

MUTILATION OF THE INDEPENDENCE OF THE JUDICIARY: THREATS, INTIMIDATION AND CONSTITUTIONAL AMENDMENTS IN ZIMBABWE

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SUMMARY

Zimbabwe adopted a new Constitution in 2013. It was widely believed that the new Constitution would deepen democracy and constitutionalism. Central to this was the establishment of an independent judiciary. Barely 10 years after the adoption of the Constitution, judicial independence has deteriorated. This has been the result of intimidation against the judiciary, and constitutional changes aimed at weakening the judiciary. This article is intended to show that there exists a long-term project to bring the judiciary under the control of the political arms in Zimbabwe. With a weakened judiciary, Zimbabwe loses the chance to entrench constitutionalism, democracy and the rule of law. The article first highlights the imperative of judicial independence, then examines how the judiciary has suffered from threats at the hands of politicians, and finally assesses the impact of two recent constitutional amendments on the independence of the judiciary. It is shown that the independence of the judiciary has been systematically mutilated, and that hopes for effective judicial review cardinal to constitutionalism have waned.

1 INTRODUCTION AND BACKGROUND

Judicial independence is central to constitutionalism and democracy. What is required is “the existence of strong democratic and judicial institutions working in general harmony with each other, independent judges who strive

to apply the law neutrally and within a culture that seeks to do justice according to law".¹ In recent times, there has been an increase in the reliance on courts to settle political disputes and this has transformed courts into playgrounds for politics.² Since the courts have become arenas for political contestation, politicians have jostled at every opportunity to control them. Where successful, this has seen a catastrophic decline in judicial independence with judges reduced to political commissaries.

Within the African context, Zimbabwe, Kenya and Malawi are prime examples of courts being entrusted with the duty to resolve political disputes involving election results.³ Hirschl notes that, in recent years, courts have become involved in

"mega politics – matters of outright and utmost political significance that often define and divide whole polities. These range from electoral outcomes and corroboration of regime change to matters of war, [and] peace."⁴

It is submitted that when courts become so powerful as to be the final arbiters of political disputes, their independence becomes threatened by political parties trying to influence the outcomes. It can also confidently be submitted that once they lack independence, the courts could then be used to "handle" political adversaries. In Zimbabwe, this has culminated in the courts making unfavourable judgments against opposition parties, including denying outright the right to bail for those arrested for political reasons.⁵

Threats to the independence of the judiciary in Zimbabwe reached their lowest ebb in November 2000 when the War Veterans' wing of ZANU-PF invaded the Supreme Court and threatened judges and lawyers.⁶ This was at the height of political tensions surrounding the acquisition of land from the White erstwhile commercial farmers. According to Magaisa:

"The regime knew that it needed judicial support for this endeavour, and it viewed the courts as hostile to its ideology and policy. The result was a wholesale turnover in key judicial positions, beginning with the forced early retirement of Chief Justice Antony Gubbay in 2001."⁷

¹ Mzikamanda *Constitutionalism and the Judiciary: A Perspective from Southern Africa* Paper presented at conference on Law Reform Agencies for Eastern and Southern Africa, Lilongwe, Malawi, (November 2011) 7.

² Hirschl "The Judicialization of Mega-Politics and the Rise of Political Courts" 2008 11 *Annual Review of Political Science* 93 95.

³ See *Chamisa v Mnangagwa* [2018] ZWCC 42; *Peter Mutharika and Electoral Commission v Saulos Chilima and Lazarus Chakwera* (Constitutional Appeal No. 1 of 2020) [2020] MWSC 1 and *Raila Odinga v Independent Electoral and Boundaries Commission* Petition no 1 of 2017.

⁴ Hirschl 2008 *Annual Review of Political Science* 94.

⁵ See SALC "Statement on the Attacks on Human Rights Defenders and Journalists in Zimbabwe" (13 April 2021) <https://www.southernafricalitigationcentre.org/2021/04/13/statement-on-the-attacks-on-human-rights-defenders-and-journalists-in-zimbabwe/> (accessed 2022-01-23).

⁶ Goredema "Whither Judicial Independence in Zimbabwe?" in Raftopoulos and Savage (eds) *Zimbabwe: Injustice and Political Reconciliation* (2004) 99.

⁷ Magaisa "Zimbabwe: An Opportunity Lost" 2019 30(1) *Journal of Democracy* 143 154.

