

**THE IMPACT OF THE 2013 CONSTITUTION ON JUDICIAL
INDEPENDENCE: THE CASE OF ZIMBABWE (2008-2014)**

**BY
DELIGHT MAKONO
(R122793h)**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS OF THE HONOURS DEGREE IN POLITICS AND PUBLIC
MANAGEMENT**

**DEPARTMENT OF POLITICS AND PUBLIC MANAGEMENT
FACULTY OF SOCIAL SCIENCES**

MIDLANDS STATE UNIVERSITY

OCTOBER 2015

Dedications

To Jehovah Jireh, my provider. You were so faithful to me in this academic pursuit and also in my life. You blessed my mind as I read. My life is therefore a testimony of your love and I am amazed by what you have done to me. You have raised me from the grass to where I am now. Thank you Lord... I sing Ebenezer-1 Samuel 7 v 12.

To my family and friends...with lot of love. Jah bless you..

Acknowledgements

All things are possible through Christ who strengthens me, without the Lord I would never have been able to achieve any of this. I am eternally grateful for His never failing love.

Profound gratitude goes to my family who always supported me throughout the years of my study. To my beloved parents, thank you for the love, warmth and advices concerning life; you always encouraged me to be someone and you never stopped believing in me. To my brothers and sisters, thank you for the sacrifices that you made for me to be what I am today. To Mr/Mrs Wilson Makono, thank you for the love and support, I am very grateful. You played a crucial role and labored to make my goal of becoming a Politics and Public Management degree holder achievable. I will always love you guys!

I also extend my profound gratitude to my supervisor Mrs Mutasa for his hard work. Thank you for your patience and guidance in helping me complete my dissertation.

To Mr Linington, Professor Sachikonye and Professor Madhuku as well as Mr. Pinduka thank you for taking time out of your busy schedule to attend to my interview questions.

Abbreviations and Acronyms

CCI	Constitutional Commission of Inquiry
CJ	Chief Justice
EU	European Union
GPA	Global Political Agreement
JSC	Judicial Service Commission
LHC	Lancaster house constitution
MDC	Movement for Democratic Change
NCA	National Constitutional Assembly
PDC	People Driven Constitution
USA	United States Of America
SA	South Africa
SADC	Southern African Development Community
ZANU PF	Zimbabwe African National Union Patriot Front
ZIDERA	Zimbabwe Democracy Recovery Act
ZLHR	Zimbabwe Lawyers for Human Rights

ABSTRACT

This research analyzed the impact of the 2013 constitution on judicial independence in Zimbabwe from 2008 to 2014. This study was taken against the contention that the 2013 people driven constitution is just a replica of the Lancaster House constitution which gave the executive branch to override the activities of the judiciary arm to the extent that the judiciary ends up operating as an extension of the executive. The major cause for failure of the Lancaster House Constitution was the fact that it was riddled with the provisions which allowed the president to meddle in the activities of the judiciary. The researcher utilized the notion of separation of powers and the realism theory, this was employed in a bid to have a better understanding of the concept of judicial independence as well as some challenges which hinders its full realization in Zimbabwe. The research is highly qualitative and in sampling the respondents, the study utilized purposive sampling technique. The study concludes that, even though the 2013 constitution brought with it some positive changes, it is still detrimental to judicial independence because it still permits the executive particularly the president to meddle in the activities of the judiciary. The researcher calls for the need to further improve the freedom of the judiciary in the constitution through including provisions that distances the executive from the activities of the judiciary. The study recommends that there is need to raise awareness to the public on issues pertaining the constitution itself and the legal framework surrounding the judicial system. The research also suggests that there should be a provision in the constitution that guarantees the budget of the judiciary as a percentage of the national budget.

Table of Contents

Dedications.....	1
Acknowledgements.....	2
Abbreviations and Acronyms.....	3
CHAPTER ONE.....	9
1.0 Introduction.....	9
1.1 Background of the problem.....	9
1.2 Statement of the problem.....	13
1.3 Objectives of the study.....	13
1.4 Research Questions.....	14
1.5 Justification of the study.....	14
1.6 Literature Review.....	15
1.7 Methodology.....	20
1.7.0 Introduction.....	20
1.7.1 Research Design.....	21
1.7.2 Sampling.....	22
1.7.3 Data Collection.....	22
1.7.4 Data Analysis.....	23
1.7.5 Delimitations.....	23
1.7.6 Limitations.....	24

1.8 Conclusion.....	24
CHAPTER TWO.....	26
2.0 LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK	
2.1 Introduction.....	26
2.2.1 The doctrine of separation of powers.....	26
2.2.2 Separation of powers: case of USA.....	29
2.2.3 Judicial Independence.....	30
2.2.4 Judicial Independence vs separation of powers.....	37
2.3 CONCEPTUAL FRAMEWORK	39
2.3.0 Introduction.....	39
2.3.1 The Concept of Separation of powers.....	40
2.3.2 Realism Theory.....	43
CHAPTER THREE.....	45
DATA PRESENTATION AND ANALYSIS.....	45
3.1 Introduction.....	45
3.1.1 Understanding the concept of judicial independence.....	46
3.1.2 The nexus between judicial independence and constitution.....	48
3.1.3 Judicial independence in Zimbabwe prior to the 2013 constitution.....	50
3.1.4 2013 Constitution vs judicial independence in Zimbabwe.....	54

3.1.5	The Judicial Service Commission in Zimbabwe.....	55
3.1.6	The appointment of judges in the 2013 constitution.....	56
3.1.7	Removal of judges.....	58
3.1.8	Remunerations.....	59
3.1.9	Case Study :judicial independence vis-a vis Political cases.....	60
3.1.10	Other Factors affecting judicial independence.....	61
3.2.0	Conclusion.....	61

CHAPTER FOUR

4.0 RECOMMENDATIONS AND CONCLUSIONS

4.1	Recommendations.....	66
4.2	Conclusions.....	67

BIBLIOGRAPHY.....	68
--------------------------	-----------

APPENDIX A: INTERVIEW GUIDE.....	70
---	-----------

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the problem

The declining relationship between the judiciary and the executive deteriorated in 1999 after the army locked up the editor of the Standard newspaper in Zimbabwe, Mark Chavunduka, and a journalist associate Ray Choto. The arrests took place after the publications by The Standard proclaiming that twenty-three army officers had been locked up for trying to incite an oust of the government. The High Court of Harare ruled thrice without success that the editor had been locked up unlawfully and ordered his prompt release. The Defence Minister or his legal representatives never appeared in court to explain their renunciation to abide by the rulings. Instead of complying with the court rulings, the Permanent Secretary of Defence issued a statement that they could not be directed by the courts but they were going to progress at their own pace. Choto was later taken into police custody (kubatana.net, 2004). This move by the military was unlawful since it was in opposition to the international law which outlaws the trying of civilians by the military.

In 1999, the reformist movements exerted pressure on the government to introduce reforms that would result in a truly democratic national constitution. The Constitutional Commission of Inquiry (CCI) was tasked to draft a constitution; this action was divergent to what was projected by the newly formed Movement for Democratic Change (MDC) and the National Constitutional Assembly (NCA) of choosing a liberated board which was not politically allied to any political party. USAID (usaidlandtenure.net) states that the prime purpose of the 2000 constitution was to allow for compulsory attainment of land without compensation as well as confining rights. People voted against the constitution and when

the government realized that the constitution had failed, it went on to introduce the fast track land reform programme.

Many judges challenged the constitutionality of the programme and ordered the people who had taken the lands belonging to the whites to leave within 24 hours and efforts were made for the government to follow the right procedures if it really wanted to redistribute land but the Executive branch never cooperated and proceeded with the implementation of the policy. The judiciary ruled that the people who had engaged in the land invasion were to be brought to justice and those who were arrested were to be charged for their wrong doings. In response to this, the president issued the Clemency Order No.1 which granted amnesty to those who had committed atrocities, tortured and assaulted people during the land invasion period and ordered that no new investigations and prosecutions were to take place into their crimes. The actions of the president were also against the internationally set standards for example principle 2.24 of the Mount Scopus Approved Reviewed International Standards of Judicial Independence of 2008 which stipulate that the authority of pardon should be applied carefully so as to avoid its use as a rubber stamping tool in the passing of judicial decisions. The president's action reduced the Judiciary to a mere formality since its decisions were never considered.

Judges who challenged the legality of the land invasion and condemned the government's actions were publicly criticised and their professionalism was challenged by the top government officials and were accused of being unfair and biased towards the white farmers, most of them were harassed and some forced to resign and many fled into exile. Rugege (2005:414) says in 2001, the then Chief Justice Gubbay, Justice Ebrahim and a number of senior judges were harassed and forced to step down for attempting to refute the unconstitutional move by the government that infringed citizens' rights with respect to the seizure of white farms by the Mugabe regime. The war veterans disturbed the operation of

the judges by invading the Supreme Court and threatened to kill the judges in 2000, the Executive never condemned their actions.

The Human Rights Watch (2008) says after the resignation of the majority of judges, the courts were packed with ZANU –PF members. Robertson (2014:5) also supports this when he says, since 2000, President Mugabe ‘bribed’ the judiciary, packed the courts with Zimbabwe ZANU-PF followers and handed out pieces of land and goods to guarantee judges loyalty. Landsberg (2007:334) says it is also predictable that a judge whose decision rest upon the good graces of the government is going to rule in favour of those who are in power thus illuminating the dangers of the nomination of judicial officers by the ruling political party, on this case ZANU-PF. Amnesty International quoted in Rugege (ibid) indicates that the harassment of the judiciary in Zimbabwe continues, where there is crisis over the rule of law, characterised by continual infringement of court orders, harassment of judicial officers and the politicization of police remains unresolved. Matyszak (2006:334) in Manyatera and Fombad (2014:90) states that the post 2000 political developments reinforced the conception that the executive was packing the judiciary with political appointees.

In 2008, Zimbabwe found itself in a milieu of economic and political crisis. This was because of the sanctions imposed on it by United States of America (USA) and European Union (EU) which became known as the Zimbabwe Democracy Recovery Act (ZIDERA) for its unconstitutional actions of 2001. There were election disputes in 2008 between President Mugabe and Tsvangirai and these disputes led to political violence. Many people lost their lives and their properties were destroyed. During that time there was ‘no justice

under the law' because the judiciary failed to play its role effectively due to political interference.

During the period of political violence, the Southern African Development Community (SADC) intervened and sent former South African president Thabo Mbeki to intercede between the warring parties which are ZANU-PF and MDC and this resulted to the creation of the Global Political Agreement (GPA). Article 6 of the GPA provided for the need to promulgate a new constitution. Manyatera and Fombad (2014:89) allude that the political havoc that Zimbabwe went through affected most of its institutions, especially the judiciary and that is the reason why it was one of the targets for adjustment during the last constitution-building process that recently led to the adoption of the so-called people driven Constitution after holding the referendum plebiscite on the 16th of March in 2013.

1.2 Statement of the problem

Despite the role played by the GPA to facilitate the writing of the 2013 Constitution, the general populace, civil societies and the international society still have mixed feeling towards the new constitution on the extent to which it promotes judicial independence. Some are claiming that it is the replication of the Lancaster House Constitution (LHC) where the ruling political elites could dictate judiciary decisions which resulted to the dismissal of judges, packing of the bench with the ruling party's members whilst some have claimed that there are some new changes and new provisions which promotes the independence of the judiciary in the 2013 constitution.

