

**THE EFFECT OF POLITICAL  
PREDICAMENTS ON THE INDEPENDENCE OF THE  
JUDICIARY  
IN AFRICA: THE CASE OF ZIMBABWE (2000-2013)**

**BY**

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## DECLARATION

I, **Doris Chapanduka (R114862P)** do hereby sincerely declare that this dissertation is my own original work that has not been previously submitted to any other university. In writing this work I duly complied with ethical issues and laws governing intellectual property.

**Dissertation Title:** The effects of the political predicaments on the independence of the judiciary in Africa :The case of Zimbabwe.

**Signed**.....

**Date**.....

## Dedication

I am dedicating this study to my parents Mr. and Mrs Chapanduka who have been with me through thick and thin. Thank you mum and dad u have been my pillars of strength God bless you.

## **Acknowledgements**

I would like to thank the Almighty for guiding me throughout my studies. I also would like to thank Mrs F Mutasa, my supervisor you have proven to be a patient and yet kind and caring person without your assistance and encouragement this research would not have been possible. My sincere gratitude extends to my and brothers. Thank you for the financial support and the inspiration Shingirayi and Tinashe Chapanduka. College would not have been made easier if it were not for the friends that surrounded me Tafadzwa Mashoko, Isaiah Dube, Pearl Gambiza, Unawo Maboyi and last but certainly not least Ishmael Msipa I really appreciate how you all turned out to be a source of inspiration and pillars of strength whenever I needed you to be. My friends from home who always kept pushing and motivating me to work hard Mathew Dungeni, Rejoice Shoko and Kelvin Chiringa I am entirely grateful. A lot of gratitude to the Midlands State University Politics and Public Management class of 2015 you all such wonderful people who have had a great impact in making me the person that I am today. I would also like to thank all those who supported me directly or indirectly but could not mention you are all responsible in moulding me into the person that I am today.

## **Abstract**

The purpose of this research is to scrutinize the impact of political crises on the judicial independence from 2000 to 2013. Zimbabwe experienced political crises that include violation of human rights, contested polls to mention just a few. These predicaments had a major and negative impact while only a few saw a shed of positivity on the bench. The study brings to light the lack of judicial independence and how this has negatively affected its constitutional mandated duties. The purpose of the judiciary is to act as a “vanguard” between the government and its people. Utilised in this research is documentary search, in-depth key and interviews that are nothing short of informative as data collection techniques. Brought to light would be the notion that separation of powers and rule of law are very crucial in assuring the independence of the judiciary which are a cornerstone to a democratic society. Failure of just and impartial execution of duties by the bench has been as a result of the erosion of the principle of separation of powers. This research suggests recommendations like the amendment or termination of POSA and AIPPA in an attempt to improve the status of judicial independence. Trusting the bench has become a thing of the past to most citizens of Zimbabwe and hence depoliticizing the criminal judicial system is just but a step further in regaining the trust of the masses. The judiciary needs to be out in full force and put its good efforts of exercising justice on the spotlight.

## **List of Acronyms**

AIPPA Access to Information and Protection of Privacy Act

ANZ Associated Newspapers Zimbabwe

CJ Chief Justice

CZI Confederation of Zimbabwean Industries

GNU Government of National Unity

JSC Judicial Service Commission

MDC Movement for Democratic Change

MDC-T Movement for Democratic Change led by Mr. Morgan Tsvangirai

MIC Media Information Commission

POSA Public Order and Security Act

ZANU (PF) Zimbabwe African National Union Patriotic Front

ZEC Zimbabwe Electoral Commission

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# CHAPTER 1

## *INTRODUCTION*

### **1.1 Background of the Study**

The judiciary is one of the three arms of state which contributes to the activation of separation of powers. It is the arm of government that aims to establish justice and equality for all under the law. The existence of true judicial independence depends highly on the special and important provisions which include appointment security of tenure of judges involving removal of judges from office. Chapter 8 section 164 of the Constitution of Zimbabwe provides for Judicial Independence. Independence is needed for the judiciary to execute its duties justly and without any intervention and to act as the precursor for the general public Ajibola (1998:56) articulates that the idea of judiciary proper functioning involves freedom to exercise its constitutional mandate without external meddling. Judges are expected to be impartial and unbiased exercising their duties in the absence of fear with appointment and removal from office carried out arbitrarily. It would also be helpful if government agencies revere to judicial rulings.

The objectivity and the neutrality of the judiciary depends on the provision of a special scenario entirely alienated from the influence of the legislature and the executive sheltered from the political, economic and every other influence. This would enhance the value of judicial independence as the prerequisites of proper execution of duties of the bench and it could protect the system substantially. In the absence of independence a judge may fail to ensure checks and balances rendering separation of power nothing but an apologue. This follows the notion that if the judiciary should cease control of allocation or the use of power it has to be isolated from the pressure and intervention of those who are to exercise power it is required to control and this should be at the highest practical degree.

As Linington (2001:166) adheres, former Chief Justice Enoch Dumbutshena denoted in agreement to the explanation given by former cabinet minister, the late Edison Zvobgo that



judicial independence goes beyond the idea of independence from the legislature and the executive, it covers impartiality from the stimulus of the political sphere whether wielded by the political organs of government or the masses or through their involvement in politics, brought in by members of the bench.

The basic principles on the independence of the judiciary as espoused by the United Nations General Assembly in November 1985, the Judiciary is expected to pass verdicts on matters presented to them without any form of bias. It goes on to elaborate that the judicial independence mandates the judiciary to maintain the highest levels of fairness in its proceedings all the while paying total respect to the parties involved. Judicial independence operates under the assumption that the system is in no way subject to the sway of the legislature and the executive.

## **1.2 Statement of the Problem**

As much as independence is crucial for the judiciary in advancing its mandate, the execution in Zimbabwean environment has proved rather obstacle filled. Major obstacles being presented by the executive itself as it seems to have taken quite a stance in meddling and intervening with the proceedings of the judiciary often a number of times. Of interest of such a scenario would be the land reform exercise of 1999 that affected the independence of the Judiciary through the prying of the other arms of government. It turns out officials of the bench have had to succumb pressure from the executive and have often had to indulge in illegitimate decisions. These have been cited as factors that contributed to the sprouting of the movement of democratic change (MDC) party to try and fill the political gap that was however countered by the new institutionalized stratagems in the judiciary. A swift observation of a number of cases ran by the bench in Zimbabwe have reflected a tremendous and perturbing singularity that has raised a lot of eyebrows that undermines the credibility of the judicial system as a whole. Allegations have been brought up that illegitimate pressure has gotten to most officers of lower courts impacting greatly on their performance whilst in office.

### **1.3 Objectives of the Study**

This systematic investigation seeks to:

- To analyse if the appointment of judges by the executive has had a bearing on judicial independence
- To gauge the level at which political patronage in terms of appointments affects members of the bench in executing their duties.
- To evaluate how politics impacts the judiciary in its pronouncements
- To endorse defensive strategies the judiciary can use to ensure it does not succumb to pressure from the executive and the legislature.

### **1.4 Research Questions**

The research seeks to answer the following questions:

1. Does the patronage politics in terms of appointment of judges in Zimbabwe leave room for sufficient checks and balances against purely political appointments?
2. What guarantee is there that the judges are impartial to the pressures and threats of political factors and elected branches when it comes to decision making processes?
3. Does patronage politics influence pretentious execution of duties by members of the bench?
4. Have members of the bench ruled in favour of government when confronted with politically related cases?
5. What can be done to guarantee judicial independence in Africa immune to political pressures the continent is currently facing?

## **1.5 Hypothesis**

Evidently the repercussions of the political issues that transpired in Zimbabwe were far reaching during the period under investigation.

## **1.6 Justification of the Study**

A democratic society has several indicators and the independence of the judiciary happens to be a major factor. The Judiciary has the obligation to resolve disputes between parties. There seems to be a bone of contention when it comes to the impartiality of the judicial system in the eyes of the international law. Ironically political holders appoint members of the judge and senior officers as the Prosecutor general. Under normal circumstances the judiciary acts as a check and balance to promote high levels of democratic development and paving way for the advancement of the establishment of the principle of separation of powers. The independence of the bench can be rightfully called a façade because as much as independence means the latitude of decision making without interference but the link to political administrative centre has made it nothing more than a smoke screen.

Political intervention runs back to the executive powers which are responsible for patronage politics via appointment of office holders and this has seen the rise of unjustified separation of powers. The interest of the researcher lies in thoroughly investigating these matters and determining how they affect judicial independence. The field of judicial independence is awash with questionable issues and thus clarity is of essence. Hence the judicial independence requires ideal scrutiny to determine if the judiciary is executing its responsibilities. It is in the public's interest if this study is conducted. This study is intended to benefit policy makers, political parties, academics, civil societies and the government.

