanisms in order to improve the protection of human rights.¹⁰⁶⁵

Thus, Chapter 4 of the Constitution contains the Declaration of Rights. Unlike the Declaration of Rights under the Lancaster House Constitution, Chapter 4 of the Constitution contains a much broader protection of human rights which include/s first generation (civil and political)¹⁰⁶⁶, second generation (socio-economic)¹⁰⁶⁷ and third

¹⁰⁶¹The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, signed at Rome 1950.

¹⁰⁶²*The Legal Monitor* ‘A Newsletter published by Zimbabwe Lawyers for Human Rights and Human Rights Defenders’ (2009) 3.

¹⁰⁶³Examples of such amendments include Amendment Number 7 (Act 23 of 1987) which abolished the offices of a Ceremonial President and a Prime Minister and introduced an Executive Presidency. This entrenched the Executive power in Zimbabwe. Amendment 11(Act 30 of 1990) ousted the jurisdiction of the Courts in deciding whether compensation for expropriated land was fair or not. Furthermore, Amendment Number 17 (Act 5 of 2005) was promulgated to oust entirely the jurisdiction of the Courts over cases of acquisition of land by the state. Constitution of Zimbabwe Amendment Act 30 of 1990 was amended in response to the *S v Juvenile* 1989 (2) ZLR 61 (S) case which abolished sentences of corporal punishment imposed upon juveniles in terms of the Criminal Procedure and Evidence Act. In response to the judgment Parliament proceeded to amend the Constitution and added a derogation that expressly allowed for such corporal punishment to be carried out.

¹⁰⁶⁴See for example the Public Order and Security Act 5 of 2002 which violates the right to freedom of assembly and peaceful demonstration.

¹⁰⁶⁵http://www.copac.org.zw/index.php?option=com_phocadownload&view=category&id=8&Itemid=280

(Accessed 16 April 2013).

¹⁰⁶⁶These include amongst many other rights, the right to personal liberty (section 49 of the Constitution of Zimbabwe; section 51 the right to human dignity; section 53 the freedom from torture or cruel, inhuman or degrading treatment or punishment; section 52 the right to persona; security; and Section 67 which deals with political rights.

generation (environmental)¹⁰⁶⁸ human rights. Section 47 of the Constitution also does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with the Constitution. The extension of the rights protected under the Constitution should be commended as the inclusion of such rights will assist the people of Zimbabwe in enforcing the different types of rights against the state and private persons. The inclusion of various types of rights is also in line with international law which recognises that all human rights are universal and inalienable; indivisible; and interdependent and interrelated.¹⁰⁶⁹ Such rights therefore apply to all equally and as such give the citizens of Zimbabwe the right to participate in decisions that affect their lives.

5.4.4.3 Duties and Application of the Declaration of Rights

Section 44 of the Constitution places a duty on the State and every person, including juristic persons, to respect, protect, promote and fulfil the rights and freedoms in the Declaration of Rights. Section 45(1) of the Constitution has a direct vertical application as it regulates the relationship between the individual and the state. The section states that the State and all executive, legislative¹⁰⁷⁰ and judicial institutions¹⁰⁷¹ and agencies of government at every level are bound by the Declaration of Rights.¹⁰⁷² On the other hand, section 45(2), similar to section 8(2) of the Constitution of the Republic of South

¹⁰⁶⁷These include amongst many other rights, section 71 the right to Health Care; section 75 the Right to Education; and section 77 the right to Food and Water.

¹⁰⁶⁸See Section 73 of the Constitution of Zimbabwe.

¹⁰⁶⁹Principle 5 of the Vienna Declaration and Program of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹⁰⁷⁰See *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (CC).

¹⁰⁷¹In the course of adjudicating legal disputes judges and magistrates are therefore required to conduct themselves in a way that complies with the Declaration of Rights provisions. Thus courts must promote the values and principles that underlie a society and recognised under the Constitution which are based on openness, justice, human dignity, equality and freedom.

¹⁰⁷²Section 45 of the Constitution of Zimbabwe which states that '(1) This Chapter binds the State and all executive and judicial institutions and agencies of government at every level. (2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it. (3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them.' On the other hand see also section 8(1) of the Constitution of South Africa which states that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

Africa¹⁰⁷³, recognises that the abuse of human rights may also be conducted by private bodies and seeks to protect individuals against the abuse of their rights by other individuals. The direct vertical application of the Bill of Rights therefore gives an individual the power to challenge the conduct of any of the organs of state for any breach of their duties under the Declaration of Rights.¹⁰⁷⁴

5.4.4.4 Interpretation of Rights

Currie and De Waal note that the process of interpretation involves ascertaining the meaning of the right involved and also determining whether the challenged law or conduct conflicts with the right in question.¹⁰⁷⁵ Thus, the Constitution establishes a Constitutional Court which is the final arbiter in all constitutional matters.¹⁰⁷⁶ This provision therefore puts the judiciary at the fore of human rights protection as it mandates the judiciary to give meaning to the provisions in the Declaration of Rights in order to establish whether law or conduct is inconsistent with a provision in the Declaration of Rights.¹⁰⁷⁷

A major difference introduced by the Constitution, unlike the Lancaster House Constitution, is the inclusion of an interpretation clause. Section 46(1) of the Constitution, drafted along similar lines to section 39(1) of the Constitution of South Africa¹⁰⁷⁸, stipulates how the Constitution should be interpreted.¹⁰⁷⁹ The Constitution

¹⁰⁷³Section 8(2) of the Constitution of South Africa states that 'A provision of the Bill of Rights binds a natural and juristic person if and to the extent that, it is applicable, taking into account the nature of the right and the nature and duty imposed by the right.'

¹⁰⁷⁴Currie I and De Waal J (2005) 44.

¹⁰⁷⁵Currie I and De Waal J (2005) 145.

¹⁰⁷⁶Section 167(1) (a) of the Constitution of Zimbabwe which states that 'the Constitutional Court is the highest court in all constitutional matters, and its decisions on those matters bind all other courts.'

¹⁰⁷⁷Motala Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 13. See also Currie I and De Waal J (2005) 145.

¹⁰⁷⁸Section 39(1) of the Constitution of the Republic of South Africa states 'when interpreting the Bill of Rights, 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 may consider foreign law.'

¹⁰⁷⁹Section 46 of the Constitution of Zimbabwe states that 'When interpreting this Chapter, a court, tribunal, forum or body- (a) must give effect to the rights and freedoms enshrined in the Chapter; (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular the values and principles set out in section 3; (c) must take into account international law and all treaties and conventions to which Zimbabwe is a state party; (d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and (e) may consider relevant foreign law; in addition to considering all other relevant

requires that in the interpretation of the Declaration of Rights, values that underlie an open and democratic society based on *inter alia*, the supremacy of the Constitution, openness, the rule of law, human dignity, equality and freedom, must be taken into consideration. The Constitution also places an obligation on the courts to take into account international law and all treaties and conventions to which Zimbabwe is a State Party when interpreting the Constitution. The Constitution however, does not specify whether non-binding international instruments may be used as a tool of interpretation of the Declaration of Rights. However, persuasive authority in this regard can be drawn from the example of South Africa, where the Constitutional Court has noted that both binding and non-binding international law may be used as tools of interpretation of the Bill of Rights. The Court in *S v Makwanyane* stated that:

'International agreements and customary international law provide a framework within which ... [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.'¹⁰⁸⁰

The *Makwanyane* case can prove to be a persuasive authority to courts in Zimbabwe. Following such an approach will ensure that courts in Zimbabwe do not limit themselves to the treaties that the country is party to, but can also rely on general international human rights law in the interpretation of the Declaration of Rights.

Although section 46(1) obliges local courts to consider international law in the interpretation of the Declaration of Rights, the same cannot be said with regards to foreign law. In *S v Makwanyane* the Constitutional Court was of the opinion that although section 35(1) of the Interim Constitution¹⁰⁸¹ stipulated that the courts "may" have regard to foreign law in the interpretation of the Bill of Rights, foreign case law

factors that are to be taken into account in the interpretation of a Constitution. (2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.'

¹⁰⁸⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) paras.36-7.

¹⁰⁸¹ Presently section 39(1)(d) of the Constitution of South Africa.

would not necessarily provide a safe guide to the interpretation of the Bill of Rights.¹⁰⁸² Caution is therefore raised against the mandatory use of foreign law in the interpretation of the Declaration of Rights because of the different contexts in which other constitutions around the world are drafted and also because of the different historical contexts within which different constitutions are written.¹⁰⁸³ However, this is not to mean that decisions that have been made in South Africa do not reflect comparative constitutional law from other jurisdictions around the world.¹⁰⁸⁴ Courts in Zimbabwe although not mandated to use foreign law will be able to seek guidance from other jurisdictions on the interpretation of key issues in relation to human rights law. However, such an approach should be accompanied by great caution as foreign law might not necessarily provide a safe guide to the interpretation of the Declaration of Rights.

The inclusion of the interpretation clause in the Declaration of Rights is a welcome development in Zimbabwe as it will aid and guide the courts to give the correct meaning to provisions in the Declaration Rights, especially with the inclusion of the injunction on international law. This will further enrich the jurisprudence of the Zimbabwean courts, which have over the years delivered shocking decisions that are contrary to international human rights norms in a bid to rubber-stamp executive lawlessness.¹⁰⁸⁵

5.4.4.5 Limitation of Rights

Many constitutional rights and freedoms are not absolute. Currie and De Waal note that constitutional rights and freedoms have boundaries set by the rights of others and by important social concerns, such as, public order, safety, health and democratic values.¹⁰⁸⁶ The Constitution permits the limitation of rights and fundamental freedoms. However, it should be noted that such limitation should be justifiable and must serve a

¹⁰⁸² *S V Makwanyane* 1995 (3) SA 391 (CC) para.37.

¹⁰⁸³ See amongst other cases *Park-Ross v Director, Office of Serious Economic Offences* 1995 (2) SA 148 (C) para 160H.

¹⁰⁸⁴ See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

¹⁰⁸⁵ See for example *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development* Harare High Court Case 2467/05 (Unreported); *Batsirai Children's Home v the Minister of Local Government and Urban Development and Others* Harare High Court Case No. 2566/05 (Unreported) where the Courts justified unlawful evictions of individuals across the country yet such evictions were conducted in complete violation of national and international laws governing evictions.

¹⁰⁸⁶ Currie I and De Waal J (2005) 163.

purpose which is compellingly important.¹⁰⁸⁷ Section 86 of the Constitution provides a limitation clause that sets out the criteria for restricting the rights in the Declaration of Rights.¹⁰⁸⁸ The Constitution, thus, provides that a limitation of rights should be justifiable and that such limitation should achieve the purpose that it is designed to achieve, with no other realistic way being available by which the purpose can be achieved without the restriction of rights.¹⁰⁸⁹

Despite providing the criteria for justifying the limitation of rights the Constitution also prohibits the enactment of any law that limits a certain class of rights enshrined in the Declaration of Rights. Thus, section 86(3) states that:

‘No law may limit the following rights enshrined in this Chapter, and no person may violate them- (a) the right to life, except to the extent specified in section 48; (b) the right to human dignity; (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; (d) the right not to be placed in slavery or servitude; (e) the right to fair trial; (f) the right to obtain an order of *habeas corpus* as provided in section 50 (7) (a).’

The Constitution therefore forbids the enactment of any law that infringes on the above rights that form the central values upon which the Constitution is established especially with regards to human dignity and the right not to be tortured or subjected to cruel and degrading punishment. The inclusion of this provision seeks to remedy previous instances where the executive has on several occasions amended the Constitution in response to unfavourable judgments from the courts, thus undermining the

¹⁰⁸⁷ *Meyerson D Rights Limited* (1997) 36-43.

¹⁰⁸⁸ Section 86 of the Constitution of Zimbabwe states that ‘(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons. (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of right or freedom concerned; (b) the purpose of the limitation in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and (f) whether there are any less restrictive means of achieving the purpose of the limitation.’

¹⁰⁸⁹ See *S v Manamela* 2000 (3) SA 2 (CC) para.32.

independence of the judiciary. An example is that of the case of *S v Juvenile*¹⁰⁹⁰, where, as stated earlier, the Supreme Court of Zimbabwe made a ruling to the effect that corporal punishment was unconstitutional as it amounted to inhumane and degrading treatment which was not reasonably justifiable in a democratic society. The judgment handed down by the Supreme Court was to enforce an earlier ruling by the Court in the case of *S v Ncube and Others*¹⁰⁹¹ in which it had held that the carrying out of corporal punishment on adults in terms of section 109 of the Prisons Regulations of 1956 was unconstitutional because it was barbaric, inherently brutal and cruel.¹⁰⁹² In response to the judgment of the Supreme Court, Parliament proceeded to amend the Constitution and added a derogation that expressly allowed for corporal punishment to be carried out. Amendment number 11¹⁰⁹³ introduced section 15(3) of the Lancaster House Constitution which read:

'No moderate corporal punishment inflicted (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone in loco parentis or in whom are vested any of the powers of his parent or guardian; or (b) in the execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of section 15(1) on the ground that it is inhuman or degrading'

The prohibition on amending the Constitution in order to limit the rights under section 86(3) of the Constitution is therefore a welcome development that seeks to ensure that individuals are able to enjoy the rights and freedoms protected in the Constitution and also to ensure that judgments of courts protecting such rights are respected irrespective of whether a decision is favourable or unfavourable to the government of the day.

5.4.4.6 Enforcement of Rights

In terms of the Lancaster House Constitution, there were two ways of bringing a matter to the Supreme Court that related to the violation of the Declaration of Rights. A person could approach the Supreme Court directly for redress if the person alleged that the

¹⁰⁹⁰ 1989 (2) ZLR 61 (S). This case dealt with the constitutionality of sentences of corporal punishment imposed upon juveniles in terms of the Criminal Procedure and Evidence Act.

¹⁰⁹¹ 1987 (2) ZLR 246 (S); 1988 (2) SA 702 (ZS).

¹⁰⁹² 1987 ZLR (2) 246 (S).

¹⁰⁹³ Act 30 of 1990.

Declaration of Rights had been, was being, or was likely to be contravened in relation to him or her.¹⁰⁹⁴ Section 24(2) of the Lancaster House Constitution further provided that;

'If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of the Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.'

Any court in Zimbabwe had the power to refer matters involving any alleged breach of the Declaration of Rights to the Supreme Court.¹⁰⁹⁵ In cases where a lower court refused to refer a matter in terms of section 24(2) such court would be held to be in breach of the Declaration of Rights.¹⁰⁹⁶ The issue of *locus standi* and public interest litigation had been a contentious issue in Zimbabwe taking into account the fact that the Lancaster House Constitution did not make reference to the issue of public interest litigation. The *locus standi* rule under the Lancaster House Constitution was adopted from the common law approach in which one has to have a personal, direct or substantial interest in a particular matter. Thus, as a result of the narrow rule on standing, the judiciary used this rule in justifying the denial of the right to standing for a number of individuals and certain groups.¹⁰⁹⁷ This therefore resulted in a number of individuals failing to have access to courts to have their disputes heard and resolved.

The Constitution of Zimbabwe has brought about several changes to address the problems associated with the narrow rule on standing under the Lancaster House Constitution. The changes in the Constitution enhance the contemporary litigation of

¹⁰⁹⁴Section 24(1) of the Lancaster House Constitution.

¹⁰⁹⁵De Bourbon A (2003) 197.

¹⁰⁹⁶*Martin v Attorney- General* 1993 (1) ZLR 153 (SC) para.158. In delivering judgment in this case Gubbay CJ stated that 'Suppose that a judicial officer, solely due to the animosity towards an accused, in bad faith and without any warrant, were to rule that the question raised him was frivolous or vexatious and so order his remand in custody pending trial. Could it be then said that the accused was only entitled to approach the Supreme Court for relief under section 24(3)? I think not. Such action by the judicial officer concerned would, as mentioned before, itself constitute an infringement of the accused's entitlement to the protection of the law. Moreover, and most importantly, since at the conclusion of any remand proceedings there is no right of appeal, no remedy under section 24(3) would be available to that accused.'

¹⁰⁹⁷See *Tsvangirai v Registrar General of Elections and Others* SC-20/2002. See also *Capitol Radio v Broadcasting Authority of Zimbabwe* SC-128-02.

human rights by providing for public interest litigation.¹⁰⁹⁸ Thus, section 85 of the Constitution provides that:

'(1) Any of the following persons, namely- (a) any person acting in their own interests; (b) any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interests, of a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interests of its members: is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award for compensation.'

Further, section 69 of the Constitution gives every person in the country the right of access to the courts with regards to criminal cases. It states that:

'(1) Every person accused of an offence has the right to a fair trial and public trial within a reasonable time before an independent and impartial court. (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law. (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute. (4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.'

The Constitution thus extends the rules of standing in Zimbabwe to accommodate public interest litigation and also allows individuals the rights of access to courts or any tribunal to resolve any dispute. The extension of the rules on standing seeks to ensure that citizens are able to openly access the courts and as a result improves the judicial protection of human rights in the country. However, it is essential that the courts in the country must be independent and impartial in the handling of any cases brought before them. An independent and impartial judiciary will result in the improvement of the protection of human rights and will aid in lifting society's confidence in the judicial system that for long has been viewed as being compromised.

¹⁰⁹⁸See Article 50(2) of the Constitution of Uganda and section 38 of the Constitution of South Africa which provides for public interest litigation.

5.4.5 Separation of Powers and Checks and Balances¹⁰⁹⁹

The separation of powers doctrine is crucial to good governance in that it is important in curbing the abuse of executive power, as it promotes greater governmental efficiency.¹¹⁰⁰ Although various scholars argue that a rigid division of powers reduces flexibility and efficiency, Ackerman J notes that it is important that a delicate balance is established to control government by separation of powers and enforcing checks and balances and avoiding the diffusing of power, making it impossible for government to take timely measures in the public interest.¹¹⁰¹ Although there cannot be a complete separation of powers amongst the branches of government, adequate safeguards need to be put in place to ensure that checks and balances exist among governmental organs, thus securing the independence of the institutions from each other so that they can act as effective checks on each other.

Currie and De Waal note that the doctrine of separation of powers underlies the principle of judicial independence as it is important in any jurisdiction for the judicial branch of government to discharge judicial functions free from any external interference.¹¹⁰² It should be noted that one of the aims of constitutionalism is to prevent the concentration of powers in one arm of the state and hence the system of checks and balances which seeks to ensure that the different branches of government control each other in the exercise of powers.¹¹⁰³ The system of checks and balances is important in that the judiciary is tasked with reviewing executive conduct and laws for compliance with the Constitution, and also with the executive exercising an important check with regards to the appointment of judges.¹¹⁰⁴

¹⁰⁹⁹ Separation of Powers and Checks and Balances were also identified by COPAC at the First All Stakeholders Meeting as one of the 17 (seventeen) Thematic Areas used to obtain information from Zimbabweans as to what issues should be addressed in the new Constitution.

¹¹⁰⁰ Carpenter G 'Strengths and Limitations of a New National Government' in Licht R and De Villiers B *South Africa's Crisis of Constitutional Democracy: Can the US Constitution Help?* (1994) 168-169.

¹¹⁰¹ *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para.60.

¹¹⁰² Currie I and De Waal J (2005) 120.

¹¹⁰³ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (First Certification Judgment) 1996 (4) SA 744 (CC) para. 112.

¹¹⁰⁴ See *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (First Certification Judgment) 1996 (4) SA 744 (CC) para.123.

The Lancaster House Constitution had several loopholes that had over the years posed a threat to the principle of separation of powers and checks and balances. The ousting of the jurisdiction of the courts with regard to land issues through Amendment Number 17 is one particular example where the independence of the judiciary was eroded and as a result the judiciary could not exercise its checks and balances in respect of Parliament, which had rubber-stamped the will of the executive to remove the court's jurisdiction with regards to land issues. Another loophole that was a threat to the separation of powers principle was the Presidential Powers (Temporary Measures) Act¹¹⁰⁵ which allowed the executive President to make temporary laws subject to parliamentary approval at a later stage.¹¹⁰⁶ Although the use of such powers could have been ideal in cases of emergency, however it was shown that the use of such powers was subject to abuse. Such powers were used at crucial times, such as election periods, to pardon offenders who had committed certain crimes during the elections, thus placing such individuals beyond the reach of the judiciary.¹¹⁰⁷

5.4.5.1 Constitution of Zimbabwe and Separation of Powers

The Constitution of Zimbabwe does not contain an express provision guaranteeing the separation of powers and checks and balances. However, it should be noted that both separation of powers and checks and balances have been built into the Constitution. Thus, the Constitution recognises separation of powers in section 88(2) which vests executive authority in the President, subject to the Constitution, through the Cabinet. Section 162 vests judicial power in the courts¹¹⁰⁸ and section 117¹¹⁰⁹ of the Constitution

¹¹⁰⁵Chapter 10:20. An Act which empowers the President to make regulations dealing with situations that have arisen or are likely to arise and that require to be dealt with as a matter of urgency.

¹¹⁰⁶Section 4 of the Presidential Powers (Temporary Measures) Act states that '(1) Copies of all regulations made in terms of section two shall be laid before Parliament no later than the eighth day on which Parliament sits next after the regulations were made. (2) If Parliament resolves that any regulations that have been laid before it in terms of subsection (1) should be amended or repealed, the President shall forthwith amend or repeal the regulations accordingly. (3) Where any regulations have been amended or repealed in terms of subsection (2) in accordance with a resolution of Parliament, the President shall not, within a period of six months thereafter, make any further regulations in terms of section two that are identical in substance to the regulations before they were amended or repealed, as the case may be.'

¹¹⁰⁷*The Associated Press 'Zimbabwe Head Grants Crimes Amnesty'*
http://wc.arizona.edu/papers/94/37/01_98_m.html (Accessed 12 March 2013).

¹¹⁰⁸Section 162 of the Constitution of Zimbabwe states that the 'Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise- (a) the Constitutional Court; (b) the Supreme

vests the legislative authority in the legislature. It should also be noted that there is an overlap with regards to the separation of powers model in the Constitution with members of the executive, more specifically the Cabinet, being tasked with conducting government business in Parliament.¹¹¹⁰

A more striking provision in the Constitution which retains the provision under the Lancaster House Constitution¹¹¹¹ pertains to the legislative authority. Section 116 of the Constitution stipulates that the Legislature of Zimbabwe shall consist of Parliament and the President.¹¹¹² It is submitted that this provision in the Constitution which gives the President legislative powers is inconsistent with the doctrine of separation of powers as the President is given powers that should be mainly reserved for parliament. What is more alarming is that the Constitution recognises the importance of separation of powers in its founding values, but proceeds to include provisions that clearly violate the protection of separation of powers. The rendering of legislative powers to the President also becomes alarming in that it also seeks to legitimise the Presidential Powers (Temporary Measures) Act¹¹¹³, a piece of legislation which has over the years allowed the President to make regulations which have more force than laws of Parliament.

The Presidential Powers (Temporary Measures) Act has given the President a broad interpretation of the provisions in respect of which the President is allowed to make regulations on, with the only restriction being that the provisions may not be used to amend the Constitution or affect constitutional provisions pertaining to the handling of

Court; (c) the High Court; (d) the Labour Court; (d) the Administrative Court; (f) the Magistrates Courts; (g) the Customary Law Courts; and (h) other courts established by or under an Act of Parliament.'

¹¹⁰⁹Section 117(1) of the Constitution of Zimbabwe states that 'the legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature.'

¹¹¹⁰Section 110(3)(b) of the Constitution. See also the *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment) 1996 (4) SA 744 (CC)* para 111 where it was argued that the overlap in that members of the executive are also members of parliament resulted in a failure by the 1996 Constitution to conform to a separation of powers between the legislature, the executive and the judiciary. In this case the Constitutional Court held that doctrine of separation of powers is not 'a fixed or rigid constitutional doctrine' and that 'it is given expression in many different forms and made subject to checks and balances of many kinds'. The court held that the overlap made the executive more directly answerable to the elected legislature.

¹¹¹¹See section 32(1) of the Lancaster House Constitution which stated that 'The legislative authority in Zimbabwe shall vest in the Legislature which shall consist of the President and Parliament.'

¹¹¹²Section 116 of the Constitution of Zimbabwe.

¹¹¹³Chapter 10:20.

money held by the Treasury.¹¹¹⁴ Although Parliament is tasked with approving the regulations made by the President, Parliament over the years has been compliant and dominated by ZANU-PF until the emergence of MDC. It has ensured that the President has become a legislature unto himself with the proper law-making procedure being pushed into the background. It is as a result of this lack of separation of powers and effective checks and balances between the executive and the legislature, that the President has over the years used the Presidential Powers (Temporary Measures) Act to make regulations that have infringed the independence of the judiciary and have resulted in the violation of fundamental human rights and freedoms.¹¹¹⁵

The position and powers of the President under the Lancaster House Constitution was a matter of controversy since the introduction of an executive presidency in 1987. It is therefore surprising that, despite the constitutional reforms, the Constitution of Zimbabwe did little to limit the powers of the President as it has simply restated powers similar to those in the Lancaster House Constitution. This begs the question of to whom exactly the President is accountable. The impression drawn from these powers is that the President is not accountable to anyone and it remains unclear how the checks and balances are going to be established under the Constitution.

Under the Constitution, the President is given powers to assent to legislation passed by Parliament. In cases where the constitutionality of legislation is questioned, the President is obliged to refer legislation to the Constitutional Court for advice on its constitutionality.¹¹¹⁶ The President after referring the Bill to the Constitutional Court is

¹¹¹⁴Section 2(a) of the Presidential Powers (Temporary Measures) Act).

¹¹¹⁵It should be noted that section 134 of the Constitution of Zimbabwe which allows for the delegation of power and states that 'Parliament may, in an Act of parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but (a) Parliament's primary law-making power must not be delegated...' See also *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) where the Constitutional Court stated that the 'manner and form provisions of the Constitution prevented Parliament from delegating to the executive the power to amend the provisions of the enabling Act of Parliament as it would undermine the separation of powers between the legislature and the executive.'

¹¹¹⁶See section 131(8) of the Constitution of Zimbabwe which states that 'If a Bill that has been presented to the President in terms of subsection (7) fully accommodates the President's reservations, the President must assent to the Bill and sign it within twenty-one days and then cause it to be published in the Gazette without delay, but if the President still has reservations about the Bill, he or she must within that period either (a) assent to the Bill and sign it, despite those reservations; or (b) refer the Bill to the Constitutional Court for advice on its constitutionality.'

only then obliged to assent and sign the Bill if the Constitutional Court upholds its constitutionality.¹¹¹⁷ The inclusion for the Constitutional Court to decide on the constitutionality of Bills is a positive step in seeking to ensure that the President is accountable and therefore does not hold much veto powers over Parliament, as the lack of such a provision would have provided the President with absolute powers in deciding what legislation should be passed in the country.¹¹¹⁸ This provision was drafted along similar lines to that of section 84(2) of the Constitution of South Africa¹¹¹⁹, and is a positive step in seeking to create accountability amongst the branches of government. However, it is imperative that an independent and impartial judiciary should be in place in order to ensure that proper checks and balances are exercised in that regard. In the case where the judiciary is subject to executive control as is the case in Zimbabwe, it would be difficult for judges to rule against the executive in cases where the executive disagrees with the legislation passed by Parliament.

With regards to the separation of powers between the President and the legislature, the Constitution provides that the approval of the President is required when an Act of Parliament sets the remuneration and benefits of civil servants, members of the security sectors and traditional leaders. In this case the President's approval is given on the recommendation of the Minister responsible for finance and after the President has consulted with the Minister responsible.¹¹²⁰ The President under the Constitution also holds greater powers over Parliament as the President has the power to dissolve

¹¹¹⁷Section 131(9) of the Constitution of Zimbabwe which states that 'if on a reference under subsection (8) the Constitutional Court advises that the Bill is constitutional, the President must assent to it and sign it immediately and caused to be published in the Gazette without delay.'

¹¹¹⁸See for example section 51(3a) of the Lancaster House Constitution which gave the President veto powers over any legislation passed by Parliament. However, such veto power was overridden by the fact that two-thirds majority of Parliament could vote for the adoption of the said legislation and as a result the President was obliged to assent to the Bill or dissolve Parliament. Thus such powers were against the spirit of checks and balances and gave the President wide ranging powers to clearly have a say in choosing legislation that he deemed suitable for the people of Zimbabwe.

¹¹¹⁹Section 84(2) of the Constitution of Zimbabwe states that 'The President is responsible for (a) assenting to and signing Bills; (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality; (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality.'

¹¹²⁰Section 203(4) of the Constitution of Zimbabwe.

Parliament if it refuses to pass his or her government budget.¹¹²¹ Such a clause can therefore lead to a scenario where Parliament, acting in good faith, can be held to ransom by the executive, and would therefore in a way pressurise Parliament to always pass such budgets even if there are credible objections. However, it should be noted that a decision to dissolve Parliament under this section can be challenged and set aside by the Constitutional Court.¹¹²² This perhaps provides a system of checks and balances by the judiciary over the executive in order to ensure that the President exercises his powers within the limits of the Constitution. However, the judiciary has to be independent to be able to resolve such a dispute in line with the Constitution.

The above discussion on the separation of powers in the Constitution depicts how the Constitution has sought to maintain a system of executive presidency as was the case under the Lancaster House Constitution. The Constitution thus further legitimises the concentration of powers in the hands of the President and therefore does not provide for a proper separation of powers and checks and balances.

5.5 Judicial Reforms under the Constitution of Zimbabwe

5.5.1 Introduction

The previous chapters have clearly elaborated on the importance of the independence of the judiciary when it comes to the protection of human rights. An independent judiciary has become a mantra for international institutions and governments around the world.¹¹²³ It is widely believed that an independent judiciary is one of the strongest guarantees to upholding the rule of law and the protection of human rights in any society and that a strong judiciary is one of the elements of the rule of law.¹¹²⁴ There are a number of features which determine the extent of the independence of the judiciary and these include the method of appointment of judges, the removal of judges from office, whether or not the judiciary has exclusive jurisdiction over judicial matters and

¹¹²¹Section 143(3) of the Constitution of Zimbabwe. See also section 109(4)(b) where the Constitution empowers the President to dissolve Parliament, if it passes a vote of no confidence in his or her government. Such action has a muzzling effect on Parliament.