Ginsburg and Ngenge (2014:29) praise the constitution when they state that Zimbabwe's new charter is incredibly progressive and generous in its guarantees for judicial independence due to the new changes it introduced which were not found in the Lancaster

House Constitution. Contrary to this, Chiduzza (2014; 386) finds some faults in the new constitution, he says the current constitution is silent on whether the Chief Justice (CJ) should seek guidance from the JSC in the appointment of temporary judges of the court therefore there is a leeway that the CJ may be lured to make appointments suggested by the executive board. This discloses that there are different perceptions towards the current constitution as some scholars tend to acknowledge the improvements on judicial independence basing on the principle of separation or devolution of powers. Therefore it is the duty of this research to examine whether the 2013 Constitution improved judicial independence or not.

1.3 Objectives of the study

- To establish the meaning of judicial independence.
- To examine the state of judicial independence prior to the 2013 Constitution.
- To examine how the 2013 Constitution improved the independence of the judiciary in Zimbabwe
- To suggest some measures which can be taken in order to address the loopholes which are still preventing the full realisation of judicial independence.

1.4 Research Questions

- What is the meaning of the term judicial independence as well as the nexus between judicial independence and the constitution?
- What was the state of judicial independence before the 2013 constitution?
- Does the 2013 Constitution adequately cater for judicial independence
- What measures can be employed to ensure the separation of the judiciary from other arms of state.

- What is the duty of the constitution in promoting judicial independence

1.5 Justification of the study

The chief focus of this study is to have an in-depth understanding of the degree to which the 2013 Constitution endorses the liberation of the judiciary system because when the constitution was put into action, there was mixed perceptions towards the Constitution pertaining the level to which it improved judicial independence in Zimbabwe. This is because a sovereign judiciary system is one of the major tenets of a democratic government or good governance as prescribed by the principle of separation of powers. Thus the researcher seeks to examine the extent to which the 2013 Constitution improves the freedom of the judiciary considering the fact that it was not well provided for in the Lancaster House constitution to the extent that it ended up operating as an extension of the executive since it could be easily manipulated by the ruling political party in a bid to serve its own goals. The study will compare and contrast provisions of the Lancaster House constitution and the 2013 People Driven Constitution in order to see the extent to which the current Constitution has improved judicial independence as compared to the old one. The study will also proffer some measures which can be employed in order to fully promote judicial independence in Zimbabwe. This research will be useful to the majority of Zimbabweans and civil society organisations since they also take part in the constitution making process, parliamentarians because they play a significant role when amending a constitution as well as politicians and other countries for peer learning purposes. The research will also pave a way for political scientists and students to clearly identify the loopholes found in the Lancaster house constitution in protecting judicial independence and the improvements made in the People Driven constitution based on the principle of separation of powers as well as proffering

measures that can be taken for the protection of the judiciary branch in future constitution making processes.

1.6 Literature Review

It takes Robertson (2014; 19)'s view that, "States should take specific measures guaranteeing the independence of the judiciary, protecting judges...in their decision making through the constitution.. Ginsburg and Nyenge (2014; 25) allude that, "...the scope of judicial power and protections for judicial independence is defined by the constitution...and can be a contentious issue in constitutional design". Keith (2002; 196) shows the importance of the constitution in ensuring the independence of the judiciary when she says the constitution guarantees the terms of office, regardless of whether appointed v or elected, and restricts the removal of judges. This means that for people to exercise their freedom and rights without infringements there should be a constitution which fully promotes and protects the independence of the judiciary. Redish (1999;2) states that the constitution plays a important role in protecting the independence of the judiciary because it provides certain grounds under which the judicial officers can be removed from their positions as well as providing avenues of judicial discipline.

In basic terms, a constitution is basically a set of rules or an accord governing the endeavour of a state, how it will be run and how the members will work mutually (www.grantnet.com). Melton and Ginsburg state that prior to 1985, more than 550 constitutions had been in black and white around the world and 60% enclosed zero or only one of the features that we identify as enhancing the independence of the judiciary, this means that many states are

putting an effort to enshrine provisions meant to protect the independence of the judiciary in their constitutions.

McNollgast (2006; 108) defines judicial independence as a product that develops from the strategic affairs among the judiciary, legislature and the executive branch not the automatic result of legal or legislative provisions that set up the tenure for judges, nor is judicial freedom limited by the checks and balances or legal ethnicities. This means that even in Zimbabwe also, the judiciary arm of state should be seen making decisions autonomously and separately from meddling of other arms. This is also supported by Singh (2000; 247) when he notes that, judicial independence primarily means the liberation of the judiciary from the executive and the legislature. Rugege (2005) alludes that judicial independence is a collectively recognized principle in democratic societies and also an obligation for a society to function on the basis of the rule of law.

The first principle of the Latimer House Principle on the Three Branches of the Government (2003; 10) states that judicial activities should be made on the basis of clarified standards and by a publicly established process, appointment on excellence and equality of opportunity for all who are competent for judicial office. Bridge (2007; 80) states that judges should be chosen exclusively on merit, from qualified persons of exceptional character with respect to the need to encourage diversity. Rugege (2007; 417) has it that the way that judges are appointed has a bearing on their freedom, so it is the duty constitution to clearly specify how the judges should be selected so as to protect the freedom of the judiciary. Section 143 (1) (a) of the Ugandan Constitution states that a person may be appointed as a Chief Justice only if he or she has worked as a judge of the Supreme Court of Uganda or a court of law with related authorities or an individual who has been an activist for twenty years. This shows the difference when compared to the Zimbabwean system especially before the 2013 constitution for example Zaba (2012) in her

analysis of the draft constitution which was later ratified and became the 2013 constitution, praises it when she states that, "...the appointment of the chief justice and, the deputy , the judge president of the High Court, prosecutor-general and all other judges will now be done by the president from a list of three candidates submitted to him by the Judicial Services Commission (JSC)". These developments mark a shift from the LHC where the president had the power to easily appoint judicial officers.

Chiduzo (2014:3 72) states that the proper classification of the least qualifications for appointment of the judiciary incentives the autonomy of the judiciary branch because it limits the chances of manipulation by those authorized to make judicial appointments in Zimbabwe where the president has the authority to approve or reject the judges chosen by the JSC. However, Chiduzo (ibid) also argue against this stating that the interference of the president in the activities of the judiciary limits the importance of the advertisements of the judicial vacancies provided for in section 180 (2) (a) which is followed by the public interview in which names of the successful candidates are the forwarded to the president who handpicks the one he wants. This overrides the whole process of devolution of power and the notion of rule of law since the president has the overall decision making authority despite the fact that the executive arm of state should be limited by law to manipulate and control the activities of the other branches.

Ginsburg and Ngenge (2014:29) state that Zimbabwe's fresh charter is very liberal and generous in its promotion for judicial autonomy, due to the new provisions which were not stated in the Lancaster House Constitution. Chiduzo (www.saflii.org) says the powers granted upon the Constitutional Court will furthermore assure that checks and balances. If these powers are well applied by an independent and neutral judiciary can prescribe the abuse of power. Chiduzo (2014:373) alludes that the Constitutional Court will deal only with cases of anticipated violations of constitutional rights. However, CJ Chidyausiku in

Linington (2001; 148) states that, "...we tend to think that the liberation of the judiciary means just independence from other arms of state. But it means more than that; it means freedom from political influence, whether employed by political organs of state or by the public or brought in by the judges themselves through their involvement". This means that the introduction of the constitutional court without putting into place proper measures to protect it from political interferences does not bring any change.

Ginsberg and Ngenge (2014:29) questions the idea of the Supreme Court which is currently working as the constitutional court for a temporary period of time in Zimbabwe stating that the clause permits the ruling party to serve its term without being disturbed by the Constitutional Court judges because they are likely to be loyal to the political leaders because they were chosen by the president before the introduction of the constitutional court by the 2013 constitution. Ginsberg and Ngenge submit that fresh changes should be made in line with the way the constitutional court operates and suggests that the constitutional judges should operate separately from the Supreme Court. Principle IV of the Latimer House Guidelines on the Three Branches of the Government places values and emphasize on averting the inappropriate removal of judges from office.

Madhuku (2010; 96-97) alludes that, If a judge can simply be removed from office, it matters very little that the selection process is rigorous and free from political influence. If judges enjoy acceptable security of tenure, it may offset the effects of a faulty appointment system in that once appointed, a judge who knows that it is difficult to remove him/her from office may develop an independent line, irrespective of the original motivations for his appointment. This means that, that there should be clear set procedures under which the judicial officers should be removed from office in Zimbabwe for judicial independence to

prevail. Chiduzza (2014; 387) says Section 187 (4) which authorises the president to set up a tribunal to inspect suspicious judges is unacceptable because there is a probability that the judges might be removed from office for political grounds since the tribunal is set up by the president. Chiduzza (ibid) gives an example of South African (SA) constitution where removing a judge from due to frivolous, vexatious or political issues is very difficult as compared to the Zimbabwean under the Lancaster House Constitution where the judges could be removed on political grounds. Section 177(1) (a) of the SA constitution states that for a judge to be removed from it requires the JSC to make a finding that a judge suffers from incapacity, is grossly incompetent or is guilty of misconduct. So the JSC should be given platform to perform its duties within the legal parameters without the prying of the president and the executive into their territory. This shows that it is the duty of the constitution to set clear standards which should be followed when removing a judge in order to protect the independence of the judiciary.

The Beijing Statement of the Principles of the Independence of the Judiciary publicised in 1982 says, "... to guarantee that all persons are able to live securely under the rule of law, to endorse, within the proper limits of the function the observance and realization of human rights and to administer the law fairly among persons and the state, there should be the judicial independence". Redish (1999:7) states that in order to certify fair treatment of individuals, litigants, to assure the practicality of judicial review, to preserve the integrity of the judicial process and to provide a means to legitimise the actions of the political branches, the independence of the judiciary should prevail. Chiduzza (2014;3) also alludes that a judiciary should be independent when deciding a case because in order for justice to prevail, the judicial officers should not have in mind the status of any party, fear anything would

result from the decision, seek to favour any party or harbour ill-will against any party. This can be seen for example in the case of Nixon's Water Gate Case in America . The Supreme Court made this ruling without considering the status of the person but they gave their judgements basing on the law. So judicial officers should have a mind free of anything that would be put at risk his or her impartiality in decision making; so the only influence he or she cannot free himself or herself from is that of the law hence it is imperative to enshrine constitutional provisions which insulate the judiciary from external control.

1.7 Methodology

1.7.0 Introduction

This chapter presents an overview the sampling measures of the sources of information, followed by a sketch out of data collection methods used throughout the study and how this data will be analysed and winds up with an acknowledgment of limitations of the study.

1.7.1 Research design

A research design is a detailed delineate of how an investigation took place. A research design classically include how data was collected, what instruments were employed, how the instruments were utilised and the anticipated means for analyzing data collected (www.businessdictionary.com). Qualitative research techniques which were used in the study are questionnaires and interviews. Winsker (2001) says that qualitative paradigm presupposes that reality is subjective, where the research interacts with the researched phenomena.

Babbie 1986 states that, qualitative approaches have the advantages of flexibility, in-depth analysis and potential to observe an array of aspects such of social situation. The qualitative research was used because the research intends to explore subjective experiences and meanings linked to the experiences of various stakeholders and actors in relation to the independence of the judiciary. The qualitative approach also allows a thorough probe into the underlying principle behind the behaviour, motivations and choices

of provisions enshrined in the 2013 constitution and this was useful in extracting the data about the impact of the new constitution on judicial independence.