Since then, what Zimbabwe has witnessed is a downward spiral in the independence of the judiciary. This has taken various forms. For present purposes, the authors focus on the political threats against the judiciary and the constitutional changes aimed at weakening the independence of the judiciary. For purposes of clarity, the authors attempt to provide a clear picture of the prevailing legal-political circumstances that may have precipitated these changes since the year 2000. One unique feature of Zimbabwe's political environment is that it is consistently in an election mode. Every political decision is made with forthcoming elections in mind. Mavedzenge notes:

"In the case of Zimbabwe, it has been suggested that the courts sometimes are used, particularly by the executive, to rubber-stamp legislation and decisions that are patently unconstitutional, but which assist the ruling party to maintain its political power."⁸

A weak judiciary is a perfect arena for legitimising illegitimate political conduct. For instance, when former president Robert Mugabe was removed from power on 17 November 2017, the courts made two strange judgments that raised suspicions of a captured judiciary.⁹ One court ruled that Mugabe's removal through a "military coup" was constitutional, and another court ruled that the sacking of Mnangagwa (who became President through the coup) as Vice President by Mugabe was illegal.¹⁰ These two rulings were not only startling in terms of legal reasoning, but were also audacious; by no coincidence, they were extremely convenient for Mnangagwa's ascendancy to power and the legitimacy of his presidency.

In this article, the authors highlight how the independence of the judiciary in Zimbabwe has been mutilated over the past few years. The authors begin by highlighting the imperative of judicial independence in the post-1990 African state, and then theorise that judicial independence is an incident of the separation of powers cardinal to constitutionalism, democracy and the rule of law. This is followed by an in-depth analysis of the contraction of judicial independence in Zimbabwe. The authors argue that the political arms of state have resorted to a combination of threats and constitutional changes to interfere with the independence of the judiciary.

⁸ Mavedzenge "The Zimbabwean Constitutional Court as a Key Site of Struggle for Human Rights Protection: A Critical Assessment of Its Human Rights Jurisprudence During Its First Six Years" 2020 20(1) *African Human Rights Law Journal* 181 202.

⁹ See *Emmerson Dambudzo Mnangagwa v The Acting President of the Republic of Zimbabwe and Attorney General* HC940/17 and *Joseph Evurath Sibanda and Leonard Leonard Chikomba v President of the Republic of Zimbabwe – Robert Gabriel Mugabe NO; Minister of Defence, Commander of the Defence Forces of Zimbabwe and the Attorney-General of Zimbabwe* HC10820/17.

¹⁰ These judgments were convenient for each other. The question of Mnangagwa's legitimacy as the successor to Robert Mugabe had to be addressed first and followed by the question of the constitutionality of the army's conduct.

2 JUDICIAL INDEPENDENCE IN POST-1990 CONSTITUTIONAL STATES IN AFRICA

Several African states have over the past years adopted democratic constitutions in what has been termed the “third wave of democratisation”. In this wave, the adoption of progressive constitutions has been the easier part; the implementation or entrenchment of the culture of constitutionalism in some of these countries has been a different story.¹¹ The constitutions whose adoption was accompanied by so much hope and jubilation are now being mutilated at an alarming rate for political expedience.

The constitutional developments of the 1990s in Africa have significantly altered the political landscape.¹² According to Masengu, Africa has, since the early 1990s, witnessed the emergence of constitutional courts wielding judicial review powers and the enforcement of fundamental rights provided for in the constitutions.¹³ It is unclear, however, whether the recent trend of interference with the powers of the courts stems from the fact that courts had become more powerful so as to threaten the political arms of state or whether the political arms have increasingly sought to control a strong institution in the form of the judiciary. What remains clear, however, is that there have been covert (and sometimes overt) threats against judges.¹⁴

In the Gambia, the former Chief Justice Judge Agyemang was forced to flee the country in the middle of the night after she had been accused of serving the interests of a hostile foreign nation. Judge Agyemang was widely viewed as a pro-human-rights judge. Prior to this, concerns had been expressed that the government was acting in a manner that sought to undermine the independence of the judiciary.¹⁵

In 2015, the Vice President of the Burundi Constitutional Court revealed that the court had passed a judgment in favour of the President’s bid for a third term after receiving threats.¹⁶

In Zimbabwe, the political arms of state have directed their efforts towards eroding judicial independence. This has been done in three main ways: one, by making threats against the judiciary; two, by making constitutional amendments that limit the powers of the judiciary; and three, by creating a system of patronage.