¹¹²²Section 143(4) of the Constitution of Zimbabwe.

¹¹²³Kirby M (2006) 12.

¹¹²⁴Boies D (2006) 58.

the question of salaries payable to judges.¹¹²⁵ Brazier also notes what the concept of judicial independence entails:

'What does judicial independence, properly defined, entail? In general the public must feel confident in the integrity and impartiality of the judiciary: judges must therefore be secure from undue influence and be autonomous in their own field. That possibility implies that neither the government nor Parliament should have any role in the appointment or removal of judges. More precisely, judicial independence may be said to require: (a) that appointments to the judicial office, renewal of part-time appointments, and promotions should not depend on uncontrolled ministerial patronage; (b) that judges should be free from improper attempts by Ministers, Members of Parliament, or peers to influence the result of cases still under adjudication; (c) that judicial salaries should not be reduced; and (d) that judges should not be removed from office unfairly or without reason.'¹¹²⁶

Considering the importance of the judiciary in the protection of human rights, Zimbabwe has identified judicial reform as a key component to improve the protection of the independence of the judiciary and the protection of human rights.

5.5.2 Judicial Authority

Section 79 of the Lancaster House Constitution vested the judicial authority in courts which consisted of the Supreme Court, High Court and such other courts subordinate to the Supreme Court and the High Court as established by or under an Act of Parliament. The Constitution of Zimbabwe derives the judicial authority from the people of Zimbabwe and also vests it in the courts. Thus section 162 states that:

'The judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise- (a) the Constitutional Court¹¹²⁷; (b) the Supreme Court¹¹²⁸; (c) the High

¹¹²⁵Madhuku L (2002) 32.

¹¹²⁶Brazier R *Constitutional Reform: Reshaping the British Political System* 2nd ed (1998) 172.

¹¹²⁷Section 166 states that '(1) The Constitutional Court is a superior court of record and consist of- (a) the Chief Justice and the Deputy Chief Justice; and (b) five other judges of the Constitutional Court; (2) If the services of an acting judge are required on the Constitutional Court for a limited for a limited period, the Chief Justice may appoint a judge or a former judge to act as a judge of the Constitutional Court for that period.'

¹¹²⁸Section 168 of the Constitution of Zimbabwe which states that '(1) The Supreme Court is a superior court of record and consists of (a) the Chief Justice and the Deputy Chief Justice; (b) no fewer than two other judges of the Supreme Court; and (c) any additional judges under subsection (2). (2) If the services of an additional judge are required on the Supreme Court for a limited period, the Chief Justice may

Court¹¹²⁹; (d) the Labour Court¹¹³⁰; (e) the Administrative Court¹¹³¹; (f) Magistrates Courts¹¹³²; (g) the customary law courts¹¹³³; and (h) other courts established by or under an Act of Parliament.’

A more notable change brought about by the Constitution is the introduction of a Constitutional Court. Historically the idea of the establishment of a Constitutional Court can be traced back to the period after the Second World War, when many European countries introduced court structures that departed from the Anglo-American model which entrusted a court with specific jurisdiction.¹¹³⁴ The departure led to the establishment of a special constitutional court to adjudicate on constitutional disputes and to prevent tyranny.¹¹³⁵

The judgments of the Constitutional Court in Zimbabwe will be based on the Constitution, which is the supreme law in Zimbabwe. Taking into consideration that the human rights situation in the country has been in turmoil over the past decade, the establishment of the Constitutional Court as the highest court in all constitutional

appoint a judge of the high Court, or a former judge to act as a judge of the Supreme Court for that period.’ The jurisdiction of the Supreme Court is stated in section 169 which reads ‘(1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction. (2) Subject to subsection (1), an Act of Parliament may confer additional jurisdiction and powers on the Supreme Court. (3) An Act of Parliament may provide for the exercise of jurisdiction by the Supreme Court and for that purpose may confer the power to make rules of court...’

¹¹²⁹Section 170 states that ‘the High Court is a superior court of record and consists of- (a) the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court; and (b) such other judges of High Court as may be appointed from time to time.’ The jurisdiction of the High Courts is established under section 171 which reads ‘(1) The High Court- (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe; (b) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions; (c) may decide constitutional matters except those that only the Constitutional Court may decide; and (d) has such appellate jurisdiction as may be conferred on it by an Act of Parliament...’

¹¹³⁰Section 172 states that ‘(1) The Labour Court is a court of record and consists of- (a) a Judge President ; and (b) such other judges of the Labour Court as may be appointed from time to time. (2) The Labour Court has such jurisdiction over matters of labour and employment as may be conferred upon it by an Act of Parliament. (3) An Act of Parliament may provide for the exercise of jurisdiction by the Labour Court and for that purpose may confer the power to make rules of the court.’

¹¹³¹Section 173 states that ‘(1) The Administrative Court is a court of record and consists of- (a) a Judge President; and (b) such other judges of the Administrative Court as may be appointed from time to time.” (2) The Administrative Court has such jurisdiction over administrative matters as may be conferred upon by an Act of Parliament.’

¹¹³²Section 174(a) states that Magistrates Courts adjudicate on civil and criminal cases.

¹¹³³Section 174(b) states that Customary Law Court’s jurisdiction consists primarily in the application of customary law.

¹¹³⁴Motala Z and Ramaphosa C (2002) 55.

¹¹³⁵Durham CW ‘General Assessment of the Basic Law: An Overview ‘in Kirchoff P and Kommers DP *Germany and its Basic Law, Past, Present and Future: A German-American Symposium* (1989) 43.

matters may lead to the improvement of the human rights situation in the country as its judgments will mainly guarantee the basic rights and freedoms of all persons. Such judgments will therefore have a binding effect on all organs of state and its agencies. Although the Supreme Court and the High Court have jurisdiction in certain constitutional matters¹¹³⁶, the introduction of the Constitutional Court is a welcome development as the Court will act as the ultimate protector of the new constitutional order.

The jurisdiction of the Constitutional Court is dealt with under section 167 of the Constitution. Section 167 states that:

‘(1) The Constitutional Court- (a) is the highest Court in all constitutional matters, and its decisions on those matters bind all other courts; (b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131 (8) (b) and paragraph 9 (2) of the Fifth Schedule; and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. (2) Subject to this Constitution, only the Constitutional Court may- (a) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to in terms of this Constitution; (b) hear and determine disputes relating to election to the office of President; (c) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President; or (d) determine whether Parliament has failed to fulfil a constitutional obligation . (3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional and must confirm any order of constitutional invalidity made by another court before that order has any force. (4) An Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court; (5) The rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court- (a) to bring a constitutional matter directly to the Constitutional

¹¹³⁶Section 175 of the Constitution of Zimbabwe states that the other courts have jurisdiction in certain constitutional matters but their decisions are not binding unless confirmed by the Constitutional Court. Section 175 of the Constitution states that ‘(1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court. (2) A court which makes an order of constitutional invalidity referred to in subsection (1) may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of the law or conduct concerned.’

Court; (b) to appeal directly to the Constitutional Court from any other court; (c) to appear as a friend of the court.'

The Constitution is now binding on all the organs of state and the Constitutional Court now has the exclusive jurisdiction to test the constitutionality of an Act of Parliament and also to control executive action. This is a welcome development in the new constitutional dispensation as the courts are now given the power to expressly conduct checks and balances in respect of Parliament and the executive branch of government. This marks a huge departure from the Lancaster House Constitution which did not include such a provision. If such powers are to be exercised by an independent and impartial judiciary, the checks and balances will bode well for human rights protection in the country and also prohibit the abuse of power by other branches of government. The powers to test the constitutionality of legislation will ensure that the legislation passed does not violate any fundamental human rights and freedoms protected in the Constitution as has been the case in the country. The powers given to the Constitutional Court will also ensure that checks and balances are also conducted on the executive branch of government which has over the years undermined the independence of the judiciary mainly through interfering with the administration of the courts and the constant defiance of court orders.¹¹³⁷

¹¹³⁷ See *The State v Toby Harden and Julian Simmonds* CRB 256/3.05 where a Norton Magistrate ordered prison authorities to release two British journalists, Julian Simmonds and Toby Harnden, on bail of Z\$1 million each. They had been arrested on 30 March 2005 whilst visiting a polling station during election proceedings in the Norton area. They were also charged with an immigration offence after it was found that their visas had expired. An immigration official aligned to the Ministry of Foreign Affairs prevented prison authorities from complying with the order served on them. As a result, the two accused were held in detention until the case had been finalised and they had been acquitted of the charges against them. See also *Roy Leslie Bennet v The Constituency Electoral Officer, Chimanimani Constituency* EP1/05 where a court order nullifying the results of the nomination court was defied by the executive when Justice Tendai Uchena, sitting in his capacity as a judge of the newly established Electoral Court, nullified the results of the nomination court for the Chimanimani constituency in which the presiding officer had unlawfully and unprocedurally refused to accept the nomination papers of Roy Bennett. Bennett intended to contest the March 2005 parliamentary election as the candidate for the opposition Movement for Democratic Change (MDC). Justice Uchena postponed the election for the Chimanimani constituency pending a fresh nomination procedure in which Bennett was to be allowed to submit his papers for nomination. On the instructions of the President of Zimbabwe, the court order was defied after the President attacked the judgment and ordered that the elections were to proceed as if nothing happened.

5.5.3 Independence and Impartiality of Courts under the Constitution of Zimbabwe

Rautenbach and Malherbe note that the independence of the courts is an incidence of the separation of powers¹¹³⁸ and as a result a number of constitutions¹¹³⁹ around the world contain provisions that protect the independence of the courts. These include, the terms of office of judges, their salaries and pensions, disciplinary actions and appointment and dismissal. Madhuku also notes that a constitution should have a clear statement providing that the judiciary is independent.¹¹⁴⁰ Madhuku notes that this is important as it allows redress to be sought in the courts in the event of any law undermining the independence of the judiciary and also enables members of the public to criticise any tendencies by the executive to interfere with the work of the judiciary.¹¹⁴¹

Although the independence of the judiciary was protected under section 79B of the Lancaster House Constitution, section 164 of the Constitution of Zimbabwe is wider than the Lancaster House provision. Section 164 of the Constitution states that:

‘(1) [t]he 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) [t]he 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 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. (3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them. (4) Nothing in this section is to be construed as preventing an Act of Parliament from

¹¹³⁸Rautenbach IM and Malherbe EFJ *Constitutional Law* 6th ed (2012) 165. See also *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC), 1998 (3) SA 785 (CC) paras. 60 70-72; *South Africa Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC), 2001 (1) SA 883 (CC) paras.25-26.

¹¹³⁹See section 165(2) of the Constitution of the Republic of South which states that ‘the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear or favour.’ See also Article 128(1) of the Constitution of Uganda which states that ‘(1) in the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.’ See also Article 128 of the Constitution of Uganda which deals with the protection of judicial independence.

¹¹⁴⁰Madhuku L (2002) 233.

¹¹⁴¹Madhuku L (2002) 233.

vesting functions other than adjudicating functions in a member of the judiciary, provided that the exercise of those functions does not compromise the independence of the judicial officer concerned in the performance of his or her judicial functions and does not compromise the independence of the judiciary in general.’

The above section provides the general constitutional guarantee with regards to the protection of the independence of the judiciary. The protection of the independence of the judiciary in this instance is drafted in accordance with international law principles which demand that the independence of the judiciary shall be guaranteed by States and enshrined in the constitution or laws of the country.¹¹⁴² In order to strengthen the independence of the judiciary, the Constitution places a duty on the State to enact ordinary legislation that will further supplement this constitutional provision. As a result legislation will have to be put in place that seeks to protect and uphold the independence of the judiciary and which should be informed and guided by the provisions in the Constitution.

In line with international norms the Constitution stipulates that no person or organ of state may interfere with the functioning of the courts. The Constitution of Zimbabwe mandates judges to thus decide cases brought before them expeditiously and without fear, favour or prejudice. The prohibition of any external interference with the judges seeks to preserve the independence of the judicial institution. As this research has identified earlier such independence is a prerequisite in ensuring and protecting the impartiality of judges. It is in this regard that the Constitution recognises the importance of the independence of the judicial institution *vis a vis* the issue of impartiality. The Constitution thus demands that judges must be impartial and must decide cases based on the facts of the case and their understanding of the law and without any direct or indirect influence on their decisions.¹¹⁴³ Although the Constitution states that a member of the judiciary can be vested with functions other than adjudicating powers, it recognises that such functions should not interfere with the independence of the

¹¹⁴²See Principle 1 of the United Nations Basic Principles on Judicial Independence, General Assembly Resolution 40/32 of 1985.

¹¹⁴³Principle 2 of the United Nations Basic Principles which states ‘that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.’

judiciary. However, it should be noted that as the independence of the judiciary is an important aspect of the separation of powers, the granting of non-judicial functions to judicial officers should be closely guarded by the Constitutional Court in order to ensure that there is no excessive interference by other branches of government with the discharge of judicial duties by judicial officers¹¹⁴⁴ and the inappropriate assignment of such powers to judicial officers.¹¹⁴⁵

5.5.3.1 Principles Guiding the Judiciary

The Constitution of Zimbabwe unlike the Lancaster House Constitution makes provision for a number of principles that will guide members of the judiciary in exercising their judicial authority.¹¹⁴⁶ These principles have been included in the Constitution so as to further strengthen the independence of the judiciary in the country.

5.5.3.1.1 Speedy Resolution of Cases

Since the Constitution has extended the rule of standing in order to allow individuals the right of access to courts for the speedy resolution of their cases, the Constitution now obliges judges to ensure that in the exercise of their duties they should ensure that

¹¹⁴⁴See *Van Rooyen v The State* 2002 (5) SA 246 (CC) where the South African Constitutional Court invalidated provisions of the Magistrates Act 90 of 1993, Magistrates' Courts Act of 1944 and regulations made under the Magistrates Act dealing with powers of the Minister to determine the salary of a suspended magistrate, vesting in Parliament the power to impeach a magistrate without investigation by the Magistrates Commission, allowing the appointment of a non-judicial officer to hear the complaints against a magistrate, vesting the power in the Minister to determine appropriate sanction in case of misconduct by magistrate, allowing the use of transfer and payment of fines as sanctions against magistrates and the initiation by the Minister of investigations into a magistrate ill-health or incapacity, giving the Minister discretion not to refer a recommendation by the Magistrates Commission to remove a magistrate from office to Parliament, and authorising the Minister to assign powers to magistrates or prohibit magistrates from exercising powers.

¹¹⁴⁵See *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) paras. 29-35 where Chaskalson P stated that 'accepted that the exercise of some non-judicial functions may be in order and expressly left open the possibility for judges to serve on commissions of enquiry, observing: 'performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions-independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of consideration of relevant information.' In *Van Rooyen v The State* 2002 (5) SA 246 (CC) paras.231-233 it was stated that magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers because to do so may make them answerable to the executive. However, Chaskalson CJ also noted that 'there may be reasons why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, and is not at present inconsistent with the evolving process of securing institutional independence at all levels of the court system.'

¹¹⁴⁶Section 165 of the Constitution of Zimbabwe.

justice must be done to all, irrespective of status and that justice must not be delayed. Thus section 165(1) states that:

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

The key importance of the role of the courts in human rights protection is explicitly recognised by the Constitution. This is so because the courts play a crucial role in the protection of fundamental human rights and freedoms. As such, in the handling of cases courts should therefore ensure that justice should be provided timeously as the old adage says "justice delayed is justice denied". This approach was also stipulated in the case of *Mandirwhe v Minister of State and Security*¹¹⁴⁷ where Baron J stated that:

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

It should be noted that the old adage of "justice delayed is justice denied" has now become a principle of customary international law that seeks to ensure the realisation of fundamental rights and freedoms.¹¹⁴⁸ Since the commencement of the Land Reform Program, the current bench has shown an indifference towards the speedy resolution of human rights cases, especially those dealing with sensitive political issues. An example is that of *Tsvangirai v Registrar General of Elections and Others*¹¹⁴⁹ where, in an urgent application, the applicant sought to have his electoral rights protected in the election which was a day away, but the Court reserved judgment until more than a month after the election had been conducted.¹¹⁵⁰

¹¹⁴⁷1981 ZLR 61.

¹¹⁴⁸Francioni F 'Access to Justice, Denial of Justice and International Investment Law' (2009) 3 *The European Journal of International Law* 729 729-730.

¹¹⁴⁹(76/02) [2002] ZWSC 20; SC-20/2002 (4 April 2002)

<http://www.saflii.org.za/zw/cases/ZWSC/2002/20.html> (Accessed 23 June 2013).

¹¹⁵⁰Legal Resources Foundation Report on Justice in Zimbabwe (2002) 73.

http://www.humanrightsfirst.org/defenders/hrd_zimbabwe/LRFreport30-09.pdf (Accessed 10 March 2013).

Another example of the delay in justice in Zimbabwe is provided in the manner in which the 2000 election petition cases were handled. After the 2000 Parliamentary elections, the MDC filed 37 electoral petitions that averred widespread violence, intimidation and other electoral irregularities. Only a number of these cases had been finalised at the time when the next Parliamentary elections were held in 2005.¹¹⁵¹ The above cases indicate the indifferent attitude that the courts in Zimbabwe have had over the years with regards to human rights cases, and the delays have resulted in the courts abrogating their duty to protect and promote fundamental rights and freedoms.¹¹⁵² Therefore, the Constitution, in a positive development seeks to address the indifferent attitude that the judiciary has manifested over the years with regards to sensitive political and human rights cases and seeks to ensure that justice is delivered timeously irrespective of status. The speedy resolution of cases will therefore result in the improvement of the judicial protection of human rights and thereby raise public confidence in the justice system.¹¹⁵³

5.5.3.1.2 Respect for Judicial Office

Section 165(2) of the Constitution stipulates that members of the judiciary must individually and collectively respect and honour their judicial office and must therefore enhance their independence in order to maintain public confidence in the judicial system. Section 165(2) of the Constitution further enforces the preamble of the Bangalore Principles of Judicial Conduct of 2002 which emphasises the importance of judges, individually and collectively, to honour and respect the judicial office as a public

¹¹⁵¹ *The Standard* 'Lawyers Slam Delays in Electoral Petitions' January 14 2005.

<http://www.thestandard.co.zw/2005/01/14/lawyers-slam-delays-in-electoral-petitions/> (Accessed 10 March 2013).

¹¹⁵² Although the Constitution empowers the courts to hear election disputes, it however 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. Article 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.'

¹¹⁵³ See *Baker v Carr* (1962) 369 US 186 where Frankfurter J states that 'The Court's authority... possessed of neither the purpose nor the sword.... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.'

trust and strive to enhance and maintain confidence in the judicial system.¹¹⁵⁴ It is therefore imperative that a judge must always bear in mind that it is his or her duty to observe high standards of conduct and should also participate in collectively establishing and maintaining the high standards of conduct.¹¹⁵⁵ Brennan CJ in emphasising the importance of maintaining high standards of conduct stated that:

'Your office requires you to serve, and that is a duty. No doubt there were a number of other reasons, personal and professional, for accepting appointment, but the judge will not succeed and will not find satisfaction in his or her duties unless there is continual realisation of the importance of the community service that is rendered. Freedom, peace, order and good government- the essentials of the society we treasure- depend in the ultimate analysis on the faithful performance of judicial duty...Knowing this, you must have a high conceit of your office... What you say and what you do, in public and some extent, in private, will affect the public appreciation of your office and the respect which it commands...'¹¹⁵⁶

Since the judiciary plays a central role in preserving the principles of justice and the rule of law, the Constitution seeks to ensure therefore that judges individually and collectively respect and honour their judicial office. This will therefore ensure that the judiciary earns its rightful place in society and by so doing will also enhance public confidence in the justice system. It is therefore important that judges in Zimbabwe should uphold this provision and desist from any activity that will shame the profession. The responsibility for promoting and maintaining high standards of judicial conduct lies with the judiciary. In accordance with the principles of judicial independence and the separation of powers, it is important that a code of conduct formulated by the judiciary itself should be adopted in each jurisdiction.¹¹⁵⁷ Although a new code might need to be adopted to encapsulate the new principles in the Constitution, it should be noted that Zimbabwe currently has Judicial Service (Code of Ethics) Regulations¹¹⁵⁸ that also support the view that judges should individually and collectively uphold and maintain

¹¹⁵⁴Preamble of the Bangalore Principles of Judicial Conduct 2002.

¹¹⁵⁵Principle 1.6 of the Bangalore Principles of Judicial Conduct 2002.

¹¹⁵⁶Brennan G, Former Chief Justice of Australia, Addressing the National Judicial Orientation Programme October 1996.

http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf (Accessed 10 March 2013).

¹¹⁵⁷Preamble of the Bangalore Principles of Judicial Conduct 2002.

¹¹⁵⁸Statutory Instrument 107 of 2012.

certain values attached to the judicial office. The Judicial Service (Code of Ethics) Regulations state that:

'Every judicial officer shall, individually and collectively, uphold, maintain and promote the following values attaching to judicial office, as further elaborated in this Part- (a) personal and institutional independence; and (b) integrity; and (c) propriety, and the appearance of propriety; and (d) equality, that is, equal treatment of all before the courts; and (e) impartiality, not only in respect of particular decisions but in respect of the process by which any decision is made; and (f) competence and diligence.'¹¹⁵⁹

The Zimbabwe Judicial Service (Code of Ethics) Regulations seek to enforce the expectation of how judges are supposed to behave in and out of court as such standards of conduct are designed to maintain confidence in the justice system.¹¹⁶⁰

5.5.3.1.3 Judicial Decisions Must be Made Freely

Section 165(3) of the Constitution also demands that judges must make judicial decisions freely and without interference or undue influence. The Constitution makes a significant change, as compared to the Lancaster House Constitution, as it does not make provision for a member of the judiciary to be placed under the direction or control of another member of the judiciary as was the case under the Lancaster House Constitution.¹¹⁶¹ As has been argued in Chapter 3, the placement of a member of the judiciary under the direction of another member is not acceptable as a judge must be independent of his or her colleagues on the bench except in cases of judicial supervision.¹¹⁶² Section 165(3) of the Constitution is also in accordance with international norms with regards to the protection of the independence of the judiciary. International law demands that judges should be free to perform their judicial functions

¹¹⁵⁹ Regulation 4 of the Zimbabwe Judicial Service (Code of Ethics) Regulations.

¹¹⁶⁰ Thomas JB *Judicial Ethics in Australia* (1988) 7. See also Principle 2.2 of the Bangalore Principles of Judicial Conduct

¹¹⁶¹ See also section 79B of the Lancaster House Constitution which also stated that 'in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.'

¹¹⁶² Madhuku L (2010) 104. He argues that the country should adopt formulations used by other countries that stipulate that the courts are subject 'only to the Constitution and the law'. For example see section 128 of the Constitution of Uganda and section 165 (2) of the Constitution of South Africa. See also principle 1.4 of the Bangalore Principles of Judicial Conduct.

independently.¹¹⁶³ This means that in performing their functions, judges should be free of direct or indirect influence or improper influence or pressures. Judges should therefore be in a position to make decisions based on the facts at hand and through the proper application of the law and render judgments without fear or favour.¹¹⁶⁴

The inclusion of the above provision in the Constitution will augur well for the protection of human rights as since the FTLRP, the suspicion has been raised that judges have been subject to external influences and that this has influenced the lack of protection of human rights in the country especially in high profile cases dealing with political issues.¹¹⁶⁵ The confidence of the public in the current judiciary has been eroded as judicial decision making has been perceived to be subject to inappropriate outside influence. As a result of political interference with the functioning of the judiciary, the government has managed to control the judiciary by packing the bench with pliant judges who have in various decisions endorsed executive lawlessness, thus abrogating their role to promote and protect human rights.

It is imperative that under the new constitutional order all three branches of government must recognise and respect the independence of the judiciary and judges must therefore be aware that they are not beholden to the government of the day.¹¹⁶⁶ Therefore it is essential to judicial independence and to maintaining public confidence in the judicial system that the executive and the legislature and the judiciary do not create a perception that a judge's decision could be coloured by external influence. Judges have a duty to apply the law as they understand it, on the basis of their understanding of

¹¹⁶³ Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary. See also Principle 8 of the United Nations Basic Principles on the Independence of the Judiciary.

¹¹⁶⁴ Geyh CG and Tassel EFV (1998) 34.

¹¹⁶⁵ *Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union* 2001 (2) ZLR 457 (S) where the judiciary under the leadership 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 and Others* Harare High Court Case 2467/05 (Unreported) and *Batsirai Children's Care v the Minister of Local Government, Public Works and Urban Development and Others* Harare High Court Case No. 2566/05 (Unreported) 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 yet it was done in violation of national and international law.

¹¹⁶⁶ Griffith J.A.G *The Politics of the Judiciary* (1985) 199.

the facts, without fear or favour and without regard as to whether or not the final decision is likely to be popular. This point was articulated by the South African Constitutional Court in the *S v Makwanyane* case in the following terms:

'The question before us, however, is not what the majority of South Africans believe a proper sentence should be. It is whether the Constitution allows the sentence. Opinion may have some relevance to the inquiry, but itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication... The Court cannot allow itself to be diverted from its duty to act as the independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.'¹¹⁶⁷

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

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

'Members of the judiciary must not- (a) engage in political activities;¹¹⁶⁸ (b) hold office in or be members of any political organisation; (c) solicit funds for or contribute towards any political organisation;¹¹⁶⁹ or (d) attend political meetings.'

This section seeks to ensure that judges remain non-partisan and to enhance the impartiality of individual judges.

5.5.3.1.4 Judicial Impropriety

Section 165(5) of the Constitution further provides that "members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial

¹¹⁶⁷ *S v Makwanyane* 1995 (3) SA 391 paras. 87-88.

¹¹⁶⁸ Further enforced by Regulation 15 of the Zimbabwe Judicial Service (Code of Ethics) Regulations.

¹¹⁶⁹ Further enforced by Regulation 8(1) of the Zimbabwe Judicial Service (Code of Ethics) Regulations. See also principle 4.14 and 4.15 of the Bangalore Principles of Judicial Conduct.

conduct or give the appearance of judicial impropriety.” It should be noted that propriety and appearance of propriety, both professional and personal, are essential elements of a judge’s life. The test for impropriety is therefore whether the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence and competence, or whether it is likely to create, in the mind of a reasonable observer, a perception that the judge’s ability to carry out judicial responsibilities in that manner is impaired.¹¹⁷⁰ It is therefore essential that a judge should desist from any conduct that will cause his or her impartiality to be questioned.¹¹⁷¹

The barring of judges from participating in political activities is a positive step in securing the independence of the judiciary in Zimbabwe. This follows years of accusations that the judiciary in the country has been heavily politicised and partisan. In order to uphold the doctrine of separation of powers, judges should therefore not engage in any political activities and should stay out of reach of such activities that will lead to their impartiality being questioned. With regards to political activity, although members of a judge’s family have every right to be politically active, a judge should be able to recognise that such activities of close family members may, even if erroneously, adversely affect public perception of a judge’s impartiality.¹¹⁷² Therefore, in cases before the court where such perception is raised, a judge should be able to recuse himself or herself from such a case.¹¹⁷³

Such has been the misfortune that has befallen most of the members of the present judiciary who have meddled in the realm of politics, thus compromising their judicial duties. Due to the naivety shown by some members of the judiciary, the executive has

¹¹⁷⁰United Nations Office on Drugs and Crime *Commentary on the Bangalore Principles of Judicial Conduct* (2007).

http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf (Accessed 20 March 2013).

¹¹⁷¹See Regulation 7(1) of the Zimbabwe Judicial Service (Code of Ethics) Regulations.

¹¹⁷²Canadian Judicial Council (*Ethical Principles for Judges* (1998)

http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf (Accessed 30 March 2013).

¹¹⁷³Canadian Judicial Council ‘Ethical Principles for Judges’ (1998).

http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf (Accessed 26 July 2013).

taken advantage of the situation to compromise the independence of the judiciary.¹¹⁷⁴ As indicated earlier, for their loyalty to the ruling party, seductive gifts have been made to members of the judiciary, with the executive and the Reserve Bank splashing out on lavish gifts, ranging from computers to plasma television sets, and satellite dishes, in order to ensure that judges remain loyal to the ruling party.¹¹⁷⁵ In order to ensure the loyalty of the judiciary, judges have also been beneficiaries of the controversial FTLRP, with the executive handing out farms to individual judges across the country.¹¹⁷⁶ The Constitution therefore seeks to remedy these past events by clearly disallowing such conduct and seeks to ensure that there will be no repeat in the future of such events in Zimbabwe, and thus entrenches the protection of the independence of the judiciary as essential to the improvement of the protection and promotion of human rights.

In conformity with Article 6.1 of the Bangalore Principles of Judicial Conduct¹¹⁷⁷, section 165(6) of the Constitution seeks to ensure that 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. This provision in the Constitution seeks to emphasise that the primary duty of a judge is to hear and determine cases requiring the interpretation and application of law, and other tasks relevant to the judicial office or the court's operation.¹¹⁷⁸ It is important that a member of the judiciary should not undertake any other duties unless they will not interfere with the separation of powers doctrine. The carrying out of extra-judicial duties should be done in a manner that will not reduce the capacity of a judge to discharge the judicial office.

5.5.3.1.5 Judicial Training

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

¹¹⁷⁴International Bar Association (2011) 11.

¹¹⁷⁵Human Rights Watch (2008) 16.

¹¹⁷⁶Gubbay A (2009) 2.

¹¹⁷⁷Principle 6.1 states that 'the judicial duties of a judge take precedence over all other activities.'

¹¹⁷⁸Other judicial duties include administrative and out of court activities. Judges have important responsibilities such as case management and pre-trial conferences and such duties should also be undertaken with diligence.

'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'¹¹⁷⁹

This provision is drafted with great influence from the Bangalore Principles for Judicial Conduct which also demand that judges must take reasonable steps to maintain and enhance their knowledge.¹¹⁸⁰ This can be done through in-service training programmes.¹¹⁸¹ It should be noted that the duty to provide constant training to the judges lies with the judiciary itself and it should assume responsibility for organising and supervising judicial training.¹¹⁸² With the increased relevance of international law, it has become imperative that judges should now keep abreast of international norms and exercise their judicial powers not only in accordance with domestic law but also in accordance with international law to the extent permitted by the domestic law.¹¹⁸³ It is imperative that constant in-house sessions should always be provided for judges in order for them to keep up to date with international human rights norms and how such laws can be applied domestically to ensure the adequate protection of human rights and fundamental freedoms.