1.7.2 Sampling

The researcher made use of purposive sampling technique. Oliver (2005) states that purposive sampling is a form of non-probability in which decision regarding the persons to be included in the sample are to be taken by the researcher, based upon a multiplicity of criteria which may include specialist knowledge of the research issue, or capacity and willingness to take part in the research. Purposive sampling was preferred by the researcher because of the need to assemble knowledge from individuals that have expertise. This made the researcher to interview those considered as rich sources on the subject that is those who have the knowledge about the impact of the 2013 constitution and judicial independence. The researcher interviewed some intellectuals who possess the knowledge about the constitution and its effect on judicial.

1.7.3 Data Collection

Rouse (www.ons.gov.uk) data collection is a systematic approach to collect information from an array of sources to get a comprehensive and accurate picture of an area of interest. The data collection methods range from In-depth interviews with the relevant key informants to the review of documents and administering questionnaires. In-depth interviews helped to get first-hand information pertaining to the impact of the 2013 constitution on judicial independence. Academia, civic society and experts in the fields of politics and law were also interviewed to provide the technical assessment of the new constitution and judicial independence.

Key informants according to Parson (www.srmo.sagepub.com), refer to the individuals who an interview pertaining to a particular problem is conducted. Key informant interviews are in-depth interviews of a chosen (non-random) collection of experts who are most knowledgeable of the issue or problem under study. Key informant interviews are qualitative formal discussions with the people and its purpose is to collect reliable information. On this study, the key informants are members of members of the NCA and the academia. Documentary review was also utilised in the research. The major advantage of documentary research is that it gives room for comparison whereby the researcher can see

the performance of the judiciary under the previous constitution and the judicial independence in the 2013 constitution

1.7.4 Data Analysis

Content data analysis technique was used to analyze the data from the in-depth interviews and documents that were reviewed. Mouton (2001) says content refers to ‘words, meanings, pictures, symbols, themes, or any message that can be communicated.’ Given that the research is exploratory the content analysis is deemed proper. This involves segmenting information; developing coding categories; and generating categories, themes and patterns.

1.7.5 Delimitation

Delimitation of the study is whereby a researcher describes the boundaries that he or she has set for the study (<https://www.bcps.org>). This study focused on the impact of the 2013 Constitution on judicial independence in Zimbabwe therefore it is limited to Zimbabwe. The research focused on judicial independence from 2008-2014.

1.7.6 Limitations

Limitations are influences that the researcher cannot control. In other words they are shortcomings, conditions or influences that were beyond the researcher’s control (<https://www.bcps.org>). Lack of resources is one of the challenges which were faced by the researcher. Getting access to some judicial documents which reveal some changes since the 2013 Constitution came into place was a herculean task given the rigorous and bureaucratic procedures the researcher had to follow in order to get the information. Getting information pertaining to the independence of the judiciary under the 2013 Constitution was also thorny because civil servants vow to the Official Secrets Act. Given the nature of the subject under study, information might be biased because some targeted interviewees were not willing to provide information about the subject under study. Some interviewees feared to discharge information deemed sensitive and where necessary, the researcher shielded their identities. The researcher also faced some difficulties to see whether what is stipulated in the constitution tallies with what is being done on the ground because most of the provisions are not yet put into practice for example the removal of judges from office.

1.8 Conclusion

This chapter has sketched out how the study was carried out. It has uncovered the theoretical justifications of the methods and approaches utilized in the study. It also

uncovers the method employed in gathering data and winds up with the study delimitation and limitations

BREAKDOWN OF THE STUDY

The study is broken down into four chapters which are as follows:

CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE STUDY.

This section will offer the problem statement, objective of the study, research questions, research methods, limitations and the study's delimitations. It is an indication of how the study will be undertaken.

CHAPTER 2: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

The section will be an audit of past examination findings and a few additions to the study.

This section will explore a deep analysis on the impact of the constitution in upholding the principle of separation of powers as a key concept in facilitating judicial independence. The part will outline the theories of the study.

CHAPTER 3: DATA PRESENTATION AND ANALYSIS

This chapter presents data findings. It will go to give a detailed analysis of the results , limitations as well as implications of the study.

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

This chapter will sum up everything about the impact of the 2013 constitution on judicial independence. It will proffer recommendations to the study.

CHAPTER TWO

2.0 LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter reviews literature on the impact of a constitution on judicial independence in Zimbabwe and elsewhere. It takes Robertson (2014; 19)'s view that, "States should take specific measures guaranteeing the independence of the judiciary, protecting judges...in their decision making through the constitution..." It also draws literature on judicial independence and constitution from internationally set standards on what should be enshrined in the constitution in order to protect judicial independence and also what other scholars say about the Zimbabwean constitution. The research will be also underpinned and guided by the concept of separation of powers. However, for argumentative sake, the study will also factor in Realism theory which has a propensity to argue against the doctrine of separation of powers.

2.2 Literature Review.

2.2.1 The doctrine of separation of powers

The doctrine of separation of powers has advanced subsequent to the works of Locke and Montesquieu as different definitions have been instituted. The idea of separation of powers

partitions the organizations of government into three branches: executive, legislative and judiciary where the executive initiate the laws; the legislature makes the laws; while the judiciary interprets the laws. For Gerwitz (1989) Separation of powers advances majority rule and great administration by guaranteeing that power is not abused in one state establishment or one person. Through components of balanced governance, the tenet counters misuse of power and advances open responsibility and transparency in the exercise of authority by each of the three branches of government. The principle of devolution of powers should be incorporated with the fabric of all great present day constitutions. Separation of powers is both substantive and formal in nature. Substantively, it requires detachment of personnel, and the autonomy of each of these branches in the execution of their authority.

Linington,G (2001), attests that formally devolution or separation of powers requires the institutional division of administrative power into the three branches. It is in this way fundamental that a constitution catch both the formal and substantive elements with a specific end goal to adequately promote decentralization of power. Institutional division of state administration into the three branches executive, legislature and judiciary. Separation of powers (trias politica principle) is a model of state administration where the state is divide into three branches in particular the executive, the judiciary and the lawmaking body. The executive involves the presidency and the cabinet, commanded with the power to execute enactment. The legislature involves the parliament, commanded to establish laws while the judiciary includes the courts,mandated to administer the law.

Haq ,U (2010) affirms that in a bid to capture the idea of devolution of power , a constitution should unmistakably demonstrate this institutional division of administrative power into these three branches subsequently, Bridge (2007)Guaranteed freedom of each of the branches from the impact of one another. The doctrine of separation of powers requires that these three branches be autonomous of one another and that they give oversight of one another. Keeping

in mind the end goal to guarantee the autonomy of each of these branches of government, the convention of devolution of powers requires that no same person(s) ought to function as a member of more than one branch.

In spite of the fact that for purposes of coordination of government capacities, it gets to be vital that sure people work in more than one branch of government. For example, a cabinet minister (who is a member of the executive) can double up as an individual from the legislature with the aim to make regulations (known as subordinate enactment) that give flesh to the principal legislation instituted by parliament. On the other hand, there should be instruments to guarantee that such mandate is not mishandled. The principle of separation of powers additionally requires that the three branches of government must check against one another, to keep away from misuse of power. In this way, it is the constitution's obligation to make instruments that entirely screens the framework.

Greg Linington (2012). Suggests that the judiciary must check against the legislature and the executive to guarantee that those branches are exercising their power suitably. Similarly, the executive must do likewise as for the judicial. Case in point, in South Africa, Canada and the United States of America, the judiciary has the power to review the constitutionality of the legislation passed by parliament or regulations made by cabinet ministers as well as the lawfulness of the decisions made by the executive. In the same nations, the law making body is naturally engaged to give oversight of the executive, requesting accountability concerning the decisions made by the executive and the judiciary. Autonomous, access to sufficient resources, Separation of powers requires that each of the three branches of government have free access to adequate resources. This is intended to maintain a strategic distance from a situation where the branch that controls resources uses such power to undermine the

autonomy of other branches. Therefore, the constitution should consequently ensure access to sufficient financing by each of the branches.

2.2.2 Separation of powers: case of United States Of America

The doctrine of separation of powers is clearly expressed in the U.S. Constitution of 1787. Article I vests the legislative powers in Congress, consisting of the House of Representatives and the Senate; Article II vests the executive powers in the president; and Article III confers judicial powers in the Supreme Court and such other lower courts that may be established by Congress. The president is elected separately from Congress for a fixed term of four years and may therefore be from a different party from that possessing the majority in either or both Houses of Congress. He cannot however, use the threat of dissolution to compel Congress's cooperation. The president also exercises control over the judiciary through his power to grant reprieves and pardons for federal offenses, and more importantly, to nominate federal judges.⁶³ The Senate checks the executive further through its right to approve treaties negotiated by the president, as well as its right to approve appointments by the president of ambassadors, judges, and other senior officers. Each House has the right to punish its own members for contempt and thus exercises some form of judicial power. The Senate is allocated additional judicial powers, possessing the sole power to try impeachments. In addition to these internal judicial powers, the Congress has the power to create and regulate the lower federal courts.⁶⁷ Regarding the judicial power, although the judiciary has not been allocated specific or general supervisory powers over the executive, it may use its general equitable jurisdiction to issue writs of mandamus against executive officers to ensure that they perform their constitutional duties. Perhaps the most important judicial check on executive action is the authority to enforce compliance with the constitutional guarantees

embodied in the Bill of Rights, which include the rights to due process of law, freedom of speech, and the right to a jury trial¹. The judiciary also controls legislative action through its power to declare statutes unconstitutional. The common law doctrine of judicial precedent, or stare decisis, enables the judiciary to set precedents that have a quasi-legislative effect. Outside the constitutional arena, however, congressional action can nullify judge-made law. In this way, the American presidential system, instead of isolating each organ from the other two, provides for an elaborate system of checks and balances.

2.2.3 Judicial independence

Ginsburg and Nyenge (2014; 25) suggest that, "...the extent of legal force and insurances for legal freedom is characterized by the constitution...and can be a quarrelsome issue in established outline". Keith (2002; 196) demonstrates the constitution's significance in ensuring the judicial freedom when she says the constitution ensures the terms of office, paying little heed to whether delegated or chose, and limits the evacuation of judges. This implies that for individuals to practice their freedoms and rights without encroachments there ought to be the constitution which completely secures the legal's autonomy. Redish (1999;2) states that the constitution assumes a critical part in ensuring the judicial freedom in light of the fact that it gives certain grounds under which the legal officers can be expelled from their positions and additionally giving roads of legal control.

In basic terms, a constitution is basically a set of rules or an accord governing the endeavour of a state, how it will be run and how the members will work mutually (www.grantnet.com). Melton and Ginsburg state that prior to 1985, more than 550 constitutions had been in black and white around the world and 60% enclosed zero or only one of the features that we identify as enhancing the independence of the judiciary, this means that many states are

putting an effort to enshrine provisions meant to protect the independence of the judiciary in their constitutions.

McNollgast (2006; 108) defines judicial independence as a product that emerges from the tactical interactions among the judiciary, the legislature and the executive not the automatic result of constitutional or statutory provisions that set up life tenure for judges, nor is judicial independence limited by the checks and balances or legal traditions. This means that even in Zimbabwe also, the judicial independence should be seen through the way it interacts with other branches not on the paper. This is also supported by Singh (2000; 247) when he comments that, judicial independence primarily means the independence of the judiciary from the executive and the legislature. Rugege (2005) alludes that judicial independence is a universally recognised principle in democratic societies and also a prerequisite for a society to operate on the basis of the rule of law.