Evidence drawn from Zimbabwe points towards a deliberate ploy by the political elite to weaken the judiciary. A judiciary endowed with so much power by the constitution is, for the elite, a stumbling block to power

¹¹ Mzikamanda paper presented at conference on Law Reform Agencies for Eastern and Southern Africa n.p.

¹² Masengu “The Vulnerability of Judges in Contemporary Africa: Alarming Trends” 2017 63(4) *Africa Today* 3 4.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Aljazeera “Burundi Court Forced to Validate Leader’s Third Term” (14 May 2015) <https://www.aljazeera.com/news/2015/5/14/burundi-court-forced-to-validate-leaders-third-term> (accessed 2022-03-27).

retention. The conduct of Zimbabwe's power elites is synonymous with the post-independent African state; shambolic constitutionalism led to economic, social and political instability, from which the continent is still reeling.¹⁷ Fombad notes that in order to prevent this problem, most post-1990 African constitutions restricted the powers of government to amend the constitution.¹⁸ Succinctly put, "the overall objective is to ensure that the general will of the people, as reflected in the constitution, is not casually and capriciously frustrated by self-seeking political leaders or transient majorities in order to perpetuate themselves in power".¹⁹

The former Lesotho Chief Justice Lehohla once stated that the "most pernicious of the challenges facing judiciaries in Africa today is that of undue interference or influence in one form or another".²⁰ He also argued that despite constitutional provisions against interference with the judiciary, there is a growing tendency among African states to control the judiciary.²¹

3 JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

One of the most fundamental features of constitutional democracies is that they allow courts to make pronouncements on issues of disagreement between different polities. Tushnet notes that "reasonable disagreements over specification are resolved by recourse to 'independent' courts".²² According to Ferejohn, "judges should be autonomous moral agents, who can be relied on to carry out their public duties independent of venal or ideological considerations".²³ Having judges who are insulated from external influence strengthens the rule of law and is also a precondition for good governance and democracy.²⁴ An independent judiciary serves "as an effective mechanism that controls and constrains the operation and power of the legislature and executive".²⁵ The word "independence", according to Ferejohn, has at least two meanings:

"One meaning commonly invoked when considering the circumstances of the individual judge – is that a person is independent if she is able to take actions without fear of interference by another. In this sense, judicial independence is the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards. Another meaning is perhaps less common in discussions surrounding judges, but applies naturally to courts and to the judicial system as a whole. We might think of a

¹⁷ See Fombad "Some Perspectives on Durability and Change Under Modern African Constitutions" 2013 11(2) *International Journal of Constitutional Law* 382 383.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Masengu 2017 *Africa Today* 3.

²¹ *Ibid.*

²² Tushnet "The Relation Between Political Constitutionalism and Weak-Form Judicial Review" 2013 14(12) *German Law Journal* 2249 2250.

²³ Ferejohn "Independent Judges, Dependent Judiciary: Explaining Judicial Independence" 1998 72 *South California Law Review* 353.

²⁴ Aydın "Judicial Independence Across Democratic Regimes: Understanding the Varying Impact of Political Competition" 2013 47(1) *Law & Society Review* 105.

²⁵ *Ibid.*

person or an institution as being dependent on another if the person or entity is unable to do its job without relying on some other institution or group.”²⁶

One of the most significant developments of the twentieth century is the expansion of the judicial domain globally.²⁷ The link between constitutionalism and judicial review has become more apparent. Combined, these constitute the backbone of mature democracy. Mature democracy, in a conceptual sense, protects itself against tyranny (and majoritarian tyranny) through constitutionalism and judicial review.²⁸ It has been observed that the inclusion of rights in constitutions and the accompanying powers of judicial review invested in courts act as power-diffusing mechanisms.²⁹ The importance of the independence of the judiciary was underscored by the words of former Chief Justice of South Africa, Mahomed CJ:

“[A] judiciary which is independent and which is perceived to be independent within the community protects both itself and the freedoms enshrined in the Constitution from invasion and corrosion. A judiciary which is not, impairs both.”³⁰

4 LEGISLATIVE AND CONSTITUTIONAL SAFEGUARDS FOR JUDICIAL INDEPENDENCE

Zimbabwe, like other constitutional democracies, has included provisions to safeguard judicial independence. For present purposes, two such provisions relate to the appointment of judges and to their compulsory retirement.