## **1.7 Methodology**

The key purpose of this study is to attain its objectives as charted above thus there is requirement to achieve the aimed result which is attaining information. This includes data collection and analysis. This part of the paper brings to light the tools in analysis and collection of data. The main objective is to link the collected data and conclusions to be drawn to the research questions and to test the hypothesis.. This comprises of a research design that brings out the research techniques utilised in the study to attain the objectives.

### **1.7.1 Documentary Search**

Creswell (2009; 180), asserts that documentary search involves the gathering of information from the documents that save as minutes of meetings or newspapers. The researcher will make use of newspapers, case law, internet sources and various writings which are consistent with the study of Judicial Independence. The Constitution of Zimbabwe Amendment 20, the piece of legislature which is the supreme law of the land shall also be made use of. This technique also involves variety of sources which helped in widening the magnitude of the study.

### **1.7.2 Key Informant and In-depth Interviews**

This study will make use of in-depth interviews with key informants being drawn from the judicial system, mainly magistrates and also lawyers. These interviews will help to elucidate information from knowledgeable respondents who have vast relevant opinions on the topic of judicial independence. The researcher will also make use of quota sampling which is a nonprobability method. This sampling technique will be used as it is a flexible method and is typical of specific groups. In-depth interviews are important as they clearly highlight critical and relevant hidden data from the respondent by making use of open ended questions in the interviews. This method would be appropriate in this study because the topic of judicial

independence is a sensitive and controversial issue, thus, it would give respondents time to share their opinions without interference.

### **1.7.3 Data Analysis**

According to James (2010:1), data analysis techniques allow one to gain a powerful insight on the data. The researcher will make use of thematic analysis in explaining the research findings. Thematic analysis is an approach that deals with data, the creation as well as the application of “codes” of data. Coding would be done as a primary process so as to develop themes by recognizing important information in the data and encoding it prior to interpretation.

### **1.8 Delimitations**

The main focus of the research is on judicial independence prerequisite of a society with democracy thus related matters such as separation of powers and the rule of law will be explored. In as much as this study is about the Judiciary secondary attention will be given to the other arms of government that is the Executive and the Legislature and discussions will be held in passing to try and capture understanding of all three arms of government. The Focus of the researcher will be on Zimbabwe.

### **1.9 Limitations**

The study is prone to challenges in collection of information when it comes to field research. Respondents are likely to withhold information as the area of study is highly politically sensitive causing unembellished hindrances for the researcher. The presence of associations like the Anti-Corruption Commission which are weak and vulnerable to manipulation instead of being there to test the judiciary in Zimbabwe. In turn this is likely to corrupt the quality of information obtained by the researcher hence the researcher will indulge in merging findings from the field with literature found.

## **Chapter 2**

### ***LITERATURE REVIEW AND THEORETICAL FRAMEWORK***

#### **2.1 Introduction**

The intentions of the researcher in this chapter are to capture some of the literature put out by other authors on the subject of judicial independence. The idea is to have these writings in relation to the research questions. Sources will include scholarly books, websites and journals. Literature review is of importance as it pushes the researcher to test the study against what is known about the field of exploration. Furthermore analysis of the literature allows the researcher to bring out a gap in literature giving the researcher a room to study thus analysis of literature will be presented. Theoretical framework will be created in second section of this chapter. This section intends to explore the principles that endeavour to explain judicial independence because of that rule of law, separation of powers, judicial activism, judicial immunity and judicial misconduct will be explored. These ideologies shall be deliberated in the case of the judicial system of Zimbabwe

#### **2.2 Literature Review**

The Constitution has been described as the supreme law of the land in Zimbabwe thus no other law is above it. The Constitution in turn provides for judicial independence as noted in Amendment 20 in Chapter 8 Section 164. It affords that independence and impartiality of the bench are fundamental to the rule of law principle and democratic governance. Subsection 164 stipulates that, "The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice." As subsection 2(a) puts it, "Neither the state nor any institution or agency of the government at any level and no other person, may interfere with the functioning of the

courts". This clearly places emphasis on the importance of the principle of separation of powers to judicial independence.

The justice must not be delayed and end members of the bench ought to conduct and execute their duties with the highest level of competence and within a judicious tardiness. This is emphasised in section 165(1b) of Chapter 8. To top it all the constitution is solely entrusted with the authority to grant the President the mandate to assign or appoint judges into office as paved by section 180 of Chapter 8. The supreme law intends to safeguard the proper execution of duties of the members of the bench shielding them from coercion and interference. Despite the fact that this provision is highlighted in the Constitution, the actual occurrences somewhat differ. The judiciary's independence has been almost obliterated owing to an indistinct separation of powers. For instance patronage politics in terms of appointment of members of the bench is more often than not a way of ensuring allegiance from the appointed to the appointee. Matters of loyalty come into play and therefore in as much as the Constitution guarantees judicial independence, appointment and removal of judges, special provisions protecting the bench from the manipulations of the executive when confronted by politically related cases. The area of judicial independence is awash with writings by a vast number of authors.

Linnington (2001:165) perceives that presidential appointments raise a lot of eyebrows leaving the whole process suspicious by nature. Clearly the provision in the Constitution for judicial independence is merely based on principle rather than practicality leaving room for a plethora of loopholes that leave the judicial system vulnerable. There is room in the procedure for the appointment of judges to affect the independence of the courts. The fact that the executive appoints persons other than those put forward by the Judicial Service Commission even after consultation makes it prone to manipulation. However it is assuring knowing that where the President has abused his powers and Parliament agrees, it can remove him from office or pass a vote of no confidence. Linnington further discusses judicial independence in relation to absence of immunity. Dissimilar to the executive, the bench is not immune to criminal and civil proceedings during their tenure. Unless the judiciary is protected it is substantially endangered by the executive and the legislature.

The relocation of Magistrates with or without their consent is also a matter of concern. They may be transferred from any post which he or she occupies in the public service. The possibility of transfers being used as a form of punishment for deciding against state cases cannot be overlooked. Should the President mistreat his discretionary powers in appointment the parliament is expected to pass a vote of no confidence, however this is unlikely to happen in the case of Zimbabwe given the dominance of the ruling party that has been quite overpowering since independence. The “harmonised” elections of 31 July 2013, ZANU Pf managed to conquer more than two thirds of the seats in the parliament leaving a great likelihood of bias if a vote of no confidence need be passed. The matter of transfers also brings to mind the possibility of the elevation of those who rule In favour of the executive in state cases as a reward for taking its side, this raises eyebrows especially with allegations of the unfavourable working conditions of the magistrates hindering them from executing their duties effectively thus in order to get a piece of the national cake they give biased verdicts.

Madhuku (2010:91) concurs with Linington as he postulates that the appointment process of the bench is greatly imperative in warranting judicial independence. He believes that there are high chances that judges appointed under a politically induced environment are likely to owe allegiance to the party involved and emanating is a judicial system devoid of any independence. Judicial independence is the keystone to the principle of separation of powers. The appointment and removal of judges is also decisive to judicial independence. The fact that a judge can effortlessly be removed from office hardly matters if the appointment in the first place was rigorous and free from political influence. The presence of appropriate security of tenure might set off the results of faulty appointment system in the sense that once in office a judge who knows the removal is no walk in the park could actually be motivated to execute the duties pedantically. International expectations of judicial independence places emphasis in contradiction of inopportune removal of judges from tenure. They contend that a judge on the verge of removal from office ought to be adjudicated by an independent and impartial tribunal with grounds for removal limited to either the incompetence of judges in performing their duties or atrocious misconducts.

Zimbabwe’s provisions on removal of a judge from office exhibits a commendable sensitivity in protecting the judges from indecorous removal from tenure. The case of Benjamin Paradza



v The Minister of Justice, Legal and Parliamentary Affairs is an illustration. Allegations hold that the judge in question corruptly tried to manipulate the verdict of two other members of the bench presiding over a case involving his business partner. The constitution only protects judicial independence as an institution but unfortunately the judges are not as protected.

With a lot of importance laid on the concepts of separation of powers, if clear lines were to be drawn between the three arms of government perhaps judicial independence could actually be possible in any society. This would be achievable if and when faced by political cases, make sure that no branch daunts the judicial arm. As discussed by Madhuku removal of the bench is quite prominent.

The issue of judicial independence has always been highly controversial taking into consideration the matter that all the three members of the tribunal are appointed by the President. This in itself squeezes the bench in a small bottle with hardly enough air to breathe. In as much as the President makes decisions in consultation with the Judicial Service Commission (JSC), it is quite a contrary because the president is also responsible for appointment of the JSC at the end of the day the president is very influential to the matters of the bench. The bench is then accustomed to dance to the bidding of the executive as the President is the piper and the Judges dance to his tune. The decisions of the bench is affected by various reasons as put across by Hatchard (1993:130).The bench is apt to take a more realistic tactic to a politically related problem by trying to reach a compromise between the result. This has been a cloud of doom for several courts in many countries. If judicial independence is tangible then protection of individual rights has to be present. Judicial appointment is vulnerable to the Executive's exploitation. The members act as a pawn of the executive as by retaining appointing known supporters of the government the executive builds a judiciary that saves face for the central government in turn the independence of the judiciary is kept "intact" while they foster the wishes of the executive.