Adequate knowledge of international law will bring about the realisation of the importance of human rights protection. It is submitted that attendance at international conferences and seminars on human rights with other judges from around the world will also bode well for the judicial protection of human rights in the country. Such conferences would ensure that judges share vital information regarding the steps that members of the judiciary must take in protecting human rights. Liaising with members from different jurisdictions is also a step which should be taken by the Zimbabwean judiciary in its quest to protect human rights. The South African judiciary would be a good starting point for the establishment of close ties in which ideas and challenges in the protection of human rights can be shared.¹¹⁸⁴ Such exposure is indeed urgently

¹¹⁷⁹Section 165(7) of the Constitution of Zimbabwe.

¹¹⁸⁰Principles 6.3 and 6.4 of the Bangalore Principles for Judicial Conduct.

¹¹⁸¹United Nations Office on Drugs and Crime (2007) 134.

¹¹⁸²United Nations Office on Drugs and Crime 2007) 134.

¹¹⁸³United Nations Office on Drugs and Crime 2007) 135.

¹¹⁸⁴This suggestion is made considering the close proximity of the two countries and the positive trend that has been set by the South African judiciary in human rights promotion and protection.

required in Zimbabwe and it would be a positive step in ensuring that the judiciary is aware of the importance of human rights protection.

5.5.3.2 Features Determining Extent of Independence of the Judiciary of Zimbabwe

Madhuku has noted that there are a number of features which determine the extent of the independence of the judiciary. He notes that these features include the method of appointment of judges, the removal of judges from office, and the question of salaries payable to judges.¹¹⁸⁵ Thus the following discussion analyses the extent to which such features are protected under the Constitution of Zimbabwe.

5.5.3.2.1 Appointment of Judges under Constitution of Zimbabwe

As has been discussed in Chapter 2 of this research, in order to guarantee the independence and impartiality of the judiciary, international law requires States to appoint judges through a strict selection process and in a transparent manner.¹¹⁸⁶ Although international law does not provide a specific method with regards to the appointment of judges, it is important that judges should be appointed and promoted on the basis of their legal skills, professional qualifications and integrity.¹¹⁸⁷ Clear selection criteria based on merit should be stipulated in the constitution of the concerned State as this is essential to protecting the independence of the judiciary. Although international law does not indicate a specific procedure with regards to the appointment of judges, there exist other international instruments which contain certain requirements that should be taken into account with regards to the appointment of judges. The Principles

¹¹⁸⁵Madhuku L (2002) 232.

¹¹⁸⁶See Principle 10 of United Nations Basic Principles on the Independence of the Judiciary; See also Article 9 of the Universal Charter of the Judge; Principle A, paragraph 4 (i) and (k) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

¹¹⁸⁷The Human Rights Committee has over the years repeatedly referred to the criteria under which judges are appointed and has established that judges should be appointed for their professional skills. See Concluding Observations of the Human Rights Committee on Bolivia, UN document CCPR/C/79/Add.74, para. 34. See also the Concluding Observations on Lebanon, UN document CCPR/C/79/Add.78, para. 15; See also Concluding Observations of the Human Rights Committee on Azerbaijan, UN document CCPR/CO/73/AZE, para. 14; See also Concluding Observations of the Human Rights Committee on Sudan, UN document CCPR/C/79/Add.85, para. 21; See also Concluding Observations of the Human Rights Committee on Slovakia, UN document CCPR/C/79/Add.79, para. 18.

and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa advocate an independent body to be entrusted with selecting judicial officers, but also allow for other bodies, including other branches of power, to perform the function of appointing judges as long as they safeguard the independence and impartiality of the judiciary.¹¹⁸⁸

5.5.3.2.1.1 Minimum Qualifications

As in the Lancaster House Constitution¹¹⁸⁹, the Constitution of Zimbabwe contains a number of requirements regarding the qualifications that a judge should have in order to be appointed to any of the courts established under the Constitution.¹¹⁹⁰ Madhuku notes that the setting of minimum qualifications for appointment is done in order to restrict the degree of manoeuvre by individuals that are empowered to make judicial appointments, and thus contributes to the independence of the judiciary.¹¹⁹¹ The inclusion of these minimum requirements reduces the risk of political appointments and is an important aspect of provisions guaranteeing an independent judiciary.¹¹⁹²

The entrenchment of the minimum qualifications for judicial appointment also ensures that judicial appointments are made on merit as envisaged by the Latimer House Guidelines. The Latimer House Guidelines identify the appointment of judges on merit as one of the key ways of preserving judicial independence.¹¹⁹³ As a result a number of African countries have adopted the same measures in order to preserve the independence of the judiciary.¹¹⁹⁴

¹¹⁸⁸Principle A, paragraph 4 (h) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. See also Principles 13-17 of the Beijing Principles and Principle II.1 of the Latimer House Guidelines.

¹¹⁸⁹See section 82 of the Lancaster House Constitution.

¹¹⁹⁰See section 177 of the Constitution of Zimbabwe for qualifications for judges of the Constitutional Court; section 178 of the Constitution for qualifications for judges of the Supreme Court; section 179 for qualifications for judges of the High Court, Labour Court and the Administrative Court

¹¹⁹¹Madhuku L (2002) 241.

¹¹⁹²Madhuku L (2002) 241.

¹¹⁹³See Guideline 3 of Latimer House Guidelines on Judicial Conduct.

¹¹⁹⁴Article 143(1)(a) of the Constitution of Uganda states that a person can only be appointed Chief Justice if he or she has served as a judge of the Supreme Court of Uganda or a court having similar jurisdiction, or he or she has practiced law as an advocate for a minimum period of 20 years. Article 143(1)(e) of the Constitution of Uganda provides that for one to qualify as a judge of the High Court in Uganda, one must have practiced for a minimum of 10 years as an advocate. Section 112(1) of the Constitution of Malawi provides that the minimum number of years of having practised as a lawyer in order to qualify for judicial appointment is ten years. Article 139(4) of the Constitution of Ghana also

The Constitution lays down the requirements that are needed for one to be appointed a judge in the various courts. These requirements are necessary in order to ensure that individuals that are appointed to the bench are best qualified for the job, have the necessary experience and qualifications and are fit and proper to hold judicial office. This is therefore in accordance with a number of international instruments¹¹⁹⁵ and the law of other foreign jurisdictions¹¹⁹⁶ that seek to ensure that fit and proper individuals are appointed as members of the judiciary. It should be noted that other imperatives stated in the Constitution, such as, gender and racial representativeness of members of the judiciary¹¹⁹⁷, can also be reflected in legislation that will act as a possible guide in the appointment of judges.

5.5.3.2.1.2 Appointment Process of Judges

The appointment of judges is one of the most important factors in guaranteeing the independence of the judiciary. In order to ensure that the independence of the judiciary is protected the appointment process should not be left entirely in the hands of politicians as this will result in judges being appointed on the basis of political allegiance. Since politicians are unavoidable in the appointment process, in order for the appointment process to be legitimate, it is important that the judicial authority must be derived from the people, and thus appointments should be made by an elected organ of state. As a result in a number of jurisdictions the head of the executive (President or Prime Minister) has a critical say in the appointment of judges. However, the only differences that might arise in a number of jurisdictions is the degree of involvement and

provides that the minimum number of years of having practised as a lawyer in order to qualify for judicial appointment is ten. In South Africa and Namibia, there are no prescribed minimum requirements and such can be attributed to the focus in both countries on promoting the advancement of formerly disadvantaged groups. However, section 174(1) of the Constitution of South Africa does recognise that the need for the appointment of an appropriately qualified individuals.

¹¹⁹⁵See Principle 10 United Nations Basic Principles on the Independence of the Judiciary which state that a person selected for judicial office should be appropriately trained, and have integrity and demonstrable ability.

¹¹⁹⁶See section 174(1) of the Constitution of South Africa which states that 'Any appropriately qualified woman or man who is fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.' See also Article 143 of the Constitution of Uganda.

¹¹⁹⁷Section 184 of the Constitution of Zimbabwe.

the extent to which the decision of the Head of State is subject to confirmation by the legislature or another body.¹¹⁹⁸

The appointment of members of the judiciary has been a topical issue in Zimbabwe over the years. Criticism has been levelled at the Lancaster House Constitution and its weak provisions on the composition of the JSC, and this has led to the perception that there was lack of independence and impartiality in the appointment process. This was further compounded by the fact that the President was entitled to proceed with the appointment of a member of the judiciary regardless of the advice received from the JSC.¹¹⁹⁹ Thus, in an effort to improve the appointment process of judges in the country, section 180 of the Constitution 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) 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.'

The analysis of the appointment process under the Constitution shall be conducted after a brief analysis of the role and composition of the Judicial Service Commission established under the Constitution. The analysis of the Judicial Service Commission is dealt with below:

¹¹⁹⁸Madhuku L (2002) 234.

¹¹⁹⁹See section 84(1) of the Lancaster House Constitution.

5.5.3.2.1.3 Judicial Service Commission (JSC)

The extent to which the appointment of judges is free from political manipulation is dependent on the independence of the Judicial Service Commission.¹²⁰⁰ It is therefore important that the Judicial Service Commission must be independent to ensure that there is fairness and transparency in the appointment process. Thus, in this regard the Constitution creates a Judicial

Service Commission (JSC)¹²⁰¹ which also plays a role in the appointment of judges.¹²⁰² The Composition of the JSC is as follows:

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

¹²⁰⁰Madhuku L (2002) 238.

¹²⁰¹Section 190 of the Constitution of Zimbabwe deals with the functions of the JSC which are: ‘(1) The Judicial Service Commission may tender advice to the Government on any matter relating to the judiciary or the administration of justice, and the Government must pay due regard to any such advice. (2) The Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose. (3) The Judicial Service Commission with the approval of the Minister responsible for justice, may make regulations for any purpose set out in this section. (4) An Act of Parliament may confer on the Judicial Service Commission functions in connection with the employment, discipline and conditions of service of persons employed in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court and other courts.’

¹²⁰²Section 189 of the Constitution of Zimbabwe.

The JSC under the Constitution consists of thirteen members, which is a significant improvement on the one under the Lancaster House Constitution. It is clear from the composition of the JSC that the President's influence over the appointment of the JSC has been reduced compared to the Lancaster House Constitution. Although some members sit on the Commission by virtue of being appointed to office by the President, considerable efforts have been made to ensure that there is independent representation on the Commission. Such independent representation will therefore ensure that appointments to the judiciary are made impartially and without any political considerations. Perhaps to further strengthen the independent representation on the JSC, the inclusion of members of civil society and members of Parliament from the different political parties on the JSC would also have enhanced the independence of the Commission.¹²⁰³

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

¹²⁰³The South African example in this case could have been followed as provided in section 178(1)(h) of the Constitution of the Republic of South Africa which states that 'There is a Judicial Service Commission consisting of- six persons designated by the National Assembly from among its members, at least three of whom must be members of the opposition parties represented in the Assembly.' See also Article 153 of the Constitution of Ghana which provides for a Commission of 18 members which include amongst other members four non-lawyers appointed by the President, a Chief and the editor of the Ghana law Reports. The influence of the President is severely curtailed as the majority of the members of the Commission gain membership independent of his or her influence.

5.5.3.2.1.4 Analysis of the Appointment of Judges

In accordance with section 180 of the Constitution, the President is mandated with the appointment of judges, but is, however, bound by the advice of the JSC.¹²⁰⁴ This marks a clear departure from the Lancaster House Constitution where the President was not bound by the advice of the JSC in judicial appointments. In order to ensure impartiality and fairness in the appointment process, the Constitution of Zimbabwe, unlike the Lancaster House Constitution, lays down a number of guidelines that need to be followed before an individual can be appointed as a judge. The guidelines stipulated in the Constitution will be discussed below.

5.5.3.2.1.5 Advertisement of Judicial Vacancies

In seeking to improve judicial appointments, the Constitution stipulates that the JSC must advertise any vacancy within the judiciary and invite applications to the post and also invite the President and the public to make nominations.¹²⁰⁵ The advertisement of vacancies is a commendable inclusion in the appointment process and seeks to ensure that suitable qualified individuals are appointed to the bench.¹²⁰⁶ It is also a welcome change from the past, as previously there was never any advertisement of judicial vacancies.¹²⁰⁷ Over the years judicial appointments were made without any such advertisements, resulting in questions being asked about the credibility of the appointment process.¹²⁰⁸ Advertisements will therefore aid in the appointment of well qualified and fit individuals to the judiciary and increase openness, transparency and scrutiny with respect to potential choices. It is submitted that such advertisements will therefore increase the professionalism of the judiciary.

¹²⁰⁴ See section 180 of the Constitution of Zimbabwe.

¹²⁰⁵ See section 180(2)(a) of the Constitution of Zimbabwe.

¹²⁰⁶ Such advertisement is in line with international law. See the Commonwealth (Latimer House) Principles on the Three branches of Government which require judicial vacancies to be advertised. See also Principle 12.3 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, Adopted by the Judicial Integrity Group at its Meeting in Lusaka, Zambia 2010.

<http://www.summitofhighcourts.com/docs/standarts/UN2.pdf> (Accessed 20 April 2013).

¹²⁰⁷ *Zimbabwe Independent* 'Mugabe Judges Appointments Stink' 19 July 2013.

<http://www.theindependent.co.zw/2013/07/19/mugabe-judges-appointments-stink/> (Accessed 23 September 2013).

¹²⁰⁸ *Zimbabwe Independent* 'Mugabe Judges Appointments Stink' 19 July 2013.

<http://www.theindependent.co.zw/2013/07/19/mugabe-judges-appointments-stink/> (Accessed 23 September 2013).

5.5.3.2.1.6 President and Public Nominations

The Constitution gives the President and members of the public the opportunity to nominate potential candidates to be appointed as judges.¹²⁰⁹ Such nominations are made after the advertisement of judicial vacancies. It is submitted that the public's involvement in the nomination process marks an improvement on the Lancaster House Constitution as it did not provide for the involvement of the public in the appointment process. The public's involvement in the judicial appointment process is therefore crucial for the legitimacy and professionalisation of the appointment process. However, despite such positive changes being introduced, the Constitution contains a more alarming provision that allows the President to make nominations for any judicial vacancy in the country.¹²¹⁰ Since the Constitution gives the President the final authority in the appointment of judges, it is alarming that the President should also be given the power to nominate any individual for judicial appointment.

It is submitted that this provision grants the President enormous powers in the appointment process. The President as a result might refuse to make an appointment if any of his or her nominations to the bench are not presented to him for appointment by the JSC. Such a scenario where the President is allowed to nominate individuals could result in the JSC being forced to forward certain names that would have been nominated by the President. Such a provision is therefore dangerous for the independence of the judiciary and is subject to abuse by the President in the case where his preferred choices are not forwarded for appointment. It also defeats the whole purpose of calling for members of the public to make nominations as their views might not make any significant contribution to the appointment process. It is therefore difficult to dispel the suspicion that this provision was included to give the President indirect supreme powers over the JSC.

¹²⁰⁹ See section 180(2)(b) of the Constitution of Zimbabwe.

¹²¹⁰ Section 180(2)(b) of the Constitution of Zimbabwe.

5.5.3.2.1.7 Public Interviews

The Constitution also provides that the JSC should conduct public interviews¹²¹¹ of prospective candidates from which a list of three qualified and recommended persons must be prepared and submitted to the President¹²¹², and from which appointments have to be made.¹²¹³ However, the President is not obliged to appoint any of the three nominees on the initial list submitted by the JSC and in such cases the President must require the JSC to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees.¹²¹⁴ However, this provision does not state the process through which the second list is to be obtained (in comparison to the first list where nominations are called for) and as to whether such individuals are also subject to any public interviews. This therefore raises great suspicion that the appointment process might be subjected to manipulation. This is so because names on the second list can be handpicked and thus result in the appointment of pliant judges to the bench. Thus, this provision also alarmingly gives the President considerable power in the appointment of judges and there is great danger that the selection of judges might be further politicised. There is need to review this provision to ensure that impartiality in the appointment process is observed.

Despite some concerns with the appointment process, efforts to ensure that there is transparency in the appointment process must be commended. They mark a departure from the past and the cumbersome appointment process procedures seek to ensure that there is a series of quality control mechanisms which will review the proposed appointees' suitability, qualifications and skill to ensure progressive jurisprudence.¹²¹⁵ In order to further strengthen the impartiality of the appointment process, it is recommended that the JSC adopts clear standards for assessing the suitability and competence of candidates. Such standards must be published so that the public is aware of the standards used to assess judges. Public awareness will no doubt lead to

¹²¹¹Section 180(2)(c) of the Constitution.

¹²¹²See section 180(2)(d) of the Constitution.

¹²¹³See section 180(2)(d) of the Constitution.

¹²¹⁴See section 180(3) of the Constitution.

¹²¹⁵*Zimbabwe Independent* 'Mugabe Judges Appointments Stink' 19 July 2013.

<http://www.theindependent.co.zw/2013/07/19/mugabe-judges-appointments-stink/>
(Accessed 23 September 2013).

confidence in the justice system as members of the public would be aware that fit, proper and well qualified individuals are appointed as judges.

5.5.3.2.1.8 Appointment of Acting Judicial Officials under the Constitution

The practice of appointing acting judges has over the years raised international controversy. This is so because such appointments have been deemed to be contrary to sound legal policy and the independence of the judiciary as a result of their insecure tenure.¹²¹⁶ Security of tenure is key to the independence of the judiciary and if judges are appointed for a fixed term, there is the danger that they will be seen as attempting to please the individuals that have appointed them in order to obtain re-appointment for another term. Another bone of contention about such appointments is the fact that their duration are matters within the gift of the executive.¹²¹⁷ In order to secure the independence of acting judges, the Mount Scopus Revised International Standards of Judicial Independence¹²¹⁸ stipulate that the institution of temporary judges should be avoided as far as possible except where there exists a long historical democratic tradition¹²¹⁹, and that acting judges should be appointed only with proper safeguards secured by law.¹²²⁰

The controversy associated with the appointment of acting judges has been well articulated in the case of *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the republic of South Africa 1996 (First Certification Judgment)*¹²²¹ where objections were raised with regards to the appointment of acting judges in the country.¹²²² The objections to the provision related to the fact that the

¹²¹⁶General Council of the Bar of South Africa *Appointment of Public Servants as Judges* (2008) 12. <http://www.sabar.co.za/law-journals/2010/august/2010-august-vol023-no2-pp11-12.pdf> (Accessed 21 March 2013).

¹²¹⁷General Council of the Bar of South Africa (2008) 12.

¹²¹⁸International Association of Judicial Independence and World peace International Project of Judicial Independence, Mount Scopus Approved Revised International Standards of Judicial Independence, Approved March 19, 2008. <http://www.jiwp.org/#/mt-scopus-standards/c14de> (Accessed 13 April 2013).

¹²¹⁹Principle 4.7 of the Mount Scopus Approved Revised International Standards of Judicial Independence.

¹²²⁰Principle 4.8 of the Mount Scopus Approved Revised International Standards of Judicial Independence.

¹²²¹1996 (4) SA 744 (CC).

¹²²²Section 175 of the Constitution of South Africa states that '(1) the President may appoint a woman or man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The

Minister of Justice effectively had a sole discretion to make the appointments of all acting judges save for the appointment of acting judges to the Constitutional Court. Such discretion therefore was said to compromise the principle of separation of powers. However, in its ruling the Constitutional Court acknowledged the merit of the objections but stated that there were sufficient safeguards to ensure that section 175(2) did not become the vehicle for an abuse of power. The Constitutional Court stated that the majority of the temporary positions needed to be filled “urgently and unexpectedly” and as such it would not be practicable to convene the large body of the JSC.¹²²³ The Court also noted that the Minister was precluded by section 165 of the Constitution from interfering in any way with the discharge by an acting judge of his or her duties.¹²²⁴ In line with international law acting judicial appointments should be made only with proper safeguards secured by law so as not to compromise the independence of the judiciary.¹²²⁵

The Constitution in section 181 provides for acting judicial appointments. It states that:

‘(1) if the office of the Chief Justice is vacant or if the office-holder is unable to perform the functions of the office, the Deputy Chief Justice acts in his or her place, but if both offices are vacant or both office-holders are unable to perform their functions, the next most senior judge of the Constitutional Court acts as Chief Justice. (2) (a) If the office of President of the High Court; (b) Judge President of the Labour Court; or (c) Judge President of the Administrative Court; is vacant or if the office-holder is unable to perform the functions of that office, the next most senior judge of the court concerned acts as Judge President. (3) If the services of an additional judge of the High Court, the Labour Court or the Administrative Court are required for a limited period the President, acting on the advice of the Judicial Service Commission, may appoint a former judge to act in that office for not more than twelve months, which period may be renewed for one further

appointment must be on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice. (2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.’

¹²²³ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)* 1996 (4) SA 744 (CC) para.129.

¹²²⁴ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (First Certification Judgment)* 1996 (4) SA 744 (CC) para.130.

¹²²⁵ See Principle II.1 of the Latimer House Guidelines on the Three Branches of Government which states that ‘judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.’

period of twelve months. (4) Persons appointed to act under subsection (3) may continue to sit as judges after their appointments have expired, for the purpose of dealing with any proceedings commenced before them while they were so acting.'

The above section clearly provides the procedure to be followed when acting judicial appointments are made. With regards to the appointment of acting judges in the High Court, Labour Court and the Administrative Court, the President is bound by the advice of the JSC in order to ensure that there are no unilateral appointments. This section also marks an improvement on the Lancaster House Constitution where the President was not bound by the advice of the JSC in the appointment of acting judges.¹²²⁶

With regards to the appointment of acting judges to the Constitutional Court¹²²⁷ and the Supreme Court¹²²⁸, the Constitution provides that such appointments should be made by the Chief Justice. The Constitution is however silent on whether the Chief Justice has to consult the JSC in appointing acting judges of the Constitutional Court and the Supreme Court. It should be noted that as head of the judiciary it is appropriate that the Chief Justice should make such appointments. However, the unilateral appointment of acting judges of the Constitutional Court and Supreme Court by the Chief Justice is of great concern and raises great questions about impartiality in such appointments. The Constitution in this instance therefore also provides for a weak constitutional protection

¹²²⁶ See section 85 of the Lancaster House Constitution stated that '(1) if the offices of the Chief Justice and Deputy Chief Justice are vacant or the Chief Justice and the Deputy Chief Justice are for any reason unable to perform the functions of their offices, the President may after consulting the Judicial Service Commission, appoint some person holding the office of judge of the Supreme Court or Judge President of the High Court to act as Chief Justice. (2) If the office of a judge of the Supreme Court or the High Court other than the Chief Justice is vacant or such judge is appointed to act in some other judicial capacity or is for any reason unable to perform the functions of his office, or if the services of an additional judge of the High Court are required for a limited period, the President may, as the case requires and after consultation with the Judicial Services Commission, appoint some person qualified for appointment as a judge of the Supreme Court or the High Court to act in that office. (3) A person appointed to act under subsection (2)- (a) shall, subject to the provisions of section 87, continue to act for that period of his appointment or, if no such period is specified, until his appointment is revoked by the President, after consultation with the Judicial Services Commission; and (b) may, notwithstanding that the period of his appointment has expired or that his appointment has been revoked, sit as a judge for the purpose of giving judgment or otherwise in relation to any proceedings commenced before or heard by him while he was so acting.'

¹²²⁷ Section 166(2) of the Constitution of Zimbabwe states that 'If the services of an acting judge are required on the Constitutional Court for a limited period, the Chief Justice may appoint a judge or a former judge to act as a judge of the Constitutional Court for that period.'

¹²²⁸ Section 168(2) of the Constitution of Zimbabwe states that 'If the services of an acting judge are required on the Supreme Court for a limited period, the Chief Justice may appoint a judge of the High Court, or a former judge to act as a judge of the Supreme Court for that period.'

of the appointment of acting judges. As a result of the loophole there is the possibility that the Chief Justice might be tempted to make appointments recommended by the executive.

In order to ensure that acting judges of the Constitutional Court and the Supreme Court are appointed impartially without any hint of political interference it is ideal that the JSC should be able to deal with the appointments of acting judges.¹²²⁹ It also would have been plausible for the JSC to make all acting judicial appointments. This is a good procedure adopted in Uganda, where the JSC appoints acting judges.¹²³⁰ This would ensure that impartiality is observed in the appointment of acting judges. The inclusion of the above measures in the Constitution would have gone a long way in securing the independence of the judiciary.

5.5.3.2.1.9 Appointment of Magistrates and other Judicial Officers

Before the introduction of the Judicial Service Act¹²³¹, Magistrates in the country were considered to be civil servants as they were employed by the Public Service Commission. As civil servants their conditions of service were fixed by the Public Service Commission and as such lacked the basic protection of the independence of the judiciary afforded to members of the Supreme Court, High Court and other special courts. However, in seeking to improve the independence of the magistracy from the control and influence of the executive, the Judicial Service Act now stipulates that Magistrates are appointed and administered by the JSC. Section 182 of the Constitution stipulates that:

‘An Act of Parliament must provide for the appointment of magistrates and other judicial officers other than judges, but- (a) magistrates must be appointed by the Judicial Service Commission; (b) judicial officers other than magistrates or judges must be appointed with

¹²²⁹ See the example of Uganda in Article 148 of the Constitution of Uganda states that ‘subject to the provisions of this Constitution, the Judicial Service Commission may appoint persons to hold or act in any judicial office other than the offices specified in Article 147 (3) of this Constitution and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices and remove such persons from office.’

¹²³⁰ Article 148 of the Constitution of Uganda.

¹²³¹ 10 of 2006.

the approval of the Judicial Service Commission; (c) all such appointments must be made transparently and without fear, favour, prejudice or bias.'

The Constitution clearly stipulates that Magistrates must be appointed by the JSC. Such provision seeks to protect the independence of the magistracy and ensure that magistrates are not appointed according to political considerations. In order to ensure that the independence of magistrates is protected in Zimbabwe it is essential that the JSC itself should be independent. The JSC should ensure that appointments are free from any external influences and that well-qualified and fit and proper individuals who will uphold the judicial oath are appointed as magistrates.

5.5.3.2.2 Removal of Judges from Office

It should be noted that the removal conditions of judges are important in securing the independence of the judiciary. Madhuku notes that if a judge can be easily removed from office, it matters very little that the appointment process is rigorous and free from political manipulation.¹²³² International standards have been put into place to preserve the independence of the judiciary and place emphasis on the improper removal of judges from office.¹²³³ It is therefore crucial that a judge in the case of inability to perform judicial duties or serious misconduct must be removed from office by an independent and impartial tribunal.

The Lancaster House Constitution provided for the removal of a judge only for inability to discharge the functions of his or her office and for misbehaviour.¹²³⁴ However, the Constitution of Zimbabwe, unlike the Lancaster House one, provides for broad and clear reasons that may result in a judge's removal from office. Thus, according to the Constitution reasons for removal of a judge from office include the inability to perform judicial functions, gross incompetence and gross misconduct.¹²³⁵ The Constitution also

¹²³²Madhuku L (2010) 96.

¹²³³See Guideline IV of the Latimer House Principles on the Three Branches of Government.

¹²³⁴Section 87(1) of the Lancaster House Constitution. It should also be noted that misbehaviour was not defined under the Lancaster House Constitution but could be taken to mean misbehaviour in matters concerning the office of judge and would include a conviction for an offence that would render the person unfit to carry out judicial functions.

¹²³⁵Section 187(1) of the Constitution of Zimbabwe.

stipulates the procedure that must be followed if the possibility of the removal of a judge is raised. Section 187 of the Constitution states that:

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

The Constitution retains the removal conditions of the Chief Justice under the Lancaster House Constitution.¹²³⁶ Similar to the Lancaster House Constitution, section 187(2) of the Constitution empowers the President to initiate removal proceeding against the Chief Justice. If such a possibility is raised by the President, the President is mandated to appoint a tribunal to enquire into the removal from office of the Chief Justice. Further, section 187(3) gives the JSC the power to advise the President on the issue of the removal of any judges, including the Chief Justice. If such issue is raised by the JSC, the President is mandated to appoint a tribunal to look into the matter.

Although the Constitution does provide some authority to the JSC with regards to the removal process of judges in the country, it however makes the President powerful with regards to the removal of judges. The President has the power to appoint a tribunal if a question arises with regards to the removal of the Chief Justice and also if the JSC advises the President that the removal of a judge, including the Chief Justice, ought to be investigated. The involvement of the President in the removal process of judges is therefore unacceptable as it is possible that a judge may be removed from office purely on political grounds. The fact that the President has the power to unilaterally appoint members of the tribunal raises suspicion about the independence of such tribunal.

¹²³⁶See section 87(2) of the Lancaster House Constitution of Zimbabwe which stated that ‘If the President considers that the question of the removal from office of the Chief Justice ought to be investigated, the President shall appoint a tribunal to inquire into the matter.’

Since the President is bound by the tribunal's findings¹²³⁷, it is possible that a tribunal might be appointed with a specific motive to remove a judge that might be viewed as "independent" by the executive. This is likely to have a direct impact on the independence of the judiciary and violates the separation of powers doctrine.

It is therefore crucial that in order to secure the independence of the judiciary, the JSC should have a central role in the removal of judges. The JSC must be given the sole power to initiate the process for the removal of a judge and also to establish a tribunal if a question arises with regards to the removal of a judge. Such process would ensure that the tribunal appointed is independent and hence as a result the tribunal will be impartial in its findings as the JSC will have the right to recommend to the President as to whether a judge can be removed from office. The Constitution could have been informed by a number of jurisdictions in Africa where the JSC is given the sole power to initiate the investigation if a question arises as whether a judge ought to be removed from office and also to recommend action to the President.