4.1 Appointment of judges

The process of appointing judges is crucial for determining the independence of the judiciary. Fombad notes that “[t]he independence of the judiciary and its ability to discharge its functions without fear, favour or prejudice depend largely on how judges are appointed”.³¹ This has become particularly important owing to the increase in politically sensitive matters that are brought before the courts.³² Where the executive wields enormous powers to appoint judges, it may interfere with the judges’ ability to dispense with “matters fairly and impartially”.³³ The United Nations Resolution on Independence and Impartiality of Judges requires that the selection of

²⁶ Ferejohn 1998 *Southern California Law Review* 353 355.

²⁷ Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2009) 1.

²⁸ Hirschl “The Political Origins of the New Constitutionalism” 2004 11(1) *Indiana Journal of Global Legal Studies* 71.

²⁹ Hirschl 2004 *Indiana Journal of Global Legal Studies* 72.

³⁰ Mahomed “The Independence of the Judiciary” 1998 115 *South African Law Journal* 658 661.

³¹ Fombad “A Comparative Overview of Recent Trends in Judicial Appointments: Selected Cases from Africa” 2021 55(1) *Canadian Journal of African Studies* 161 162.

³² Fombad 2021 *Canadian Journal of African Studies* 182.

³³ *Ibid.*

judges be done in a transparent manner.³⁴ Chiduzza notes that politicians are involved in the appointment process to give it legitimacy; however, this prerogative cannot be left entirely in the hands of politicians.³⁵ Pertinent here is the role played by the Judicial Service Commission. Section 90 of the Constitution of Zimbabwe, 1980 (Lancaster House Constitution) provided for the composition of the Judicial Service Commission. The Judicial Service Commission comprised the Chief Justice or Acting Chief Justice or the most senior judge of the Supreme Court, the Chairman of the Public Service Commission, the Attorney-General, and not less than three other members appointed by the President, of whom one must be a person who is or has been a Supreme Court or High Court judge, a person who has been qualified as a legal practitioner in Zimbabwe for not less than five years, or a person who is possessed of such legal qualifications or experience as the President considers suitable and adequate for appointment to the Judicial Service Commission; and the remaining presidential appointees must be chosen for their ability and experience in administration, for their personal qualifications, or for their suitability otherwise for appointment. It is crucial to note that of the six possible members of the Judicial Service Commission under the Lancaster House Constitution, three members were directly appointed to the Commission by the President, two appointed by virtue of being the holders of offices to which they were appointed by the President after consultation with the Judicial Service Commission, and one was directly appointed by the President to an office by virtue of which he was a member of the Commission.

Section 189 of the new Constitution (Constitution of Zimbabwe, 2013)³⁶ creates the Judicial Service Commission. In terms of section 189(1), the Judicial Service Commission is made up 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 practised 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

³⁴ UN Human Rights Council *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers* Resolution adopted by the Human Rights Council (5 October 2010) A/HRC/RES/15/3 (2010) <https://www.refworld.org/docid/4cbbabd72.html> (accessed 2022-04-26) par 2.

³⁵ Chiduzza "Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?" 2014 17(1) *Potchefstroom Electronic Law Journal* 368.

³⁶ Constitution of Zimbabwe Amendment (No 20) Act, 2013.

least seven years' experience in human resources management, appointed by the President.

Section 180 of the 2013 Constitution states:

- “(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)(c) are [sic] suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.
- (4) The President must cause notice of every appointment under this section to be published.”³⁷

The rationale for this section is to provide for a process to appoint judges that is transparent and free of manipulation.

4 2 Compulsory retirement of judges

The Constitution of Zimbabwe, 2013 sets the age of retirement for the judges of the Constitutional Court at 70 years.³⁸ The compulsory retirement of judges is at the heart of judicial independence. The strict retirement age ensures that judges' allegiance cannot be bought in exchange for extension of tenure. As a further entrenchment of compulsory retirement, the Constitution of Zimbabwe, places a restriction on any amendments to provisions relating to, among others, extension of tenure for judges. Section 328 of the Constitution requires any amendments to the said provision to be put to a national referendum. In addition, the effect of section 328(7) is that any amendments that may allow for extension of tenure for public officers will not apply to anyone currently in office when the amendments come into effect. This means that no judge is allowed to benefit from an amendment effected while still in office. This provision guards against judges lobbying for constitutional amendment to benefit themselves.

³⁷ S 180 of the Constitution of Zimbabwe, 2013.

³⁸ S 186(1)(a) of the Constitution of Zimbabwe, 2013.