Hatchard (1993:131) is of the opinion that the appointment of the bench entirely on political premise is utterly wrong nevertheless as the former Chief Justice of Zimbabwe has fittingly pointed out. The most important thing at that level is not ineludibly without political consideration but a constructive pledge to a selection of professionally proficient persons

proven honest. Appointment of the bench should be entirely on the basis of merit devoid of political influence. Appointment of judges should be done to serve the general public and not act as a personal assistance to the executive.

Related to this is the application of secondary pressure by the government on judges. Political influence in giving verdicts by the executive can be seen as a means of compulsion in some scenarios coercing the bench to make decisions that favour the government in security related cases because of fear of cutting off of benefits. Pressurising the chief justice into conveying certain cases to particular judges who are inexplicably pro government, this is a way to undercut the independence of the judiciary. As propounded by Hatchard (1993:95), former Justice Dumbutshena renowned that, “When the executive ignores the orders and punishments of the courts, there is an inevitable breakdown of law and order, resulting in uncivil chaos because the courts cannot enforce their orders.” The Constitution however omits to mention any judicial immunity from prosecution. Protection is vital because it ensures that members of the bench act without any partiality devoid of fear in the execution of their duties. Consequently it is challenging to for the bench to function if their actions in court are subjected to legal chronicles. Presidential immunity is present and if such privileges were extended to judges their position would be solidified. The courts therefore have a duty to protect the individual rights of the bench against the government and in turn the government is supposed to be precursor between the government and the general public. Be that as it may, the courts at times are unable to enforce the law due to the way too much power is concentrated in the hands of the Executive. The hands of the judicial hands are therefore tied. Linington and Hatchard are in consensus concerning judicial immunity as the both believe that judicial immunity would be a major boost to the ego of the bench in carrying out their duties. Thus immunity will bring an increase to judicial independence.

The matter of judicial independence takes a turn as studies by Gorejena (2005:106) reveal a side that is economically sensitive. Gorejena stipulates that the working conditions of the judiciary make appointees susceptible to illegitimate subtle and direct manipulation from the executive and the legislature. The fact that each of the members of the bench had been offered farms seized under duress from white commercial farmers in the infamous fast track land reform Program is public knowledge. A number took up offers and are proud owners of

farms whose acquisition may still be a matter challengeable in court. Former Chief Justice Anthony Gubbay in 2002 sited independence of the judiciary amidst the deliberations on the shaping and administration of political authority in a state. A number of the pedigrees of the predicaments in Zimbabwe as a state are visible in the speech by CDE Webster Shamuyarira. Shamuyarira articulates the notion that government overall dogma is most of the times informed by and signifies prevalent interests. The Judiciary have a choice to at least share that ideology or be held responsible for the policies enunciated by government. The Judiciary is considered to be betraying the state and the people if it goes against government positions on ideology, political and diplomatic matters.

November 2000 saw the war veterans association, a very persuasive sector, conveying its incongruity with judicial inhibitions to the intentions of government of procuring agricultural land through rather superfluous permissible measures much more fervidly, they did this by threatening the Supreme Court intimidating the bench and cornering them via invasion of the courts. This was clearly crossing the line as it resulted in massive friction between the judiciary and the government with rather a nauseating effect as this can be described as nothing less than outrageous course of action and the executive did not take action but rather sat quietly folding hands. Even up to date tensions continue to be hastened at exacerbated rates by the Constitutional changes by Government and Parliament. 2002 saw government seeking to prevent the courts from deciding the cogency of electoral challenges arising as a result of violent parliamentary elections of June 2000. The preponderance of the encounters had been propounded by the foremost opposition party the MDC thus the ingenuity had to miss the mark and for sure it did. Further along the lane in 2004 Presidential flouting through the Presidential powers of the Temporary Measures Act was experienced when the power of the courts to validate the authenticity of pre-trial incarceration of persons accused of certain offences of “economic sabotage” a rather colloquial classification. As provided by the Presidential Act infringement came through a presidential decree and no court would have jurisdiction to consider bail for a suspect accused of economic sabotage until 21 days. At the close of 2003, Zimbabwe’s Lawyers for Human rights remorsefully noted that in Zimbabwe there is an executive repudiating to put in place secure court instructions that are seen to be critical to the state of the ruling party ZANU (PF). In a number of cases the bench has suffered fraudulent and illegitimate attacks from the Executive. Apparently the government

has records of attacking the bench or members of the legal profession whenever the Executive is unsatisfied with particular court decisions. The ruling party clearly holds itself above the law and having the licence to pick and select which verdicts to go with and which ones to go against as witnessed by the way it is constantly disrespecting the verdicts given by the courts.

Working conditions have a major influence on how duties will be carried out in court. If judges work under poor working conditions they might succumb to bribery prohibited by section 165(5) of amendment 20 of the constitution. More so, the matter of land invasion has been vital in discussing Judicial Independence and Rule of Law in Zimbabwe as noted above. Should rule of law be pragmatic in both the constitution and in practise judicial verdict would be obligatory and impartiality of the bench safeguarded. Judges would not adjust their decisions on political matters absent of fear and intimidations if the rule of law were to be observed. Gorejena's perceptions are unswerving with the researcher's study as they bring out cases which the government has flouted rulings from the court, hand picking their own laws. Saki (2007:7) is in support of Linington's outlook in discussing the issues of Presidential appointment of the Judiciary.

Just like other countries the Constitution of Zimbabwe is not formally elusive in the procedure of appointing senior judiciary members because of the manifestation of the executive and the legislature. Repudiating awfully the conception of Judicial Independence as the section of judges is not at liberty to make self-directed decisions that aggravate the government. Allegations are that in Zimbabwe judicial appointment is not as open as it appears but it is rather a paper tiger given that the Judicial Service Commission is packed with partisans, appointees and benefactors hereafter their sentiments are fluently rehabilitated and prejudiced. More so, Saki points out that the exclusion of judges from office is conducted through nonconformist means. Chapter 8 Section 187 of the Zimbabwean Constitution provides, in Amendment 20, for the removal of judges however no requirement is needed for the tribunal to conduct hearings in public and publishing of findings should take place. It is only fair to determine that the exclusion of judges from tenure is easily manipulated by the executive in both the making up of the tribunal and the Judicial Service Commission who are

mandated by the Constitution with the job of appraising the issues concerning the removal of the bench.

Chidyausiku was appointed Chief Justice ahead of several senior judges making him the first appointment to the office made straight from the high court bench. Reports hold that Chidyausiku is also a beneficiary of the government's commercial farm apportionment arrangement. In February and June 2002, from a report compiled from various sources with the Ministry of Lands and Agriculture included, Chidyausiku is registered as the proprietor of the 895 hectares of land in Mazowe known as "estate Farms." Ziyambi, Cheda and Malaba are three high court judges appointed as Supreme Court judges in July 2001. Reports hold that of the three two are beneficiaries of the commercial farm allocation scheme. Cheda and Malaba have vast lands in different parts of the country which they benefit from immensely. It has become common knowledge in the legal and judicial circles in Zimbabwe the affluences of these judges. This has a very massive impact on how these judges are perceived by their colleagues in the judicial world and the general public at large. As articulated by Section 165(6), members of the judicial system are not to engage in activities which interfere with or compromise their judicial duties. Judges are barred from receiving gifts as this is believed to disturb their verdicts in the courtroom. Accepting is thus considered violation of the aspect of impartiality and is judicial misconduct.

Consequently this entails that gifts such as farms are no different from this case. Issuing of farms was clearly a violation of Section 165 and thus it was a huge judicial misconduct. Given the facts that these farms were given to the judges during the early stages of the land invasion by the war veterans one is left to believe that they were given as a form of bribe to buy the allegiance of the judges to the incumbent government, buying their loyalty such that they give it should legal proceedings take place in the case of the invasion of the land. The land issue and rule of law in Zimbabwe are taking centre stage in discussion of judicial independence.

The land issue clearly demonstrates the level at which equality has eroded before the law and democracy in Zimbabwe Also of importance as deliberated by Saki (2007:7) is the matter of appointments. The fact that the whole issue of appointments is left in the hands of the

executive makes it very questionable to people. In as much as the appointment of the bench is done in consultation with the judicial service commission as provided in the constitution, the JSC has proven to be weak when it comes to checks and balances. Feltoe (2004:134) emphasises on the matter of the independence of the judiciary and political predicaments. He believes that the Zimbabwean government has “kicked out” several impartial judges replacing them with those loyal to the ruling party. It is worrisome to note that members of the bench ruling against the government wishes have been ridiculed and physical threats have befallen magistrates such that they now execute their duties with fear and bias.