The primary standard of the Latimer House Principle on the Three Branches of the Government (2003; 10) expresses that judicial arrangements ought to be made on the premise of a plainly characterized criteria and by an openly pronounced procedure, arrangement on legitimacy and equity of chance for all who are qualified for judicial office. Span (2007; 80) expresses that judges ought to be selected only on legitimacy, from qualified persons of superb character with respect to the need to support assorted qualities. Rugege (2007; 417) states that the way that judges are designated has an orientation on their autonomy, so it is the obligation constitution to unmistakably maintain how the judges ought to be named to ensure judicial freedom. Segment 143 (1) (a) of the Ugandan Constitution expresses that a man may be appointed as a Chief Justice just in the event that he or she has served as a judge of the Supreme Court of Uganda or a court with related locales or a person who has been a promoter for a quarter century. This demonstrates the distinction when contrasted with the Zimbabwean particularly before the 2013 constitution

for instance Zaba (2012) in her examination of the draft constitution which was later approved and turned into the 2013 constitution, lauds it when she expresses that, "...the appointment of the chief justice, the deputy chief justice, the judge president of the High Court, prosecutor-general and every single other judge will now be done by the president from a rundown of three chosen people submitted to him by the Judicial Services Commission (JSC)". These imprint a takeoff from the LHC where the president could without much of a stretch delegate judicial officers

Chiduza (2014;3 72) states that the minimum's codification capabilities for appointment of the judiciary livens up judicial autonomy in light of the fact that it confines the likelihood of control by those enabled to make legal arrangement framework in Zimbabwe were the president has the power to affirm or dismiss the judges picked by the JSC. Nonetheless, Chiduza (on the same page) additionally reprimands this expressing that the president's contribution in the judicial exercises overrides the the importance of the advertisements of the judicial vacancies accommodated in section 180 (2) (a) which is followed by the public interview in which names of the successful candidates are sent to the president who handpicks the one he needs. This overrides the entire procedure of public interview since the president has the overall say in the whole process.

Ginsburg and Ngenge (2014:29) state that Zimbabwe's new constitution is exceptionally dynamic and liberal in its insurances for judicial freedom because of the new changes it presented which were not found in the Lancaster House Constitution. Chiduza (www.saflii.org) says the powers offered to the Constitutional Court will moreover ensure that balanced governance are connected on parliament and the executive branch of government. On the off chance that these powers are well applied by an autonomous and fair

judiciary system can forbid the misuse of office. Chiduzza (2014:373) implies that the Constitutional Court will bargain just with instances of accepted infringement of protected rights. In any case, CJ Chidyausiku in *Linington* (2001; 148) states that, "...we tend to surmise that judiciary autonomy implies only freedom from the legislature and the executive. In any case, it implies substantially more than that; it implies autonomy from political impact, whether applied by political organs of government or by the general population or got by the judges themselves through their association". This implies that the introduction of the constitutional court without instituting legitimate measures to shield it from political interferences does not bring any change

Ginsberg and Ngenge (2014:29) questions the thought of the Supreme Court which is as of now functioning as the established court for a provisional timeframe in Zimbabwe expressing that the clause allows the ruling party to serve its term without being disturbed by the Constitutional Court judges in light of the fact that they are prone to be faithful to political leaders on the grounds that they were picked by the president before the introduction of the constitutional court by the 2013 constitution. Ginsberg and Ngenge present that crisp changes ought to be made in accordance with the way the constitutional court works and recommends that the sacred judges ought to work independently from the Supreme Court.

Principle IV of the Latimer House Guidelines on the Three Branches of the Government places models and emphasize on preventing the unconstitutional removal of judges from office

Madhuku (2010; 96-97) states that, If a judge can without much of a stretch be expelled from office, it is important to make sure that the procedure is thorough and free from political control. On the off chance that judges appreciate satisfactory security of tenure, it

may counterbalance the impacts of a faulty arrangement framework in that once appointed, a judge who realizes that it is hard to uproot him/her from office may build up an autonomous line, paying little heed to the first inspirations for his appointment.

This means that, that there should be a clear set of procedures under which the judicial officers should be removed from office in Zimbabwe for judicial independence to prevail.

Chiduzo (2014; 387) says Section 187 (4) which empowers the president to set up a tribunal to investigate suspicious judges is unacceptable because there is a possibility that the judges might be removed from office for political grounds since the tribunal is set up by the president. Chiduzo (ibid) gives an example of South African (SA) constitution where removing a judge from due to frivolous, vexatious or political issues is very difficult as compared to the Zimbabwean under the Lancaster House Constitution where the judges could be removed on political grounds. Section 177(1) (a) of the SA constitution states that for a judge to be removed from it requires the JSC to make a finding that a judge suffers from incapacity, is grossly incompetent or is guilty of misconduct. So the JSC should be given platform to perform its duties within the constitutional parameters without the prying of the president and the executive into their territory. This shows that it is the duty of the constitution to set clear standards which should be followed when removing a judge in order to protect the independence of the judiciary.

Linnington (2001; 148) states that the Judicial Service Commission (JSC) should not be subject to the direction of any authority and its decisions require the major concurrence of a majority of all the commission's members. Section 19 provides for the qualities of the members of the JSC, even though they are supposed to be chosen on the basis of merit, the

president plays an important role in the appointment of judges. However, Mavedzenge (2012; 3) states that due to the reduction of the president's influence on the appointment of the JSC, the 2013 constitution presents an opportunity for the appointment of an impartial JSC which in turn will appoint impartial judges and members of the prosecuting authority thus providing an opportunity for judicial independence and observance of the rule of law. Section 90 (1) (d) of the Lancaster House Constitution which gave the president some powers to appoint five out of six members of the JSC but the current constitution gives the president opportunity to appoint only two out of fourteen members of the commission therefore the influence of the president is greatly reduced. Chiduzza (2014; 377) states that section 180 of the current constitution is to some extent is dangerous because even though the president appoints a few members of the commission, the fact that the president has the final authority in the appointment of the judges limits the JSC from executing its duties without being controlled and the involvement of the president in the appointment of the members of the JSC is also dangerous since he has the potential to control them since he have a hand a hand in their appointment. So for the JSC to operate independently, the president should not be given the power to appoint judicial commissioners and can hand that duty to the parliamentarians.

An independent judiciary can be characterised by security of tenure which in most cases should be permanent appointment in the judicial office. The Principle 4,7 of Mount Scopus Approved Revised International Standards of Judicial Independence of 2008 states that the temporary appointment of judges should be avoided as far as possible and it goes on to state that acting judges should be appointed only with proper safeguards secured by law so not to compromise the independence of the judiciary. Principle 11, 1 of the Latimer House Guidelines on the Three branches of Government says the, "Judicial appointments should be

permanent...” Chiduzza (2014;383) states that security of tenure is key to the independence of the judiciary because if judges are appointed for a fixed term there is danger that they will be seen as attempting to please the individuals that have appointed them in a bid to be reappointed if their contract ends. On Section 85 of the Lancaster House Constitution the president was not bound by the JSC in the appointment of judges. Chiduzza (2014; 386) states that the current constitution is silent on whether the Chief Justice (CJ) should consult the JSC in appointing acting judges of the court. So there is a possibility that the CJ may be tempted to make appointments recommend by the executive.

According to the Guide to Judicial Conduct (2013:9), judicial independence is sometimes erroneously perceived as a privilege enjoyed by the judges, while it is in fact a keystone of the system of government in a democratic state. Walker (2012:48), states that a strong, effective and independent judiciary plays a vital role in ensuring that the law reaches all corners of the society. Kornhauser cited in Burbank and Friedman (2002:621) states that judicial independence is very important because, “...it empowers and insulates judges from check or balance by the political branches, especially by the executive”. Singh (2000; 245) states that an independent judiciary is necessary for a free society and a constitutional democracy for the reason that it ensures the rule of law and the realization of human rights and also the prosperity and stability of a society. One can note that, judicial independence should not on paper only but should prevail and should be practiced.

The Beijing Statement of the Principles of the Independences of the Judiciary promulgated in 1982 says, “... to ensure that all persons are able to live securely under the rule of law, to promote, within the proper limits of the judicial function the observance and attainment of human rights and to administer the law impartially among persons and the state, there

should be the judicial independence”. Redish (1999:7) states that in order to ensure fair treatment of individuals, litigants, to assure the viability of judicial review, to preserve the integrity of the judicial process and to provide a means to legitimise the actions of the political branches, the independence of the judiciary should prevail. Chiduzo (2014:3) also alludes that a judiciary should be independent when deciding a case because in order for justice to prevail, the judicial officers should not have in mind the status of any party, fear anything would result from the decision, seek to favour any party or harbour ill-will against any party. This can be seen for example in the Nixon’s Water Gate Case in America in which Nixon, the then American President was found guilty by the Supreme Court of America (http://en.wikipedia.org/wiki/Watergate_scandal). The Supreme Court made this ruling without considering the status of the person but they gave their judgements basing on the law. So judicial officers should have a mind free of anything that would be put at risk his or her impartiality in decision making; so the only influence he or she cannot free himself or herself from is that of the law hence it is imperative to enshrine constitutional provisions which insulate the judiciary from external control. In this regard, the research seek to review the role of the constitution in promoting judicial independence in Zimbabwe thereby filling and rectifying the gap being left by literature in indicating the impact of the existence of the executive branch in the whole policy making process of any country which seek to adhere to the principle of separation of powers .

2.2.4 Judicial Independence vs separation of powers: case of Botswana

As for Mouton ,j(2001) the judicial branch is normally charged with the enforcement of the constitution and other laws, and to ensure that the other two branches act in accordance with them. The ability of the courts to do this is by no means automatic, but instead is heavily contingent upon the judiciary's independence. Keith C.K(2002) has it that, two barometers

typically measure the judiciary' independence personal independence and functional independence. The personal sometimes referred to as the relational independence of the judiciary is reflected by factors such as the nature of judicial appointments and the terms and conditions of service.

The government appoints all the members of the Botswana judiciary to their positions, the executive controls the judiciary. According to the Magistrates' Court Act of 1983, the president, acting in accordance with the advice of the Judicial Service Commission, may appoint qualified persons to any of the five grades of magistrates provided for under that Act, The constitution also empowers the president alone to appoint the Chief Justice, who heads the High Court, but requires the president to consult with and obtain the advice of the Judicial Service Commission in appointing all other judges of the High Court. The same anomaly exists with respect to the Court of Appeal, where the president appoints the judges in consultation with the Judicial Service Commission, but alone appoints the president of that court. It is certainly not satisfactory for a politician acting in isolation to appoint the heads of the country's two highest courts without the benefit of the Judicial Service Commission's advice, and with no constitutional criteria to counter the influence of a desire for political expediency. This provision exposes judges so appointed to political manipulation, therefore placing the independence of the judiciary at risk.

The salaries of judges, the Attorney General, and members of the Judicial Service Commission are charged to the Consolidated Funds which permanently authorizes their compensation and prohibits the government from reducing it arbitrarily to pressure or influence them. Although the government appoints the Attorney General, the independence of the office is guaranteed constitutionally by section 51 (7), which provides that in discharging judicial functions, the Attorney General "shall not be subject to the direction or control of any person or authority. Thus, the Attorney General, although part of the executive

and the legislature, is independent of each. Functionally, judges in Botswana are shielded from threats, interference, or manipulation intended to compel them to favour unjustly a party or the state in legal proceedings. These features of the judiciary system in Botswana clearly indicates the extend to which it adheres to the principle of separation of powers .

From the above assertion it can be noted that , though different schools of thoughts tend to address the nexus between judicial independence and the principle of separation of powers ,a close review to the cases above clearly shows the interference of the executive branch as a key threat to judiciary independence in Zimbabwe like any other democratic state. It is highly the duty of the constitution to safeguard the principle of separation of powers ,thus for judicial independence to prevail ,the functions of the other branches are to be clearly defined and limited to the decisions made in each of the branches and this can only be made possible when each arm of state conduct checks and balances autonomously. The literature under review gave picture on the role of the constitution as a tool of safeguarding judicial independence, however didn't provide for the minimisation of executive powers as well as the need to raise awareness to citizens of the state on issues pertaining the legal framework surrounding the judiciary system ,thus for justice to prevail in any society there should be mass understanding of rules and regulations that binds the social, economic and political activities of the society. This also helps in defining the duties and limits of each organ of state thereby promoting devolution of power , and independence.