Article 84 of the Constitution of Namibia restricts the grounds for the removal of a judge to mental incapacity and gross misconduct.¹²³⁸ Only the JSC is empowered to initiate the investigation and to recommend to the President. The President as a result can only act on the recommendations of the JSC and even with respect to the office of the Chief Justice the President cannot initiate removal proceedings.¹²³⁹ In South Africa two stages are established for the removal of a judge. The Judicial Service Commission must make a finding whether a judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct.¹²⁴⁰ The National Assembly can also call for a judge to be removed by

¹²³⁷Section 187 of the Constitution states that '(7) A Tribunal appointed under subsection (2) or (3) must inquire into the question of removing the judge concerned from office and, having done so, must report its findings to the President and recommend whether or not the judge should be removed from office. (8) The President must act in accordance with the tribunal's recommendations in terms of subsection (7).'

¹²³⁸Article 84(2) of the Constitution of Namibia states that 'judges may only be removed from office on the ground of mental incapacity or gross misconduct, and in accordance with provisions of Sub-Article (3) hereof.'

¹²³⁹Article 84 of the Constitution of Namibia states that '(1) A judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission... (3) The Judicial Service Commission shall investigate whether or not a judge should be removed from office on such grounds, and if it decides that the judge should be removed, it shall inform the President of its recommendation.'

¹²⁴⁰Section 177(1)(a) of the Constitution of South Africa.

a resolution that is adopted by a supporting vote of at least two thirds of its members.¹²⁴¹ The powers of the President in the removal process are therefore limited in that the President must remove a judge upon the adoption of a resolution calling for a judge to be removed.¹²⁴² Therefore, in order to secure the independence of the judiciary the Constitution should have limited the powers of the President in the removal of judges.

5.5.3.2.3 Tenure of Judges

As has been noted earlier, the security of tenure of judges is also crucial to securing the independence of the judiciary and seeks to explain the importance of maintaining judges on permanent appointment and the abolition of their tenure of office without their consent. Although the Constitution provides that judges cannot be removed from office unnecessarily, it does provide for a compulsory retirement age so that judges can be replaced. Madhuku notes that since judges wield enormous powers but yet are not politically accountable to the people, it would therefore be inappropriate for a judge to occupy a judicial seat forever.¹²⁴³ Madhuku also notes that the compulsory retirement age of judges takes away from the executive the power to grant a favourable judge the privilege of remaining in office longer than others as this would undermine the independence of the judiciary.¹²⁴⁴ Section 186 of the Constitution states that:

‘(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 and the High Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire. (3) A person may be appointed as a judge of the Supreme Court or the High Court for a fixed term, but if the person is so appointed, other than in an acting capacity, he or she ceases to be a judge on reaching the age of seventy years even if the term of his or her appointment has not expired; (4) Even though a judge has resigned or reached the age of seventy years or, in the case of a judge of the Constitutional Court or a judge referred

¹²⁴¹Section 177(1)(b) of the Constitution of South Africa.

¹²⁴²Section 177 (2) of the Constitution of South Africa.

¹²⁴³Madhuku L (2002) 243.

¹²⁴⁴Madhuku L (2002) 243.

to in subsection (3), reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge. (5) A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission. (6) The office of a judge must not be abolished during his or her tenure of office.'

The protection of the tenure of judges under the Constitution is remarkably different from that provided under the Lancaster House Constitution. The Lancaster House Constitution allowed the President to extend the retirement age of judges.¹²⁴⁵ The President was given the power to either accept or reject the medical report as to the mental and physical fitness of a judge to continue in office. The provision granted the President the power to extend the retirement age of a judge provided an avenue through which the executive may seek to influence judicial behaviour.¹²⁴⁶ This might have resulted in only pliant judges having their terms of office extended, which would undermine the independence of the judiciary.

The Constitution of Zimbabwe, unlike the Lancaster House Constitution, has taken away the powers of the President to grant a judge the privilege of remaining in office.¹²⁴⁷ In an effort to enhance the independence of the judiciary, the Constitution now provides that judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years and a compulsory retirement age of 70.¹²⁴⁸ The Constitution does not grant the President the discretionary power to extend the term of office of a judge. However, a judge of the Constitutional Court upon completion of their term may be appointed as a judge of the Supreme Court or the High Court if they so qualify. One can infer that the idea behind the non-renewable term of not more than 15 years for

¹²⁴⁵Section 86 of the Lancaster House Constitution stated that '(1) Subject to the provisions of section 87, a judge of the Supreme Court or the High Court shall retire when he attains the age of sixty-five years unless before he attains that age, he has elected to retire on attaining the age of seventy years: Provided that (a) an election under this subsection shall be subject to the submission to, and acceptance by, the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office; (b) the provisions of this subsection shall not apply to an acting judge or a judge who has been appointed for a fixed period of office.'

¹²⁴⁶Madhuku L (2002) 243.

¹²⁴⁷See for example the Constitution of South Africa which also uses the same method. Section 176(1) of the Constitution of the Republic of South Africa states that a judge of the Constitutional Court is appointed for a non-renewable term of 12 years and must retire at the age of 70 years, whichever occurs first, except where an Act of Parliament extends the term of office of the Constitutional Court judge.

¹²⁴⁸The age of retirement also applies to judges of the Supreme Court and the High Court. See section 186(2) of the Constitution of Zimbabwe.

Constitutional Court judges is to provide a regular rotation of judges in the Constitutional Court, so that constitutional interpretation can reflect changing attitudes of society. An implication can also be drawn as to why judges of the Constitutional Court can still be appointed as judges of the Supreme Court and the High Court before they reach the age of 70. Due to their experience it would be a huge loss to the legal profession if they were not to be appointed to the judiciary before they reached their retirement age. Hence the Constitution envisages that if they so qualify, they can still be retained as judges of the Supreme Court and High Court. Section 186 (6) also protects the tenure of judges and stipulates that the office of a judge must not be abolished during his or her tenure.

Although the Constitution states that a judge who has resigned or reached the age of seventy years may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge, it is however silent on the specific time that the judge should remain in office. Such a gap therefore leaves such provision open to abuse as no specific time is mentioned in the Constitution as to the period that a judge will be allowed to sit in that regard. Perhaps the example set by Uganda¹²⁴⁹ and Ghana¹²⁵⁰ could have been followed in order to ensure that a stipulated time is allocated for any further period to enable a judge to finish proceedings

¹²⁴⁹Article 144 of the Constitution of Uganda states that '(1) A judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office- (a) in the case of the Chief Justice, the Deputy Chief Justice, a justice of the Supreme Court and a justice of Appeal, on attaining the age of seventy years; and (b) in the case of the Principal Judge and a judge of the High Court, on attaining the age of sixty-five years; or (c) in each case, subject to Article 128 (7) this Constitution, on attaining such other age as may be prescribed by Parliament by law; but a judicial officer may continue in office after attaining the age at which he or she is required by this clause to vacate office, for a period not exceeding three months necessary to enable him or her to complete any work pending before him or her.'

¹²⁵⁰Article 145 of the Constitution of Ghana states that '(1) A Justice of a Superior Court or a Chairman of a Regional Tribunal may retire at 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.'

that would have commenced before the attainment of the retirement age so as to create consistency and certainty within the judicial system.

5.5.3.2.4 Remuneration

In order to maintain the independence of the judiciary, it is vital that the salary that is payable to a judge is not reduced during his or her tenure of office and that such salaries payable to judges must be charged to the Consolidated Revenue Fund so that Parliament cannot seek to exert influence on judges via the annual discussion of the state budget.¹²⁵¹ Principle 11 of the United Nations Basic Principles of Judicial Independence recognises that for the judiciary to be independent, sufficient and sustainable funding should be provided to enable it to perform its functions to the highest standards. The Latimer House Principles also stipulate that appropriate salaries and benefits, supporting staff, resources and equipment are essential for the proper functioning of the judiciary and that the salaries of judges and benefits should be set by an independent body.¹²⁵²

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

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

¹²⁵¹ Such clauses are included in various Constitutions around Africa. See Article 128 of the Constitution of Uganda and Article 127 of the Constitution of Ghana.

¹²⁵² Principle IV of the Latimer House Principles on the Three Branches of Government.

Section 188 of the Constitution stipulates that judges are entitled to salaries and allowances and other benefits fixed from time to time by the Judicial Service Commission with the approval of the President and that such salaries and allowances may not be reduced whilst in office. The President thus approves such salaries after consulting with the Minister responsible for justice. The President is however not bound by the advice of the Minister responsible for justice but is bound by the recommendations of the Minister responsible for finance with regards to the setting of salaries and allowances for judges.

Although the Judicial Service Commission is given the role of fixing the salaries and allowances of judges from time to time, the Constitution gives a key role to the President to approve such salaries. The Constitution thus leaves the determination of such salaries in the hands of the executive which does not bode well for the independence of the judiciary.¹²⁵³ Magaisa notes that in order to confer financial autonomy on the judiciary, the judiciary must be given the power to determine its budget.¹²⁵⁴ Magaisa notes that this can be done through clear constitutional provisions that guarantee the judicial budget as a percentage of the national budget.¹²⁵⁵ This idea is also supported by Dakolias and Thachuk who suggest that the financial influence of the political branches of the state over the judiciary could be reduced by making judicial budgets some fixed percentage of the national budget.¹²⁵⁶ As a result, if the funds of the judiciary are constitutionally guaranteed, they would be removed from the direct control of politicians. Magaisa is of the view that this would ensure that the judiciary has access to funds to meet its basic needs.

¹²⁵³It should be noted that during the opening of the 2014 legal year, Chidyausiku CJ, criticised government for unilaterally reducing the conditions of service for serving judges and other judicial officers. Such reduction of conditions of services have been done in direct violation of the Constitution and also highlights the dangers of giving politicians to determine the conditions of service of judges. Such actions pose a great danger to the independence of the judiciary. For more see *New Zimbabwe* "Chidyausiku Attacks Government Over Salaries" 13 January 2014.

<http://www.newzimbabwe.com/news-13854-Chidyausiku+attacks+govt+over+salaries/news.aspx>
(Accessed 17 February 2014).

¹²⁵⁴Magaisa A 'Judiciary Must be Financially Independent' *New Zimbabwe* 14 May 2009
<http://blog.newzimbabwe.com/2009/05/amagaisa/judiciary-must-be-financially-independent/comment-page-13/> (Accessed 23 September 2013).

¹²⁵⁵Magaisa A 'Judiciary Must be Financially Independent.

¹²⁵⁶Dakolias M and Thachuk K (2000) 363.

Another example that could also have informed the remuneration of judges in Zimbabwe is that of South Africa. In South Africa the President is given the power to set the remuneration of judges. In doing so the President is guided in terms of the Judges Remuneration and Conditions of Employment Act¹²⁵⁷, by an independent commission established by the Independent Commission for the Remuneration of Public Bearers Act.¹²⁵⁸ The establishment of an independent commission whose recommendations would bind the President in Zimbabwe would have gone a long way in securing the independence of the judiciary.

5.6 Do the Constitutional Guarantees on Judicial Independence Suffice?

This chapter has made an attempt to analyse the provisions in the Constitution of Zimbabwe relating to securing the independence of the judiciary and the improvement of human rights in Zimbabwe. Constitutional reforms were undertaken that led to the adoption of a new Constitution. The lack of protection of the independence of the judiciary, the current political and economic situation and human rights abuses necessitated the constitutional reforms in order to ensure these issues are addressed.

Attempts have therefore been made to secure the independence of the judiciary, which will subsequently lead to an improvement of the judicial protection of human rights. However, key questions need to be asked with regards to the significance of provisions of the Constitution relating to the independence of the judiciary.

An analysis of these provisions has been made in this chapter. The Constitution has been accorded supremacy status and seeks to promote the founding principles established under section 3. It also provides for a Declaration of Rights in order to improve the promotion and protection of human rights. The Constitution also contains wider provisions with regards to standing and also contains guidelines for the interpretation of the provisions of the Constitution. These are important changes that have been introduced by the Constitution and clearly mark a huge departure from the Lancaster House Constitution. The separation of powers doctrine is also built into the

¹²⁵⁷ 47 of 2001.

¹²⁵⁸ 92 of 1997.

Constitution with a distinction being made between the three organs of state. However, as highlighted, although the judiciary is separate from the other organs of state, there are problems regarding the separation of powers between the executive (President) and the legislature.

The Constitution has brought with it substantial changes that seek to promote and protect the independence of the judiciary. If the provisions of the Constitution are properly implemented there is no doubt that there would be a significant improvement in the state of the judiciary. The individual, institutional and substantive independence of judges, in accordance with international law, is adequately protected in the Constitution. With regards to the personal independence of the judiciary, the Constitution has introduced fundamental changes with regards to the appointment of judges. Impartial and transparent appointment procedures have been put into place to ensure that fit and well qualified individuals are appointed. The appointment procedures seek to enhance transparency and impartiality and also mark a huge departure from the appointment procedure under the Lancaster House Constitution.

The Constitution also establishes a broadened JSC with independent representation. Although improvements could have been made to enhance the independent representation on the JSC, the Constitution however does make changes as compared to the one under the Lancaster House Constitution. Thus, the Constitution has provided for a broadened JSC with independent representation and has put into place appointment procedures that seek to enhance impartiality in the appointment process. Despite some concerns about the appointment procedures in the Constitution, it cannot be denied that it has enhanced the transparency of the appointment process.

Although positive changes have been made there are however concerns about certain provisions in the Constitution that are still a threat to the independence of the judiciary. These provisions relate to the role of the President in appointments, removal of judges and the setting of remuneration of judges. The President still has the power to unilaterally appoint tribunals that look into the question of the removal of a judge. Such unfettered powers do not bode well for the independence of the judiciary. The same can

also be said about the powers given to the President to fix the salaries of judges without being bound by the advice of the JSC. Such measures have a huge impact on the financial independence of the judiciary. As a result one wonders if such gaps identified in this chapter will not be used by the executive to negatively impact on the independence of the judiciary. There is a necessity to address the gaps identified in this chapter.

5.6.1 Other Measure to Improve Judicial Independence in Zimbabwe

A crucial question that needs to be asked is: whether the constitutional protection of the provisions relating to the independence of the judiciary will result in the improvement of the judiciary in the country? It should be noted that the respect for the independence of the judiciary goes deeper than constitutional guarantees as to appointments, security of tenure and salaries. The respect for the independence of the judiciary is a product of the actual relationship between the judiciary, the executive and the legislature. Chidyausiku notes that the respect for the independence of the judiciary is not achieved solely by the presence of a neat structural balance (as theorised by the doctrine of separation of powers).¹²⁵⁹ He notes that additional factors are also required in order to ensure that there is respect for the independence of the judiciary.¹²⁶⁰ These factors include, besides the attitude of the executive and the legislature to judicial independence and all it entails, the commitment of judges themselves to guard and defend their independence and the readiness of the people to support the independence of judges as defenders of people's liberties.¹²⁶¹ The judiciary should closely guard its independence. The establishment of a perfect working relationship between the three organs of state is therefore essential and will also go a long way to boosting the confidence of the public with regards to the judicial system and the administration of justice in the country.

¹²⁵⁹Chidyausiku GG *Modern Challenges to the Independence of the Judiciary* (2010) 5. Conference and Annual General meeting of the Southern African Chief Justices Forum, Johannesburg, South Africa. http://www.venice.coe.int/SACJF/2010_08_RSA_Johannesburg/Zimbabwe.pdf (Accessed 20 June 2012).

¹²⁶⁰Chidyausiku GG (2010) 5.

¹²⁶¹Chidyausiku GG (2010) 5.

The administration of justice in the country has continued to suffer over the years as a result of severe economic difficulties and inadequate resources. The shrinking of the economy has resulted in insufficient funding of the judiciary and this has resulted in massive corruption within the judicial system. It is essential that sound economic policies are developed in order to improve the situation and ensure that the judiciary is well funded. Judges' salaries also need to be improved. Better salaries are likely to motivate judges and provide a greater propensity for judges to resist corruption. These changes listed above are fundamental in seeking to protect the independence of the judiciary.

Crucial to this research is the attitude of the executive towards the judiciary. One important change that needs to accompany these judicial reforms is a change in the attitude of the executive towards the judiciary. This research has noted that a major barrier to the respect for judicial independence in contemporary Zimbabwe has been the government's intolerance of control and accountability.¹²⁶² Over the years the government has adopted a policy that has mainly been informed and represented by popular interests and the judiciary has been expected to share this policy and be responsive to the policies articulated by government.¹²⁶³ Any contradiction with any government ideological, diplomatic and political policies has therefore resulted in the judiciary being deemed disloyal to the people and the government at large.¹²⁶⁴ It is as a result that since the attainment of independence, the executive and parliament have expressed displeasure with the notion of a judiciary that is independent. As a result

¹²⁶²See speech by ZANU-PF Member of Parliament Webster Shamhu (Hansard 22.02.01) which highlights the intolerance attitude that the executive has adopted towards the judiciary. He stated that 'For in a democracy like ours, power belongs ultimately to the people. Those who exercise power do so on behalf of the people to which they must always be accountable. No species of power is exempt from the universal tendency to corrupt those who wield it. Our judiciary is no exception. No person who wields power should therefore be exempt from the obligation to be accountable to us the people of God. In a democracy, there is need for vigilance so as to ensure that every institution or individual remains within the bounds of law. Our judiciary deserves the people's critical democratic attention regarding the manner in which it exercises the power entrusted to it. It is unfortunate that the propaganda of 'judicial imperialism' masquerading as 'judicial independence' has been so insidious that otherwise insightful people have failed to see the grave mistakes being perpetrated by some sections of the judiciary. As a result, the current scrutiny of the judicial independence must not be allowed to continue to be used to mask the reality of judicial despotism... It is therefore the democratic right and duty of the people of Zimbabwe, as free people, to monitor, and control the power of the judiciary.'

¹²⁶³Goredema C (2004) 102.

¹²⁶⁴Goredema C (2004) 102.

there have been constant clashes between the executive and the judiciary. Most of these clashes have been highlighted in this thesis, where over the years the executive has expressed its displeasure with a number of judicial decisions. Such tension has resulted in a number of constitutional amendments that have sought to nullify a number of judicial decisions and exclude judicial review of some executive decisions.¹²⁶⁵

Presently there are already signs that the current ruling party will not cease its attempts of harassing independent judges that seek to protect and promote human rights in the country. In April 2013, Chidyausiku CJ reportedly opened an inquiry into the conduct of Hungwe J in the wake of allegations of misconduct and negligence levelled against him.¹²⁶⁶ The allegations against Hungwe J related to conducting a hearing in the middle of the night and ordering the release of prominent human rights lawyer Beatrice Mtetwa.¹²⁶⁷ It is believed that Hungwe J had been under government scrutiny for also delivering a number of judgments that have irked the authorities.¹²⁶⁸ Such actions by the government in victimising independently-minded judges clearly highlight the attitude of the government towards such judges. Such actions also portray a culture of intolerance and highlight the extent to which the government is willing to go to frustrate the efforts of independently-minded judges in human rights protection. Thus, the persecution of such judges continues to violate the independence of the judiciary and raises serious doubts about the state of the judiciary in the country and its ability to independently protect and promote human rights.

Accusations were also levelled against the President for appointing judges to the Supreme Court and High Courts before the July 2013 elections without following proper procedure.¹²⁶⁹ Accusations have been levelled against ZANU-PF for packing the courts

¹²⁶⁵ Goredema C (2004) 102. The author describes how Gubbay CJ described the threat to judicial independence in Zimbabwe as emanating from two sources: legislative abuse and unlawful action.

¹²⁶⁶ *The Herald* 'Justice Hungwe Under Probe' 4 April 2013.

<http://www.herald.co.zw/justice-hungwe-under-probe/> (Accessed 10 April 2014).

¹²⁶⁷ *The Zimbabwe Eye* 'Stressed High Court judge Hungwe Takes Vacation'

<http://www.zimeye.org/?p=79151> (Accessed 8 April 2013).

¹²⁶⁸ *The Zimbabwe Eye* 'Stressed High Court judge Hungwe Takes Vacation'

<http://www.zimeye.org/?p=79151> (Accessed 8 April 2013).

¹²⁶⁹ Sibanda M and Kwaramba F 'Judges Appointments; Mugabe Did Not Consult Tsvangirai' *Daily News* Live 18 July 2013.

with party loyalists in anticipation of electoral challenges by the MDC. It is the packing of courts with such judges and the courts lack of independence that the MDC-T cited for withdrawing its presidential election petition with the Constitutional Court.¹²⁷⁰ The executive seems therefore not to have relented in its efforts of undermining the independence of the judiciary through the violation of appointment procedures and packing the courts with pliant judges.

5.7 Conclusion

Although the Constitution has tried to address the question of judicial independence in Zimbabwe, it has not done so fully. It has introduced crucial changes as compared to the Lancaster House Constitution and such changes should improve the state of the judiciary and human rights protection. There are loopholes that pose a threat to the independence of the judiciary. These loopholes identified throughout this chapter need to be addressed as they pose a serious threat to the independence of the judiciary. Failure to address such gaps will no doubt impact negatively on the independence of the judiciary in Zimbabwe. Measures to rectify the loopholes must be accompanied by the several factors discussed in this chapter. This will no doubt lead to an improvement in the state of the judiciary and subsequently the protection of human rights by the judiciary. As a result the next chapter offers recommendations that can be implemented to further strengthen the independence of the judiciary which will subsequently strengthen the judicial promotion and protection of human rights.

<http://www.dailynews.co.zw/articles/2013/07/18/judges-appointments-mugabe-did-not-consult-tsvangirai> (Accessed 27 September 2013).

¹²⁷⁰ Reuters 'MDC-T Drops Court Challenge to Mugabe Re-Election' 16 August 2013.

<http://uk.reuters.com/article/2013/08/16/uk-zimbabwe-election-idUKBRE97F0Q820130816> (Accessed 23 October 2013).

CHAPTER 6

ENLARGING THE PLACE OF HUMAN RIGHTS PROTECTION IN ZIMBABWE: A CRITICAL EVALUATION OF INTERNAL REMEDIES TO ADDRESS HUMAN RIGHTS IN ZIMBABWE

6 Introduction

The previous chapters of this thesis have made a concerted effort to discuss the need for the improvement of the independence of the judiciary in Zimbabwe as a pre-requisite for the improvement of the judicial protection of human rights. However, although this thesis recognises that the judiciary is the primary institution charged with human rights protection, its role in that regard should not be over-emphasised.¹²⁷¹ This is so because the judiciary in any democratic society is not the only body that is tasked with the protection of fundamental rights and freedoms. For example, there exists another wide range of institutions and people who also bear a significant responsibility for the protection of human rights in society.¹²⁷² In addition to such institutions and individuals there are specific measures that also need to be taken in order to improve the human rights situation in Zimbabwe. The purpose of this chapter is therefore to identify a number of domestic initiatives that need to be adopted (other than the judicial reforms) in Zimbabwe in order to improve the protection and promotion of human rights.

6.1 States' Obligations to Promote and Promote Human Rights

It should be noted that a number of international human rights instruments require States to take domestic measures to ensure the protection and promotion of human rights.¹²⁷³ This is mainly due to the fact that States incur the responsibility for not complying with their legal obligations which relate to respecting and ensuring the effective enjoyment of human rights recognised under the different international legal instruments.¹²⁷⁴ It is therefore crucial that for individuals to enjoy any fundamental

¹²⁷¹For example there are other institutions and quasi- judicial bodies that are tasked with the responsibility for the protection and promotion of human rights.

¹²⁷²O'Regan CME (1998) 13.

¹²⁷³Steiner HJ, Alston P and Goodman R *International Human Rights in Context: Law, Politics, Morals; Text and Materials* 3ed (2007) 1123. See also Shaw M *International Law* 6ed (2008) 268.

¹²⁷⁴Evans M *International Law* 3ed (2010) 290.

protection of human rights there should be effective protection of such. Besides putting into place pro-human rights laws, it is important that in order to achieve effective domestic protection of human rights, a network of complementary norms and mechanisms must be put into place for the coordination or supervision of the implementation of laws enacted to protect human rights.¹²⁷⁵ Examples of such mechanisms include an independent judiciary (which has been discussed in the previous chapters), a non-partisan police force service, effective and accessible human rights institutions which are given specific statutory powers to enforce human rights protection, a lively NGO community, state adherence to international treaties and a population with a strong human rights culture.¹²⁷⁶ Although some of these mechanisms have been in existence over the years in Zimbabwe, such mechanisms have not led to the effective domestic protection and promotion of human rights. This therefore implies that there is need to have a re-look at the domestic mechanisms put into place to protect and promote human rights in Zimbabwe and analyse how best these mechanisms can be utilised to improve the human rights situation. The strengthening of such mechanisms together with an independent judiciary will bode well for the protection and promotion of human rights. This is what the discussion below seeks to address.

6.2 Enhancing the Role of the Police in Human Rights Protection

The police in any democratic society has an important role to play in the protection of human rights.¹²⁷⁷ This role becomes important due to the fact that a number of issues that relate to human rights never reach the courts and are often solved at the grassroots level of the justice system.¹²⁷⁸ This therefore makes it important that the police do not abuse human rights but instead act in a manner that protects the most vulnerable individuals in society.¹²⁷⁹ Section 219 of the Constitution of Zimbabwe provides for the

¹²⁷⁵Reif LC 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1-69 2.

¹²⁷⁶Reif LC (2000) 2.

¹²⁷⁷Crawshaw R, Cullen S and Williamson T *Human Rights and Policing* (2007) 27.

¹²⁷⁸Kirby M (2006) 11.

¹²⁷⁹Kirby M (2006) 11.

establishment of a police force, namely the Zimbabwe Republic Police (ZRP).¹²⁸⁰ Although the Constitution does not explicitly mention the issue of human rights protection as one of the functions of the ZRP, one would argue that human rights protection is an integral aspect in maintaining peace and security. The Constitution also makes it mandatory for the police to work within the confines of its constitutional mandate and the context of international standards.

The Zimbabwe Police Act ¹²⁸¹ also goes further to elaborate on the duty of the police in safeguarding public safety and public order and reinforces the constitutional obligations of the police to preserve internal peace and security and maintain law and order. This was also the case under the Lancaster House Constitution.¹²⁸² The Act also complies with the wording of the Constitution of Zimbabwe (section 219) as it seeks to ensure that the police are responsible for preserving internal peace and maintaining law and order in the country.

International law also recognises the important role of the police with regards to human rights protection. The international Bill of Rights, which consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), contain various normative values with regards to human rights protection and obliges States to implement the rights by adopting legislative and other measures

¹²⁸⁰Section 219 of the new Constitution of Zimbabwe states that '(1) There is a Police Service which is responsible for (a) detecting, investigating and preventing crime; (b) preserving the internal security of Zimbabwe; (c) protecting and securing the lives and property of the people; (d) maintaining law and order; and (e) upholding this Constitution and enforcing the law without fear or favour....(3) The Police Service must be non-partisan, national in character, patriotic, professional and subordinate to the civilian authority as established by this Constitution. (4) An Act of Parliament must provide for the organisation, structure, management, regulation, discipline and subject to section 223, the conditions of service of members of the Police Service.'

¹²⁸¹No.2 of 1995/Chapter 11:10. See also the section 4 Uganda Police Act Chapter 303 which reads 'Subject to the Constitution and this Act, the functions of the force are- (a) to protect the life, property and other rights of the individual; (b) to maintain security within Uganda; (c) to enforce the laws of Uganda; (d) to ensure public safety and order...'

¹²⁸²Preamble of the Police Act of Zimbabwe, with reference to section 93 (1) of the Lancaster House Constitution which stated that 'there shall be a Police Force which, together with such other bodies may be established by the law for the purpose shall have the function of preserving the internal security of and maintain law and order in Zimbabwe.'

to ensure that these rights are not violated.¹²⁸³ Further, there exists a comprehensive framework of international human rights standards that relate to law enforcement and criminal justice systems.¹²⁸⁴ International law demands that any police force in any democratic society must adopt a comprehensive human rights policy.¹²⁸⁵ Further, international law also demands that human rights standards must be incorporated into standing orders for the police and they also are to be provided with periodic human rights training.¹²⁸⁶ The Preamble to the Code of Conduct for Police Officials, Southern African Regional Police Chiefs Co-operation Organisation¹²⁸⁷, also places human rights norms as an important tool in the professionalisation of police services in the Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO) member countries.¹²⁸⁸

The obligations of the police in section 219 of the Constitution entrust the ZRP with the duty to maintaining the law and order which is imperative for the enjoyment of human rights.¹²⁸⁹ Makwerere *et al* note that in carrying out law enforcement duties, the police should always apply human rights standards, such as, the right to life, prohibition against torture, liberty, privacy and the protection of the law, expression, assembly and

¹²⁸³See for example Article 2.1 of the ICCPR which states that 'Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' and Article 2.2 of the ICCPR states that "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional process and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.'

¹²⁸⁴The overall framework includes guidelines, principles, codes of conduct and declarations of various authoritative bodies. Although some of the guidelines are not binding they do carry persuasive guidance with regards to human rights standards that relate to law enforcement. The instruments include amongst many others the Code of Conduct for Law Enforcement Officials General Assembly Resolution 34/169 of 17 December 1979, the Conventions against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the United Nations General Assembly Code of Conduct for Law Enforcement Officials (1979), and the Convention on the Elimination of All Forms of Racial Discrimination (1966).

¹²⁸⁵See Office of the United Nations High Commissioner for Human Rights *Professional Training Series No. 5/Add.3 Human Rights Standards and Practice for the Police* (2004) 1.

¹²⁸⁶See Office of the United Nations High Commissioner for Human Rights (2004) 1.

¹²⁸⁷SARPCCO was established in 1995 to foster better cooperation and mutual assistance between countries in Southern Africa. The Code of Conduct was adopted at the 6th General Meeting of SARPCCO in Mauritius August 2001.

¹²⁸⁸Member countries of SARPCCO are: Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

¹²⁸⁹See also Nsereko DDN 'The Police, Human Rights and the Constitution: An African Perspective' (1993) 15:3 *Human Rights Quarterly* 465-484 466.

association.¹²⁹⁰ Makwerere also notes that the powers of the police entail great responsibilities and impact heavily on the relationship between the police and the public.¹²⁹¹ This is so because in cases where law enforcement officials themselves flaunt the law, there is little hope for society to function under the rule of law. As a result human rights protection can only be effective where the rule of law flourishes.