The rearrangement of the Supreme Court has paved way to the rise of dramatic change in the court’s approach to human rights matters. Serious human rights violations have been noted but the courts seem keen on rather perpetuating executive action instead of shielding human rights. Accusations have been made against the courts of deterring from dealing with a numbers of important cases concerned with human rights violations and also there have been long drawn out deferrals in giving verdicts on such cases.

## ***2.3 Theoretical Framework***

### **2.3.1 Separation of Powers**

As put across by the Human Rights Bulletin (2010:2) separation of powers is a form of governance for democratic states where the state is divided into three branches of power. The three branches are the Executive, the Legislature and the Judiciary. The three have different responsibilities towards the law. The Executive is responsible for enforcing the law, the Legislation makes the law and the Judiciary is fundamental to interpretation of the law. Each branch of government is separate and autonomous powers and is accountable for all its actions. Baron de Montesquieu backed the notion that the powers of government ought to be inherent in different entities in order to curtail power abuse and arbitrariness. Hence a state that adheres to a constitution that allows for separation of powers guards against selfish rulers who seek to foster for their personal gain at the suffering of other citizens. Societies that do

not foster for the observance of separation powers and rule of law are construed as a nation absent of a constitution at all. Liberal democracies to date consider separation of powers as a rudimentary constitutional principle. Parting of the Executive, Legislative and Judiciary is reckoned indispensable in deterring from the usurpation and totalitarianism by holders of these powers. Expressed in other ways it simply entails that the idea of sharing power among different parts of government is done to ensure that no one branch obtains too much power. This is in line with the proposals made by John Locke and Montesquieu to ensure division of political power among the three arms of government. The judiciary infers and relates the law under the guise of the autonomous state. Zimbabwe has experienced quite a number of violations of this doctrine as explained by Chief Justice Rita Makarau.

Human rights bulletin (2010:3) holds that breach in principle in the Zimbabwean context is through the Presidential powers (Temporary Measures Act) which in Chapter 10:20 literally permits the president to create laws. A clear illustration is the constant meddling of the Executive in the Judiciary behind the fast track land reform programme. Presenting yet another example showing that division of power principle fell vulnerable to misrepresentation by the executive in Zimbabwe and this was ahead of the Government of National Unity commencement. Despite provisions of non-interference in the Constitution substantiation of manipulation has been noted and recorded.

### **2.3.2 Rule of Law**

Rule of law as a feature of a state entails that no man is above the law despite his ranking or condition. All men are subject to the law and acquiescent to prerogative as presented by Dicey (1885:193). Rule of law advocates for equality of all before the law with the Constitution being the supreme law of the land. For several systems of government, rule of law is a principle that takes precedence in the foundation of democracy. This is so as a result of the demands of the doctrine that requires the absence of arbitrary power, equality before the law and judicial independence or objectivity of the law to enforcement agencies. However newspaper editors in Zimbabwe have gone out on a limb to denounce the governments “disruption of the substance of the law grounded society we wholly anticipated armour-plated the populace’s democratic progression.” The supremacy of the rule of law entails the

preponderance of the conventional law of the land and equality before the law. Rule of law is established upon the Constitutional values that is separation of powers. Judicial independence is the first and inescapable desideratum of rule of law.

Sellars (2010:5) believes that the fundamental definition and drive of the law is the exertion to determine what amalgamation of powers in society, or what form of government will induce the creation of good and equal laws an, unbiased carrying out and authentic clarification of the law. Judges ought to be secured and well remunerated, so that they can apply the law without distress or bias. Persistent consideration is necessary for the establishment of the rule of law to the combination of powers in civilization that will form the most autonomous laws that gain everyone with the absence of respect to the welfares of those in power. These constitute of an illustrative government with a divided legislature a designated Executive and a Judiciary independent and full of confidence to ensure proper interpretation of the law ensuring the firmness of the principle of separation of powers. The Judiciary will be in a position to affirm the law absence of any bias and exclusion of meddling over authentic cases by the Executive and the egislative powers. The majority of the members of the bench with the inclusion of the Chief Justice, considering the land reform matter as political and not legal, have appreciatively accepted free occupation of vast productive agricultural land commandeered from the white commercial farmers. By so doing they have left their judicial independence highly vulnerable and have ostensibly presumed the legitimacy of the fast track reform programme and related issues and seriously breached by the rule of law. This is a severe contradiction to the principle of rule of law as they have sworn to protect and enforce.

An observation made by Justice Anthony Gubbay (2009:3) is that, “Disturbing conduct was the harassment of the High Court and Supreme Court judges by the war veterans and followers”. Spearheading this campaign was the Minister of Information who accused the Supreme Court of being prejudice in favour of white land owners at the cost of the populace who had no land. Disrespect of the rule of law and the process of the Constitution is clearly evident through such attacks as the Constitution guarantees judicial independence. Zimbabwe human rights NGO forum Special Report (2001:23) recorded that the president of the Confederation of Zimbabwean Industries (CZI), Zed Rusike was quoted saying government officials ought to act responsibly and deter from issuing hate and racial statements all along



respecting the doctrine of the rule of law and the bench as institutions of integrity and competence in order to retain the interests of investors in Zimbabwe. He went on to justify this by saying that after more than 20 years independence was for all regardless of race, colour, creed or political connexion.

After the court struck down the state's telecommunications and broadcasting monopolies, Section 50(2) (a) of the Law and Order Maintenance Act in addition with the amendment to Section 5(4) of the Land Acquisition Act the liaison between the Supreme Court and state Executive has taken a turn for the worst. The court engrained that the executive could be litigated in its official aptitude and twice ruled that the land acquisition and the expulsion of farmers should follow legal provisions found. The fast track resettlement programme was deemed unconstitutional and permitted the Administrative court's decision to necessitate a feasible land policy from government by July the first 2001 permitting it to ensue with acquisitions after had been entitled. The ruling that the occupation of the farms was illegal and trespassing was passed by Justice Garwe on 17 March 2000. Upholding the same verdict by Justice Garwe was Justice Chinhengo. Garwe gave the war veterans an ultimatum that was to eradicate themselves within 24 hours before calling upon the police to throw them out utterly ignoring Executive interference which might thwart that action. It was not surprising when both the war veterans and the police did not adhere to the ruling of the courts as they argued that a political situation was required to the matter of trespassing. The late CDE Chenjerai Hunzvi unheeded justice Garwe's order to pull out his followers from the farms in question and records state that he stated that the State President himself was in control of the occupants of the farms thus only him could give the order of removal. In simple terms they did not answer to the judiciary but to the Executive itself rendering the bench useless to them. Indications are that the doctrine of the Rule of Law in Zimbabwe has since been eroded. It is without a doubt that Rule of Law is an important prop of independence of the bench as an independent Judiciary enforces the law and makes sure the government abides by it. The pretext that the doctrine of rule of law is practised in Zimbabwe has become quite unrealistic by the day.

The legal system has been subdued to enormous harm and has become a political contextual. Thus the concept of judicial impartiality need be strongly upheld. Judicial impartiality

requires judges to be unbiased, and to not favour either side in a case. While judges have their own sympathies and opinions like everyone else, they must set these aside, and listen to and judge a case with an open mind. People trust the legal system because judges are impartial; therefore, even a belief or apprehension that a judge is not being impartial is enough for a judge to be removed from hearing a case.

It is not enough for the Judiciary, as an institution, to be independent - individual judges must be seen to be objective and impartial. In their personal lives, judges must avoid words, actions or situations that might make them appear to be biased or disrespectful of the laws they are sworn to uphold. They must treat lawyers, clients and witnesses with respect and must refrain from comments that suggest they have made up their minds in advance. Outside the courtroom, judges do not socialize or associate with lawyers or other persons connected with the cases they hear, or they may be accused of favoritism. Judges typically declare a conflict and withdraw from a case that involves relatives or friends. The same is true if the case involves a former client, a member of the judge's former law firm, law partners or a former business associate, at least until a year or two has passed since the judge was appointed and those ties were severed.

Judges often choose to avoid most forms of community involvement. A judge may undertake community or charitable work but cannot offer legal or investment advice. Judges cannot take part in politics, either as a party member, fundraiser or donor, and many choose to relinquish their right to vote. While judges have been more willing in recent years to make public speeches or agree to media interviews, they refrain from expressing opinions on legal issues that could come before them in a future case. Judges are forbidden from being paid to do anything other than their judicial duties, but can accept appointments to serve on royal commissions, inquiries and other official investigations.

### **2.3.3 Judicial Activism**

Judicial activism as propounded by Kmiec (2004:3) is the verdict passed by the courts that arguably go further than application and understanding of the law and extends into the jurisdiction of change and creation of laws or going against legal practices. The judge's personal philosophies or political connexions without a doubt are the influence of those

decisions. A judge is said to be “legislating from the bench” should he or she make a court decision that is not in line with the constitution or statutory law or legal precedent. It is possible that a judge may have held back exercising judicial restraint, this is supposed that the judge is being a judicial activist. Judicial activism involves the practise of judicial review, or the description of a particular verdict in which the member of the bench is generally envisioned to be keener to rule on constitutional matters and prepared to overturn legislative or executive actions.