5 THREATS AGAINST THE JUDICIARY IN ZIMBABWE

The courts have been abused to score cheap political points. Members of opposition parties and civil-society organisations have endured arrests with no bail and, in some cases, outright detention without trial.³⁹ The courts are severely compromised. The former president, Robert Mugabe, is on record threatening judges who allow opposition members to demonstrate.⁴⁰ Minister of Justice Kazembe Kazembe has also made some disparaging remarks against the judiciary.⁴¹ Historically, the government of Zimbabwe has made serious threats against the judiciary, including against individual members. The former Minister of Home Affairs has previously remarked:

“But even after this, recalcitrant and reactionary members of the so-called benches still remain masquerading under our hard-won independence as dispensers of justice or, shall I say, injustice by handing down pieces of judgment which smack of subverting the people’s government. We inherited in toto the Rhodesian statutes which these self-same magistrates and judges used to avidly and viciously interpret against the guerrillas. What is so different now apart from it being majority rule? Our posture during constitutional negotiations with the British ... that the judiciary must be disbanded, can now be understood with a lot of hindsight.”⁴²

The interference with the judiciary has worsened since President Mnangagwa came to power through a military coup in November 2017. Research has shown that under the current government, there is “continued capture and undermining the independence of the courts”.⁴³ The government has adopted strategies such as public attacks, threats and intimidation and pushing through constitutional amendments that undermine the independence of the judiciary.⁴⁴ The theoretical supposition in this article is that judicial independence entails that the judges are able to discharge their duties without external interference or undue influence.⁴⁵ According to Hofisi,

³⁹ For e.g., Hon Joanna Mamombe, Hon Job Sikhala, Hopewell Chin’ono, Makomborero Haruzivishe, Peter Mutasa, Linda Masarira, Netsai Marova and Cecelia Chimbiri, among others.

⁴⁰ BBC News “Mugabe Lambasts Judges Over Protests” (4 September 2016) <https://www.bbc.com/news/world-africa-37270873> (accessed 2022-02-11).

⁴¹ ISS Africa “Mnangagwa Regime Continues to Score Own Goals” (1 June 2021) <https://issafrica.org/iss-today/mnangagwa-regime-continues-to-score-own-goals> (accessed 2022-03-02).

⁴² Karekwaivanane *The Struggle Over State Power in Zimbabwe: Law and Politics Since 1950* (2017) 208.

⁴³ Buchanan-Clarke and Mashingaidze “Rebuilding Constitutionalism and Rule of Law in Zimbabwe” (August 2021) *Good Governance Policy Brief* <https://www.africaportal.org/publications/rebuilding-constitutionalism-and-rule-law-zimbabwe/> (accessed 2022-03-07).

⁴⁴ *Ibid.*

⁴⁵ Siyo and Mubangizi “The Independence of South African Judges: A Constitutional and Legislative Perspective” 2015 18(4) *Potchefstroom Electronic Law Journal* 816.

the judiciary in Zimbabwe is generally viewed as captured, “subject to the whims of the executive”.⁴⁶

The 1980 Constitution had a clear statement on the independence of the judiciary. Section 79B of the 1980 Constitution provided 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”.⁴⁷

A similar statement is made in section 165(2) of the South African Constitution,⁴⁸ which states that “[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”. Section 165(3) states that “[n]o person or organ of state may interfere with the functioning of the courts”.⁴⁹ The 2013 Zimbabwe Constitution entrenches judicial independence in section 164.⁵⁰ In addition, the Constitution also establishes the Constitutional Court.⁵¹ The Constitutional Court is expressly empowered to exercise judicial review powers.⁵² Chiduzo commends the inclusion of this provision in the Constitution as it gives the courts the power to hold the other branches of government to account.⁵³ He further argues that if these powers are exercised impartially, they will prohibit abuse of power by other branches of government.

6 CONSTITUTIONAL CHANGES AFFECTING THE INDEPENDENCE OF THE JUDICIARY

In addition to threats against the judiciary, political arms in Zimbabwe have also resorted to making constitutional changes that have the effect of weakening the judiciary. This has been done by tampering with the ways in which judges are appointed and in how their tenures are extended. The

⁴⁶ Hofisi “The Constitutional Courts of South Africa and Zimbabwe: A Contextual Analysis” 2021 35 *Speculum Juris* 55.

⁴⁷ S 79(B) of the Constitution of Zimbabwe, 1980.

⁴⁸ Constitution of the Republic of South Africa, 1996.