However, despite the existence of such guidelines that seek to assist the police with issues relating to human rights protection, the police force in Zimbabwe has over the years been highly compromised to the extent that it has abdicated its constitutional functions, responsibilities and obligations.¹²⁹² The IBA has reported that the partisan attitude of the Zimbabwean police has been responsible for serious violations of human rights and the rule of law in Zimbabwe.¹²⁹³ The partisan nature of the ZRP is further emphasised by Makwerere *et al* who state that:

‘The police in Zimbabwe today is seen as a symbol of increasingly bitter social debate over law enforcement... Too often as is the case with Zimbabwe, police agencies play elitist political games while giving lip-service to the needs of the powerless segments of the community. In Zimbabwe this has led to the conclusion by the powerless that the ZRP are there to serve the interests of the rich and powerful.’¹²⁹⁴

The IBA has over the years expressed great concern about the abuse of human rights by the ZRP. It has detailed how police officers in Zimbabwe have been responsible for some of the most serious human rights and rule of law violations in the country.¹²⁹⁵ Several cases have been reported where members of the ZRP have consistently shown disrespect and contempt for the law, lawyers and judicial authorities, thus undermining the administration of justice and rule of law in the country. The police in Zimbabwe have over the years been accused of serious violations of human rights mainly through the carrying out of unlawful action, excessive use of force¹²⁹⁶ and torture¹²⁹⁷, unlawful

¹²⁹⁰ Makwerere D, Chinzete TG and Musorewegomo C ‘Human Rights and Policing: A Case Study of Zimbabwe’ (2012) 2:17 *International Journal of Humanities and Social Science* 129 132.

¹²⁹¹ Makwerere D, Chinzete TG and Musorewegomo C (2012) 132.

¹²⁹² International Bar Association (2007) 7.

¹²⁹³ International Bar Association (2007) 7.

¹²⁹⁴ Makwerere D, Chinzete TG and Musorewegomo C (2012) 131.

¹²⁹⁵ International Bar Association (2007) 7.

¹²⁹⁶ Makwerere D, Chinzete TG and Musorewegomo C (2012) 133 give various examples on how the use of excessive force by members of ZRP has resulted in the violation of human rights. Most prominent of

detentions¹²⁹⁸, and the constant contempt of court orders.¹²⁹⁹ Such unlawful arrests and use of torture have been mainly targetted against individuals that have been deemed to be resistant to government policies, mostly members of the opposition political parties and also legal representatives carrying out their professional duties.¹³⁰⁰ What has been most disturbing about such human rights abuses is that such violations by members of the ZRP have been done with impunity.¹³⁰¹

these examples is that of Murambatsvina (Operation Restore Order) where the police fired teargas directly into the homes of residents of Porta farm and where a man who was suffering from tuberculosis died shortly after being exposed to the gas. Another example includes the use of lethal force on Gift Tandari, Youth Chairman of the National Constitutional Assembly, who was shot dead by the police in March 2007 during a rally organised by Save Zimbabwe Coalition.

¹²⁹⁷The Zimbabwe Human Rights NGO Forum reports how the police have been notorious for actively perpetrating acts of Organised Violence and Torture (OVT), mainly against MDC supporters with 65% of OVT's reported in Harare involving the police as perpetrators. See Zimbabwe Human Rights NGO *A Culture of Impunity in Zimbabwe: A Report on Access to Justice for Survivors of Organised Violence and Torture (OVT) in Zimbabwe* July 2012. <http://www.hrforumzim.org/wp-content/uploads/2012/10/OVT-REPORT-2012-AUGUST-2-FINAL-CTP.pdf> (Accessed 02 September 2013).

¹²⁹⁸International Bar Association (2007) 27 reports that it had received numerous reports of widespread arbitrary arrests by members of the ZRP without any charges ultimately being brought against detainees or with charges that were subsequently found by the courts to be baseless. Examples include the case of the Women of Zimbabwe Arise (WOZA) whose members have been detained on numerous occasions, with charges that have been dropped or have yet to be ascertained.

¹²⁹⁹See *Fidelis Charamba and Others v The Minister of Home Affairs and Others* High Court Case No.6420/08 (Unreported) where the High Court declared the abduction and secret detention of several abductees as unlawful and ordered that they be released. Despite the court order, the individuals remained incarcerated for two months. See also *Jestina Mukoko and 31 Others v The Commissioner General of Police and Another* High Court Case No.7166/08 (Unreported) where the court granted an order for the police to release the abducted persons who were in police custody in defiance of previous orders of the High Court. The individuals in this case remained incarcerated until they were granted bail in May 2008.

¹³⁰⁰International Bar Association (2007) 35. The International Bar Association reveals how a shocking number of cases and complaints of threatening behaviour, physical and verbal assaults on lawyers and court officials have been reported in the country. Most of these incidents mostly occurred when lawyers enquired about their detained clients. Examples include the arrests of prominent lawyers Alec Muchadehama and Andrew Makoni and after their arrest members of the legal profession, acting upon the interests of the two arrested lawyers, secured a High Court order declaring their arrest and detention unlawful and ordering their immediate release. Despite this order the ZRP refused to release the lawyers. A second High Court order was also defied by the ZRP stating that the two lawyers were to be brought to court before the 6th of May 2007. In March 2013 top human rights lawyer Beatrice Mtetwa was arrested and detained by the police as she tried to save her clients whose property was being searched by police and who in the process refused to produce a valid search warrant. As a result of her interference she was arrested and charged with contravening section 184(1)(g) of the Criminal Law (Codification) Act for allegedly defeating or obstructing the course of justice. In response to the continued arrest of legal practitioners, in December 2012 lawyers marched to parliament delivering copies of a petition complaining about harassment by state authorities while executing their duties. After the arrest of Beatrice Mtetwa a petition was filed in March 2013 with the Minister of Home Affairs, the Chairman of the Judicial Services Commission, Minister of Justice Legal Affairs, the Police Commissioner against harassment and intimidation.

¹³⁰¹See Zimbabwe Human Rights NGO Forum (2012) 3-24.

It is as a result of the continued impunity, that the issue of the continued violation of human rights by the ZRP must be addressed so as to ensure that the police are able to abide by their constitutional duty of maintaining peace and security. Perhaps the crucial question is how the issue of the violation of human rights by the ZRP can be adequately addressed? As has been highlighted previously in this chapter, the ZRP has become a politicised institution that has over the years carried out its duties in a partisan manner. Reforms therefore are necessary in order to improve the ZRP's image and mandate with regards to policing human rights issues. It is therefore imperative that such reforms should ensure that the ZRP must conduct itself as a national security service charged by the Constitution and statute with ensuring public order and security in the country. The ways in which the ZRP can improve its policing of human rights are discussed below:

6.2.1 De-Politicising of the Police

In order to improve the image of the police and ensure that it remains non-partisan in conducting its duties, the Constitution of Zimbabwe now demands that the Police Force must be non-partisan, national in character, patriotic, professional and subordinate to the civilian authority established by the Constitution.¹³⁰² The inclusion of such provisions should therefore serve as a reminder to the ZRP of the importance of upholding its constitutional obligations to the people of Zimbabwe. However, for the de-politicisation of the police to be effective, the attitude of government is key in ensuring that the ZRP is able to conduct its duties without any political interference. Hence the government of Zimbabwe must be willing to facilitate such change as it can be seen how politicised the ZRP has become.¹³⁰³ It is therefore important that the government respects the

¹³⁰²Section 219(3) of the Constitution. See also section 208 of the Constitution which states that '(1) Members of the security services must act in accordance with this Constitution and the law. (2) Neither the security services nor any of their members may, in the exercise of their function- (a) act in a partisan manner; (b) further the interests of any political party or cause; (c) prejudice the lawful interests of any political party or cause; or (3) violate the fundamental rights or freedoms of any person. (3) Members of the security services must not be active members or office –bearers of any political party or organisation.'

¹³⁰³To clearly highlight the politicisation of the ZRP in Zimbabwe and in blatant disregard of section 208(3) of the Constitution which prohibits members of the security services from being active members or office –bearers of any political party or organisation and Section 48(2) of the Schedule of offences of the Zimbabwe Police Act which makes it an offence for police office bearers from participating in politics, two senior police officers won the right to represent ZANU-PF in the recently held election as members of Parliament while serving as top police officials in the country. Such actions have further fuelled the depth

Constitution and ensures that it brings to an end the partisan use of the police force and provides the police force with an environment where the professionalism envisaged in the Constitution can be established.

It is also important to note that the independence of the police from political or other societal forces is crucial for them to effectively carry out their constitutional duties.¹³⁰⁴

Nsereko notes that in matters of partisan politics the police must always maintain a neutral position as any appearance of partiality is likely to erode the public's confidence in the police.¹³⁰⁵ The International Bar Association has noted that biased policing in the country has polarised Zimbabwean society which has led to heightened insecurity and political tensions.¹³⁰⁶ De-politicising the ZRP will ensure that the members of the Police Force are able to serve the people of Zimbabwe and thus ensure that fundamental rights and freedoms are protected irrespective of divergent political views or opinions.

In seeking to maintain the independence of the police in Zimbabwe, it is crucial that the methods and procedures of recruiting members of the police must be free from undue political interference. The Police Force is under the command of a Commissioner-General of Police who is appointed by the President after consultation with the Minister responsible for the Police.¹³⁰⁷ Although the Constitution creates a Police Service Commission¹³⁰⁸, the Commission does not have any role with regards to the appointment of the Commissioner-General of Police.¹³⁰⁹ It should be noted that the appointment of the Commissioner-General by the President after consulting the Minister responsible for police might raise some doubts about the impartiality of such

and extent of the politicisation of members of ZRP. For more on the involvement of police officers in party politics see Human Rights Watch *The Elephant in the Room: Reforming Zimbabwe's Security Sector Ahead of Elections* (2013) 23-24.

¹³⁰⁴Nsereko DDN (1993) 472.

¹³⁰⁵Nsereko DDN (1993) 472.

¹³⁰⁶International Bar Association (2007) 54.

¹³⁰⁷Section 222(1) of the Constitution of Zimbabwe.

¹³⁰⁸Section 222(1) of the Constitution of Zimbabwe stipulates the composition of the Police Service Commission and states that 'There is a Police Service Commission consisting of a chairperson, who must be the Chairperson of the Civil Service Commission and a minimum of two and a maximum of six other members appointed by the President.'

¹³⁰⁹Section 223 of the Constitution of Zimbabwe lists the functions of the Police Service Commission which states amongst other issues that '(1) The Police Service Commission has the following functions- (a) to appoint qualified and competent persons to hold posts or ranks in the Police Service; (b) to fix and regulate conditions of service, including salaries, allowances and other benefits, of member of the Police Service.'

appointment. Since the President alone determines who can be appointed as Commissioner-General, it is highly possible that individuals that have close ties with the executive might be appointed to the post, thus ensuring the protection of the political interests of the ruling elite. The example of the appointment process of the Inspector-General of Police in the of the Republic of Namibia could have been used as a reference point in ensuring that questions are not raised about the appointment process of the Commissioner-General.¹³¹⁰ Nsereko is however of the view that such appointment of a Commissioner-General by the President may be justified on the basis that the police force, through its Commissioner-General, must be accountable to the people through their elected government.¹³¹¹ As such the government is always held liable in cases where issues go wrong. Despite this assertion by Nsereko, it is, however, crucial that checks must be put into place to ensure that impartiality is observed in such appointments. In the case of Zimbabwe there is no independent body¹³¹² that is involved in the appointment of the Commissioner-General, which thus leaves such appointment to the President. Thus, it leaves the whole appointment process subject to political manipulation.

The Police Service Commission is given the constitutional mandate of appointing other members of the police service in the country. However, since the Commission is virtually composed of members solely appointed by the President, it is therefore possible that such appointments may be carried out in a partisan manner. This will therefore result in a police service that is partisan and that will seek to protect the

¹³¹⁰In order to ensure that the appointment of the Inspector-General of Police is free from any undue political interference, Section 115 of the Constitution of the Republic of Namibia stipulates that the President appoints the Inspector-General acting on the advice of the Security Commission. Section 114 of the Constitution of Namibia states that 'the Security Commission shall consist of the Chairperson of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of Police, the Commissioner of Prisons and two (2) member of the National Assembly appointed by the President on the recommendation of the National Assembly.'

¹³¹¹Nsereko DDN (1993) 472.

¹³¹²Even if the Constitution were to involve the Police Service Commission in the appointment process, questions are bound to be asked about the independence of the members in the Commission. This is so because the body consists of chairperson, who must be the chairperson of the Civil Service Commission (according to section 202 of the Constitution of Zimbabwe, the Chairperson of the Civil Service Commission is appointed solely by the President), and a minimum of two and a maximum of six other members appointed by the President. The virtue that all the appointees to the Commission are virtually presidential appointees will thus result in their independence being questioned as it is possible that such partisan appointment may be made to the Commission.

interests of its masters. It is therefore crucial that for any appointments to be deemed to be fair and impartial, it is important that the Commission must be independent of any political influences so as to ensure that capable individuals who will uphold the values of the Constitution are appointed to the force. It is submitted that the appointment of such capable and independently-minded individuals will go a long way to addressing the violations of human rights by members of the police.

The protection of the security of tenure and reasonably adequate remuneration of members of the Police Force are also crucial in ensuring that members of the police force in Zimbabwe are able to discharge their duties without any fear or favour. Nsereko also notes that members of the police must be provided with adequate security. Security of tenure will thus protect members of the police from any political victimization, and adequate remuneration will ensure that suitable and qualified individuals are attracted to the profession. The recruitment of such qualified individuals should ensure that individuals who are qualified and of good character and willing to observe the values of the new constitutional order are appointed.¹³¹³ The low salaries of members of the Police Force in Zimbabwe have over the years made the profession unattractive and a number of police officials have resigned citing poor pay and working conditions as the main reasons for such resignations.¹³¹⁴ It is therefore important that the salaries of members of the police force should be made attractive as such measures will aid in improving conditions of service and also effect an improvement in the policing of human rights in the country.

6.2.2 Adequate Police Training on Human Rights

The Police Force in Zimbabwe has since 1995 been providing new police recruits with human rights training as part of their training programme.¹³¹⁵ However, despite such training and the importance of human rights, the police over the years have been at the

¹³¹³ Nsereko DDN (1993) 473.

¹³¹⁴ *TalkZimbabwe* '22 Police Officers 'Protest Over Poor Pay' 19 February 2007. http://www.genocidewatch.org/images/Zimbabwe_19_Feb_07_22_police_officers_protest_over_poor_pay.pdf (Accessed 21 August 2013).

¹³¹⁵ *Newsday* 'Human Rights Syllabus Not New for The Police' May 21, 2013. <http://www.newsday.co.zw/2013/05/21/human-rights-syllabus-not-new-for-police/> (Accessed 21 August 2013).

forefront of human rights violations in the country. However, it is not clear whether members of the police force are provided with any further and regular training programmes about the importance of promoting and protecting human rights. It is crucial that in accordance with international human rights standards, the government of Zimbabwe must provide police officials with frequent human rights training in order to improve the policing of human rights. The importance of such training was further enforced by article 13.2 (a) of the GPA which stated:

'For the purposes of ensuring that all state organs and institutions perform their duties ethically and professionally in conformity with the principles and requirements of a multi-party democratic system in which all parties are treated equally, the Parties have agreed that the following steps be taken (a) that there be inclusion in the training curriculum of members of the uniformed forces of the subjects on human rights, international humanitarian law and statute law so that there is greater understanding and full appreciation of their roles and duties in a multi-party democratic system.'

The inclusion of such a clause by the political parties in the GPA clearly indicates the concern with regards to the abuse of human rights by members of the Police Force, hence the emphasis on the importance of providing training to improve human rights policing. The need for the provision of human rights training in Zimbabwe is further recognised in the fact that during the Universal Periodic Review (UPR) process, there were recommendations that Zimbabwe should improve human rights training for security sector personnel.¹³¹⁶ This was so because it was reported that lower ranked officials in the police force were poorly trained on human rights issues.¹³¹⁷ The need for providing adequate training to police officials is also emphasised by the former Zimbabwe Human Rights Commission (ZHRC) Chairman, Jacob Mudenda, who after consultation with the Commissioner-General of the ZRP has advocated for the introduction of a human rights curriculum in the police training syllabus.¹³¹⁸ The main idea behind the introduction of such curriculum is to expose police officers to human

¹³¹⁶Human Rights Council *Report of the Working Group on the Universal Periodic Review: Zimbabwe* A/HRC/19/14 (2011) 13-24.

¹³¹⁷United States Department of State *Country Reports on Human Rights Practices for 2011: Zimbabwe* <http://www.state.gov/j/drl/rls/hrrpt/2011/humanrightsreport/index.htm#wrapper> (Accessed 20 August 2013).

¹³¹⁸*Newsday* 'Chihuri Yields to Pressure' May 17, 2003. <https://www.newsday.co.zw/2013/05/17/chihuri-yields-to-pressure/> (Accessed 10 September 2013).

rights issues, especially with regards to the promotion and protection of human rights. It is submitted that such educational measures should be adopted to guarantee that there is no repetition of past human rights violations by the police. It is also crucial that for such training to be effective adequate resources must be made available for such training curricula. The provision of adequate training will ensure that Zimbabwe complies with international standards for the policing of human rights.

6.2.3 Conforming to International Standards on Policing of Human Rights

It is important that since international human rights law is binding on all States and their agents, the policing standards of the police force in the country should be in conformity with international standards for human rights. As a member of the United Nations, Zimbabwe should ensure that it provides effective policing to protect the rights in a number of international instruments to which the country is a state party.¹³¹⁹ Although not binding, the International Human Rights Standards for Law Enforcement¹³²⁰ puts in place various legal and ethical standards that can be used to guide the conduct of the police in Zimbabwe with regards to the policing of human rights. Key amongst these standards is the importance for law enforcement officials to respect and obey the law at all times. The International Human Rights Standards also emphasise on the importance of law enforcement officials to respect and protect human dignity and maintain and uphold the human rights of all persons.

As a member of SARPPCO it is also important that Zimbabwe should also be guided by the Code of Conduct of SARPPCO. The Code of Conduct which is intended as a minimum standard for policing is guided by the respect for human life, reverence of the law, integrity, respect for property and service excellence. The Code of Conduct recognises the importance of human rights norms and ethical practices as essential

¹³¹⁹For example Zimbabwe has acceded to a number of international treaties and as such has obligations under international law to ensure that there is no violation of such rights. Examples of these treaties include amongst many others the International Covenant on Economic, Social and Cultural Rights (Accession 13 May 1991), the International Covenant on Civil and Political Rights (accession 13 May 1991), International Convention on the Elimination of All Forms of Racial Discrimination (accession 13 May 1991).

¹³²⁰Dissel A and Frank C *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPPCO Code of Conduct for Police Officials* (2012) 2.

aspects of professionalising the police service.¹³²¹ It is important that Zimbabwe should abide by the SARPCCO Code of Conduct in order to address allegations of political bias, and the abuse of human rights in the country. The adherence to international standards of human rights policing will also contribute to ending the culture of impunity that has been associated with human rights violations by the police.¹³²²

6.3 Enhancing the Effective Protection and Promotion of Human Rights by Independent Human Rights Institutions

Independent National Human Rights Institutions (NHRIs) which have emerged out of the human rights movement play a great role in the protection and promotion of human rights.¹³²³ Reif notes that the importance of NHRIs has been widely recognised by the United Nations human rights bodies since 1946.¹³²⁴ In 1992 the United Nations Commission on Human Rights adopted the Guiding Principles Relating to the Status of National Institutions (Paris Principles) and such principles were also adopted by the General Assembly in 1993.¹³²⁵ The Paris Principles provide enormous guidance and direction on the formation of NHRIs in general, and also provide standards and principles that NHRIs must follow in order to function effectively.

The importance of independent NHRIs is also emphasised by the Vienna Declaration and Programme of Action which was adopted at the end of the Vienna World Conference on Human Rights.¹³²⁶ The Vienna Programme of Action recognises the importance played by NHRIs in the promotion and protection of human rights, disseminating human rights information and providing education about human rights.¹³²⁷ NHRIs supplement the role of other democratic institutions in ensuring that issues of

¹³²¹ SARPCCO Harare Resolution on the SARPCCO Code of Conduct for Police Officials 2001.

¹³²² Dissel A and Frank C (2012) 209.

¹³²³ Reif LC (2000) 2.

¹³²⁴ United Nations Centre for Human Rights *National Human Rights Institutions: A Handbook on the Establishment and Strengthening OF National Institutions for the promotion and Protection of Human Rights* Professional Training Series No. 4 at 4-6 UN Doc. HR/P/PT/4, U.N Sales No. E.95.XIV.2 (1995).

¹³²⁵ G.A Res 134, U.N GAOR, 48th Sess., U.N Doc. A/RES/48/134 (1993).

¹³²⁶ Vienna Declaration and Programme of Action, adopted June 25 1993.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (Accessed 21 August 2013).

¹³²⁷ See Paragraph 36 of the Vienna Declaration and Programme of Action 1993.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (Accessed 21 August 2013).

human rights remain the central focus of political discourse in every society.¹³²⁸ Over the years the United Nations has made concerted efforts to encourage States to focus on the domestic enforcement of human rights and also by providing assistance in strengthening NHRIs.¹³²⁹ The African Commission on Human and Peoples' Rights also recognises the importance of NHRIs as such institutions are required to assist the Commission in the promotion of human rights at country level.¹³³⁰ NHRIs affiliated to the Commission are also entitled to attend and participate in the Commission's public sessions and are also required to submit reports on their activities to the Commission every two years.¹³³¹

6.3.1 Constitution of Zimbabwe and NHRIs

The Constitution of Zimbabwe establishes a number of institutions to help ensure the protection of the rights enshrined therein.¹³³² These institutions similarly to the South African model¹³³³, are charged with supporting and entrenching human rights and democracy, promoting constitutionalism, protecting the sovereignty and interests of the people, securing and ensuring the observance of democratic values by the State and all institutions and agencies of government, and ensuring that all injustices are remedied.¹³³⁴ These institutions which are accountable to Parliament, are independent and must perform their functions without fear, favour or prejudice.¹³³⁵ In order to secure the independence of these institutions, the Constitution of Zimbabwe prohibits any

¹³²⁸ Kumar R 'National Human Rights Institutions: Good Governance Perspectives on Institutionalisation of Human Rights' 2003 19:2 AM. U. INT' L. Rev 259 278.

¹³²⁹ Reif LC (2000) 4.

¹³³⁰ African Commission on Human and Peoples' Rights *National Human Rights Institutions* <http://www.achpr.org/network/nhri/> (21 August 2013).

¹³³¹ African Commission on Human and Peoples' Rights *National Human Rights Institutions* <http://www.achpr.org/network/nhri/> (21 August 2013).

¹³³² According to section 232 of the Constitution of Zimbabwe, these institutions include the Zimbabwe Electoral Commission, Zimbabwe Human Rights Commission, Zimbabwe Gender Commission, Zimbabwe Media Commission and the National Peace and Reconciliation Commission.

¹³³³ Section 181 of the Constitution of South Africa establishes a number of institutions which are independent organs with a general mandate of strengthening constitutional democracy in South Africa. These institutions are independent and subject only to the Constitution and are accountable to Parliament and must report on their activities and the performance of their functions to the House of Assembly at least once a year.

¹³³⁴ Section 233 of the Constitution of Zimbabwe.

¹³³⁵ Section 235 of the Constitution of Zimbabwe.

interference with their activities.¹³³⁶ The Constitution also mandates members of the independent Commissions to be non-political.¹³³⁷ Although the other independent institutions mentioned in the Constitution also play a role in the protection and promotion of human rights, this thesis will mainly focus on the Zimbabwe Human Rights Commission which has the primary role of promoting and protecting human rights in the country. Although the Lancaster House Constitution provided for a Human Rights Commission¹³³⁸, the Zimbabwe Human Rights Commission was only established in 2009, after 29 years of democracy. The Zimbabwe Human Rights Commission only began to function in March 2010 when the President appointed the Chairman and other members of the Commission¹³³⁹ and became fully operation in 2012 after the passing of enabling legislation.¹³⁴⁰

The functions of the Zimbabwe Human Rights Commission are dealt with under section 243 of the Constitution.¹³⁴¹ The Zimbabwe Human Rights Commission has a general mandate of promoting awareness and respect for human rights and the realisation of such rights. However, it should be noted that the fact that the Constitution has established a fully operational Human Rights Commission with enabling legislation, will

¹³³⁶Section 235(3) of the Constitution of Zimbabwe.

¹³³⁷Section 236 of the Constitution of Zimbabwe.

¹³³⁸Section 100R of the Lancaster House Constitution

¹³³⁹Zimbabwe Human Rights Commission 'Bill Watch: The Zimbabwe Human Rights Commission' <http://www.swradiofrica.com/pages/billwatch120410.htm> (Accessed 21 August 2013).

¹³⁴⁰Zimbabwe Human Rights Commission Act 2 of 2012.

¹³⁴¹Section 243 of the Constitution of Zimbabwe states that '(1) The Zimbabwe Human Rights Commission has the following functions- (a) to promote awareness of and respect for human rights and freedoms at all levels of society; (b) to promote the protection, development and attainment of human rights and freedoms; (c) monitor, assess and ensure observance of human rights and freedoms; (d) to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate; (e) to protect the public against abuse and maladministration by State and public institutions and by officers of those institutions; (f) to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by the authority or person; (g) to secure appropriate redress, including recommending prosecution of offenders, where human rights or freedoms have been violated; (h) to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of such investigations; (i) to recommend to Parliament effective measures to promote human rights and freedoms; (j) to conduct research into issues relating to human rights and freedoms and social justice; and (k) to visit and inspect (i) prisons, places of detention, refugee camps and related facilities; and (ii) places where mentally disordered or intellectually handicapped persons are detained.' See also section 9 of the Zimbabwe Human Rights Commission Act 2 of 2012 which gives jurisdiction to the Human Rights Commission. However, the jurisdiction of the Commission with regards to investigating human rights abuses is limited to only matters that arose from 13th February 2009.

not automatically guarantee the effective protection and promotion of human rights. In emphasising this point, Reif notes that:

'National human rights institutions may be established by a government with the best of intentions, such as when a state is making the transition to democratic government, or consolidating its democratic structure, or when established democracies wish to fine tune their institutions. However, national human rights institutions can be established by governments that are not democratic or by governments who want to give the appearance that they are taking steps to improve the human rights and administrative justice situation in their countries, while the reality is that there is little material change after the institution starts operations.'¹³⁴²

The success of the Zimbabwe Human Rights Commission in effectively protecting and promoting human rights goes deeper than its mere establishment. Reif notes that for any human rights institution to effectively discharge its functions, there are a number of factors, which include legal, political, financial and social factors that need to be addressed.¹³⁴³ These factors are analysed below.

6.3.1.1 Independence

The first crucial issue is that the government of Zimbabwe should ensure that the Human Rights Commission is independent. Independence is the attribute that underpins a national institution's legitimacy and credibility and contributes to an institution's effective discharge of its functions.¹³⁴⁴ It is therefore important that the government respects the independence of the Commission and recognises the importance of such independence in ensuring that the Commission conducts its functions effectively. In seeking to maintain such independence the government must ensure that the appointment of members of the Commission is done impartially¹³⁴⁵ and that such members have extensive knowledge of human rights issues and international law.

¹³⁴²Reif LC (2000) 23.

¹³⁴³Reif LC (2000) 23.

¹³⁴⁴United Nations Centre for Human *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and protection of Human Rights* Professional Training Series NP.4 U.N Doc HR/P/PT 4 (1995) 37.

¹³⁴⁵See Section 242 of the Constitution of Zimbabwe states that '(1) There is a commission to be known as the Zimbabwe Human Rights Commission consisting of- (a) a chairperson appointed by the President after consultation with the Judicial Service Commission and the Committee on Standing Rules and

6.3.1.1.1 Appointment of Chairperson of the Human Rights Commission

Impartiality with regards to the appointment of the members of the Commission is an issue that raises questions. This is so because in appointing the Chairperson of the Human Rights Commission, the President is not bound by the advice of the JSC and the Committee on Standing Rules and Orders. Section 242(3) of the Constitution also states that:

'If the appointment of a chairperson to the Zimbabwe Human Rights Commission is not consistent with a recommendation of the JSC, the President must cause the Committee on Standing Rules and Orders to be informed as soon as practicable.'

The Constitution is, however, silent on why the Committee must be informed in such instance and the appropriate action that the Committee has to take if such a decision is made. The suspicion of partisan appointments in this regard cannot be dismissed with regards to such unilateral appointments.¹³⁴⁶ Perhaps a more transparent model of appointment, as the one used in South Africa, could have been adopted to effect impartial appointments.¹³⁴⁶ For example, the appointment of the former Chairperson of the Human Rights Commission, Jacob Mudenda, caused controversy as there were reports that constitutional procedures were not followed in his appointment.¹³⁴⁷ The credibility of the appointment of Jacob Mudenda was also called into question as the Chairperson was a former Governor of Matabeleland North during the Gukurahundi massacres. His political allegiance to the ruling party has seen him being elected as a ZANU-PF Member of Parliament in the recently held elections and subsequently as the

Orders; and (b) eight other members appointed by the President from a list of not fewer than twelve nominees submitted by the Committee on Standing Rules and Orders.'

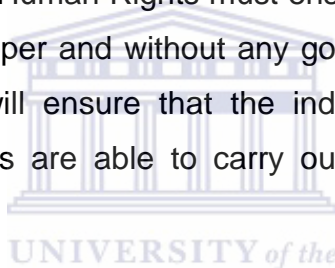
¹³⁴⁶See section 193(4) of the Constitution of South Africa states that 'The President, on the recommendation of the National Assembly must appoint the Public Protector, the Auditor-General and the members of (a) the South African Human Rights Commission; (b) the Commission for Gender Equality; and (c) the Independent Electoral Commission.'

¹³⁴⁷*Newsday* 'Mugabe, Tsvangirai Misfire' February 20, 2013.

<http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> (Accessed 22 August 2013). The MDC-M led by Welshman Ncube alleged that they were not consulted and neither was the Committee on Standing Rules and Orders consulted in the appointment of the current Chairperson of the Human Rights Commission. The appointment was as a result in violation of section 237 of the Constitution of Zimbabwe.