Judicial Activists impose their perceptions of the requirements of the constitution rather than conceding the views of other government officials or prior courts as put across by Roosevelt (2014:1). Activist judges pass verdicts on cases based on their policy orientations rather than an authentic interpretation of the law leaving out the unprejudiced role and legislating from the bench. Verdicts may be considered activist for either striking down legislative or executive action or for permitting it to hold. Our court system it is perceived to have a long standing history of being contaminated by prevalence of judicial activism. The rise of opposition politics with those championed by the Movement for Democratic Change has seen members of the bench failing to keep their political wiles outside the courtroom.

The behaviour by some of Zimbabwe’s members of the bench according to Nkiwane (2012:13) with particular reference to the Chief Justice Chidyausiku and Justice Chinembiri Bhunu has made a ridicule of the court system. One bad apple spoils the whole crate and as such judicial activism is blemishing the image of the whole judicial system. It all comes back to the principles of separation of powers and the doctrine of rule of law as being pillars that foster judicial independence. This is so because usurpation of power by some branches of government will definitely occur if the line is not drawn.

Considering the kind of political predicaments Zimbabwe faced during the period under review, it can be realised that a compromise was made to the judiciary’s independence. More so, negating the importance of rule of law is out of the question as it plays a crucial role in ensuring judicial independence as it emphasizes on the fact that all men are under the law despite their position, ranking or any matter whatsoever. In relation to Zimbabwe’s experience it can be noted that this concept was nowhere near the realm of being practised

during the fast track land reform programme therefore it seriously compromised the judicial system.

### **2.3.4 Judicial Misconduct**

Actions that can be classified as judicial misconduct include: conduct prejudicial to the effective and expeditious administration of the business of the courts; using the judge's office to obtain special treatment for friends or relatives; accepting bribes, gifts or other personal favors related to the judicial office; having improper discussions with parties or counsel for one side in a case; treating litigants or attorneys in a demonstrably egregious and hostile manner; violating other specific, mandatory standards of judicial conduct, such as judicial rules of procedure or evidence, or those pertaining to restrictions on outside income and requirements for financial disclosure; and acting outside the jurisdiction of the court, or performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts among reasonable people. Rules of official misconduct also include rules concerning disability, which is a temporary or permanent condition rendering judge unable to discharge the duties of the particular judicial office.

A judicial investigative committee is a panel of judges selected to investigate a judicial misconduct complaint against a judge accused of judicial misconduct. Judicial investigative committees are rarely appointed. According to U.S. Court statistics, only 18 of the 1,484 judicial misconduct complaints filed in the United States Courts between September 2004 and September 2007 warranted the formation of judicial investigative committees. Pinning down a precise definition of *judicial misconduct* is challenging since most codes of judicial *conduct* include, generally, a prohibition against conduct prejudicial to the administration of justice that could bring the judicial office into disrepute. The American encyclopedia of law, Corpus Juris Secundum ((Title 48A, "Judges"), while sidestepping the requirement for a concise definition, nonetheless provides this helpful summary of the law.

The Judicial Conduct and Disability Act establishes a process by which any person can file a complaint in a federal court alleging that a federal judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" or has become,

by reason of a temporary or permanent condition, "unable to discharge the duties" of the judicial office. This process cannot be used as a means to collaterally attack a judge's rulings. An attorney can explain any rights you have as a litigant to seek review of a judicial decision. The lawmaker promulgated the Judicial Service (Code of Ethics) Regulations, 2012, under Statutory Instrument 107 of 2012. In its preamble, the above Code of Ethics states and whereas the Constitution provides for the impeachment of a judicial officer, it is recognized that no formal complaints mechanism is provided to deal with complaints about judicial officers falling short of impeachable conduct.

This part, when read in conjunction with Section 15 of The Judicial Service Act [Chapter 7:18], which states "Subject to the Constitution, this Act or any other enactment, any case involving misconduct or suspected misconduct on the part of a member of the Judicial Service shall be investigated, adjudicated upon and, where appropriate, punished by the Commission", is a sad indictment on our Judicial Officers. The mere fact that the Lawmaker, in his wisdom, had to make provision for disciplining Judicial Officers is an acknowledgement and testimony to the fact that our Judicial Officers have allowed themselves to be compromised. And hence could not be trusted to be given total independence as is due to them.

The fact that the Executive is many a time accused of arm-twisting the Judiciary, in the process, compromising the same yet, it is the Executive that initiated, and guided debate in Parliament and Senate that led to the promulgation of the Judicial Service Act [Chapter7:18] and all subsidiary legislation under it. This is the price the Judiciary has to pay for allowing themselves to be compromised. In the eyes of the voting public, the Judiciary is viewed with suspicion, for, by failing/ refusing to apply the laws of the state, it is seen as reversing the gains of the war of liberation, through the unsound judgments that offend the letter and spirit of the Constitution. Hence, the Judiciary must be treated as junior to the other arms of state, needing strict regulations to guide them. Thus, we, the voting public owe a debt of gratitude to the Lawmaker for providing us with the means to seek redress against the 'evil' Judiciary.

Instead of seeing the writing on the wall and jealously guarding its independence as provided for in the Constitution, the Judiciary allows itself to be used to hurt people by delaying and denying justice. It does not matter how the Courts try to dress it up, if they cause an injustice,

they are responsible for tearing the social fabric of our beloved society and as such, must be exposed and shamed.

This, must be done, to protect those other members of the Judiciary who have remained true to their oath of office, for, those corrupt elements will not rest until the entire bench is compromised, as a protective measure. Our Courts exist to do justice and this justice is the by-product of the diligent application of the laws of the land period.

The Code of Ethics looks at the conduct of Judicial Officers on and off the bench, calling all Officers to conduct themselves to the highest standards of personal and professional behavior. For example, it would be improper behavior for a married judge to have a “girlfriend”. While this may be considered a petty issue by some, in the eyes of the Judicial Service Commission, these is a serious offence, for Judicial Officers are Marriage Officers as well as have the power to grant divorces, so, the Judicial Officer cannot perform such a task, if he himself has dirty hands. It is even worse when a Judicial Officer causes a party to the proceedings before him or her injustice. Whether the injustice is an undue delay in finalizing the matter, partiality, failure to possess the knowledge and skill in applying the law, it is immaterial; the Judicial Officer must be dragged before a tribunal of his peers and answer. If found guilty, the ultimate sanctions is dishonorable discharge from his/ her office.

The above provisions have been embedded into our Constitution of Zimbabwe Amendment [Number 20] Act and codified in the Code of Ethics [Statutory Instrument 107 of 2012]. They signify the Lawmaker’s resolve to hold the Judiciary to account for deviations from the high standards expected the world over, of judicial officers, on and off the bench.

### **2.3.5 Judicial immunity**

Judicial immunity can be described as a judge’s complete protection from personal liability for exercising judicial functions. It protects judges from liability for monetary damages in civil, court for acts they perform pursuant to their judicial function. A judge generally has immunity from civil damages if he or she has the jurisdiction over the subject matter in issue, this means that a judge has immunity for acts relating to cases before the court, but not for acts relating to cases beyond the court’s reach. For example, a criminal court judge would not have immunity if he or she tried to influence proceedings in a juvenile court. Some states

codify the judicial immunity doctrine in statutes. Most legislatures including Parliament let court decisions govern the issue.

Judicial immunity is a common-law concept derived from judicial decisions. It originated in the courts of medieval Europe to discourage persons from attacking a court decision by suing the judge. Losing parties were required instead to take their complainants to an appellate court. The idea of protecting judges from civil damages was derived from this basic tenet and served to solidify the independence of the judiciary. It became widely accepted in the English and United States courts.

Justice depends upon the ability of judges to render impartial decisions based upon open-minded and unbiased consideration of the facts and the law in each case, as well as maintains public trust and confidence within the courts. Within the United States, justice manifests independence in decisional processes, as well as institutional operations, or the ability of the court to administer their own operations as part of an independent branch of government. Many countries in Latin America, Africa, Eastern Europe, and Asia are undergoing significant changes to enhance judicial independence. Even established democracies struggle to ensure an independent judiciary. While there are different assumptions about how to structure an independent judiciary, there is general agreement on a number of key elements that must be structured to fit the needs and situation of any country striving to ensure judicial independence within a well-balanced democratic system.

The cry for justice is universal. Responding to that cry all over the world, lawyers, judges, court administrators, and judicial educators seek to reform justice systems and promote the rule of law. At this time in our world's history, there is no higher calling. The rule of law is an essential feature of all democratic countries. The essential nature of democracy is government by, for, and of the people. Although it is important that each judge is able to decide cases solely on the evidence presented in court by the parties and in accordance with the law, the recent experiences following the enactment of the Constitution whereby the Constitutional Court chose to defer the adjudication of some the election applications in order to conveniently and craftily allow the disputed nomination date to pass goes a long way towards exposing the challenges that the judiciary finds itself in when a great leader exists in the political community.