2.3 Conceptual Framework and Theoretical Framework

2.3.1 The concept of Separation of Powers

To understand the impact of the constitution on judicial independence, it is imperative to first understand the underpinning conceptual considerations .The doctrine of separation of

powers rooted in the writings of the popular French philosopher Montesquieu shows the role played by a constitution in promoting judicial independence how the independence of the judiciary can be achieved. Mawere (2009) says the separation of powers divides the institutions of government into three branches that is legislative, executive and judicial with the legislature responsible for making laws, the judiciary for interpreting the laws and the executive for putting the laws into action. state Blackstone (1884; 268) states that separation of powers primarily means the separation of the judicial from other powers, Haq (2010:2) notes that since judicial independence is a crucial component inherent in the proper and effective administration of any government; critical to it is the larger requirement of a separation of powers which must be established before attempting to affect any concept of judicial independence.

According to Montesquieu' s document uploaded by Uroki (www.academia.edu), "...it is essential that the person with the powers in any three organs that is the executive, judiciary, and legislature, shall not be permitted to encroach upon the powers confided to the others...". Saunders (2006; 3) states that the accumulation of all powers , legislative, executive and judiciary in the similar hands , whether of one, a few or many and whether inherited, self-selected or elective; may justly be pronounced the very description of tyranny. Thomas Jefferson cited in Alvey (2005; 13) states that concentrating of legislative, executive and judicial power in the same hands is precisely the definition of despotic government. This means that for judicial independence to prevail in Zimbabwe there should be clear separation of powers between the three organs of the government so that each branch can have a leeway to perform its functions without the control of the other in order to avoid the abuse of power.

Alvey (2005; 12) states that separation of powers is imperative to check on the abuse of executive power as well as the goal of limited and accountable government. Locke in (ibid) states that the same person should not have the power to make laws, to exercise them as well as enforcing them. Vile (1967; 13) states that, it is essential for the establishment and maintenance of political liberty that the government be divided into three branches and there is a corresponding identifiable function of government. Locke (1960) cited in Alvey (2005; 12) argues against the concentration of power in the hands of one person. Waldron (2000;443) states that the persons who make up the three agencies must be kept separate and distinct, no individual being is authorized to be at the same time a part of more than one branch. This is because once one branch especially the executive gets lots of powers; it is more likely to misuse the powers and the judiciary is the branch which is more vulnerable to the concentration of powers on the executive. This reveals that separation of powers is the bedrock of judicial independence in Zimbabwe because the judiciary cannot enjoy its independence if there is no unambiguous separation of powers.

Vile cited in Waldron (2013; 443) states that separation of powers is fundamental for the establishment as well as maintenance of political liberty that the government be divided into three branches or departments .To each of these three branches there is a corresponding peculiar function of government. Each of these branches must be restricted to the exercise of its own function and not allowed to impinge upon the functions of the other branches. Singh (2000; 246), states that the independence of the judiciary depends on the totality of a favourable environment created and backed by all state organs, including the judiciary and the public opinion. This means that in Zimbabwe, the judiciary should be supported by all states organs and the boundaries between these branches should be explicitly demarcated and there should be creation of a friendly environment for judiciary

to exercise its independence. The independence of the judiciary also needs to be constantly guarded against the unexpected events and changing social, political, and economic conditions for the reason that it is too fragile to be left unguarded. So restricting the encroachments of the three branches into each other's activities helps to insulate the judiciary from external control since it is too brittle.

Bentham and Boyle (1995; 72), allude that if courts are not independent of both legislature and executive cannot act without fear or favour to ensure that public officials operate within the law. Separation of powers is one of the essential elements of the rule of law because without a proper separation of powers will be imperilled (www.thezimbabwean.co). Montesquieu quoted in Chidzuza (2014; 3) states there is no liberty if the judiciary power be not separated from the legislature and executive because where it is joined with the legislature, the life and liberty of subjects would be open to the elements of arbitrary control and were it attached with the executive power; the judge might behave with hostility and aggression. Rautenbach and Malherbe in Chidzuza (2014) state that the independence of the courts is an incidence of the separation of power, so the constitutions of all countries should contain provisions meant to protect the independence of the courts This means that if the judiciary is not separated from other branches it will not be able to perform its duties independently hence the rule of law be observed. This same applies to the case of Zimbabwe, for rule of law to prevail and or the citizens to fully enjoy their rights, the doctrine of separation of powers should be observed.

Haq (2010;) postulates that certain enumerated powers should be exclusively exercised by only one branch or sector therefore with respect to the judiciary, arbitration or party disputes should be a function of the courts, so implicit in the doctrine of separation of

powers is a prohibition against legislative or executive encroachments. Chiduzza (2014) states that, the judiciary should be separated from from the legislature and the executive in order to guarantee judicial independence. Unclear separation of powers can result to the encroachments of the branches into each other's business which at the end can cause abuse of power. The doctrine of separation of power is there to provide for the existence of a free and democratic society, a clear demarcation between the three branches of government.

However, Geoffrey Marshal cited in Saunders (2006; 2) states that the concept of separation of powers is infected with so much imprecision and inconsistency because every constitutional system that purports to be based on separation of powers also provides for a system of checks and balances under which each branch encroaches upon another. There are not always lucid dividing lines between administrative, legislative and judicial functions because in the contemporary world, there must a grand deal of cooperation and interaction between the Executive, the legislature and the judiciary if the state business is to be effectively and efficiently done. This reveals that the attainment of the doctrine of separation of powers is not feasible.

2.3.2 Realism Theory

Even though a lot of scholars advocate for separation of powers, realism theory challenges the attainability of the doctrine of separation powers through its emphasis on human nature and the issue of power. Morgenthau cited in Gerwitz (1989) places selfishness and power-lust at the centre of human being. He goes on to state that the insatiable human lust for power, *animus domandi* that is the desire to dominate is the main cause of conflict. Realists view human beings as naturally egoistic and self-interested to the degree that self-interests overcome moral principles (www.plato.stanford.edu). Morgenthau (2001) says, just like states; human beings look beyond appropriate amount of power. Since the search for power

and security is unquenchable in human beings; it becomes difficult for the government branches to fully adhere to the separation of powers doctrine since each branch will be seeking to dominate others hence making it difficult for judicial independence to prevail since it can only prevail once the branches try to treat each other equally without trying to dominate each other.

Classical realists argue that structural anarchy or the nonexistence of a central authority to settle disputes among the three branches is the essential feature of the contemporary system, and it gives rise to the security dilemma. This means that since the doctrine of separation of powers advocate for the equalisation of the three branches of the government, the lack of an overarching authority, each branch might try to dominate other branch due to the quest for power hence making it difficult for separation of powers to be observed. This means that once separation of powers doctrine is not wholly observed the judiciary will not be able to perform its duties autonomously because it is very fragile.

CHAPTER THREE

DATA PRESENTATION AND ANALYSIS

3.0 Data Presentation

3.1 Introduction

This chapter analyses the impact of the 2013 Constitution on judicial independence. The researcher seeks to indicate whether the 2013 constitution brought some changes with it on judicial independence in Zimbabwe. The chapter will start by explaining what judicial independence is, this can help one to have an insight of the importance of judicial independence and also the nexus between the constitution and judicial independence. The research goes on to give a brief back ground of the state of judicial independence before the 2013 constitution as well as look at the current performance of the judiciary under the 2013 constitution since the independence of the judiciary can only be seen in practice instead of the constitutional provisions which provide for the independence of the judiciary. After this, the researcher will also look at the challenges being faced by the judiciary which are being faced by the judiciary which are making it difficult for it to perform its duties autonomously or which are making it liable to the compromise of its independence. This part will be largely based on respondents' perceptions and contributions towards the impact of the 2013 constitution on judicial independence in Zimbabwe .

3.1.1 Understanding the concept of Judicial Independence

There is no a worldwide accepted description of judicial independence but scholars explain it differently because academic formulations of independence do not always match. Judicial independence means that judges must be free to exercise judicial powers without interference with litigants, the media, powerful individuals or entities such as huge companies and most importantly the state (www.Judiciary.gov.uk). Judicial independence therefore means that the judicial officers should be free from any unwarranted influences that might prevent them from deciding on legal disputes basing on the legal qualities. Mr Pinduka defined judicial independence as a concept derived from the doctrine of separation of powers and judicial independence means that the judiciary should be detached from the other branches of the government, perform its duties exclusive of the influence from any branch of the government or political elites.

Judicial independence is characterised by two elements that is institutional and personal independence. Rugege (2005; 412) defines institutional independence as the independence of the judiciary from other branches of the government that is the legislature and the executive. Rugege (2005; 413) also define personal independence as the impartiality of a judge meaning a judge's ability to make decisions without favour fear or prejudice with regard to the parties irrespective of their position in society and in other words it means the absence of bias . Personal independence is protected by three facets that are decent remuneration and conditions of service, security of tenure as well as immunity from civil liability for loss caused by performance of judicial duties. This means that the judicial officers should be well remunerated and their tenure of office should be secure so as to avoid situations where they might try to pass biased judgements in a bid to remain in office.

Institutional independence is founded on different factors for instance the ability of the constitution to distinguish the judiciary from any other branches of the government means

that it is recognised as a stand-alone institution. The judiciary should have the adjudicatory powers were the decisions passed by the judiciary cannot be reversed or nullified by any branch or any individual. Mr Madhuku referred to a South African case titled *S v Mamabolo (e.tv and Others Intervening)* where Mamabolo who was the spokesperson for the Department of Correctional services challenged the judges claiming that they had wrongly granted bail to a certain prisoner and declared that the prisoner was not going to be set free. The South African Constitutional Court ruled that in their constitutional order, the judiciary is an independent pillar of the state hence it was supposed to exercise its judicial authority fearlessly along with impartial because it stands on the same footing with the legislature and the executive both as branches of the state. This means that judiciary should not be subject to control by any branch of the government but should pass judgements independently.