⁴⁹ S 165(3) of the South African Constitution.

⁵⁰ S 164 of the 2013 Zimbabwe Constitution is titled “Independence of the Judiciary” and states: “(1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore– (a) neither the State nor any institution or agency of the government at any level, and no other 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.”

⁵¹ S 166 of the Constitution of Zimbabwe, 2013.

⁵² S 167 of the Constitution of Zimbabwe, 2013.

⁵³ Chiduzo “Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?” 2014 17(1) *Potchefstroom Electronic Law Journal* 368.

2017 Constitutional Amendment No 1 and the 2021 Constitutional Amendment No 2 bear testimony to this.

6 1 Constitutional Amendment No 1 and independence of the judiciary

In October 2016, acting in terms of section 180 of the Constitution, the Judicial Service Commission invited nominations from the President and members of the public for candidates to fill the position of Chief Justice. The incumbent was about to reach the retirement age of 70 and was obliged to retire in terms of the Constitution. Four candidates were nominated, and the interview date was set for 16 December 2016. Before the interviews could take place, the then-Chief Justice, in his capacity as the Chairperson of the Judicial Service Commission received an executive order to stop the interview process. The Chief Justice defied this order on the grounds that it lacked constitutional basis. The events that followed clearly support the view that there had been a long-term project to diminish the independence of the judiciary. The words of the then-Chief Justice Chidyausiku are telling:

“Ever since adopting our stance to abide by the Constitution, a segment of the media has sought to impugn the integrity of the Judicial Service Commission. This is most regrettable. This is all I wish to say on this unfortunate debate. In this regard, I am inspired by Michelle Obama’s words of wisdom, ‘when your detractors go low, you go higher’. You do not follow them into the gutter.”⁵⁴

While this battle was raging on, the Ministry of Justice proposed an amendment to section 180 of the Constitution, specifically to dispense with the public interviews. It is our view that public interviews were included in the Constitution in order to bring transparency to the appointment of judges and to ensure that the judges would be appointed on merit. This aspect is crucial to judicial independence. Any attempt to reverse it consequently undermines the safeguards for protecting judicial independence. Four days before the interviews, one Romeo Zibani made an urgent chamber application to the High Court for an interdict against the public interviews.⁵⁵ Conspicuously, despite being cited, the Minister of Justice did not oppose the application. The then-Minister of Justice is the current President Mnangagwa. The basis for Zibani’s application was that the interview process was unconstitutional because it was open to bias.⁵⁶ He relied on the fact that the Chief Justice, in his capacity as the Chairperson of Judicial Service Commission would essentially be interviewing his colleagues. It was also contended that one of the nominees also served as the secretary of the Judicial Service Commission:

⁵⁴ Munyoro “Chidyausiku Speaks on Chief Justice Saga” (2017-01-17) *The Herald Zimbabwe* <https://www.herald.co.zw/chidyausiku-speaks-on-chief-justice-saga/> (accessed 2022-02-23).

⁵⁵ Verheul “From ‘Defending Sovereignty’ to ‘Fighting Corruption’: The Political Place of Law in Zimbabwe after November 2017” 2021 56(2) *Journal of Asian and African Studies* 189 195.

⁵⁶ Bazana and Jackson “An Appraisal of the Recruitment and Selection Process of the Judiciary (Chief Justice) in Zimbabwe” 2019 11(1) *Inkanyiso: Journal of Humanities and Social Sciences* 39 40.

“The fifth and eighth respondents are part of the Commission, the JSC, which is the first respondent. The fifth respondent is its secretary as well as judge of appeal in the Supreme Court where the seventh respondent also sits as a judge of appeal... The applicant contends that over time, relationships have formed between and among these individuals which may result in either prejudicial bias or favourable bias between and amongst them.”⁵⁷

The High Court agreed with the respondents that the impugned provision was lawful, but found that it was contrary to the constitutional values of transparency and accountability. The interdict was granted. Without dwelling on the merits of this judgment, what is worrying is the expression made by the court that upholding the Constitution ahead of an expressed intention by the executive to amend section 180 would be “slavish-adherence to the separation of powers doctrine.” This reasoning is deeply flawed. This amounts to holding a constitution in abeyance simply because there is a group lobbying against it. At this point, the proposed amendment had not even been tabled for consideration in Parliament. According to Hofisi and Feltoe, this judgment is “at variance with the basic principles of independence of the judiciary, the separation of powers and the supremacy of the Constitution”.⁵⁸