The responsibility of judges in disputes is to protect the weak and not the strong suggesting that in cases where an individual takes on the state, the courts have a duty to protect the individual yet in many cases it would appear that the judiciary exists to serve the state and its actors. Although an independent and impartial judiciary is one of the cornerstones of any democracy, the judges appear to be accountable to state actors and themselves. They enjoy immunity from prosecution for any acts they carry out in performance of their judicial functions yet it is precisely in the performance of such functions that they are often found wanting.

## **2.4 Conclusion**

In a nutshell, judicial independence is crucial in every democratic society. Conversely taking into account the above writings by various authors, judicial independence is but a myth in Zimbabwe. For as long as the process of appointment and removal of the bench remains compromised it will remain an apologue. Also the principles of separation of powers and rule of law, the cornerstones of judicial independence but are nonetheless not being practised as they ought to be. Judicial activism has taken precedence in the judicial system and serious records of judicial misconduct have been duly noted in Zimbabwe. Hence given the literature above the next chapter seeks to focus on what was gathered in the field.



## **Chapter 3**

### ***DATA COLLECTION AND ANALYSIS***

#### ***The effects of the predicaments of judicial independence in Zimbabwe***

##### **3.1 Introduction**

The intentions of the researcher in this chapter are to highlight the findings that were attained as fieldwork and documentary research carried out. The findings or the data collected will be linked to the objectives of the study emphasised in Chapter 1. The research also aims to respond to the questions in Chapter 1 and an analysis of the data will be presented. Some of the objectives involve highlighting on whether the law can exist as an independent singularity from the emerging political exposé and an analysis of how political patronage in the case of appointments affects judges' delivery of duties amidst others. The nature of political predicaments Zimbabwe encountered from 2000 to 2013 will also be highlighted in this Chapter. Explanations of the gaps between data collected and the literature review will be provided with the progression of the Chapter. The question of utmost importance is how did the anomalies that were encountered by the judiciary during the period under review disturb its independence and to what degree did the judiciary conquer some of these problems and retain its independence.

The nature of catastrophes that Zimbabwe encountered from 2000 to 2013 is as follows:

1. Violations of human rights
2. Fast track and Land reform programme
3. Dubious Polls
4. Engrained dictatorship

Certain data was obtained from interviews that were piloted as part of field work. The idea of face to face interviews was to enable the researcher to probe for responses. The researcher interviewed lawyers and magistrates and a few influential people who have knowledge on the matter of judicial independence. The researcher utilised such respondents to gather sufficiently informative answers for the purposes of analysis. Nonetheless, as the fact that the nature of the study was politically sensitive, the researcher faced hindrances in gathering of information. By means of protecting respondents the researcher will adhere to secrecy and confidentiality by not disclosing their identities.

### **3.2 Violations of Human Rights**

In the period under review numerous cases of human rights violations were noted. Several of these cases were of political nature. The Declaration of Human Rights in Amendment 20 of Chapter 4 of the Constitution of Zimbabwe is provided for, thus the judiciary is tasked with the protection of the rights of the people at all costs. Nonetheless since 2000, the social, economic and political rights of Zimbabweans have been violated. This study will however pay more attention to the political rights violations. Ndlovu (2013:6) emphasises on the case of the 29 MDC activists who were arrested for the murder of a police officer in Glen View in May 2011 as a case that highlights how the independence of the judiciary has severely been compromised. In the case of the State v S Madzokere the courts delayed the matter for over two years. In as much as the Movement for Democratic Change was part of the Government of National Unity (GNU) it seemed powerless in ensuring that its members got a fair trial and a hearing in time. Trevor Maisiri, a political analyst explains that the long winded nature of the matter looked like an attempt by the state to render the opposition party as a violent group ahead the 31<sup>st</sup> of July 2013 polls. Certain members of the public the judiciary has sold out its independence to the executive because a number of members of the bench criticize human rights lawyers and human rights activists.

However, there is one case that tried to restore the people's trust in the judicial system. The case of Jestina Mukoko v Attorney General shows that the judiciary is capable of executing

their duties without fear or bias as although during the time under review the nation went through quite worrisome political crises. She argued that her constitutional rights had been violated as she was subject to torture and degrading human treatment. The judicial decision from the Supreme Court, though long awaited, finally was passed in September 2012. Magaisa (2012:3) Mukoko was charged with contravening s24 (a) of the Criminal Law (Codification and Reform Act) [Chapter 9:23]. Jestina Mukoko put it to the courts that the nature of her torture included being struck on the soles of her feet with such force she was in austere pain. The court ruled that by application of the principle law, Jestina Mukoko had not committed any offence instead it passed the verdict that the state had actually committed a crime against her by subduing her to torture.

Writing in consensus with the Chief Justice and Justices Sandura, Garwe and Ziyambi, Justice Malaba established that the case allowed the Supreme Court clarity on the fundamental human rights. Given the Mukoko case it can be noted that in some instances the judiciary strongly disrepute the state's unjustified human rights violations. Thus the political predicaments faced by the nation had a great impact on the independence of the judiciary. The majority of the respondents felt that it is quite impossible for the judiciary to carry out their duties freely and impartially because of executive interference. The judiciary has therefore failed to ensure the safety of the public it ought to protect to a greater extent. This is so as most of the decisions passed by the courts support the ruling party and most are politically induced cases.

### **3.3 Fast Track Land Reform Programme**

In the year 2000 the Fast Track Land Reform programme had reached its crowning as many white commercial farmers were forced by the government to vacate their farms. This resulted in the legality of the matter being challenged in court. A case point is *The Commercial Farmers v Ministry of Lands and Others*. A court order declaring the invasion unlawful was issued in March 2000. The order also came with a directive to the police to make sure the invaders vacated the premises in question. According to Coltart (2005:5) the government in

2001 responded to this order by taking its attention to the removal of the Chief Justice at the time. By the middle of the year 2001 Chief Justice Anthony Gubbay had been hounded out of office and in his place sat a judge sympathetic to the government and whose political affiliation clearly lay with the ruling party. This clearly places emphasis on the extent at which the independence of the judiciary has been compromised as some members are prepared to pass judgement in favour of the incumbent government not on the basis of right and wrong but simply to keep their jobs. In respect of the case noted above, it is sad to realise that the initial and original decision was reversed and the newly appointed members of the Supreme Court rubberstamped the illegal invasions by the Government

Another case of the same nature in which the independence of the judiciary as a distinct arm of government was diluted is the case of the Commissioner of Police v Commercial Farmers Union. Clearly the concept of rule of law was discarded in this case. Jeremy Waldo explains that, "Rule of law is the image of a land where everyone is subject to the same rules, where they are applied scrupulously and impartially by the officials who take that as their vacation." In Zimbabwe the principle of rule of law has proven to be nothing more than a romantic idea. The then Attorney General Chinhengo J is believed to have said that the, "decision of whether the question of where and when to enforce court orders is a political and not a legal." In this regard the power of the courts is limited and affected execution of its duties of ensuring justice for all.

It is with misfortune that evidence to support the notion that certain court orders were not respected by the government because some members of the bench have been known to be loyal to the executive making decisions in favour of the ruling party is tangible. A number of judges were offered farms by the government hence the problem arose when the same judiciary was expected to adjudicate fairly on the matters of those deprived of their rights via the Fast Track Land Reform Programme. This impacted negatively on its independence as most of them had to make decisions that did not compromise their loyalty to the top offices of government. Again decision making was no longer based on the principle of wrong and right but on the basis of job security. The adage paying the piper effectively describes the position of the judiciary.

### **3.4 Dubious Polls**

After the year 2000 the case of disputed polls has remained a problem in Zimbabwe. As put across by one respondent, the rise of the Movement for Democratic Change led to an intense political schism in the country. A lot of work needs to be done by the judiciary to convince citizens that the way they handled electoral cases in the period running up to 31 July 2013 was free and fair, in turn regaining confidence of the people in the judicial system. Since 2000 a spasm of dubious polls has been experienced in Zimbabwe with allegations of episodes of vote rigging and intimidation being witnessed. The judiciary has a major task in handling and resolving disputes however give the problem above the decisions by the judiciary have at times been belittled and its judgement disrespected by other arms of government.

In the case of *Tendai Laxton Biti and Another v Zimbabwe Electoral Commission (ZEC) and Another* supports the notion mentioned afore. On the eve of Election Day, the MDC-T Secretary General filed for an urgent court application seeking the courts to convince the ZEC to make available to the party and other election candidates electronic copies of the voters roll. The courts ruled in favour of Biti however ZEC did not provide electronic copies as set by the courts but instead printed copies were made available and were collected at around 6pm Election Day eve. As Makonese et al (2013:25) puts it, “Non provision of an electronic voter’s roll within reasonable time is a serious breach of the Electoral Act.” The judiciary is at the locus of ensuring that the whole electoral cycle is accomplished to the consummation of the citizens by making certain the court contests and petitions are held absent of bias and equitably.