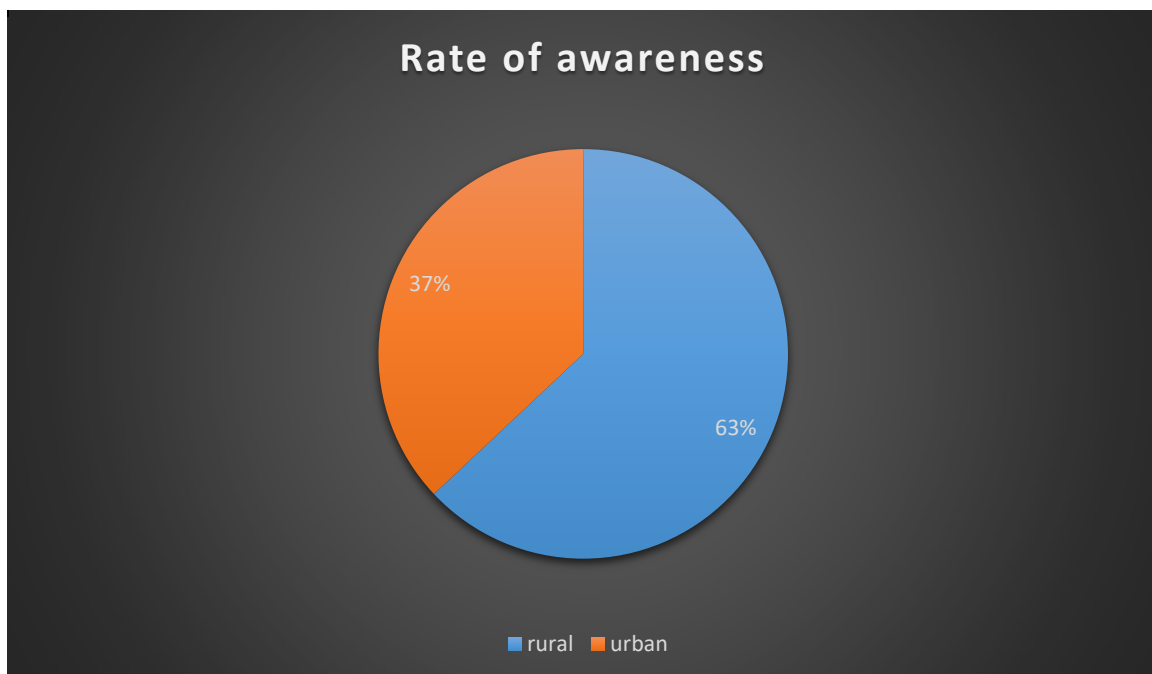


Fig 1: Rate of awareness concerning the constitution and judicial independence

The above chart shows the respondent rate in rural and urban areas respectively, on the basic knowledge pertaining the constitution and its impact towards promoting judicial independence in Zimbabwe. It can be noted that majority of the population in Zimbabwe rural areas has no idea on the legal framework surrounding the judiciary system neither the existence of the constitution

3.1.2 The nexus between Judicial Independence and the Constitution

Professor Sachikonye states that judicial independence plays a part by providing checks and balances just like the executive or the legislature. It is the custodian of the laws enshrined in the constitution therefore the judiciary is there to safeguard those laws and pass judgments to those who go against what is stipulated in the laws of the nation. Same applies to the constitution; it plays a significant role by demarcating the boundaries were the judiciary ends as well as demarcating the boundaries of the other branches. In other words, the judiciary and the constitution depend on each other. Linington argued that, the constitution is important for the prevailing of the independence of the judiciary but the major problem lies in the implementation and also abiding to what is stipulated in the constitution since the constitution is just a paper.

Redish (1999;2) states that the constitution plays a significant role in protecting the independence of the judiciary because it gives certain grounds under which the judicial officers can be removed from their position and provides for the avenues of judicial discipline. Professor Madhuku comments that the judiciary cannot be protected by putting into place some provisions meant to protect it in the constitution, but the major problem lies on the implementation of what is stipulated by the constitution. It should be noted that, no judge can execute his or her duties affably unless he or she is independent and also

impervious from being attacked either personally or professionally. Therefore, it is the responsibility of the constitution to mark the demarcations of the other branches of the government.

Levinson (2006;1) states that the nature and scope of the safeguards a constitution offers for judicial independence will generally signify how serious a society is about the devotion to the rule of law, constitutional government and democracy. The scholar goes on to state that the altitude of judicial independence enjoyed by the judiciary in a democratic country is determined through the nature of the guarantees provided by the constitution. Bassiouni et al (1998) state that judicial independence promotes constitutionalism since people will be forced to hold on to the constitutional principles and those who go against these principles are charged and brought to justice by an impartial court.

Professor Madhuku (2002) states that; The independence of the judiciary is a logically corollary of the principle of separation of powers in that the vesting of judicial functions in a body of persons is truly independent. Virtually all constitutions pay some regard to the principle of separation of powers and the extent to which a constitution guarantees the independence of the judiciary is usually a good measure of the seriousness with which the principle of separation of powers is taken

This means that the constitution plays a vital role in the protection of the independence of the judiciary therefore revealing that there is a correlation between the independence of the judiciary and the constitution.

3.1.3 Judicial Independence in Zimbabwe prior to the 2013 Constitution

Professor Madhuku argues that before the 2013 constitution, the judiciary was independent on paper but on the ground, the independence was questionable. He went on to state that it is important to look at the performance of the judiciary on the ground rather than looking at

the constitutional provisions because what is stipulated in the constitution in some cases is not what is done on the ground, so it is imperative to examine whether what is stipulated in the constitution tallies with what is being done on the ground. Professor Madhuku argued that the judiciary used to apply the law as it is when dealing with cases involving private citizens but its judgments in cases where members of the executive were involved or political issues, the way it handled these issues was very questionable.

Professor Madhuku went on to refer to some cases where the judgments passed by the judiciary were obscure or questionable. In *Tsvangirai v Registrar General of Elections & Others S-20/2002*. The litigant contended that the Electoral Act (modification) Statutory Instrument 41D of 2002 which was in print three days prior to the 2002 presidential elections by the head of state were in violation of his right to protection of the law as well as the freedom to expression. Chikomo (2014; 15) argues that the court was diffident to check the powers of the executive and hid behind legalese in order to thrill the executive. The action of the judicial officers was influenced by the way they were appointed, they were appointed basing on political related lines therefore they had to appease those who had appointed them by passing biased judgments.

On the case of the *Commercial Farmers Union v Minister of Lands and Others*, on this case the government farmers sought to have the government stopped from continuing with acquiring land for resettlement until it complied with the previous court order. Arguably, Professor Madhuku notes that this was a difficult order for the Supreme Court because it was being asked to meet head-on with the government and order it to tag along its own laws. There was contempt of the court orders; the Supreme Court ruled that the rule of law has been overthrown and it also criticized the Land reform process.

Mayo (2015) states that during the land reform arguments in the courts, while delivering a speech, the president uttered that the safety of judges could no longer be guaranteed after they had passed judgments which were against his notorious and chaotic land reform program. Professor Madhuku states that, “whatever justifications may be given for this order, the matter of fact is that the Supreme Court was giving in to the political pressure that had been built around the land question ...” hence its independence was limited the political pressure Gubbay cited in (ibid) states that such attacks revealed impertinence for the rule of law and the course of the constitution which guarantees judicial independence. Professor Madhuku notes that the judiciary developed an ice-cold feet when it came to the remedy on how to deal with the land issue, to deliver justice independently. The executive carried on with its plans without taking heed of the judicial rulings.

Mr. Linington claims that the previous constitution was dominated by the president since he is the one who appointed the majority of the judges according to section 84 and section 90 of the Lancaster House Constitution. This was dangerous to the independence of the judiciary since the president had the leeway to appoint judges as well as unseating some judges from the bench. Professor Madhuku made reference to the way in which the Gubbay bench was unseated from the bench and also the way the Chidyausiku bench was placed on the bench. This means that there was political control in the judiciary which in turn made it possible for the judiciary to rule in favor of the political elites

Professor Sachikonye also states that there was subjectivity on the way the judges handled the cases and it would be very wrong to give a blanket judgment that the judiciary was not independent or it was independent since the way these judicial officers performed their duties differs because some maintained objectivity when dealing with either political or non-political issues whilst others passed their judgments basing on the political party were one belongs to hence resulting to different explanations towards the performance of the

judiciary and the exercise of its independence. Mawere (2013) also comments on this issue, claiming that section 90 of the Lancaster House Constitution provided for the appointment of judges by the president yet section 164 of the same constitution offered the independence and impartiality of the courts. This means that the whole judicial process was shrouded with politics.

Section 84 of the Lancaster House Constitution provided for the appointment of the judges but unfortunately, it was not crystal clear on how the judges were to be appointed. Hodzi (2011; 18) states that once there is no clear criteria of appointment of judges there is a high probability that the system would be extremely abused by the executive. Mr Pinduka made reference to the way in which the Judge President George Chiweshe was appointed stating that he is an ex-combatant, was the President of the Zimbabwe Electoral Commission (ZEC) in 2008 which was accused of manipulating election results and also took long to announce the election results; in 2010 the same person was appointed to be the Judge President hence revealing that there is no way that person's judgments could be expected to be objective since the way he was appointed is questionable.

The court's judgments on matters related to politics were found wanting, this can also be seen for example on *The National Constitutional Assembly (NCA) v others v The President of the Republic of Zimbabwe & Anor*. On the matter concerned, court dismissed with costs, the application by the NCA seeking court to stop the respondents from carrying out a constitutional referendum plebiscite on the 16th of March 2013. Applicants were of the view that the time set by the respondent was grossly inadequate in light of the complexity of the opinion being sought by the voters; there was also no official copy of the draft constitution at the time of setting of the date. The complainants argued that from the interviews they had conducted in Epworth, 70% of the respondents did not know what a constitution is; only 10% had seen a copy of a constitution of which 67% was in English and 33% in other

languages. Despite the merits of the case provided by the complainants, the court dismissed these facts and never sought some justifications from the executive. Professor Madhuku argued that, the reason behind the action taken by the courts on this case lies in the way these judicial officers were appointed.

3.1.4 The 2013 Constitution vis-à-vis Judicial Independence

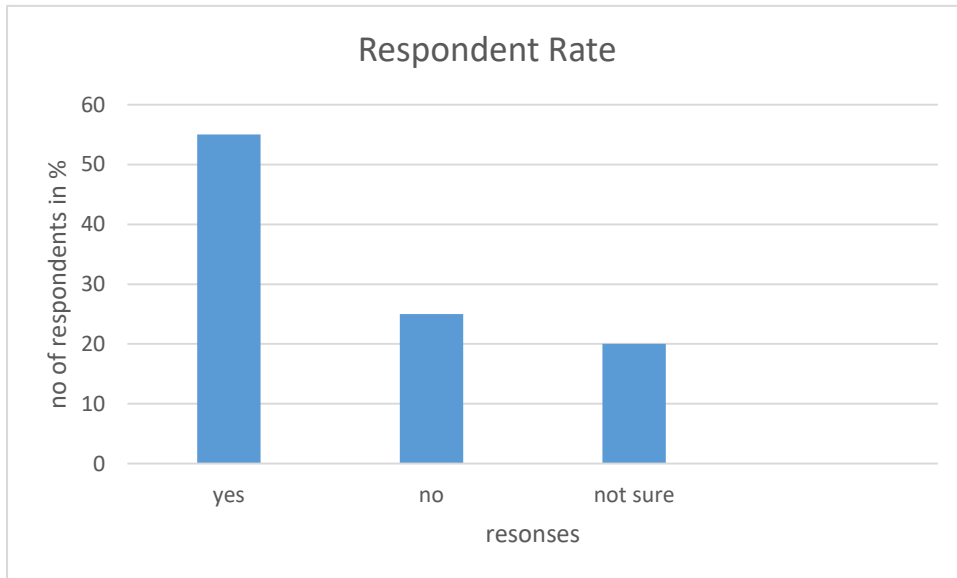


Fig 2: impact of the 2013 constitution on judicial independence in Zimbabwe

Fig 2 shows the respondent rate towards the extent to which the people driven constitution improved the autonomy of the judiciary system in Zimbabwe. 55% of the respondents agreed that, there are some changes on the 2013 constitution on judicial independence, However 25% of them cited that the PDC is to some extent a duplicate to the LHC on issues pertaining the freedom of the Judiciary arm of state in Zimbabwe

Madhuku cited in Chiduzza (2014; 369) states that the features of the which determine the degree to which the independence of the judiciary includes the methods of the appointment of the judges, the methods of the removal of judges, salaries and working conditions of the

judges. Professor Sachikonye argued that the constitution spelt out more on the roles of the process of recruitment and other conditions of service of staff.