Speaker of Parliament whilst holding the office of the Chairperson of the Zimbabwe Human Rights Commission.¹³⁴⁸

Allegations of corruption and close links with the ruling party have also been levelled against the Chairperson of the Commission, thus questioning the credibility of his appointment.¹³⁴⁹ Reif is of the view that the personal character of the person(s) appointed to head a Human Rights Commission is an important contributory factor in ensuring that the institution is able to discharge its duties effectively.¹³⁵⁰ Taking into consideration the close relationship that Mr. Mudenda enjoyed with the government, there was a risk that the Commission might have been politicised. Reif notes that it is important that individuals with an established history of independence from government should be appointed to head human rights institutions.¹³⁵¹ As such, any future appointments to the Zimbabwe Human Rights must ensure that individuals with credible credentials, who are fit and proper and without any government links are appointed to head the Commission. This will ensure that the independence of the institution is established and that individuals are able to carry out their duties in a non-partisan manner.



6.3.1.1.2 Appointment of Other Members of the ZHRC

Other members of the Zimbabwe Human Rights Commission are appointed by the President from a list that is submitted by the Committee on Standing Rules and Orders.¹³⁵² Considering the fact that ZANU-PF won a majority in the recently held

¹³⁴⁸ *Newsday* 'Mugabe, Tsvangirai Misfire' February 20, 2013.

<http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> (Accessed 22 August 2013). See also *New Zimbabwe* 'MDC-T MPs to Boycott Parliament Opening' 27 August 2013 <http://www.newzimbabwe.com/news-12173-MDC-T+to+boycott+parliament+opening/news.aspx> (Accessed 26 August 2013).

¹³⁴⁹ *Newsday* 'Mugabe, Tsvangirai Misfire' February 20, 2013.

<http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> (Accessed 22 August 2013).

¹³⁵⁰ Reif LC (2000) 24.

¹³⁵¹ Reif LC (2000) 27.

¹³⁵² Section 242(1)(b) of the Constitution of Zimbabwe. See also Section 150(2) of the Constitution of Zimbabwe deals with the Committee on Standing Rules and Orders. It states that 'the Committee on Standing Rules and Orders must consist of the Speaker and President of the Senate and the following Members of Parliament- (a) the Deputy Speaker; (b) the Deputy President of the Senate; (c) the Minister responsible for finance and two other Ministers appointed by the President; (d) the Leader of Government in each House; (e) the leader of the Opposition in each House; (f) the Chief Whips of all the political parties represented in each House; (g) the President of the National Council of Chiefs; (h) two Members

elections, its members will form a large percentage of the individuals appointed to the Committee on Standing Rules and Orders. Although members of the opposition sit on the Committee on Standing Rules and Orders, their limited number in this regard might result in them having a limited say on who gets appointed to the Zimbabwe Human Rights Commission. Such a limited say might therefore result in the appointment of partisan individuals who will have close ties to government. If such appointments are made, the independence of the whole institution will be questioned and this might therefore have a negative impact on the promotion and protection of human rights by the institution. Efforts therefore need to be made to ensure that members of the Committee on Standing Rules and Orders are non-partisan when dealing with such appointments. Party politics should therefore not play a role in the appointment of members of the Zimbabwe Human Rights Commission.

In order to ensure impartiality, the Constitution of Zimbabwe has put into place measures that at least seek to guarantee transparency in the appointment process.¹³⁵³ Despite the political imbalance with regards to the Committee on Standing Rules and Orders, such measures will at least seek to ensure that a degree of impartiality in the appointment process is observed. It is therefore crucial that any future appointments to the Zimbabwe Human Rights Commission must not be based on political considerations but must be made on merit as envisaged by the Constitution.¹³⁵⁴ It is the duty of the President therefore to ensure that fit and proper individuals with extensive knowledge of human rights are chosen to contribute towards the improvement of the promotion and protection of human rights in the country.

who are not Ministers or Deputy Ministers, one being a Senator appointed to the committee by the President of the Senate and one being a Member of the National Assembly appointed by the Speaker; and (i) eight Members who are not Ministers or Deputy Ministers, four elected to the committee by the Senate and four elected by the National Assembly.'

¹³⁵³Section 237 of the Constitution of Zimbabwe states that '(1) For the purpose of nominating persons for any appointment to any independent Commission, the Committee on Standing Rules and Orders must- (a) advertise the position; (b) invite the public to make nominations; (c) conduct public interviews of prospective candidates; (d) prepare a list of the appropriate number of nominees for appointment; and (e) submit the list to the President.'

¹³⁵⁴See section 242(4) of the Constitution of Zimbabwe.

6.3.1.1.3 Enabling Environment

In order to enhance the independence of the ZHRC, it is also important that members of the Commission must be given an enabling free environment to discharge their duties without any political hindrance.¹³⁵⁵ Members of the Commission should exercise their powers without the fear of dismissal or non-reappointment. Commissioners of the Human Rights Commission are granted security of tenure in order to ensure that they exercise their duties without any fear of being removed from office.¹³⁵⁶ Commissioners thus have clearly defined terms of office in order to ensure that they discharge their duties without fear or favour.¹³⁵⁷ More importantly the Constitution protects members of any independent Commission from arbitrary removal from office.¹³⁵⁸ As a result members of independent Commissions can only be removed from office on the grounds provided for in the Constitution and proper procedure has to be followed in that regard.¹³⁵⁹ However, the independence of the Commission might be compromised in the sense that the President is given the authority to remove members of the Human Rights Commission and to appoint members of the tribunal to hear the matter of the removal of a member of the Commission.¹³⁶⁰ Since the President solely constitutes the tribunal it is possible that political considerations can play a part in the removing of Commissioners.

¹³⁵⁵Section 235(1)(a) of the Constitution of Zimbabwe. See also section 7 of the Zimbabwe Human Rights Commission Act which deals with the independence and impartiality of the Commission and Commissioners.

¹³⁵⁶See section 3(1) of First Schedule of the Zimbabwe Human Rights Commission Act 2 of 2012 states that: 'A Commissioner shall hold office for a term of five years and shall be eligible for reappointment for another term of office not exceeding five years.'

¹³⁵⁷International Council on Human Rights *Assessing the Effectiveness of National Human Rights Institutions* (2005) 12.

¹³⁵⁸Section 237(2) of the Constitution states that: 'A member of an independent Commission may be removed from office only on the ground that the member concerned- (a) is unable to perform the functions of his or her office because of physical or mental incapacity; (b) has been grossly incompetent; (c) has been guilty of gross misconduct; or (d) has become ineligible for appointment to the Commission concerned. (3) The procedure for the removal of judges from office applies to the removal from office of a member of an independent Commission.' See also section 20 of the Zimbabwe Human Rights Commission Act which deals with the removal of members of the Human Rights Commission.

¹³⁵⁹See section 187 of the Constitution of Zimbabwe which deals with the procedure for the removal of judges.

¹³⁶⁰See section 20(4) of the Zimbabwe Human Rights Commission Act states that: 'The tribunal referred in this section shall consist of a chairperson and two other members appointed by the President...'

In order to ensure that the Zimbabwe Human Rights Commission is able to discharge its duties effectively, the Zimbabwe government needs to ensure that the Commission has adequate resources, its members are adequately remunerated, that the institution itself is financially independent, and that any public funds should not be under the direct control of the government.¹³⁶¹ Zimbabwe has over the last decade faced massive economic challenges. Such challenges have already had a negative impact on the Commission, with the former Chairperson of the Commission, Reg Austin, resigning and citing the lack of facilities, including an office for the Commission, amongst the reasons thereof.¹³⁶² Thus, the provision of adequate resources to the Commission will prove to be a big challenge that the government of Zimbabwe needs to address taking into consideration the severe financial challenges that the country has been facing over the years.¹³⁶³ Adequate remuneration needs to be provided in order to ensure professionalism within the institution. Concerted efforts should be made to ensure that sufficient financial resources are made available to the Commission. Such funds should therefore be made available either through local funding or through donations, grants or loans made by the governments of other countries. However, considering Zimbabwe's political relations with other countries, especially Western countries, such funding might seem difficult to access. An improvement in political relations with other countries will go a long way to securing such funds.

6.3.1.2 Accessibility

The accessibility factor requires that national human rights institutions must be accessible to citizens, with the public having knowledge of the institution, its physical

¹³⁶¹The issue of funding of the Zimbabwe Human Rights Commission is dealt with under section 17 of the Zimbabwe Human Rights Commission Act 2 of 2002.

¹³⁶²News24 'Zimbabwe Appoints New Rights, Elections Chief' February 02, 2013.
<http://m.news24.com/news24/Africa/Zimbabwe/Zim-appoints-new-rights-election-chiefs-20130218>
(Accessed 22 August 2013).

¹³⁶³However, it should be noted that the United Nations Development Programme in Zimbabwe (UNDP) and the European Commission (EC) have been providing financial support to the Zimbabwe Human Rights Commission so as to improve human rights protection and the rule of law in the country. See UNDP and EC *Support for the Strengthening of the Promotion and Protection of Human Rights and the Rule of Law Through Enhanced Capacity Institutions*. See <http://www.undp.org.zw/focus-areas/democratic-governance/support-for-the-strengthening-of-the-promotion-and-protection-of-human-rights-and-the-rule-of-law-closed> (Accessed 11 September 2013).

location and the diversity of its composition.¹³⁶⁴ The accessibility of the Zimbabwe Human Rights Commission is crucial in order to ensure that individuals who are exposed to human rights violations or non-fulfilment of their rights can seek redress.¹³⁶⁵ It is also crucial that information should be readily available about the role and purpose of any Commission. In order to enhance accessibility national offices need to be opened across all the provinces in Zimbabwe and such information should be disseminated through the public media. This will ensure that Zimbabweans are aware of the existence of such an institution and the purpose that it seeks to serve. The fact that the former Chairperson of the Commission, Reg Austin, cited the lack of offices for the Commission as one of his reasons for resignation implies that efforts need to be made to ensure that the work of the Commission is spread across the country. Adequate resources should therefore be made available for such effort to take place. The appointment of staff to the Commission should also reflect the diverse cultures in Zimbabwe in order to improve accessibility of the Commission. The accessibility of the Commission countrywide will also ensure that it is able to carry out general education programmes on human rights issues for the general populace. Such programmes will ensure that the people of Zimbabwe are taught human rights issues and the aim and scope of the Commission with regards to human rights promotion and protection. Such education programmes will therefore ensure that individuals know the exact steps to take in cases where their rights are violated.

6.3.1.3 Mandate of the Commission

Since the Zimbabwe Human Rights Commission is charged with the promotion and protection of human rights, it is important that the Commission must be given a broader mandate. Such broader mandate will ensure that it carries out its functions efficiently. Reif notes that such broader mandate will ensure that there are no jurisdictional conflicts with other State institutions and also ensure that the police and other security

¹³⁶⁴Reif L.C (2000) 26.

¹³⁶⁵International Council on Human Rights (2005) 16.

forces, and prisons which are often the sources of human rights problems, are included within the jurisdiction of the institution.¹³⁶⁶

Thus, the Constitution of Zimbabwe grants the Commission a broader mandate with regards to the protection and promotion of human rights. In accordance with the Paris Principles, the Commission is mandated to receive complaints on any alleged human rights violations in the country.¹³⁶⁷ The Commission is also mandated with investigating the conduct of any person or authority, where it is alleged that any of the rights and freedoms set out in the Declaration of Rights have been violated.¹³⁶⁸ The Commission is given the powers to gather information and evidence and in the process of gathering such, the Commission is given a number of powers which include, to require witnesses to appear before it¹³⁶⁹, and the powers to visit all places of detention to ascertain the conditions of such places.¹³⁷⁰ In addition the Commission is mandated with securing the appropriate redress for such complaints and to recommend the prosecution of offenders, where human rights have been violated.¹³⁷¹ The broader powers that are given to the Commission will therefore enable it to deal with individual cases and also ensure that such violations of human rights are addressed. The constitutional guarantee of such powers will further enhance the promotion and protection of human rights and further ensure that the Commission is able to discharge its duties efficiently.

6.3.1.4 Accountability

The accountability of any independent institution dealing with human rights is essential in ensuring the effectiveness of such institution in the promotion and protection of human rights. Accountability is usually implemented by imposing a legal duty on the

¹³⁶⁶Reif LC (2000) 25. See also section 243(1)(h) of the Constitution of Zimbabwe which gives the Commission to direct the Commissioner-General of Police to investigate suspected cases of human rights violations and to report back to the Commission the results of such investigations. See also section 243(1)(k)(i) and (ii) which also gives the Commission the power to visit prisons, places of detention, refugee camp in order to ascertain the conditions under which persons are kept and make any recommendations regarding those conditions to the Minister responsible for administering the law to those places.

¹³⁶⁷See section 243(1)(d) of the Constitution of Zimbabwe.

¹³⁶⁸See section 243(1)(e) of the Constitution of Zimbabwe.

¹³⁶⁹See Section 241 of the Constitution of Zimbabwe.

¹³⁷⁰See section 243(1)(k)(i) and (ii) of the Constitution of Zimbabwe.

¹³⁷¹See section 243(1)(g) of the Constitution of Zimbabwe.

institutions to regularly report on their work to a State body directly (Parliament or Parliamentary Committees).¹³⁷² Reif emphasises the point that accountability to the public is also essential and such can be carried out by ensuring that annual and special reports are distributed in the public sphere and through regular communication between the institution and complainants during investigations.¹³⁷³

In seeking to enhance the accountability of the Zimbabwe Human Rights Commission, sections 244¹³⁷⁴ and 323¹³⁷⁵ of the Constitution recognise the importance of the Commission to report to Parliament about its operations and activities. Parliament is given the legal duty to consider reports submitted by the Zimbabwe Human Rights Commission. Such checks will ensure that Parliament is able to ensure that the Commission is fulfilling its constitutional obligations. The mechanism will strengthen the work of the Commission and also ensure that it is properly accountable in relation to its mandate.¹³⁷⁶

6.4 Respecting the Role of Human Rights Defenders and Non-Governmental Organisations (NGOs) in Zimbabwe

6.4.1 Human Rights Defenders

Besides the role played by NHRIs, human rights defenders and NGOs also play an important role in assisting victims of human rights violations and serve as a crucial link between victims and the State. The United Nations defines human rights defenders as 'people who, individually or with others, act to promote or protect human rights.'¹³⁷⁷ This

¹³⁷²Gregory R 'Building an Ombudsman Scheme: Provisions and Operation Practices' (1994) 12 *Ombudsman Journal* 83-116.

¹³⁷³Reif LC (2000) 27. See also International Council on Human Rights (2005) 23.

¹³⁷⁴Section 244(2) of the Constitution states that 'In addition to the report it is required to submit in terms of section 323, the Zimbabwe Human Rights Commission may, through the appropriate Minister, submit reports to Parliament on particular matters relating to human rights and freedoms which, in the Commission's opinion, should be brought to the attention of Parliament.'

¹³⁷⁵Section 323 of the Constitution states that '(1) Every Commission must submit to Parliament, through the responsible Minister, an annual report describing fully its operations and activities, the report being submitted not later than the end of March in the year following the year to which the report relates. (2) An Act of Parliament may require a Commission to submit further reports in addition to the annual report specified in subsection (1), and may prescribe the way in which reports are to be submitted.'

¹³⁷⁶International Council on Human Rights (2005) 23.

¹³⁷⁷United Nations 'Human Rights Defenders: Protecting the Right to Defend Human Rights Fact Sheet No.29.'

broad definition encompasses professional as well as non- professional human rights workers , volunteers, journalists exposing human rights violations, lawyers, and anyone carrying out, even on an occasional basis, a human rights activity.¹³⁷⁸ The role of human rights defenders includes investigating and gathering information regarding human rights violations and reporting them, supporting victims of human rights violations, and conducting human rights education and training.¹³⁷⁹

The work and importance of human rights defenders has over the years received international recognition. As a result a number of international instruments have been put into place to protect the work of human rights defenders around the world. The main instrument that protects the rights of human rights defenders is known as the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (commonly known as the Declaration on Human Rights Defenders).¹³⁸⁰

The Declaration sets out international standards that seek to protect the activities of human rights defenders around the world. The Declaration protects the rights of human rights defenders around the world and these rights include, amongst many others, the right to discuss and develop human rights ideas and advocate for their acceptance¹³⁸¹, the right to criticise government bodies and agencies and to make proposals to improve their functioning¹³⁸², and the right to provide legal assistance or other advice and assistance in defence of human rights.¹³⁸³ States have the responsibility of implementing and respecting all the provisions of the Declaration. States also have a

<http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> (Accessed 31 August 2013).

¹³⁷⁸ See the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

¹³⁷⁹ United Nations 'Human Rights Defenders: Protecting the Right to Defend Human Rights Fact Sheet No.29.'

<http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf> (Accessed 31 August 2013).

¹³⁸⁰ G.A. res .53/144, annex 53 U.N GAOR Supp., U.N. Doc. U.N. DOC. A/RES/53/144 (1999).

¹³⁸¹ Article 7 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

¹³⁸² Article 9(3)(c) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

¹³⁸³ Article 8(2) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

duty to protect human rights defenders against any violence, retaliation and intimidation and such duty is not only limited to actions by State bodies and officials but also to actions of non-State actors.¹³⁸⁴

In an effort to support the work of human rights defenders, the Office of the Special Rapporteur on the Situation of Human Rights Defenders was established in August 2000. The Office was established to provide support for the implementation of the Declaration and to gather information on the situation of human rights defenders around the world.¹³⁸⁵ The duties of the Special Rapporteur include, amongst others, seeking, receiving, examining and responding to information on the situation and the rights of anyone, acting individually or in association with others to promote and protect human rights; and establishing cooperation and conducting dialogue with governments and other interested actors on the promotion and effective implementation of the Declaration on Human Rights Defenders. Recently the General Assembly has also adopted a resolution protecting human rights defenders.¹³⁸⁶ The resolution urges States to create a safe and enabling environment in which human rights defenders can operate free from hindrance and insecurity.

The African Commission in 2004 also established the Special Rapporteur on Human Rights Defenders.¹³⁸⁷ The mandate of the Special Rapporteur includes seeking, receiving, examining and acting upon information on the situation of human rights defenders in Africa. The Special Rapporteur is also mandated to submit reports at every session of the African Commission and to raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa.

¹³⁸⁴Article 2 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

¹³⁸⁵See Commission on Human Rights Resolution 2000/61.

¹³⁸⁶General Assembly Resolution A/HRC/22/L.13.

¹³⁸⁷African Commission on Human and Peoples' Rights 'Special Rapporteur on Human Rights Defenders.'

<http://www.achpr.org/mechanisms/human-rights-defenders/> (Accessed 23 October 2013).

6.4.2 Non-Governmental Organisations (NGOs)¹³⁸⁸

Marcinkute notes that the existing gap between human rights norms and the enforcement of these norms has over the years provided space for human rights NGOs to play a crucial role in the promotion and protection of human rights.¹³⁸⁹ Article 71 of the United Nations Charter provides a legal basis for the activities of NGOs.¹³⁹⁰ Charnovitz notes that the consultative norms in Article 71 of the U.N Charter have over the years influenced institutional developments in many international organisations around the world.¹³⁹¹ For example, the Organisation of American States (OAS) in 1999 adopted the Guidelines for the Participation of Civil Society Organisations in OAS Activities.¹³⁹² The Constitutive Act of the African Union (AU) in 2001 called for the establishment of an advisory Economic, Social and Cultural Council which would encompass social and professional groups of the Member States.¹³⁹³ As such in the modern day NGOs have assumed a crucial role with regards to the promotion and protection of human rights. With the increased role of NGOs in human rights protection, questions have been raised about their effect on the efficient protection of human rights and on the State, which through the use of sovereignty has a monopoly on decisions of how its citizens are treated.¹³⁹⁴ Despite this, it cannot be denied that NGOs around the world perform a vital role in the promotion of human rights, democracy and the rule of law as an integral component of a strong civil society.

¹³⁸⁸Charnovitz S 'Non-governmental Organisations and International Law' in Bianchi A *Non State Actors and International Law* (2009) 350 describes NGO's as groups of persons or of societies freely created by private initiative, that pursue an interest in matters that occur or transcend national borders and are not profit seeking.

¹³⁸⁹Marcinkute L 'The Role of Human Rights NGO's: Human Rights Defenders or State Sovereignty Destroyers' (2011) 4:2 *Baltic Journal of Law and Politics* 52 54.

¹³⁹⁰Article 71 of the United Nations Charter states that 'the Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence. Such arrangements may be made with international organisations and, where appropriate, with national organisations after consultation with the member of the United Nations.'

¹³⁹¹Charnovitz S (2009) 350.

¹³⁹²CP/RES.759 (1217/99).

¹³⁹³See Article 22 of the Constitutive Act of the African Union: Adopted in 2000 at the Lome Summit (Togo) entered into force in 2001.

¹³⁹⁴Marcinkute L (2011) 54.

NGOs have made a significant contribution to the formulation and development of international human rights law through international litigation, instituting or intervening in cases as parties, serving as experts, and testifying as witness.¹³⁹⁵ NGOs are also consistently involved in monitoring States to ensure that they comply with their obligations under international law. In order to ensure that States abide by their international law obligations, NGOs are responsible for gathering information with respect to the abuse of human rights and freedoms. Such information is gathered from the public, governments and other domestic institutions empowered with the protection of human rights, and NGOs use such information to make enquiries verifying such human rights violations. The gathering of such information therefore makes it important that NGOs should work closely with established domestic institutions so as to ensure effective promotion and protection of human rights.¹³⁹⁶ NGOs also assist victims with the redressing of violations, through counselling, rehabilitation and reintegration schemes, and providing psycho-social, medical, socio-economic and other assistance. The advocacy work of NGOs on behalf of victims of human rights violations contributes to the prevention of human rights violations.¹³⁹⁷

However, despite the importance of the work of Human Rights Defenders and NGOs in human rights promotion and protection, their work in Zimbabwe has over the years been severely frustrated. Human Rights Defenders and NGOs have over the years faced enormous obstacles in the country in their quest to promote and protect human rights. Such obstacles have ranged from torture, unexplained disappearances and the use of restrictive laws to silence their activities. Over the years human rights defenders have been harassed, marginalised and become victims of repeated human rights violations. More worryingly such violations of human rights have been done with impunity.¹³⁹⁸

¹³⁹⁵ Mertus J 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transitional Civil Society (2011) 15:5 *American University Journal of International Law* 1336 1369.

¹³⁹⁶ Welch CE *NGOs and Human Rights: Promise and Performance* (2001) 5.

¹³⁹⁷ Organisation for Security and Cooperation in Europe (OSCE) 'Supplementary Dimension Meeting, Protection and Promotion of Human Rights: Responsibilities and Effective Remedies 12-13 July 2007 Hofburg Vienna.'

<http://www.osce.org/odihr/25638> (Accessed 23 September 2013).

¹³⁹⁸ See International Federation for Human Rights (FIDH) *Zimbabwe: On-going Risks for Human Rights Defenders in the Context of the Political Deadlock and Pre-Election Period* (2012) 16.

Lawyers taking up human rights cases in Zimbabwe have also been subjected to arrest, abuse and torture for fighting for the protection of human rights. Such lawyers include Gabriel Shumba, a human rights lawyer who has been condemned to exile in South Africa for taking up human rights cases.¹³⁹⁹ His successful communication before the African Commission on Human and Peoples' Rights in *Gabriel Shumba v Republic of Zimbabwe*¹⁴⁰⁰ shows how he was tortured for taking up human rights cases. Other human rights lawyers, such as, Andrew Makoni, Alec Muchadehama and Beatrice Mtetwa, have all been subjected to arrests and threats for taking up human rights cases.¹⁴⁰¹ Human Rights Watch in its interviews with human rights lawyers in the country has revealed how lawyers in the country have been unwilling to take on human rights cases for fear of personal hazards associated with confronting government.¹⁴⁰² Restrictive legislation has also been used to restrict the works of human rights defenders. Such legislation includes the Public Order and Security Act (POSA)¹⁴⁰³ which has mainly been used to ban public meetings and activities of civil society, thus restraining the freedom of peaceful assembly.¹⁴⁰⁴ Other legislation, such as, the Access to Information and Protection of Privacy Act¹⁴⁰⁵ and the Criminal Law (Law Reform and Codification) Act¹⁴⁰⁶, have also been used to threaten, harass, criminalise and intimidate human rights defenders.

The work of NGOs in Zimbabwe has also been severely limited through the enactment of the Private Voluntary Organisations Act (PVOA).¹⁴⁰⁷ The Act has been used to force NGOs involved in human rights work to register with the then Ministry of Public Service,

¹³⁹⁹ *New Zimbabwe* 'Zimbabwe Lawyer Tells US Congress of Torture' 19 March 2004. <http://www.newzimbabwe.com/pages/SHUMBA.1556.HTML> (Accessed 31 August 2013).

¹⁴⁰⁰ Communication 288/2004.

¹⁴⁰¹ See International Federation for Human Rights (FIDH) (2012) 20.

¹⁴⁰² Human Rights Watch (2008) 35.

¹⁴⁰³ Act 5 of 2002.

¹⁴⁰⁴ See sections 24-31 of POSA which contain provisions relating to public gatherings. Section 24 of POSA makes it mandatory for anyone wishing to organise a public gathering to notify the police four days in advance. Section 25 of POSA authorises the police to place restrictions on the gathering or to prohibit such gathering entirely.

¹⁴⁰⁵ Act 1 of 2002. AIPPA has mainly been used to control the free flow of information as it empowers the government to determine the type of information that reaches its citizens. As a result, media freedom has been severely curtailed and independent newspapers have been under huge threat from the government with staff from independent newspapers arraigned before courts for publishing information which has been deemed to be prejudicial to state security.

¹⁴⁰⁶ Act 23 of 2004.

¹⁴⁰⁷ 22 of 2001/Chapter 17:05.

Labour and Social Welfare or risk prosecution.¹⁴⁰⁸ It should be noted that registration in this case is not automatic as the government has the right to deny an organisation's right to registration after the examination of the organisation's financial books and records.¹⁴⁰⁹ In order to control the activities of NGOs, the PVOA contains restrictions on foreign funding to civic organisations and such foreign funding was later banned in a later amendment to the Act.¹⁴¹⁰ Such measures have therefore crippled the operations of a majority of NGOs in Zimbabwe and as a result forced a number of them to shut down.¹⁴¹¹ This has therefore impacted negatively on the promotion and protection of human rights in the country.

The deteriorating relationship between the government and civil society also resulted in the government drafting, in 2004, the Non-Governmental Organisations (NGO) Bill¹⁴¹², which sought to restrict the activities of civil society. Although the President did not sign the Bill into law¹⁴¹³, it sought to provide for an enabling environment for the operation, monitoring and regulation of all non-governmental organisations and to repeal the PVOA. The Bill included repressive measures that violated several provisions of the Lancaster House Constitution.¹⁴¹⁴ Amongst many repressive measures included in the Bill was the prohibition of all local NGOs from receiving any foreign funding to carry out

¹⁴⁰⁸See section 6 of the PVO Act.

¹⁴⁰⁹See section 20 of the PVO Act.

¹⁴¹⁰Private Voluntary Organisations Act 22 of 2001/Chapter 17:05 General Notice of 2007 –Code of Procedure for the Registration and Operations of Non-Governmental Organisations in Zimbabwe.

¹⁴¹¹*Nehanda Radio* 'ZANU-PF Ban of NGO's in Zimbabwe Self Defeating' February 19, 2012.

<http://nehandaradio.com/2012/02/19/zanu-pf-ban-of-ngos-in-zimbabwe-self-defeating/> (Accessed 12 September 2013).

¹⁴¹²H.B 13, 2004. See also http://www.kubatana.net/docs/legisl/ngobill_040820_veritas.pdf (Accessed 31 August 2013).

¹⁴¹³*The Namibian* 'Mugabe Rejects Notorious NGO Bill' 20 May 2005

http://www.namibian.com.na/indexx.php?archive_id=16418&page_type=archive_story_detail&page=5216 (Accessed 23 October 2013).

¹⁴¹⁴The Bill was passed in violation of the rights to freedom of expression (section 20 of the Lancaster House Constitution and association (section 21 of the Lancaster House Constitution). It is important to note that the Lancaster House Constitution did not impose any restriction on the purposes for which an association could be formed. The only restrictions under section 21(3)(a) and (b) that could be imposed under any law dealt were those "in the interests of defence, public safety, public order, public morality or public health" or to protect the rights of the freedom of other persons and they must be shown to be reasonably justifiable in a democratic society. Measures to restrict the freedom of association and expression of NGOs were therefore unreasonable and in direct violation of the Lancaster House Constitution.

activities involving or including issues of governance.¹⁴¹⁵ The Bill also sought to prohibit foreign NGOs from registering if their sole or principle purpose involved or included issues of governance which are broadly defined to include the promotion and protection of human rights and political governance issues.¹⁴¹⁶ The United Nations High Commissioner for Human Rights, Navi Pillay, expressed great concern about the drafting of such laws that sought to limit the freedom of NGOs, and saw them as a serious threat to the respect for human rights.¹⁴¹⁷ A number of scholars expressed great concern about the Bill as it would have resulted in the closure of many NGOs around the country. For example, Mapuva and Mapuva note that the threat of closure of NGOs would have had a negative effect on a number of projects that different NGOs had undertaken and as the government alone could not sustain most of these programmes it would have needed the assistance of such NGOs.¹⁴¹⁸

The discussion above clearly highlights the importance of human rights defenders and civil society organisations in human rights protection. However, as discussed above, an unfriendly and hostile environment has been created by the government of Zimbabwe in seeking to destabilise the work of human rights defenders and civil society organisations. As a result this has had a negative impact on the promotion and protection of human rights in the country. It is therefore crucial that the government of Zimbabwe respects the Constitution and realise the importance of promoting and protecting fundamental rights and freedoms and the institutions established to give effect to such. It is crucial that the Zimbabwean government must improve the operational environment of human rights defenders. By so doing this will ensure that the rights of human rights defenders enshrined in the UN Declaration of Human Rights Defenders are acknowledged by the government. The government should also ensure that lawyers are able to perform all their professional functions without any intimidation, hindrance, harassment or improper interference.¹⁴¹⁹ It is also imperative that the

¹⁴¹⁵ See Clause 9(1) of the Non-Governmental Organisation Bill.