The opposition party The MDC lost the 2013 election and gave three reasons as to why the frontrunner withdrew his court appeal requesting access to materials to prove his case. He believed he would not get a fair hearing as he noted that the Judiciary was biased. The MDC denounced the 31 July re-run and proclaimed it void at the same time withdrawing its petition. MDC-T spokesman Mr Douglas Mwonzora cited that they pulled the petition

because the party believed strongly the case would not be handled in a free and non-partisan way, he went on to note that an earlier petition to the electoral court to get access to the materials that had been overturned for the foreseeable future. Naturally after such turn downs the opposition party had lost trust and confidence in the courts.

Rumors circulating within the corridors of law are to the effect that if Tsvangirai's lawyers failed to turn up for the Concord hearing, they would have been charged with contempt of court, in spite of the fact that the outcome of the case was predetermined. As if that was not enough, after dismissing the opposition's challenge with costs, the honorable judge Chinembiri Bhunu issued a directive for Tsvangirai's lawyers to be arrested, not for contempt of court, but, on allegations of attacking the institution for its partiality in favor of ZANU PF. One respondent was evidently emotional when he stated that since when have lawyers been made to account for views held by their clients and be punished for that? How can the honorable judge convince even a layman in the street that his directive has any merit in the eyes of the law? Does that need a rocket scientist to realize that ours is a compromised institution that has failed to live to its expectations? Or else, the judges underestimate our intelligence to be bold enough to issue such directives that undermine the integrity of the institution? It is like trying to convince citizens into believing that the sun rises from the west and sinks to the east. By seeking redress before the courts following the disputed July elections, the opposition had fallen into ZANU PF's most reliable trap, that is, the compromised judiciary. Her emotions seemed to have tripled when she ended her assessment by stating that the executive is desperate to legitimise this stolen election thereby gaining credibility internally and abroad.

The judiciary ought to safeguard human rights before, during and after elections. 2008, saw Zimbabwe hold its general elections and when a consequent run off was professed Morgan Tsvangirai and the MDC party dropped out of the running claiming violence and voter intimidation by the ruling party, suggestion of petitions did not rise. As Nkiwane (2012:9) puts it, the courts were biased and showed no signs or intentions of giving a ruling that was independent in as much as previous petitions demonstrated the courts inability to efficiently handle with critical cases in a proficient, vigorous and autonomous way. It has

since become a notorious phenomenon that the Presidential Elections Petition yields no electoral justice in Zimbabwe.

Nkiwane (2009:9) places emphasis on the 2002 election being the major setback to electoral justice in Zimbabwe. The “humble” beginnings starting with Chief Justice Godfrey Chidyausiku who withheld judgement on the Presidential election results that had been contested by the MDC candidate for the presidential seat Mr Morgan Tsvangirai. The matter was no light matter as it was an intense Constitutional matter with severe repercussions on the government of the country. Chief Justice Chidyausiku did not see the case as in need of immediate attention hence he reserved judgement ad infinitum. In the end it cannot be wrong to determine that Zimbabwe was under the governance of a President with challengeable legitimacy. Moyo (2002:36) stipulates that, reservation of judgement in plenty of the MDC applications by the Supreme Court was intended to invalidate some of the electoral regulations which the party felt utterly bigoted it to win the Presidential seat in the 2002 Election. On the contrary, however minor, less important cases were granted audience by the same judge and the court in September 2010.

One interviewee noted that Chief Justice Chidyausiku deliberately withheld judgement when Jonathan Moyo was pursuing nullification of the appointment of Lovemore Moyo as the Speaker of Parliament. Surprisingly judgement was issued within reasonable time in favour of the applicant who happened to be a member of the ruling party ZANU PF, coincidence or tactic move? It can be deduced that the judiciary passes verdicts that favour the ruling party even at moments where the opposition party seems to have the upper hand and a better shot at winning the case. Showing the extent at which the judiciary has been affected by the politics of the day as the scenario given above had a great impact on the independence of the judiciary in the passing of judgements. Certain members of the judicial system believe that it is impossible for the bench to maintain their neutrality in an intensely polarized environment with much emphasis being placed on the formation of the MDC. The created environment was meant to depict the MDC as a violent party. For instance is the period after the murder of Cain Nkala and Limukani Luphala in Matebeleland in late 2001. Cause and blame was laid on the MDC as part of the ZANU PF smear campaigning programme.

Be that as it may, in the case of *ZIMNAT Insurance Co .Ltd v Chawanda* it was maintained that the law must be relentlessly on the move and supple to the contemporary economic and social conditions. Thus at times members of the bench are forced by the status quo to indulge in decision making that is in line with the prevalent ether. Sellars (2010:45), Oliver Wendell Holmes a jurist from America implied that, “The felt necessities of the time, the prevalent moral and political theories, and institutions of public policy, avowed or unconscious, even the prejudices which judge share with their fellow-men have a good deal more to do than the syllogism in determining the rules by which men should be governed.”

In retrospect of the previous statement the conclusion that the judiciary is mainly affected by the political status quo of the day can be drawn. In as much as the law is in existence, the community itself has moments of playing part in the judgements the bench passes. Whether the MDC was responsible for the murder of Cain Nkala or not ZANU PF and the society had already labelled them murderers tarnishing the image of the party painting them as criminals cornering the bench to pass judgements they knew went well with the people. The courts have been known to delay the passing of their decisions in cases such as the electoral petitions to ensure the result benefits the incumbent government

### **3.5 An Engrained Dictatorship**

As of 2000, it would seem Zimbabwe has experienced an engrained dictatorship. Makonese (2013:65) defines dictatorship as a government system in which rulers have absolute power and abuse it. This is quite evident in some of the laws enacted by the Executive which were nothing short of oppressive leaving no breathing room for the people as they were applied selectively. The Access to Information and Protection of Privacy Act (AIPPA) was passed at the peak of the 2002 political despotism. As Makonese etal (2013:27) stipulate, Section 80 concerning abuse of journalistic privilege has been the most violated provision by law enforcement agencies, politicians and influential and powerful people resulting in the illegitimate detaining of journalists, intimidation and harassment hindering them from doing their work.



Evidence to support the notion that AIPPA is a piece of legislature inexplicably repressing the civil liberties of the people is quite bountiful. Therefore belief is there that AIPPA was enacted to control the growing criticism of the ruling party through media since 2000. At one point in time, The Daily News was shut down by the government with the police seizing equipment. The directorship was charged with acts of contravening AIPPA as they were said to be operating without registration and qualification. The paper sought to contest the Constitutionality of the Act's constraint and regulatory system. The Constitutional Court nonetheless refused to hear the case claiming the paper had "dirty hands" because apparently it refused to register thus it openly defied the law.

The Public Order and Security Act (POSA) Chapter 11:17 like AIPPA is believed to be oppressing human rights activists together with journalists. Allegations that POSA was selectively applied in the period afore the 31<sup>st</sup> of July 2013 polls have been noted. Makonese etal (2013:25) state that, during the Southern African Development Community lawyers (SADCLA) it was crystal clear that a number of contesting parties refrained from bringing forth their solicitations to conduct campaigns. In Zimbabwe the MDC was deprived of holding its "crossover" rally on the 29<sup>th</sup> of July 2013 as permitted by the law. Nonetheless, after protestors of the affected party ran rampant, consent was contracted but came with stern necessities making it unmanageable for the party's enthusiasts were denied to "toy- toyi"

The case of Associated Newspapers of Zimbabwe (ANZ) v Media Information Commission is also an illustration of an engrained dictatorship and a predicament in legitimacy. ANZ is the publisher of the Daily News and denying a publishing licence for ANZ was kept in place since 2002. The Shadow Report on African Commission on Human and People's Rights (2007:28) reports that ANZ put efforts to foster for its rights to procedural fairness via the courts but delays and judicial weakness saw the continuous denial of the licence. A period of two years passed and before the Supreme Court handed down their judgement however they ruled in favour of the applicant. Yet another brave and legally sound judicial decision was passed by the High Court after the ANZ applied once again, Justice Omerjee ruled that the police had no right to occupy the premises of the ANZ without a court order. The MIC finding hard to accept took the case to the Administrative Court in October 2013 and Mr

Majuru gave a verdict setting aside the decision of the MIC by proclaiming that the MIC had acted outside the law by turning down the ANZ entreaty for a license.

Application of AIPPA and POSA has had a great effect on the judicial independence in the country. This is so because the belief around the two acts is that they were applied selectively and the court is left with no room to flex their legal muscles concerning the acts as it has become the order of the day. It is assumed that POSA was put in place to be utilised against members of the opposition party to try and reduce their public reach out and AIPPA was intended to restrict free writing against private newspapers and journalists in private press as they in most cases pointed out the errors of the ruling party. Thus to determine that POSA and AIPPA are an infringement to some of the individual rights that the bench ought to safeguard. More so some of the court orders have been disrespected thus in turn affecting the independence of the judiciary. In as much as rule of law is very important for the independence of the judiciary, the courts have moments in which, as noted above, have passed at times what can only be described as brave and well-reasoned verdicts contrary to superior courts who have only complied with the needs of the Ruling party.