3.1.5 The Judicial Service Commission (JSC)

Professor Sachikonye argued that the constitution spelt out more on the roles of the JSC and goes on to say, the President's influence over the appointment of the JSC has been decreased even though some members are still appointed to office by him. He goes on to state that if it carries out its duties very well (the JSC), it will provide better working conditions for judges and also produce independent judicial officers. The JSC in the LHC was mainly made up of presidential appointees. Madhuku (2002) states that the extent to which the appointment of judges is free from political manipulation is largely dependent upon the independence of the JSC. The JSC is provided for on section 189 of the 2013 Constitution comprises of Chief Justice (CJ), deputy chief justice, judge president of the High Court Judges the Attorney General and other three judges. Section 180 (1) states that the CJ is the head of the JSC and it also states that he is appointed by the president and some members are appointed by the president. This renders the activities of the judiciary questionable since the executive has a hand in the appointment of the administrative body of the judiciary.

The Zimbabwe Lawyers for Human Rights (2012) observes that independence of the JSC remains subject to inquiry due to the number of the people who are appointed by the president. Hodzi (2011; 18) states that whenever the executive has a hand in the appointment of the JSC, there is no way one can expect the commission to be independent nor objective in the performance of its duties and there will be no warranty that there will be no interference of the executive in the activities of the JSC. So this means that the activities of the JSC would be questionable and likely to be biased towards the executive since the president has a hand in the

appointment of the administrative body of the judiciary of separation of powers as well as disruption of the doctrine of separation of powers due to the involvement of the President in the activities of the judiciary.

3.1.6 The appointment of judges in the 2013 Constitution

Professor Madhuku argues that the 2013 Constitution marked a significant departure from the LHC constitution because it introduced a provision which provided for the advertisement of judicial vacancies. He goes on to state that over the years, the appointment of the judicial officers was conducted in secrecy without advertisements and it made people to lack confidence in the judiciary. The advertisements will help in the appointment of well qualified and fit persons to the judiciary and increases transparency, openness and professionalism in the judicial system. This enables the appointment of the judicial officers who are independent since they will be appointed basing on merit and hence promoting judicial independence.

Mr. Linington applauded the arrangement that the JSC is required to conduct the public interviews because it enhances transparency in the judicial system as well as enhancing public confidence in the judicial system and it gives room for the appointment of judges basing on the skills and knowledge in the field of the judiciary instead of political patronage or *homeboyism* as alluded to by Professor Makumbe. Zimbabwe Lawyers Human Rights (2012) eulogized this provision stating that advertising the vacancy and having public interviews increases openness, transparency of the appointment system. This is likely to improve professionalism of the judiciary due to the transparent system in their appointment process. In October 2014, the JSC acted according to what is stated in the constitution when

it announced that it was going to conduct public interviews to select High Court judges on Tuesday 28 October 2015 at the Crowne Plaza Hotel and all members of the public had the right to attend and observe the proceedings (www.zimeye.com).

Zimbabwe Lawyers for Human Rights (2012) notes that the constitution provides for the need for the JSC to compile a list of three qualified and recommended persons which should be submitted to the President and the president is required to appoint any one judicial officer from that list. However, the president is not compelled to appoint any of the three nominees on the list put forward to him by the JSC and in such a circumstance; the JSC will be required to submit another list. Mr Linington argues that the provision is good because the president can not reject the second list. However, Mr Munyoro argues that the provision does not state how the second batch of be obtained in contrast to the first list and also clarifying whether such individuals are subject to public interviews. The process is more likely to be manipulated because people on the second list can be handpicked which could result in the appointment of pliant judges on the bench and there is danger that the selection process might be politicized.

Professor Sachikonye noted that section 180 (2) and (3) is a startling provision which permits the President to make nominations for any judicial vacancy in the country after that the President also have the powers to nominate any person for judicial appointment. This provision does not specify the qualities considered by the president besides the legal qualifications that can make a person to be considered, “suitable for the appointment to the office”. This provides a room for the president to appoint judicial officials basing on political affiliations instead of merit.

Magaisa (2014) questions if the expansion of the system to allow the public to nominate candidates has any affect at all since the president also takes part in the nomination process. He argues that it is very dangerous because the president is also allowed to nominate some candidates, so there is a probability that he would naturally favor his own nominees over the nominees made by the public then the public nomination would turn out to be nothing but a pricey charade. This also defeats the whole purpose of calling for public nominations as their views might not make any noteworthy contribution in the appointment process. Miti (2013) states that in the actual sense, the discretion to select and appoint the judicial officers lies in the hands of the executive whilst the JSC and the public play a cosmetic role in the appointment process since their involvement is overridden by the president's final decision. This therefore shows that there are very high chances that the involvement of the president poses a great danger to judicial independence and it is also against the concept of separation of powers.

3.1.7 Removal of judges

The president has the powers to appoint a tribunal to investigate on the conduct of judges being suspected. Section 87 (1) of the LHC, provided for the grounds under which a judge could be removed from office; which were failure to discharge the duties of his or her office as well as misbehavior. This same applies to the 2013 Constitution on section 187 (1) which provides clear reasons for the removal of the judges from office which are gross incompetence and gross misconduct. Mr. Matinenga argues that the 2013 constitution is better than the LHC because it is clear on the process of removing judges.

The 2013 constitution gives the president some powers to appoint a tribunal if an issue comes up with regards to the removal of judges. The fact that the president has the powers to unilaterally select members of the tribunal raises doubt about the independence

impartiality of such tribunal. This therefore provides fertile grounds for the removal of the judges for political reasons. The president is also bound by the findings of the tribunal; it is probable that a tribunal might be appointed with a definite intention to remove a judge who might be viewed as 'independent' by the executive.

The Zimbabwe Lawyers for Human Rights (2012) comments on the process of the removal of judges claiming that either the JSC must deal with disciplinary issues or it must be done by an independent organ and the participation of the President goes against the doctrine separation of powers. The process for removal of judges is provided for under section 187 of the 2013 constitution. Mr. Munyoro argues that even though the constitution provides some authority to the JSC with regards to the removal procedure of judges, it renders the president powerful with regards to the removal process of judges.

Mr. Munyoro argues that if a judge is at danger of removal, the judge should be given a platform to be informed of the accusations, to be stood for at a hearing, to make a complete defense as well as to be judged by an impartial and independent tribunal. He goes on to state that reasons for removal ought to be crystal clear and should be limited. Mr Munyoro goes on to say that the executive should not be involved in the process of removing a judge because once it gets involved; the independence of the judiciary will be limited as well as the doctrine of separation of powers dismantled.

3.1.8 Remuneration

Section 188 (1) provides for the remuneration of judges were the president is mandated to approve the salaries of the judges after consultation with the minister responsible for justice, the president is also not bound by the advice from the minister of finance when it comes to the setting of salaries and allowances of judicial officers from time to time, the constitution

gives the president a key role in the determination of and approving such salaries. This can be seen for instance when the CJ Chidyausiku lamented about the conditions of services in his speech on the occasion of the official opening of the 2015 Legal Year on 11 January 2015 saying poor conditions of all judges and magistrates need to be upgraded because a judicial officer who is not adequately remunerated or who is not appropriately housed and lacks of reliable transport to and from courts, is more susceptible to corruption.

Mr Matinenga also made reference to the 2014 event in which the CJ Chidyausiku bemoaned and criticized the government for unilaterally reducing the conditions of for serving judges. The CJ claimed that such reduction were in direct violation of the constitution and it revealed the dangers of giving politicians the powers to determine the conditions of service for judges. This therefore is likely to make judicial officers pass some judgments in favor of politicians so as to get their salaries increased.

3.1.9 Case study: Judicial Independence vis-a-vis Political Cases

The majority of the interviewees made reference to the judgment passed by the judiciary to a case which includes Rugare Gumbo and Didymus Mutasa claiming that the judgments passed by the judiciary were not based on the law but were influenced by the executive. Mutasa and Gumbo are the expelled political leaders who wanted to challenge the ruling party(ZANU-PF) in the courts over its decisions to expel them from the party. Professor Madhuku claims that the judiciary under the 2013 Constitution is doing a good job in passing objective judgments in cases involving private individuals whilst its judgments on cases involving political elites are very questionable.

Mayo (2015) states that, the president blatantly threatened judges over that case and it hence revealed the contempt for the judiciary. The ruling party claimed that the issue was not to be handled by the courts because it was a political issue and it was to be dealt with by the party basing on party constitution instead of the national constitution. Legal experts claimed that the aggrieved had the right to take their case to the court basing on section 67 (2) of the constitution which states that that every Zimbabwean has the right to form as well as to participate in the activities of a political party. Magaisa (2015) also made reference to section 171 (1) of the constitution which states that the high court has the original jurisdiction over all civil and criminal issues throughout Zimbabwe. Section 166 (3) (a) also states that the constitutional court should hear cases which deal with the alleged infringement of fundamental rights enshrined in chapter 4 of the constitution. Political freedom is one of the fundamental human rights hence justifying the need for these expelled people to have their case heard by the courts.

Madhuku cited in Mayo (2015) states that Mugabe's remarks appeared to undermine the judiciary, but they will not necessarily annihilate its independence if the judges take a stance and ignore them, however basing on Madhuku's argument; how can the judicial officers ignore the president's comments if he is the one who appoints them, have a hand in their removal process as well as their remuneration? Mawere (2013) states that, anyone who understands the link between ZANU-PF and the judiciary cannot be confused when reading some of the judgments that have come from the bench. He goes on to state that Justice Hungwe is now well acquainted with how the wheels of the system can unexpectedly turn when certain affiliates of the executive branch are threatened. On this case, the courts ruled in favor of the state and this judgment never surprised many people because they knew how the judiciary passes judgments when it comes to issues which include individuals and politicians.

This is because judicial officers know that they depend on the executive since it controls all of its activities, so ruling against the members of the executive is like biting a hand that feeds them. This therefore reveals that the 2013 constitution have some loopholes since it did not fully protect the judicial independence by also allowing the president to play certain roles in the judicial activities.

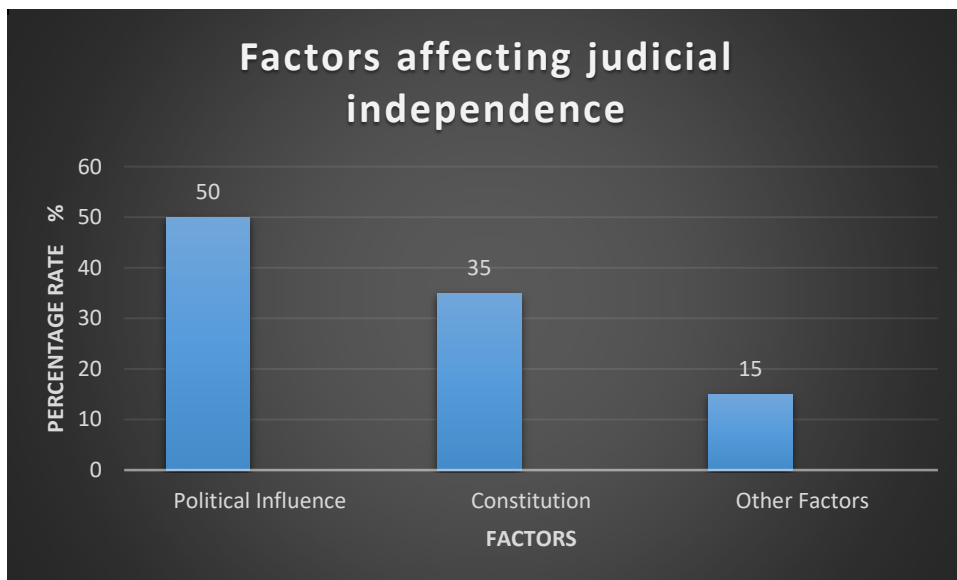


Fig 2: factors affecting judicial independence.