¹⁴¹⁶ See clause 9(4) of the Non-Governmental Organisation Bill.

¹⁴¹⁷ *UN News Centre* 'Restrictions on NGOs Worldwide Undermining Human Rights' 25 April 2012. <http://www.un.org/apps/news/story.asp?NewsID=41858> (Accessed 31 August 2013).

¹⁴¹⁸ Mapuva J and Muyengwa- Mapuva L 'A Critique of the key Legislative Framework Guiding Civil Liberties in Zimbabwe' (2012) 15:4 *PER* 125 134.

¹⁴¹⁹ See Principle 16 of the Basic Principle on the Role of Lawyers 2003.

security of lawyers must be adequately safeguarded by local authorities in cases where such security is threatened as a result of lawyers discharging their functions.¹⁴²⁰

It is also crucial that the government of Zimbabwe must amend or repeal any repressive legislation that has been used to negatively affect the work of human rights defenders and NGOs. As has been noted above, repressive legislation has been used in Zimbabwe to silence dissent, perpetrate human rights violations, and place the fundamental rights of Zimbabweans under siege. Repressive legislation has been used to systematically harass, arrest and torture with impunity those perceived to be supporting the political opposition as well as those who expose human rights violations. The amendment or repeal of such legislation must be made a priority by the recently constituted Parliament as such legislation is in violation of a number of provisions of the Constitution.¹⁴²¹ Since the Constitution is granted supremacy status¹⁴²², a number of provisions in the repressive legislation are therefore inconsistent with the Constitution and should be amended or repealed. Such measures will no doubt bode well for the improvement of the promotion and protection of human rights in Zimbabwe and allow human rights defenders and NGOs to conduct their duties without any hindrance.

6.5 Upholding and Maintaining the Independence of the National Prosecuting Authority (NPA)

The Constitution of Zimbabwe creates a National Prosecuting Authority (NPA)¹⁴²³ to replace the office of the Attorney General (AG) which was established under the

¹⁴²⁰See Principle 19 of the Basic Principle on the Role of Lawyers 2003.

¹⁴²¹See for example section 58 of the Constitution of Zimbabwe which states that '(1) Every person has the right to freedom of assembly and association and the right not to associate with others'. See also section 61 of the Constitution of Zimbabwe which states that '(1) Every person has the right to freedom of expression, which includes (a) freedom to seek, receive and communicate ideas and other information; (b) freedom of artistic expression and scientific research and creativity and other information; (c) academic freedom (2) Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.'

¹⁴²²See section 2 of the Constitution of Zimbabwe which states that '(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with is invalid to the extent of the inconsistency. (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.'

¹⁴²³See section 258 of the Constitution of Zimbabwe states that: 'there is a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions.'

Lancaster House Constitution. The AG's office was charged with instituting and undertaking criminal proceedings before any court in Zimbabwe.¹⁴²⁴ The AG's office was supposed to be an independent institution that played a great role in the protection of human rights through the prosecution of perpetrators of human rights violations. However, there were great concerns about the independence and impartiality of the institution. This is so because there were reports that the AG's office had lost its impartiality especially in cases dealing with political violence.¹⁴²⁵ Human Rights Watch has reported how prosecutors have over the years been at the centre of abuse of the law through the denial of bail¹⁴²⁶ to MDC supporters and through the practice of selective prosecution of perpetrators of human rights violations.¹⁴²⁷ According to Human Rights Watch, the AG's office had adopted a policy and practice in "political" cases to oppose bail in all circumstances, regardless of the merits of each individual case.¹⁴²⁸ Instructions were given by the AG's office to all prosecutors to ensure that as a matter of policy and as a deterrent to other "would be offenders"¹⁴²⁹ that no person accused of committing or inciting political violence should be granted bail.¹⁴³⁰ Thus, the use of section 121 of the Criminal Procedure and Evidence Act (CPEA)¹⁴³¹ has been seen as a substitute to detention mechanisms and has also been in contravention of the principle

¹⁴²⁴Section 76(4) of the Lancaster House Constitution.

¹⁴²⁵Human Rights Watch (2008) 22.

¹⁴²⁶Whilst section 117 of the Criminal Procedure and Evidence Act (CPEA) Chapter 9:07 states that bail should not be refused to an individual unless there is clear evidence that the accused is likely to commit other offences, interfere with witnesses or abscond, section 121 of the CPEA empowers a prosecutor to overturn the granting of bail by a magistrate. Therefore in cases where a prosecutor gives notice of intention to appeal against bail, such notice suspends the ruling against bail pending the noting of the appeal.

¹⁴²⁷Human Rights Watch (2008) 22.

¹⁴²⁸Human Rights Watch (2008) 22.

¹⁴²⁹See the case of *State v Ranganai Dzinchito* CRB 2796/2008 (Unreported) where in denying bail to the accused the Presiding Magistrate stated that "[T]he court is of the view that it is not in the interests of justice to admit the accused to bail. The situation in the country at the moment is very volatile. While the presumption of innocence operates in favour of the accused it is necessary though unfortunate that those who are brought on allegations of such public violence be kept in custody to sound a warning". This case clearly illustrates how some courts in the country have diverted away from ruling on cases based on sound legal principles and have instead placed political considerations at the expense of people's rights.

¹⁴³⁰Human Rights Watch (2008) 22.

¹⁴³¹Chapter 9:07.

that an accused person shall be presumed innocent until proven guilty by a competent court of law.¹⁴³²

In an effort to improve the prosecution of crimes and human rights violations in the country, the Constitution of Zimbabwe now establishes a NPA. The NPA is headed by the Prosecutor-General.¹⁴³³ In order to ensure that there is impartiality in the appointment of the head of the NPA, the Constitution stipulates that such appointment is made by the President on the advice of the JSC following the procedure for the appointment of a judge.¹⁴³⁴ In this case it therefore means that the President is bound by the advice of the JSC. This will therefore ensure a degree of transparency in the appointment of the Prosecutor-General and ensure that appointments are impartial and free from any political interference. In order to secure the independence of the Prosecutor-General, the Constitution guarantees security of tenure¹⁴³⁵ and provides that removal conditions of judges apply to the removal of the Prosecutor-General.¹⁴³⁶

In order to ensure that the Prosecutor-General conducts his or her duties without any external interference, section 260 of the Constitution of Zimbabwe provides for the independence of the Prosecutor-General. The sections states that:

‘(1) Subject to this Constitution, the Prosecutor-General- (a) is independent and is not subject to the direction or control of anyone; and (b) must exercise his or her functions impartially and without fear, favour, prejudice or bias. (2) The Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings.’

¹⁴³² See section 69 of the Constitution of Zimbabwe which states that ‘(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.’ See also section 18(3) (a) of the Lancaster House Constitution stated that ‘Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.’ See also Article 14(2) of the ICCPR which states that ‘Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.’

¹⁴³³ Section 259(1) of the Constitution of Zimbabwe.

¹⁴³⁴ Section 259(3) of the Constitution of Zimbabwe.

¹⁴³⁵ See section 259(5) of the Constitution of Zimbabwe.

¹⁴³⁶ See section 259(7) of the Constitution of Zimbabwe.

The constitutional guarantees of the independence of the Prosecutor-General and security of tenure are welcome developments that will go a long way in ensuring that he or she conducts their duties without fear or favour.¹⁴³⁷

The Constitution also ensures that the Prosecutor-General and officers of the NPA must act in accordance with the Constitution and the law in the discharge of their duties.¹⁴³⁸ In seeking to ensure the independence and impartiality of the NPA, section 261 provides a number of guidelines. It states that:

‘(2) No officer of the National Prosecuting Authority may, in the exercise of his or her functions- (a) act in a partisan manner; (b) further the interests of any political party or cause; (c) prejudice the lawful interests of any political party or cause; or (d) violate the fundamental rights or freedoms of any person. (3) Officers of the National Prosecuting Authority must not be active members or office-bearers of any political party or organisation. (4) An Act of Parliament may make further provision to ensure the political neutrality of officers of the National Prosecuting Authority.’

The above section therefore seeks to separate the functions of office bearers of the NPA from the realm of politics which has previously tarnished the credibility and impartiality of the AG's office. Such provisions and the accountability of the Prosecutor-General to Parliament¹⁴³⁹ will ensure that the institution is able to discharge its duties in a manner that will enhance justice.

Although the Constitution makes a great effort to protect the independence of the NPA, it is important that the executive must also do the same. It is submitted that the executive must also seek to ensure that this independence is respected. The institution must not be used as an instrument to settle political scores as this will tarnish its image and affect its ability to conduct its constitutional mandate. Political will is therefore

¹⁴³⁷ See section 259(7) of the Constitution of Zimbabwe states that ‘The provisions relating to the removal of a judge from office apply to the removal of the Prosecutor-General from office’. See also section 259(8) of the Constitution of Zimbabwe which states that ‘the conditions of service of the Prosecutor-General, including his or her remuneration, must be provided for in an Act of Parliament, but the remuneration must not be reduced during the Prosecutor-General's tenure of office.’

¹⁴³⁸ Section 261 of the Constitution of Zimbabwe.

¹⁴³⁹ See section 262 of the Constitution of Zimbabwe states that ‘The Prosecutor-General must submit to Parliament, through the appropriate Minister, an annual report on the operations and activities of the National Prosecuting Authority, the report being submitted not later than six months after the beginning of the year following the year to which the report relates.’

crucial in this instance to ensure that the NPA is able to discharge its constitutional duties without any fear or favour and in the process ensure that any violators of fundamental rights and freedoms, irrespective of their political affiliation, are brought to justice. Lack of political will in ensuring the protection of the independence of the NPA will result in a lack of public trust in the institution and hence a public distrust in the justice system. It is therefore important that there has to be a realisation by the Zimbabwean government that human rights constitute a fundamental element in any country's political, social and economic development.

6.6 Improved Role of the Southern African Development Community (SADC) in Human Rights Protection in the Region

The Southern African Development Community (SADC) is a regional economic community in Southern Africa with the aim of creating a 'Free Trade Area' amongst its members.¹⁴⁴⁰ Zimbabwe is a State Party to the SADC Treaty. The SADC has over the years played a critical role in trying to resolve the political impasse in Zimbabwe.¹⁴⁴¹ It is from this role that, in trying to address and improve the human rights situation in the country, SADC should also have a role to fulfil and ensure that its Member States are in compliance with Article 4 (c) of the SADC Treaty which emphasises the promotion and protection of human rights, democracy and the rule of law.¹⁴⁴² Thus, the government of Zimbabwe as a Member State of SADC is bound by the provisions of the Treaty and as such SADC has a role in ensuring that Zimbabwe fulfils its Treaty obligations. However, that is not to say that the wider international community as a whole does not have a role to play in seeking to ensure that the culture of human rights protection is observed in Zimbabwe. It indeed has such, but the main focus on SADC is as a result of the proximity of the institution and the role it has assumed over the years in trying to end the political impasse in the country.

¹⁴⁴⁰ Cowell F 'The Death of the Southern African development Community Tribunal's Human Rights Jurisdiction' (2013) 13:1 *Human Rights Law Review* 153 153.

¹⁴⁴¹ Open Society Initiative for Southern Africa 'SADC's Role in Zimbabwe'
<http://www.osisa.org/openspace/zimbabwe/sadcs-role-zimbabwe> (Accessed 24 October 2013).

¹⁴⁴² Article 4(c) of the SADC Treaty.

The SADC Treaty which was signed in 1992 established the Community's main administrative and political organs and the Treaty was adopted with the aim of promoting greater economic, political, and security co-operation within the region.¹⁴⁴³ Article 4 of the SADC Treaty elaborates on a number of principles that Member States must observe. Key amongst these principles is the importance of human rights, democracy and the rule of law.¹⁴⁴⁴ It should also be noted that the SADC Treaty does not refer to any specific human rights instruments other than in the wording of Article 4 of the Treaty.

In an effort to promote peace, security and a culture of human rights, SADC adopted a number of policies that have recognised the importance of human rights.¹⁴⁴⁵ The SADC Organ for Peace, Defence and Security was established in 1996 with its objectives including the promotion of peaceful settlement of disputes and the promotion and observance of human rights as provided for in the charters and conventions of the African Union (AU) and the United Nations.¹⁴⁴⁶ The SADC Treaty in Article 9 also established the SADC Tribunal which has a primary role of ensuring adherence to and the proper implementation of the SADC Treaty and its subsidiary instruments as well as adjudicating on disputes. Although the SADC Treaty does not expressly grant the SADC Tribunal jurisdiction with regards to human rights complaints, the SADC Tribunal using a number of provisions in the SADC Treaty and SADC Protocol of the Tribunal and Rules of Procedure had the capacity to hear applications regarding human rights¹⁴⁴⁷ in cases where individuals were not being protected by the legal system in their home state.

¹⁴⁴³See Preamble of the SADC Treaty.

¹⁴⁴⁴Article 4 of the SADC Treaty states that 'SADC and its Member States shall act in accordance with the following principles (a) sovereign equality of all Member States; (b) solidarity, peace and security; (c) human rights, democracy, and the rule of law; equity, balance and mutual benefit; (e) peaceful settlement of disputes.'

¹⁴⁴⁵Cowell F (2013) 155.

¹⁴⁴⁶Article 2(g) of the Protocol on Politics, Defence and Security Co-operation 2001.

¹⁴⁴⁷It should be noted that the Protocol of the Tribunal and Rules of Procedure of 2000 does not include in the jurisdiction of the Tribunal the issue of handling human rights cases. However, articles 17- 20 elaborate on a series of complaints that the Tribunal may entertain, which include disputes between states and natural or legal persons. Article 15(2) of the Protocol of the Tribunal and Rules of Procedure of 2000 also allows an applicant to bring an action against a state if they have exhausted all available remedies or unable to proceed within their domestic jurisdiction. The Preamble to the SADC Treaty also emphasises the importance of the guaranteeing of human rights, observance of human rights and the rule

However, such capacity was suspended in August 2012 and its jurisdiction to hear individual human rights complaints was as a result terminated.¹⁴⁴⁸ This was after the Heads of Government meeting in 2012 passed a resolution stating that a new Protocol for the Tribunal had to be drafted and that in future its activities had to be 'confined to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.'¹⁴⁴⁹ The lack of a clear human rights jurisdiction for the Tribunal might have been an indicator as to why the SADC Summit decided to terminate such jurisdiction. However, Norlander believes that the decision to terminate the jurisdiction of the SADC Tribunal with regards to human rights can mainly be attributed to the fact that the Tribunal had become 'inconvenient' for SADC Heads of Government as it had issued decisions that were viewed to be 'too independent' for the liking of SADC leaders.¹⁴⁵⁰ Some of these cases were against the government of Zimbabwe.

A number of civil rights groups expressed great concern about the decision of the SADC Heads of Government and cited the fact that most national courts in the region were often packed with pliant judges and as a result the SADC Tribunal offered victims of human rights abuses an opportunity for impartial judgment and redress.¹⁴⁵¹ Although the SADC Tribunal dealt with a number of human rights cases, the lack of enforcement mechanisms hindered the Court's ability to effectively promote and protect human rights. This is so despite the fact that Article 24 of the SADC Protocol of the Tribunal and Rules of Procedure states that the decisions of the Tribunal are final and binding and requires States to treat the SADC Tribunal decisions under the law of foreign judgments in their jurisdictions.¹⁴⁵² However, in cases of non-enforcement of the

of law. See also Article 4(c) of the SADC Treaty which emphasises the importance of human rights, democracy and the rule of law.

¹⁴⁴⁸Final Communique of the 32nd Summit of SADC Heads of State and Government, Maputo, Mozambique, 18 August 2012.

¹⁴⁴⁹Final Communique of the 32nd Summit of SADC Heads of State and Government, Maputo, Mozambique, 18 August 2012.

¹⁴⁵⁰Norlander J 'Regional Organisations, Human Security, Human Rights and International Law 2011 *Development Dialogue* 57.

¹⁴⁵¹*Baobab Africa* 'Beheading the Monster' August 22, 2012.

<http://www.economist.com/blogs/baobab/2012/08/sadc-summit> (Accessed 31 August 2013).

¹⁴⁵²Article 32 of the SADC Protocol of the Tribunal and Rules of Procedure states that 'The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the Member State in which the judgment is to be enforced shall govern the enforcement. (2) Member States and institutions of the Community shall take forthwith all measures necessary to ensure execution of

Tribunal's judgment, the Protocol of the SADC Tribunal and Rules of Procedure provides for such cases to be referred to the SADC Summit which would take appropriate action. However, the effectiveness of this mechanism has been questioned and labelled as a 'tiger without teeth due to its ineffectiveness in addressing such issues'.¹⁴⁵³

The ineffectiveness of the enforcement mechanism especially by the SADC Summit is mainly highlighted in the cases that Mike Campell brought to the SADC Tribunal challenging the land invasions in Zimbabwe in 2000. Mike Campell and other farm owners had their farms compulsorily acquired by the government in its implementation of the Land Reform Program. They brought a number of cases before the SADC Tribunal alleging that their rights under the Lancaster House Constitution had been violated.¹⁴⁵⁴ Despite these judgments being granted in favour of Mike Campell and others, the Government of Zimbabwe refused to comply with the judgments and subsequent orders declaring that Zimbabwe was in breach and in contempt of the decisions of the Tribunal.¹⁴⁵⁵ The President labelled the decision of the SADC Tribunal as being 'nonsense and of no consequence'.¹⁴⁵⁶ As a result of continued violence,

decisions of the Tribunal. (3) Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the Member States concerned. (4) Any failure by a Member of State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned. (5) If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.'

¹⁴⁵³Ruppel OC and Bangamwabo F 'The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration' (2009) 8 *Monitoring Regional Integration in Southern Africa Yearbook* 179.

¹⁴⁵⁴See *Mike Campell (PTY) Limited v The Republic of Zimbabwe* (2/07) [2007] SADCT 1 (13 December 2007) where the applicants sought an interim measure from the Tribunal restraining the Zimbabwean government from, removing or allowing the removal of the applicants from their agricultural land. In the case the SADC Tribunal granted an interim order, ordering the Government of Zimbabwe to take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence and beneficial use of the farms belonging to the applicants. See also final judgment of *Mike Campell (Pty) Ltd v Republic of Zimbabwe* (2/2007) [2008] SADCT (28 November 2008) where the Tribunal ruled in favour of Mike Campell and 77 other white farmers where the Tribunal stated that Zimbabwe was in breach of its obligations under articles 4(c) and 6(2) of the SADC Treaty.

¹⁴⁵⁵*Campell v Republic of Zimbabwe* (SADC (T) 03/2009) [2009 SADCT 1 (5 June 2009)].

¹⁴⁵⁶American Renaissance 'Mugabe Uses Birthday Bash to Rebuke White Farmers' 28 February 2009 http://www.amren.com/mtnews/archives/2009/03/mugabe_uses_bir.php (Accessed 31 August 2013). See also *Gramara (Pty) Ltd and Cloete v The Government of Zimbabwe and Others* Zimbabwe High Court 5483/09 (Unreported) where the application for the domestic registration of the SADC Tribunal judgments was dismissed as the High was not persuaded that the SADC Tribunal could entertain and adjudicate on cases of alleged violation of human rights committed by Member States against their nationals. The High

further farm invasions and the non-compliance with its decisions, the Tribunal in accordance with Article 32(5) of the SADC Protocol reported its findings to the SADC Head of State Summit¹⁴⁵⁷ so that the Heads of State could take appropriate action against the Government of Zimbabwe.

Despite the referral of the cases to the SADC Summit, the Zimbabwean government successfully lobbied other SADC Member States for the removal of the capacity of the SADC Tribunal to hear individual applications relating to human rights cases.¹⁴⁵⁸ As a result of the removal of this jurisdiction the SADC Summit therefore failed to take any measures against the Government of Zimbabwe for its failure to fulfil its Treaty obligations with respect to promoting and protecting human rights. It should be noted that although the SADC Treaty states that sanctions for non-compliance with the provisions of the Treaty may be imposed, there is no specific sanction for non-compliance with judgments of the SADC Tribunal.¹⁴⁵⁹ Ndlovu notes that the decision of the SADC Summit to suspend the SADC Tribunal represents a failure by the Summit to guarantee the effectiveness of the Tribunal and reaffirm the mandate of the Tribunal by calling for the enforcement of its decisions.¹⁴⁶⁰ Ndlovu also notes that a bad precedent has thus been set. This is so because the SADC Summit has allowed the principle of sovereignty to trump the wider interest of integration despite the fact that by being Member States of SADC, members had surrendered some sovereignty to the body.¹⁴⁶¹ Cowell notes that the consensus to remove the jurisdiction of the SADC Tribunal with regards to hearing human rights cases has led to the weakening of the rule of law amongst SADC governments and will clearly jeopardise the protection of human rights

Court was also of the view that the enforcement of the Tribunal's case would be inconsistent with the decision of the Supreme Court which had ruled that the farm invasions were lawful.

¹⁴⁵⁷The Summit is the SADC's principal organ that is tasked with the responsibility of policy direction and control of SADC functions.

¹⁴⁵⁸Cowell F (2013) 153.

¹⁴⁵⁹See article 33 of the SADC Treaty states that '(1) Sanctions may be imposed against a Member State that; (a) persistently fails, without good reason, to fulfil obligations under this Treaty; (b) implements policies which under the principles and objectives of SADC; or (c) is in arrears for more than one year in the payment of contributions to SADC, for reasons other than those caused by natural calamity or exceptional circumstances that gravely affect its economy, and has not secured the dispensation of the Summit. (2) The sanctions shall be determined by the Summit on a case-by-case basis.'

¹⁴⁶⁰Ndlovu P 'Campbell v Republic of Zimbabwe: A Moment of Truth for SADC Tribunal' (2011) 1 *SADC Law Journal* 63 78.

¹⁴⁶¹Ndlovu P (2011) 78.

in the region.¹⁴⁶² Nathan also states that the politics around the suspension of the Tribunal's human rights mandate has created the impression that, rather than human rights being a common core value of the Organisation, there was a 'common commitment to state solidarity and regime protection.'¹⁴⁶³

The importance of the establishment of the relevant SADC Tribunal and its importance in human rights protection is well articulated in the South African Constitutional Court case of *Government of the Republic of Zimbabwe v Fick and Others*.¹⁴⁶⁴ The Constitutional Court highlighted the problem of the violation of human rights in Africa and stated that the SADC Tribunal had been established to promote and protect fundamental rights and freedoms. In response to the suspension of the capacity of the SADC Tribunal to hear human rights cases, Mogoeng J stated that:

'For the right or wrong reasons, or a combination of both, Africa has come to be known particularly by the western world as the dark Continent, a continent which has little regard for human rights, the rule of law and good governance. Apparently driven by a strong desire to contribute positively to the renaissance of Africa, shed its southern region of this development-inhibiting negative image, coordinate and give impetus to regional development, Southern African States established the Southern African Development Community (SADC) with special emphasis on, among other things, the need to respect, protect and promote human rights, democracy and the rule of law.'¹⁴⁶⁵

The Constitutional Court also further emphasised the importance of the SADC Tribunal and stated that it was the keystone of justiciability and was set up to ensure that no

¹⁴⁶²Cowell F (2013) 164.

¹⁴⁶³Nathan L 'Solidarity Triumphs over Democracy- The Dissolution of the SADC Tribunal' (2011) 57 *Development Dialogue* 123 136.

¹⁴⁶⁴2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC). In this case the Constitutional Court handed down a judgment dismissing an appeal against the decision of the Supreme Court of Appeal. This was after the farmers who had won their case against the government of Zimbabwe in the SADC Tribunal had initially approached the North Gauteng High Court for registration and enforcement of the costs order in South Africa. The North Gauteng High Court had ordered the registration and execution of the costs order against the property of government of Zimbabwe in South Africa. Following the judgment of the North Gauteng High Court, the government of Zimbabwe also unsuccessfully appealed to the Supreme Court of Appeal (*Government of the Republic of Zimbabwe v Fick and Others* (2012) ZASCA 122) against the decision of the North Gauteng High Court. This led to the appeal to the Constitutional Court which dismissed the appeal and held that the North Gauteng High was correct in ordering that the enforcement of the cost order of the SADC Tribunal in South Africa.

¹⁴⁶⁵*Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) para.1.

SADC Member State was able to undermine the regional development agenda by betraying the objectives of SADC with impunity.¹⁴⁶⁶ The SADC Tribunal therefore played a crucial role in human rights protection within the region. The decision of the South African Constitutional Court to honour the decision of the SADC Tribunal clearly reflects the important role that the Tribunal played in protecting fundamental rights and freedoms. The decision is a reflection of the general independence of the South African courts and clearly sends a critical message to SADC leaders on the important role that the Tribunal had in protecting human rights for SADC citizens.

From the above discussion it is evident that the decision of the SADC Summit to not take any action against the government of Zimbabwe, but rather suspend the jurisdiction of the Tribunal to handle human rights cases, has left SADC citizens with no recourse to justice when their rights are violated by their governments. Because of the proximity of the Tribunal and the delays in the handling of human rights cases by the African Commission on Human and Peoples' Rights, the Tribunal offered great hope for the protection of human rights for SADC citizens. The decision of SADC Summit reflects the hierarchy of values in which human rights and the rule of law have become subordinate to the respect for regime solidarity and state sovereignty.¹⁴⁶⁷ Instead of following the example set by other regional economic communities, such as, the Economic Community of West African States (ECOWAS)¹⁴⁶⁸ and the East African Community (EAC)¹⁴⁶⁹, that secure the rights of individuals' access to their respective courts, SADC

¹⁴⁶⁶ *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) para. 2.

¹⁴⁶⁷ Nathan L (2011) 136.

¹⁴⁶⁸ Citizens of ECOWAS Member States are able to file complaints against human rights violations of state-actors at the ECOWAS Court of Justice. ECOWAS Member States have given the court which has existed formally since 1991, a mandate to hear complaints relating to human rights violations and the decisions of the court are legally binding on all ECOWAS Member States and the ECOWAS Court of Justice rules according to the provisions of the African Charter on Human and Peoples' Rights. The Court of Justice has the competence to rule on human rights violations through an individual complaint procedure since 2005. It allows applications to be made even in cases where local remedies have not been exhausted.

¹⁴⁶⁹ The East African Community Court of Justice is a treaty-based judicial body of the East African Community which has the duty of ensuring the adherence to the law in the interpretation and application of and compliance with the East African Community Treaty of 1999. Although the explicit human rights jurisdiction of the Court is yet to be formalised, the Court has over the years ensured that basic rights of individuals under the Treaty are respected.

has pushed its human rights values into the background in favour of protecting political regimes within the region.

The decision of the SADC Summit leaves questions to be answered. These questions include who is now going to police any abuse by a SADC Member State? And who will also ensure that SADC Member States take appropriate measures to promote the principles of human rights, democracy and the rule of law? The removal of human rights jurisdiction from the Tribunal also calls into question why the Tribunal was established in the first place.

There is no doubt that the SADC Treaty places much emphasis on the importance of human rights, democracy and the rule of law in the region. Therefore, it is important that a new Protocol on the Tribunal must clearly give the Tribunal express jurisdiction in hearing human rights issues. SADC leaders must acknowledge that the political instability in a number of Member States has had a negative effect on the promotion and protection of human rights in the region¹⁴⁷⁰ and should as a result make concerted efforts to ensure that such violations are addressed. A new Protocol on the Tribunal must also ensure that the decisions of the Tribunal are enforced by domestic courts in Member States. Such enforcement will provide for an effective means of securing compliance with decisions of the Tribunal.

It is also important that SADC must adopt standards of intolerance towards human rights violations within the region and should put to an end the habit of seeking to protect regimes that violate the Treaty. SADC Member States can no longer hide behind the notion of sovereignty with regards to human rights violations. Human rights have assumed great importance and have matured beyond expectation and now exert a moral and political force above the legal order of the state.¹⁴⁷¹ Appropriate actions, such as, sanctions and suspension from the regional body, are measures that can be

¹⁴⁷⁰ *South African Government News Agency* 'SADC Leaders Under Pressure to Solve Political Logjams' 02 September 2009.

<http://www.sanews.gov.za/africa/sadc-leaders-under-pressure-solve-political-logjams> (Accessed 12 September 2013).

¹⁴⁷¹ Basnet G 'State Sovereignty vs. Human Rights'

http://www.nepalnews.com/archive/2013/others/guestcolumn/feb/guest_columns_05.php (Accessed 10 September 2013).

adopted by SADC leaders in punishing Member States that will in future blatantly violate the provisions of the Treaty. Failure to address the human rights challenges in the region and adoption of mechanisms to stop such human rights abuses will thus seriously further undermine the credibility of SADC and its willingness to promote a culture of respect for human rights within the region.

6.7 Executive Policy Shift

The discussion in this thesis has highlighted the impact that the politicisation of the judiciary and various agencies of government has had on the protection and promotion of human rights. Executive interference with the judiciary has resulted in its failure to adequately protect and promote human rights. The same political interference has been extended to other governmental agencies and constitutionally established bodies that are given the mandate to promote and protect human rights. The political interference by the government in these institutions charged with protecting and promoting human rights has over the years been a major barrier to ensuring the effective domestic protection of human rights.

Over the years the government has adopted a policy that has mainly been informed by and represented, popular interests and as a result it has been expected of other government agencies and any individual to share this policy and be accountable to the policies articulated by government.¹⁴⁷² The attitude of the executive and its political policies has thus been a major hindrance to the enjoyment of fundamental rights and freedoms. The executive's intolerance of various political views has fuelled the massive abuse of human rights mainly by its law enforcement agencies which have been deployed across the country to crush any dissent.¹⁴⁷³ Such intolerance has greatly contributed to the culture of impunity in the country.

It is therefore important that the executive initiates a policy shift with regards to the political situation in the country and the protection and promotion of human rights. There

¹⁴⁷²Goredema C (2004) 102.