### **3.6 Conclusion**

The unaltered conclusion is that Zimbabwe experienced a corroded separation of powers and rule of law during the period under review which in turn diluted the concept of judicial independence. An unhealthy level of political meddling in the justice delivery system and the judiciary in Zimbabwe. As shown by the findings above, political predicaments incorporated impartiality in the judiciary during 2000-2013. Given the challenges emphasised afore that led to the failure of the judiciary to act as a vanguard, Chapter 4 will note possible recommendations.

## **Chapter 4**

### ***CONCLUSIONS AND RECOMMENDATIONS***

#### **4.1 Introduction**

The above exploration examined the impact of political predicaments that arose as a result on the infringement of judicial independence in Zimbabwe. The study put into perspective the nature of political crises that the nation encountered and thoroughly scrutinised the effect they had on the judiciary of the country. The purpose of this Chapter is to try and congest and put in a capsule the inquiry and the logical inferences thereof. Together with the inferences are anticipated recommendations that could be useful in flattening some of the controversies circling the independence of the Judiciary in Zimbabwe.

#### **4.2 Important Conclusions**

The search above sought to scrutinize the effect of political predicaments on the independence of the judiciary during the period under review. Indications show that the political crises had a negative impact on the judicial independence. As shown by some of the verdicts passed in favour of the government not to mention how some verdicts were disrespected. The crises that arose include the epidermis of the Fast Track Land Reform and visibility of an engrained dictatorship among others. The fast track land reform programme that was carried out was a clear illustration of how the principle of rule of law has been washed away. Rule of law is a concept that encompasses the idea that no man is above the law and that judicial pronouncements should be protected. However the land reform put the undermining of powers of the courts by the war veterans and certain members of the public on the spotlight. Judges' failure to give an effective judgement was also engineered by the fact that some of them had received farms as gifts thus expecting them to be objective was a superfluous notion. This impinged a sense of allegiance by members of the bench to the

mandatory government. The donation of gifts is against the Constitution of Zimbabwe concerning judicial conduct and this in a way is meddling.

A lot of concern arose in the case of contested polls in Zimbabwe. Judicial independence has been hindered because of the diverged political atmosphere since the rise of the opposition party The Movement of Democratic Change. Because of the inability of the bench to be objective a lot of political parties in Zimbabwe have lost their faith in the courts. More so the MDC has been labelled the leading party in cases of violence thus the judicial independence concerning complaints by the party have been put in disrepute. An example would be the death of Cain Nkala when he was murdered, blame was already put on the party even before the commencement of investigations. Clearly the independence of the judiciary has been tainted by the politics of the day. The Judiciary has a lot to do to restore the trust of the people to prove that their execution of duties is fair and objective.

Dominant to the idea of judicial independence is the appointment and the exclusion of judges from tenure. These doctrines are two sides of a coin and have been dominated by the executive leaving room for the appointment of the bench to be based on parochial grounds. This is so to ensure a sense of allegiance from the bench after the 2000 reconstruction. Presidential appointments have an effect as some members of the bench feel obligated to give decisions that go in favour with the government in politically nurtured issues.

An engrained dictatorship has also been the cause of a biased judicial system in Zimbabwe. Acts of parliament like AIPPA and POSA are alleged to have been activated to nail down opposition. Despite the fact that some of the acts of parliaments violate human rights, the courts hardly have room to act as a precursor. The courts have at often number of times failed to protect the majority against government abuse thus the hands of the bench are tied leaving the populace vulnerable to dictatorial tendencies. The final thought comes down to this, the political predicaments encountered by the country between 2000 and 2013 had a negative impact on the independence of the bench. In as much as the Constitution of Zimbabwe allows for judicial independence, the populace does not share the same sentiments on the observation.

Nonetheless, there are a few cases that give a glimmer of hope to the notion that the judicial system in Zimbabwe is in fact operating on the basis of objectivity during the period under scrutiny. It is rather sad to note that these cases happen to be in the lower courts and not the superior courts but all the same there are cases recorded to have been conducted in a manner of fairness and in absence of bias. At least some members of the bench have tried to uphold the judicial role in fostering for the standing of the law. The case of Justice Mathonsi at the high court in Bulawayo and Mr. Majuru of the Administrative Court to mention a few shows that a few judges may still be immune to the influence of the Executive.

### **4.3 Recommendations**

For the nation to achieve judicial independence there is prerequisite to have a self-regulating Judicial Service Commission (JSC) that is objective. The JSC is consulted by the Executive in the making decisions concerning appointment of members of the bench. In a perfect world this would work however the problem comes from the fact that the JSC is handpicked by the President himself. This merely forms a chain of sympathisers toward whatever political stance the President decides to take. Therefore no politician should be given the dictate to appoint members the bench. Appointment by the Executive or anyone holding political office only instils a sense of allegiance to the appointed paving way for them to pass favourable judgements to those they owe allegiance. The Judicial Service Commission should be restructured to ensure exemplification and impartiality.

The bench ought to be well remunerated to deter from economic and financial pressure in passing verdicts. Certain judges who received gifts from the government did so as a result of the deteriorating economic situation. Acceptance of gifts while carrying out duties in office by the bench is completely deplored by the Constitution of Zimbabwe. Hence well remunerated judges may have the guts to avoid incidences bias judgements and throw away bribes.

In correlation to the matter of bribery there is also need for an impartial watchdog institution. The Anti-Corruption Commission needs to be strong to ensure that the eradication of corruption is achieved; making sure a thorough monitoring of all arms of government is carried out.

To protect the Judiciary from meddling by the Executive and the Legislature when faced with a politically sensitive matter, the removal of the bench should be passed by both houses of the parliament. An illustration where this has proved effective is the case of the United Kingdom, judges of the high court and the Supreme Court cannot be excluded from tenure without an address passed by both houses of assembly. This is very significant as transparency is guaranteed.

Amendments to acts like POSA and AIPPA need be made as they have a tendency to impinge on the rights of the people the courts ought to be shielding. Should these acts be amended friction and tensions between the judiciary and the executive ought to diminish. In all honesty POSA and AIPPA have no place in an acceptable democratic society as they infringe upon individual rights the courts fight to protect. A great need to de-politicise the criminal justice system and cease Executive interference is visible in the context of Zimbabwe. Power ought to be derived from the people for the judiciary to carry out their duties constitutionally in the absence of bias.

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## **Appendix**

### ***Interview questions***

1. How best would you describe judicial independence?
2. What is your view on judicial independence in Africa?
3. Do you believe there is judicial independence in Zimbabwe?
4. In your opinion does the constitution of Zimbabwe thrive to uphold the principle of judicial independence?
5. How have instruments have law hindered members of the bench in executing their duty
5. What are the effects of lack of judicial independence within a state?
6. How has Zimbabwe catered for the principle of judicial independence?
7. What can a state do to improve the independence of the bench?

# MIDLANDS STATE UNIVERSITY

## FACULTY OF SOCIAL SCIENCES

DEPARTMENT OF POLITICS AND PUBLIC MANAGEMENT

### GUIDELINE FOR MARKING DISSERTATION

ITEM UNDER OBSERVATION	COMMENTS	SCORE
<b>Title [10 marks]</b> <ul style="list-style-type: none"><li>• Is the title clear and precise?</li><li>• Does the title expose the problem under investigation?</li></ul>		
<b>Abstract/Introduction [10 marks]</b> <ul style="list-style-type: none"><li>• Does the abstract successfully bridge the gap between the title and subject?</li><li>• Does the student demonstrate knowledgibility about the nature, problem and purpose of study?</li><li>• Have the objectives of the study been clearly stated?</li><li>• How relevant is the literature reviewed and theories used?</li></ul>		
<b>Content [50 marks]</b> <ul style="list-style-type: none"><li>• Are the chapters well laid out and coherent?</li><li>• Does the work show the use of relevant research methods?</li><li>• Is the evidence authentic?</li><li>• Is there evidence of</li></ul>		

research?		
<b>Conclusion/ Recommendation [10 marks]</b> <ul style="list-style-type: none"> <li>• Has the work been resented?</li> <li>• Does the conclusion answer the objectives?</li> </ul>		
<b>Reference [10 marks]</b> <ul style="list-style-type: none"> <li>• Have the references been accurately presented?</li> <li>• Has the referencing style been consistent?</li> </ul>		
<b>Layout, Presentation and Editorial Assessment [10 marks]</b> <ul style="list-style-type: none"> <li>• Is there continuity in the style of writing?</li> <li>• Is there correct use of English in terms of consistency?</li> </ul>		
<b>TOTAL SCORE (100 MARKS)</b>		

Signature of the Supervisor.....Comment on Submission.....

Signature of the Marker.....Date.....

Signature of the Moderator.....Date.....