The foregoing was the culmination of factional fights within the ruling ZANU-PF party.⁵⁹ Each faction was angling for control of the judiciary. Hofisi and Feltoe seem to suggest that the Minister of Justice and his faction had ties to one of the candidates owing to his liberation war credentials and strong ties to the military. Legal blogger Alex Magaisa submits:

“what is clear from this case is that the process of appointing the Chief Justice has been the subject of political gamesmanship within the context of ZANU-PF’s succession politics ... it is hardly a coincidence that Romeo Zibani submitted his application at the same time that the Ministry of Justice was also crafting an amendment in the process of appointing a Chief Justice and that the Ministry had no interest in opposing Zibani’s application.”⁶⁰

The events leading to the appointment of the Chief Justice provide a backdrop for the criticism against the judiciary. The process was and remains tainted. The political involvement in the appointment process had the effect of “diminishing authority and prestige that should attach to the office”.⁶¹

The Constitution of Zimbabwe Amendment Act No 1 gave the President the sole responsibility to appoint the Chief Justice, Deputy Chief Justice and Judge President of the High Court. The President is allowed to appoint these members of the judiciary without following recommendations of the Judicial Service Commission and his only obligation would be to inform the Senate.

⁵⁷ *Zibani v Judicial Service Commission* HC 12441-16 par 11.

⁵⁸ Hofisi and Feltoe “Playing Politics with the Judiciary and the Constitution?” 2017 *The Zimbabwe Electronic Law Journal* 68.

⁵⁹ Verheul 2021 *Journal of Asian and African Studies* 189 195.

⁶⁰ Hofisi and Feltoe 2017 *The Zimbabwe Electronic Law Journal* 68.

⁶¹ VERITAS “Chief Justice Succession: The Continuing Saga” (2 March 2017) http://www.veritaszim.net/sites/veritas_d/files/Court%20Watch%202017%20-%20Chief%20Justice%20Succession_The%20Continuing%20Saga.docx (accessed 2022-04-02).

Allowing the President to act alone when making judicial appointments is contrary to the principles of accountability and transparency. According to Fombad allowing members of the executive to play a decisive role in the appointment of judges leaves the judiciary branch vulnerable to manipulation.⁶²

6 2 Constitutional Amendment No 2 and the independence of the judiciary

A Constitution Amendment Bill was gazetted in January 2021. It was signed into law in May 2021. This constitutional amendment is endowed with flaws, both in terms of the process that led to its promulgation and in terms of its substance. According to Makumbe, the method used to adopt the amendment “fell short of adherence to correct legal procedures”.⁶³ Section 328 of the 2013 Constitution of Zimbabwe provides that a Bill amending the Constitution must be made public by the Speaker of Parliament 90 days before its introduction in the House of Assembly. The Bill was never made public before it was tabled in Parliament. This essentially deprived the people of the opportunity to comment and discuss the Bill. Some changes that were later made to the Bill were never tabled for discussion. They were made just before adoption without giving sufficient time for debate.

Constitutional Amendment No 2 has been widely criticised for violating judicial independence. It affords the President wide discretionary powers on the appointment of judges after the Judicial Service Commission has tendered its recommendations.⁶⁴ Furthermore, the amendment extends the age of retirement for judges by 5 years from 70 to 75 years.⁶⁵ According to scholars, this extension is yet another assault on the independence of the judiciary as this amendment was solely crafted to retain the current Chief Justice, Luke Malaba, who was due for retirement.⁶⁶ The Constitution of 2013 has a safeguard against this. Section 328(7) requires that, should there be an extension of the tenure of the Chief Justice, it should not benefit the incumbent.⁶⁷ The rationale behind this section is straightforward: it is meant to prevent the capture of sitting judges by incentivising their allegiance with tenure extensions. According to Madhuku, provisions that give power to the President to extend the retirement age provide a loophole through which the

⁶² Fombad 2021 *Canadian Journal of African Studies* 161 175.

⁶³ Makumbe “Amendment or Abrogation? The Zimbabwe Constitutional Amendment Bill Number 2 and Its Implications to Democracy, Judicial Independence and Separation of Powers” 2021 *Academia Letters* 2.

⁶⁴ Buchanan-Clarke and Mashingaidze “Rebuilding Constitutionalism and Rule of Law in Zimbabwe” (August 2021) *Good Governance Policy Brief* <https://www.africaportal.org/publications/rebuilding-constitutionalism-and-rule-law-zimbabwe/> (accessed 2022-03-07) 11.