¹⁴⁷³Amnesty International 'Zimbabwe: Continued Clampdown on Dissent Amnesty International submission to the Universal Periodic Review 2011'.
<http://www.amnesty.org/en/library/asset/AFR46/016/2011/en/df265ba2-f8f0-443a-9fc2-04671084eb63/afr460162011en.pdf> (Accessed 21 August 2013).

is no doubt that the tense political climate has resulted in the violation of fundamental rights and freedoms. The emergence of opposition political forces with different political ideologies to those of the ruling party has resulted in gross violation of human rights. Individuals with different political ideologies have been subjected to persecution. In order to address such problems it is crucial that the government of Zimbabwe respects the different opinions that are in the country and in the process also respect the political rights of its citizens. Policies seeking to promote political tolerance and human rights protection and promotion should become a priority for the newly elected government. In order to ensure that there is effective domestic protection of human rights, the government should lead from the front and adhere to and respect the rights in the Constitution and various international treaties to which Zimbabwe is a party. Respect also needs to be extended to the institutions that are established so as to bring to an end the government's violations of human rights.

6.8 Conclusion

The importance of human rights protection has over the years assumed great importance. Thus, international law mandates States to put into place various domestic measures to promote and protect human rights. Zimbabwe has over the years implemented such measures but the effectiveness of such measures has been undermined by political interference. As such the domestic protection of human rights in the country has been undermined. It is therefore important that the domestic measures discussed in this chapter are implemented together with the judicial reforms that have been discussed in the previous chapters. Political willingness to implement such measures is key to addressing the human rights situation in the country. If the measures discussed in this chapter are properly implemented and complement the constitutional reforms, there is no doubt that there will be an improvement in the promotion and protection of human rights in Zimbabwe.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7 Introduction

This research has dealt with the problem of the judicial protection of human rights in Zimbabwe. This problem has been attributed to the judiciary's lack of independence. Thus, this research has shown the importance of the independence of the judiciary in human rights protection. The importance of the establishment of an independent judiciary has been emphasised as being critical for human rights protection in any democracy.¹⁴⁷⁴ In order to address the issue of the independence of the judiciary in Zimbabwe, this study has thus made an analysis of the new constitutional dispensation and its guarantees of judicial independence. This has been done in order to ascertain the significance of the new constitutional dispensation in improving the independence of the judiciary. Considering the importance of judicial independence regarding human rights protection, this study has thus advocated for the Zimbabwean judiciary to be independent in order to improve its human rights protection. This chapter seeks to draw conclusions from all the chapters and provide recommendations on how best the Constitution of Zimbabwe should improve the independence of the judiciary, which would subsequently lead to an improvement in the judicial promotion and protection of human rights.

7.1 Summary

Chapter 2 of this study analysed the importance of the independence of the judiciary in human rights protection. The independence of the judiciary has been identified as the strongest guarantee in upholding the rule of law and the protection of human rights.¹⁴⁷⁵ This chapter also looked at how efforts have been made internationally to adopt instruments that seek to call upon states to adopt such instruments and implement measures domestically in order to protect the independence of the judiciary. Although

¹⁴⁷⁴Widner J and Scher D (2008) 249.

¹⁴⁷⁵Boies D (2006) 58.

some of these instruments are not binding they offer significant guidelines on how states can strive to effectively protect the independence of the judiciary. As a result states can measure their domestic protection of the independence of the judiciary against these international principles. Any constitutional reforms of the judiciary should therefore be closely guided by these instruments.

Chapter 3 of this study dealt with a historical analysis of the protection of human rights by the judiciary in Zimbabwe. This chapter highlighted how historically, the judiciary in Zimbabwe had attained the status of being one of the most independent and respected judiciaries in Africa. Soon after the attainment of independence, the judiciary was well known for its impartiality and independence and its enriching human rights jurisprudence advanced the promotion and protection of human rights.¹⁴⁷⁶ However, since the FTLRP, the judiciary lost its respected status of being one of the most independent judiciaries.¹⁴⁷⁷ Constant interference by the executive greatly affected the independence of the judiciary and consequently the promotion and protection of human rights. The executive took advantage of the weak constitutional guarantees under the Lancaster House Constitution to constantly undermine the independence of the judiciary. As a result a new Constitution has been adopted that seeks to improve the independence of the judiciary and consequently the judicial protection of human rights.

Chapter 4 provided a comparative study of the protection of the independence of the judiciary in Uganda, South Africa and Canada. The realisation of the importance of the independence of the judiciary in human rights protection in these jurisdictions has advanced the cause of human rights. Uganda has had a post-colonial history marred by civil war, economic decline, social disintegration and human rights violations.¹⁴⁷⁸ As a result the political landscape in Uganda has influenced the judiciary's character, its independence and its ability to protect human rights. The costly effect of human rights violations has thus seen Uganda make significant strides in seeking to ensure that the judiciary is independent. Although the judiciary has been faced with various challenges that have threatened its independence, there has been general consensus that the

¹⁴⁷⁶De Bourbon A (2003) 197.

¹⁴⁷⁷African Commission on Human and Peoples' Rights (2007) 3-16.

¹⁴⁷⁸International Bar Association (2007) 12.

Ugandan judiciary has made significant strides in human rights protection. Although in some cases the judiciary has exercised restraint, there is still room for improvement in the protection of human rights in Uganda. South Africa and Canada have provided the best practices with regards to protecting judicial independence. It is no surprise therefore that these jurisdictions thrive with regards to human rights protection. As a result they offer best practices that can be adopted by Zimbabwe in order to improve the independence of the judiciary and its protection of human rights.

Chapter 5 looked at the constitutional reform that has culminated in the adoption of a new Constitution in Zimbabwe. The Constitution of Zimbabwe which is accorded supremacy status provides for an improved Declaration of Rights as compared to the one under the Lancaster House Constitution. It recognises the doctrine of separation of powers, although it does so inadequately with regards to the relationship between the executive and parliament. The Constitution has also made a great effort to promote the independence of the judiciary. It has instituted a number of changes that seek to promote and protect the independence of the judiciary. Fundamental changes have been made in the appointment process and the composition of the JSC to ensure impartiality and transparency in the appointment of judges. However, there are still significant issues that need to be addressed in the appointment process in order to ensure that the whole process is fully transparent. Despite efforts to improve transparency in the appointment process, the President is still given significant powers in the removal and setting of the remuneration of judges in the country. These unfettered powers have been highlighted as a major threat to the independence of the judiciary. This chapter also noted that constitutional reforms only will not guarantee the improvement of the independence of the judiciary and the protection of human rights. There has to be a shift in policy by the executive and to provide the judiciary with a free environment to deliver justice. This research has also noted the necessity of judges to uphold their judicial oath and guard their independence jealously. Such change in attitude and the remedying of the loopholes with regards to the protection of the independence of the judiciary will bode well for the future protection of human rights in the country.

Chapter 6 of this research recognises that although the judiciary in Zimbabwe is the primary institution charged with human rights protection, its role must not be over-emphasised. This chapter advocated for other domestic measures to be implemented in order to complement the judiciary in the promotion and protection of human rights.

7.2 Recommendations

7.2.1 Political Will and Commitment

The politicisation of the judicial institution in Zimbabwe has been noted as the most significant factor that has exacerbated the human rights crisis in the country. As has been highlighted in this research, the government in Zimbabwe has over the years adopted a policy that has sought to interfere with and frustrate the independence of the judiciary and other institutions charged with human rights protection. The government has thus purged independently-minded judges and replaced them with pliant judges who have over the years defended executive lawlessness. The lack of political will to foster a culture of human rights protection has been a major contributing factor to the human rights crisis in Zimbabwe. It is crucial that in order to respect the Constitution of Zimbabwe and its values there needs to be a realisation by the government of the importance of human rights protection in order to address the social, political and economic problems in Zimbabwe. The government of Zimbabwe should therefore learn from other jurisdictions, such as, Uganda, of the grave consequences of a lack of human rights protection. Political will resulted in several reforms being put into place and these have significantly improved the independence of the judiciary and human rights protection. Therefore, this research notes that political will should be accompanied by the following measures:

7.2.1.1 De-Politicisation of the Judicial Institution

In order to enable the judiciary to function effectively, there needs to be respect for the rule of law, the separation of powers doctrine and the independence of the judiciary. The executive should provide the judiciary with a politically free environment so as to enhance the judicial protection of human rights.

There is need for the government to respect the supremacy of the Constitution and the constitutional mechanisms it has put into place to secure the independence of the judiciary. The government should ensure that no individual or state institution interferes with this independence. Constitutional provisions on the appointment of judges and its process¹⁴⁷⁹, the removal of judges, and the financial independence of the institution must be respected. The individual and the institutional independence of the judiciary should be respected. Therefore, there needs to be a change from the past where the government has constantly interfered with the functioning of the judiciary and thus frustrated its quest to promote and protect human rights. Respect for the independence of the judiciary should also be extended to implementing its judgments irrespective of whether those decisions are against state policy. Such measures will no doubt enhance accountability, respect for the rule of law and separation of powers, and the independence of the judiciary. Human rights protection thrives where there is respect for the rule of law and respect for the independence of the judiciary.

7.2.1.2 Respect for Institutions that Protect Human Rights

This research also recognises that in order to improve the promotion and protection of human rights in Zimbabwe, there is a need for the government to establish a politically free environment that promotes the respect for human rights. Such an environment is crucial to ensure that institutions established by the Constitution to promote and protect human rights, do so effectively.

Political will and commitment are also needed to ensure that there is the de-politicisation of the Zimbabwe Republic Police (ZRP), so as to ensure that it carries out its mandate in accordance with the new provisions in the Constitution. In order to fully carry out its duties, it is crucial that the police must be free from any external interference. It is crucial that police officials and their leaders rid themselves of impressions of any political affiliation and conduct their duties without fear or favour.

¹⁴⁷⁹The executive should avoid scenarios where in the appointment of judges proper procedure is not followed and just simply announces publicly that judges have been appointed to the judiciary. A prime example is the packing of the courts on the eve of the elections. For see *Zimbabwe Independent* 'Mugabe Judges Appointment Stinks' 19 July 2013. <http://www.theindependent.co.zw/2013/07/19/mugabe-judges-appointments-stink/> (Accessed 29 October 2013).

The de-policisation of the police force will no doubt be a positive step in arresting the culture of impunity.

Political will is also required to ensure that the independence of the ZHRC is respected and that there is no interference with its functioning. Any appointments by the President to the ZHRC must be transparent, and ensure that political considerations are not taken into account in any appointments. The executive should also ensure that individuals that are appointed to the institution are fit and proper persons and have no political link with any party. The institution should be well funded and there needs to be commitment by the government and Parliament to fully support the operations of the Commission.

As has been noted in this research, the ruling party has over the years had great suspicions about the activities of NGOs and Human Rights Defenders. This suspicion has arisen because the ruling party has claimed that NGOs and Human Rights Defenders have been working with opposition parties to advance regime change in Zimbabwe. Thus, the activities of NGOs and Human Rights Defenders have been severely curtailed, worsening the human rights situation in the country. The ZHRC has thus recognised the importance of the part played by members of civil society and has urged the government to have a change of attitude with respect to the work done by civil society.¹⁴⁸⁰ As has been highlighted in this research NGOs and Human Rights Defenders play a crucial role in human rights protection. They are crucial in complementing the judiciary in the promotion and protection of human rights. Thus, as a result of this crucial role, the government of Zimbabwe should provide them with a politically free environment that will effectively promote their activities. There is also an urgent need to repeal or amend pieces of legislation that infringe on the activities of NGOs and Human Rights Defenders, in order to ensure that they operate in an environment that supports their activities.

¹⁴⁸⁰ *New Zimbabwe* 'NGO's Not Enemies of the State, ZANU PF Told' 20 October 2013. <http://www.newzimbabwe.com/news-12725-NGO%E2%80%99s+not+enemies+of+State,+Zanu+PF+told/news.aspx> (Accessed 29 October 2013).

7.2.1.3 Respect for International and Regional Instruments

Zimbabwe as a member state of the United Nations (UN), African Union (AU), and Southern African Development Community (SADC) is party to various international treaties that recognise the importance of the independence of the judiciary and human rights promotion and protection. As a state party to these instruments the government of Zimbabwe has a duty to implement the obligations thereof. Decisive steps should be taken to adhere to these international and regional mechanisms that seek to promote the independence of the judiciary and foster human rights observance. Adherence to these international and regional instruments will result in Zimbabwe upholding its international obligations and will also go a long way in resolving relations with the wider international community, that have expressed great concern about human rights violations in the country.

7.2.2 Reducing the Powers of the President in the Appointment, Removal and Setting of Remuneration of Judges

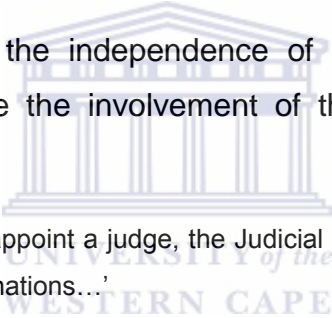
As has been discussed in chapter five, attempts have been made to constitutionally guarantee the independence of the judiciary in Zimbabwe. Although some of the reforms have brought with them measures that will significantly improve the judiciary in Zimbabwe, there are provisions that still pose a threat to the independence of the judiciary. This research advocates that the powers of the President should be reduced and that such provisions should therefore be amended or repealed in order to effectively secure the independence of the judiciary and improve human rights protection. Thus, the powers of the President need to be reduced in the appointment process, removal of judges and the setting of remuneration of judges.

7.2.2.1 Appointment Process

The first provision of the Constitution that should be amended is section 185(2)(b) which allows the President and the public to nominate any potential candidates to be appointed as judges. As has been noted in this research the involvement of the public has been a welcome development so as to enhance transparency in the appointment process and also to enhance public trust in the judicial institution. However, this

research has expressed great reservations about the involvement of the President in the nominations process. Since in accordance with the Constitution, judicial appointments are made by the President, it is alarming that the President should also be given the powers to nominate any individual for judicial appointment. This provision grants the President enormous powers in the appointment process of judges in the country. The President as a result might refuse to make an appointment if any of his or her nominations to the judicial bench are not presented to him by the JSC for appointment. Such a scenario where the President is allowed to nominate individuals will therefore result in the JSC forcibly forwarding certain names that would have been nominated by the President. The provision therefore leaves a loophole that can be taken advantage of and result in the appointment of judges that share the same political ideologies as the ruling party.

Therefore, in order to protect the independence of the judiciary, section 185(2)(b) should be amended to exclude the involvement of the President in the nomination process and should read:



'Whenever it is necessary to appoint a judge, the Judicial Service Commission must- (b) invite the public to make nominations...'

The exclusion of the President from the nomination process should ensure that there is transparency in the appointment process and that any names submitted by the JSC for appointment are derived in a democratic manner and free from any undue influence. Such a provision will also act as a check on the President to ensure that individuals appointed to the judiciary are well qualified and fit and proper.

Amendments also need to be made to section 180(3) which currently reads:

'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.'

This provision does not state the process through which the second list is to be obtained (in comparison to the first list where nominations are called for) and as to whether such

individuals are also subject to any public interviews. This therefore raises great suspicion that the appointment process might be subjected to manipulation. This is so because names on the second list can be handpicked and result in the appointment of pliant judges to the bench. In order to maintain impartiality in the appointment process, section 180(3) should be amended to read:

'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 and such list must comply with the provisions of subsection (2)¹⁴⁸¹, whereupon the President must appoint one of the nominees to the office concerned.'

The amendment of the provision will therefore bring clarity to how exactly the JSC obtains the second list in cases where the President objects to any names forwarded in the first list. Such clarity will ensure that the whole appointment procedure is impartial and reduce the dangers of names being handpicked to suit the demands of the President. This will enhance the appointment process and further protect the independence of the judiciary.

7.2.2.2 Removal of Judges

This research has highlighted that the President also has substantial powers in the removal of judges under the Constitution. Such powers pose a potential threat to the independence of the judiciary. The President in accordance with section 187 of the Constitution is given the powers to appoint a tribunal if a question arises with regards to the removal of the Chief Justice and also if the JSC advises the President that the removal of a judge, including the Chief Justice, ought to be investigated.¹⁴⁸² This research has noted that the powers given to the President in the removal process of judges are unacceptable as the Constitution leaves loopholes that may be used to remove a judge from office purely on political grounds. The fact that the President has the powers to unilaterally appoint members of the tribunal raises suspicion about the

¹⁴⁸¹Section 180 (2) of the Constitution of Zimbabwe states that 'Whenever it is necessary to appoint a judge, the Judicial Service Commission must- (a) advertise the position; (b) invite the President and 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.'

¹⁴⁸²Sections 187(2) and (3) of the Constitution of Zimbabwe.

independence of such tribunal. Since the President is bound by the tribunal's findings¹⁴⁸³, it is possible that a tribunal might be appointed with a specific motive to remove a judge that might be viewed by the executive as "independent". This will have a direct impact on the independence of the judiciary. In order to secure the independence of the judiciary, the JSC should be given the central role in the removal process, the appointing of a tribunal, and recommending to the President if the question of the removal of a judge arises.

Thus, sections 187(2) and (3) should be amended to give the JSC the power to investigate or appoint a tribunal to look into the question of the removal of a judge and to recommend to the President whether a judge should be removed from office. A new section should be included in the Constitution and should read:

'A judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission. The Judicial Service Commission shall investigate whether or not a judge should be removed from office on such grounds in subsection (1), and if it decides that the judge should be removed, it shall inform the President of its recommendation.'

The inclusion of the above provision will ensure that the JSC controls the whole process of the removal of judges and takes away substantial power from the President which might be subject to potential abuse or misuse. The control of the whole process by the JSC should reduce fears of political considerations being taken into account in the removal of judges. Such measures will augur well for the independence of the judiciary and enable judges to discharge their duties without any fear of removal for delivering decisions that might be viewed as "unpopular" by the executive.

7.2.2.3 Remuneration of Judges

Although the salaries of judges in Zimbabwe are charged against the Consolidated Revenue Fund, the Constitution gives the President wide powers in the approval of

¹⁴⁸³See Section 187 of the Constitution of Zimbabwe states that '(7) A Tribunal appointed under subsection (2) or (3) must inquire into the question of removing the judge concerned from office and, having done so, must report its findings to the President and recommend whether or not the judge should be removed from office. (8) The President must act in accordance with the tribunal's recommendations in terms of subsection (7).'

salaries for judges. Although the JSC is involved in the fixing of salaries, its role is diluted in the sense that the President is given the authority to approve these salaries. Thus, the Constitution leaves the determination of the salaries of judges in the hands of the executive which poses a threat to the independence of the judiciary. It is therefore important that section 188(1) of the Constitution should be amended to remove the role of the President and ministers¹⁴⁸⁴ in the setting of the salaries of judges. The JSC should be given a big role in determining the salaries and financial budgets of the judiciary. Such budgets can also be set by Parliament but it should act only on the recommendation of the JSC and possibly an independent commission on the remuneration of judges which can be established to assist the JSC in determining the budget of the judiciary. Thus, section 188(1) should read:

‘Judges are entitled to salaries, allowances and other benefits fixed from time to time by Parliament on the recommendation of the Judicial Service Commission and the Independent Commission on the Remuneration of Judges established by an Act of Parliament’

The inclusion of this clause should result in the removal of executive control of the financial budget of the judiciary and leave it in the hands of Parliament acting on the recommendations of the JSC and the independent Commission on the Remuneration of Judges. This should secure the financial independence of the courts and ensure that a sufficient budget is allocated to the judiciary which will enable it to carry out its duties effectively and control its own processes. The salaries of judges should be reviewed from time to time in order to ensure that they remain competitive so as to reduce the risk of corruption. The removal of the executive’s control of the finances of the judiciary should go a long way to ensuring that the judiciary in Zimbabwe remains independent.

7.2.3 Judiciary must Uphold Judicial Oath, Code of Conduct and Independence

It should be noted that in line with the Constitution of Zimbabwe, judges are required to take an oath before assumption of any judicial duties¹⁴⁸⁵ and must adhere to a Judicial

¹⁴⁸⁴This is an example adopted in Uganda. See article 128 (6) of the Constitution which reiterates that the judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.

¹⁴⁸⁵See section 185 of the Constitution of Zimbabwe.

Service Code of Ethics.¹⁴⁸⁶ The judicial oath and the Code of Ethics affirm the importance of judges to uphold the Constitution and to administer justice to all persons, without fear, favour or prejudice. They reinforce the constitutionally protected principles that seek to guide the judiciary in the conduct expected of judicial officers in undertaking their duties.¹⁴⁸⁷ The judicial oath and the Code of Ethics of judges seek to ensure that members of the judiciary remain impartial in the exercise of their duty, avoid any personal gain, and abstain from any conduct that will endanger the public trust in the institution. The Code thus seeks to enhance the independence of the judiciary and public trust in the judicial institution.

As has been highlighted in this research, the conduct of the judiciary in Zimbabwe has greatly diminished the public confidence in the justice system as judges have descended into the arena of politics thus greatly tarnishing the image of the judiciary. Its conduct has greatly compromised the rule of law and the protection of human rights as the judiciary has sought to defend executive lawlessness. It is therefore crucial that in order to improve the independence of the judiciary, judges must respect the Constitution and the Judicial Service Code of Ethics. Strict adherence to the judicial oath and the Judicial Service Code of Ethics will boost the projection of human rights and public trust in the justice system.

It is crucial that the judicial leadership must also closely guard the independence of the institution and address any possible threats or attempts to interfere with the independence of the judiciary. Unlike the judicial leadership under Gubbay CJ, the current judiciary in Zimbabwe has been lacking in protecting its independence and has remained silent despite the constant undermining of its independence by the executive. Such silence has greatly contributed to its loss of independence and the lack of protection of human rights. This research advocates that the judiciary should be resilient in the protection of its independence. The judiciary should be in a position to publicly rebuke any attempts to undermine its independence. Such measures have been adopted by members of the judiciary and lawyers in Uganda, who in 2007 went on a

¹⁴⁸⁶Statutory Instrument 107 of 2012.

¹⁴⁸⁷See sections 164 and 165 of the Constitution of Zimbabwe.

week-long strike in defence of the independence of the judiciary.¹⁴⁸⁸ In South Africa the judiciary has jealously guarded its independence in the light of attempts by the executive to undermine it.¹⁴⁸⁹ Such measures have no doubt maintained, and have contributed to the increase of the culture of human rights protection.

7.2.4 Review of Judges' Conditions of Service

There is no doubt that the current economic conditions in Zimbabwe have severely hampered the delivery of justice in Zimbabwe. The economic difficulties have thus made the conditions of service of the judiciary unattractive, thus making it difficult for the judiciary to attract more qualified individuals to the bench.¹⁴⁹⁰ It is as a result of the economic difficulties that the meagre salaries of judges in Zimbabwe have fuelled corruption within the judiciary, affecting the delivery of justice in the country¹⁴⁹¹. As has been noted in this research the executive has taken advantage of the economic difficulties to encroach on the independence of the judiciary through the provision of seductive gifts. Such gifts have been used by the government as a way of gaining loyalty from the judiciary, thus interfering with its independence. The economic difficulties have resulted in endemic corruption within the judiciary and have negatively impacted on the justice delivery system. It is no secret that in order to protect and maintain the independence of the judiciary, the institution should be adequately funded and the remuneration of judges should ensure that the salaries and benefits of judges are commensurate with the status and responsibility of their office.

The major challenge to the improvement of the salaries of judges in Zimbabwe is the current economic situation facing the country. However, there is no doubt that in order

¹⁴⁸⁸See *BBC News* 'Uganda's Judges Strike Over Raid' 5 March 2007.

<http://news.bbc.co.uk/2/hi/africa/6418943.stm> (Accessed 29 October 2013). The strike was in response to the raid on the High Court by armed forces after the granting of bail to six treason suspects.

¹⁴⁸⁹For more see Gordon A & Bruce D (2007) 55.

¹⁴⁹⁰*Newsday* 'Poor Salaries Keep Potential Judges Away' 7 March 2013.

<https://www.newsday.co.zw/2013/03/07/poor-salaries-keep-potential-judges-away/> (Accessed 10 April 2014).

¹⁴⁹¹The severe economic difficulties have recently resulted in the government scrapping retention allowances to members of the judicial service. This has resulted in the unconstitutional reduction of the conditions of service of members of the judicial service. See *ZimEye* 'Chidyausiku Tells Mugabe To Respect Constitution' 13 January 2014.

<http://www.zimeye.org/chidyausiku-tells-mugabe-to-respect-constitution/> (Accessed 10 April 2014).

to protect the independence of the judiciary and enhance the protection of human rights, there is great need and urgency to improve the conditions of service for members of the judiciary. The provision of adequate remuneration will further enhance the independence of the judicial institution.

7.2.5 Enforcing Separation of Powers

The principle of the independence of the judiciary has its origin in the doctrine of separation of powers, which states that the three arms of government, that is, the executive, legislature and judiciary, must be independent from each other so as to avoid the concentration of power in one organ of the state.¹⁴⁹² The principle therefore entails that at a minimum no branch of government should encroach on the powers of another branch of government and neither should a branch deprive another branch of government of the powers and resources necessary to performing its core functions and duties.¹⁴⁹³ However, despite such guarantees the application of this doctrine in Zimbabwe has over the years been problematic. Makarau J has acknowledged that Zimbabwe has over the years experienced a gross violation of the doctrine.¹⁴⁹⁴ The violation of the separation of powers doctrine has mainly been seen in the way in which the executive has over the years used its powers to compromise the independence and impartiality of the judiciary. Over the years the powers of the President have also overlapped with and infringed on the powers of Parliament. This has mainly been seen in the enactment of the Presidential Powers (Temporary Measures) Act¹⁴⁹⁵ which allows the President to create law.

Despite efforts to address these problems in the Constitution of Zimbabwe, this research has noted that problems still exist with regards to the separation of powers in Zimbabwe. Although the Constitution recognises the three arms of government, it has been noted that it further legitimises the concentration of powers in the hands of the

¹⁴⁹²Wade ECS and Bradley AW (1991) 51. See also Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2005) 18.

¹⁴⁹³McQuoid-Mason D, O'Brien EL and Green E (eds) *Human Rights for All: Education Towards a Rights Culture* (1993) 33. See Currie I and De Waal J (2005) 18.

¹⁴⁹⁴*The Zimbabwean* 'Judge President Calls for Separation of Powers' 13 January 2010.

<http://www.thezimbabwean.co/news/27864/judge-president-calls-for-separation-of-powers.html> (Accessed 7 April 2014).

¹⁴⁹⁵[Chapter 10:20].

President and therefore does not provide for a proper separation of powers. It is therefore crucial that in order to address the issue of the independence of the judiciary, there is need for a strict adherence to the separation of powers doctrine. Thus, there is need to address the imbalance of powers that exists between the President and the legislature. Although this research has noted that there can never be a total separation of powers, the system of checks and balances must be properly established to ensure that there is no abuse of power by any organ of the state.

7.2.6 Adopting Best Practices from Other Jurisdictions

This research made a comparative analysis in chapter four of the practices in Uganda, South Africa and Canada. This comparative analysis was done to establish the protection of the independence of the judiciary in these jurisdictions and how such independence has greatly contributed to their promotion and protection of human rights. Although there are challenges in Uganda, significant efforts have been to improve the independence of the judiciary through its constitutional guarantees. As has been evident in this research, a number of such suggestions have been made for Zimbabwe to perhaps adopt measures found in the Constitution of Uganda to further strengthen its constitutional guarantees of judicial independence. The same has also been done with regards to South Africa, where best practices with regards to the constitutional protection of the independence of the judiciary have also been identified. The comparative analysis clearly highlighted the crucial effect of the independence of the judiciary on human rights protection. If the best practices are adopted as suggested in this thesis, they will go a long way in ensuring that the independence of the judiciary is effectively protected in Zimbabwe. This will no doubt also bode well for the judicial promotion and protection of human rights.

7.2.7 Education and Training of Judicial Officers

This research recognises the great value of education and training of judicial officers on the importance of an independent judiciary in human rights protection. The continued training of judicial officers on human rights issues is very crucial for members of the judiciary in order for them to maintain and enhance their competence. This will no

doubt enhance the confidence of the public in the judicial system and also enhance the independence of the judiciary. With the law evolving and changing, it is crucial that such training should be provided to meet the demands of modern times.

As has been highlighted in chapter five, in order to improve the independence of the judiciary in Zimbabwe, it is crucial that the training of judicial officers must be a prerogative of the judiciary itself. This is so in order to avoid any outside interference with the functioning of the judiciary. It is also crucial that any human rights training must be conducted by experts on human rights issues who will render valuable knowledge to judges on international trends and approaches to human rights protection. In order to realise this goal, it is imperative that sufficient funds be availed to the judiciary in order to carry out this process.

With regards to judicial training, it is also crucial that judges must be exposed to the protection of human rights in other countries. Such exposure can be gained mainly through exchange programmes with other countries and through the attendance of workshops that deal with human rights protection. Such exchange programmes and workshops will enable judges from Zimbabwe to share ideas with other judges from foreign jurisdictions on the challenges that the respective judiciaries face with regards to their independence and human rights protection. Crucial ideas on how to improve the independence of the judiciary and human rights protection can thus be shared, which will crucially aid the judiciary in Zimbabwe on how to adopt best practices in human rights protection.

7.3 Conclusion

This research from chapters two to six has made an attempt to achieve the aims and objectives set out at the beginning and also prove the research hypothesis. This research has recognised the crucial role that the judiciary plays in the promotion and protection of human rights. However, in order to do so the judiciary has to be independent from the other two branches of government. After a lengthy period of lacking judicial independence, constitutional reforms have culminated in the adoption of a new Constitution. There is no doubt that the Constitution has made quite significant

improvements to protect the independence of the judiciary. Such reforms should ensure that the independence of the judiciary is protected and if correctly implemented there is no doubt that there will be an improvement in the state of the judiciary and consequently human rights protection. Although improvements have been made there remain some loopholes in the Constitution that should be addressed in order to effectively protect the independence of the judiciary. There is also need for political will and commitment to enhance the independence of the judiciary and to learn from other jurisdictions, such as, Uganda, South Africa and Canada, on how best the independence of the judiciary enhances human rights protection. It is also crucial that the judicial reforms must be accompanied by a set of viable domestic measures that seek to improve the promotion and protection of human rights. Such mechanisms will therefore complement the role of the judiciary in human rights protection.

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