⁶⁵ S 13 Constitution of Zimbabwe (Amendment No. 2) Act, 2021.

⁶⁶ Buchanan-Clarke and Mashingaidze “Rebuilding Constitutionalism and Rule of Law in Zimbabwe” (August 2021) *Good Governance Policy Brief* <https://www.africaportal.org/publications/rebuilding-constitutionalism-and-rule-law-zimbabwe/> (accessed 2022-03-07) 11.

⁶⁷ S 328(7) of the Constitution of Zimbabwe, 2013.

executive may influence the judiciary.⁶⁸ The extension of the Chief Justice's tenure was therefore "a well thought out plan to weaken vital institutions such as the judiciary and fill the courts with judges beholden to the executive".⁶⁹ Madhuku notes that the privilege of extension of tenure beyond retirement age may be reserved for "good" judges. This means that the President is likely only to extend the tenure of judges who are viewed as favourable to the system. He adds that "[t]his, in the long term, undermines the independence of the judiciary".⁷⁰

The extension of the Chief Justice's tenure was met with legal resistance. The night before the Chief Justice turned 70, an urgent application was made to the High Court for a declaratory order that the Chief Justice's term had come to an end and that the amendment to the Constitution cannot benefit him.⁷¹ The application was centred on the effect of section 186 of the Constitution of Zimbabwe, as amended by Amendment No 2,⁷² in light of the restrictive provision in section 328 of the Constitution. The court was faced with the task of interpreting section 186 in light of the provisions of section 328. The court held that the purpose of section 328 is "among other important considerations, to ensure that a person who occupies or holds public office does so for limited time, to prevent turning persons into institutions thereby compromising on the precepts enjoined in s 3 of the Constitution".⁷³ Furthermore, the court held, the provision was meant to "ensure that a person who holds public office does not influence changes in the law in order to entrench his or her occupation of the public office by

⁶⁸ Madhuku "Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa" 2002 46(2) *Journal of African Law* 232 243.

⁶⁹ Makumbe 2021 *Academia Letters* 2.

⁷⁰ Madhuku 2002 *Journal of African Law* 232 243.

⁷¹ *Kika v Minister of Justice Legal & Parliamentary Affairs* (HC 264-2021, HC 2128/21) [2021] ZWHC 264.

⁷² S 186 of the 2013 Constitution is titled "Tenure of office of judges" and states: " (1) The Chief Justice and the Deputy Chief Justice hold office from the date of their assumption of office until they reach the age of 70 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to their mental and physical fitness so to continue in office. (2) Judges of the Constitutional Court are appointed for a non-renewable term of not more than 15 years, but— (a) they must retire earlier if they reach the age of 70 years unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to 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) 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. (3) Judges of the Supreme Court hold office from the date of their assumption of office until they reach the age of 75 years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that the election 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. (4) Notwithstanding subsection 7 of section 328, the provisions of subsections (1), (2) and (3) of this section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court and judges of the Supreme Court."

⁷³ *Kika v Minister of Justice Legal & Parliamentary Affairs* supra 19.

extending the length of time that he or she remains in that office.”⁷⁴ The judgment concluded by declaring, among other things, that the tenure of the Chief Justice had come to an end. In response to this judgment, the Minister of Justice, Ziyambi Ziyambi, openly “spewed vitriol” against the judges accusing them of being captured by foreign states.⁷⁵ It can be argued that the courts were being targeted for scuppering the efforts by the government to undermine the independence of the judiciary through extending the tenure of the Chief Justice.

7 CONCLUSION

For democracy and constitutionalism to take root in Zimbabwe, judicial independence must be strengthened. The Constitution of Zimbabwe, despite recent mutilations, can be considered to be progressive and exemplary in charting a democratic trajectory for the country. However, threats and intimidation that have been meted out to the judiciary are a cause for concern. The government’s commitment to democracy and constitutionalism is questionable. Constitutional provisions relating to independence of the judiciary have been amended twice in the recent past. Both amendments have the effect of contracting the independence of the judiciary. As a result, there has been a steady regression of the independence of the judiciary, with political arms amassing more power and thereby placing the aspirations for constitutionalism and democracy in jeopardy. Zimbabwe needs a strong and independent judiciary if the aspirations of constitutionalism and democracy are to be realised.

⁷⁴ *Ibid.*

⁷⁵ Makumbe 2021 *Academia Letters* 3.