The above bar graph highlights the key factors affecting the autonomy of the judiciary system in Zimbabwe. It can be clearly noted that politics pays a greater influence in interfering with the activities and decisions made by the judicial branch of Zimbabwe. However the constitution plays a crucial role in providing the framework but to a limited extend as compared to that of politics. Other factors affecting judicial independence are explored and analyzed below:

3.1.10 Other factors affecting Judicial Independence

Professor Sachikonye says even though the constitution states that the judiciary should be well remunerated, the government is failing to provide enough money for the judiciary due to the prevailing economic hardships in the country. Professor Matodzi (2015) states that the poor salaries are compromising the independence of the judiciary because some judges are now involved in corruption and bribes due to lack of adequate salaries. Mr. Pinduka also argued basing on the speech delivered by the CJ Chidyausiku on the official opening of the 2015 Legal year. The CJ said the judicial officers and all those who support them need to be adequately remunerated. The learned judge went on to state that a judicial officer who is not well remunerated is most vulnerable and susceptible to be compromised. The CJ went on to state that the poor conditions are what is fueling corruption in the judicial system. This problem is not emanating from the constitution because even though the constitution states that judicial officers should be well remunerated, the government's coffers are empty therefore it is failing to act according to the constitutional stipulations.

Mr Linington also state that the other issue which is compromising the independence of the judiciary is the issue of delays being caused by the work overload were too many cases are required to be handled by too few judges. Nemukuyu (2015) states that when the judges of the Supreme Court were criticized by the CJ for sleeping on duty, they defended themselves by claiming that they were being called from time to time to help out at the Constitutional Court. This same applies to the Bulawayo case were Agere (2015) states that there is scarcity of personnel in the Southern part of the country were five judges are handling both criminal and civil cases from the whole of Midlands, Bulawayo and Matebeleland. Kamocha comments that this provides a room for the compromise of judicial independence

as some judges may be attempted to accept bribes from people who would want their cases to be heard urgently.

Mr Pinduka argued that weak institutions are also contributing to partial judicial independence. He argues that the police are politicized to the extent that they do not take action when a member of the judiciary receives threats from the general public or the influential individuals. This is because there is no a clear cut between police and politics hence the police ends up working as an extension of the executive hence making it difficult for it to perform its duties.

From the research, one can note that even though the 2013 constitution brought some changes meant to improvise judicial independence, there are still some loopholes which still need to be addressed in order to achieve judicial independence to its fullness. The constitution is still shrouded with the provisions meant to provide for the inclusion of the president on the sections meant to provide for judicial independence. These loopholes identified all over this study need to be addressed as they pose a serious threat to the independence of the judiciary. Failure to deal with these threats will no doubt continue impacting negatively on judicial independence in Zimbabwe. Once these factors are dealt with, this will lead to advancement in the state of the judicial independence and will strengthen the position of Zimbabwean politics in adherence to the principle of separation of powers as a core feature in promoting democracy.

3.2.1 Conclusion

This chapter has sketched out how the study was carried out. It has uncovered the theoretical justifications of the methods and approaches utilized in the study. The chapter also addressed the intentions of the topic under study thereby outlining the actual research findings.

CHAPTER FOUR

4.0 CONCLUSIONS AND RECOMMENDATIONS

4.2 Recommendations

Owing to the uncertainty showed by interviewees and the general public on the extent to which the 2013 constitution impacted positively on judicial independence, the researcher found out that there is a need for some changes in the judicial system. The changes should be first undertaken in the JSC which is the administrative body responsible for the day to day running of the judicial activities. The appointment of the members of the JSC should be

autonomous from the executive. This enables it to perform its duties without being manipulated and controlled by the executive hence promoting judicial independence. The researcher suggests that the parliamentarians should have a hand in the entire appointment process of commissioners. This is because since parliament consists of a lot of people, final decisions concerning the appointment of the commissioners are met after some discussions instead of having the president to appoint some commissioners since those appointed by the president are more likely to appoint the judicial officers on politeness. The role of the constitution on judicial independence is undisputable. Even though different stakeholders put some effort to enact the 2013 constitution in order to address the major constitutional issues which were affecting mainly the judiciary since it is the branch of the government responsible for the maintenance of order in the country, observance of rule of law as well as protecting human rights there are still some loopholes in the newly enacted constitution. The researcher found that though the 2013 constitution is better in terms of contents as compared to the Lancaster House Constitution, it changed to a lesser extent the status of judicial independence in Zimbabwe since the judicial processes are still dominated by the executive; just like in the LHC where the executive also controlled the judiciary hence overriding the issue of separation of powers and judicial independence.

Most of the judicial processes are being done by the executive for instance the appointment process, the removal of the judges as well as the appointment of the tribunal to investigate on the conduct of suspected judges since it is the one which possesses the power to appoint the judicial officers. The researcher also found out that it is too early to judge the 2013 constitution's impact on judicial independence since some provisions are not yet put into practice because there is need to see whether what is stipulated in the constitution tallies with what is the constitution. The researcher also found out that the 2013 constitution's impact on judicial independence cannot be overruled because it also improved transparency

and accountability in process of appointing the judicial officers by publishing any vacancy which arise in the judicial sector, introducing the public interview for the candidates as well as putting emphasis on meritocracy hence promoting professionalism and minimizing the appointment of judges on political grounds.. Since it is the administrative body of the judiciary also (the JSC), it should be respected and it should have access to what it needs in order to be able to provide for the judges.

The researcher also suggests that judicial officers should execute their duties separately from national political and ideologies. There is also need for the top officials of the judicial branch to make necessary arrangements to raise awareness to the public concerning the legal framework surrounding the judicial system. This can be done through the holding of public seminars, conferences, meetings as well as teaching the members of the judiciary what is meant by judicial independence. This can be seen in most rural areas where almost 80% of the people doesn't know what a constitution is, and in such circumstances, there is no way one expect such a person to know what judicial independence is. The judges need to be well-informed on the meaning of judicial independence, this will help them to be autonomous from political control.

Basing on the CJ's speech in which he bemoaned about the spread of corruption in the judicial system, the researcher suggests that very high salaries should be justified for judges and should not be reduced to immunize them from the temptations of corruption and bribes. The executive also should not have a hand in the setting of the salaries of the judicial officers. There should be provisions in the constitution that guarantees the budget of the judiciary as a percentage of the national budget. The fixed budget reduces political influence over the judiciary .This enables them to perform and pass their judgments basing on the law and applying the law impartially instead of passing decisions in favor of political issues in order to get financial gains.

There is need to ensure that the process is based on merit and demonstrating the merits of each candidate in terms of their performance at the interviews and track record their performance. There is also need for sufficient disclosure of all information about the candidates in terms of their personal background, qualifications, as well as track record .This therefore improves the independence of the judiciary since there will be clear procedures to be followed and the qualities required hence improving the independence of the judiciary by avoiding appointments based on political lines. Promotions should be done following a clear career path so that judicial officers can do their job objectively knowing that they will be awarded for their hard work instead of being promoted for passing judgments in favor of political elites.

4.1 Conclusions

The role of the constitution on judicial independence is undisputable. Even though different stakeholders put some effort to enact the 2013 constitution in order to address the major constitutional issues which were affecting mainly the judiciary since it is the branch of the government responsible for the maintenance of peace and order in the country. The researcher found that though the 2013 constitution is better in terms of contents as compared to the Lancaster House Constitution, it changed to a lesser extent the status of judicial of independence in Zimbabwe since the judicial processes are still dominated by the executive; just like in the LHC were the executive also controlled the judiciary hence affecting the principle of separation of powers and protection of human rights in Zimbabwe.

Most of the judicial processes are being done by the executive for instance the appointment process, the removal of the judges as well as the appointment of the tribunal to investigate on cases of misconduct and abuse of office by judges hence a clear indication of a

politicized judicial system. However, the researcher also found out that it is too early to judge the impact of the 2013 constitution on judicial independence since some provisions are not yet put into practice. The researcher also found out that the 2013 constitution's impact on judicial independence cannot be overruled because it also improved transparency and accountability in process of appointing the judicial officers by publishing any vacancy which arise in the judicial sector, introducing the public interview for the candidates as well as putting emphasis on meritocracy hence promoting professionalism and minimizing the appointment of judges on political grounds

BIBLIOGRAPHY

BOOKS

Adam, I and Dyson, R.W. (2003). *Fifty Major Political Thinkers*. London: Routledge

Alvey, J. R. (2005). *The Separation of Powers in Australia: Issues for the States*. New Zealand: University of Otago

Beetham, D. and Boyle, K. (1995). *Introducing Democracy*. Cambridge; Polity Press

Burbank, S, and Friedman, F. (2002). *Judicial Independence at Crossroads: An Interdisciplinary Approach*. USA: University of Pennsylvania

Blackstone, W. (1884). [1765-69] *Commentaries on the Laws of England*. Edited by Cooley, T. Chicago: Callaghan and Co

Linington, G. (2001). *Constitutional Law of Zimbabwe*. Harare: Legal Resource Foundation

Madhuku, L. (2010). *An Introduction to Zimbabwean Law*. Harare: Weaver Press

Madison. (1966). *The Federalist of Papers*, Fairfield (2nd Ed) New York: Anchor

Vile, M. C. J. (1967) *Constitutionalism and the Separation of Powers*. Oxford: Clarendon Press

JOURNALS

Gerwitz,P. 1989. Realism in Separation of Powers Thinking. William and Mary Law Review. Volume 30 Issue 2 Article 9. 343-354

Madhuku,L. (2002). Constitutional Protections of the Independence of the Judiciary: A Survey of the Position in Southern Africa. *Journal of African Law*. 232-245

Bridge.(2007). Constitutional Guarantees of Independent Judiciary. *Netherlands Law Association. Electronic Journal of Comparative Law*. Volume11.3 Available at: www.ejcl.dg/113/article1131-24.pdf [accessed: 17 February 2015]

ONLINE MATERIAL

Chiduzo, L.(2014). *Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?*.Available at: www.saflii.org/za/journals/PER/2014/17.ghtmls/ [accessed: 02 November 2015]

Haq, U.U. (2010). *Judicial Independence in Light of the Basic Principles on the Independence of the Judiciary: Who has the Right Idea?* Nova Southeastern. Selected Works

Human Rights Watch. (2008)*Our Hands Are Tied: Erosion of Rule of Law In Zimbabwe*. Available at: www.hrw.org/sites/default/files/reports/zimbabwe1108.pdf [accessed:12 December 2014]

Keith, C.K.(2002). Judicial Independence and Human Right Protection around the World. Texas: *Collin Community College*. Volume 8.No4. Available at: www.utdallas.edu/~ck16000/JudicatureJudicialindependence.pdf [accessed: 02 March 2015]

Landsberg,B.K.(2007). Symposium-Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development. Available at: http://www.mcgeorge.edu/Documents/Conferences/JUDIND_LANDSBERG_MASTER.pdf [accessed: 22 November 2014]

Magaisa,A. T.(2012). *Checks and Balances on the New Power of the Executive in the Draft Constitution* .Available at :newzimbabweconsituion.wordpress.com [accessed on 02 February 2015]

Magaisa, A.T. (2009). Judiciary Must be Financially Independent.

Magaisa, A.T.(2015). Do Courts Have a Jurisdiction over Internal Party Disputes?. newzimbabweconsituion.wordpress.com [accessed on 05 April 2015]

Mawere, M.(2009). Zimbabwe 2009: *The Separation of powers Doctrine Revisited*. MUTUMWAMAWERE .Available at <http://www.mmawere.com/article/218> [accessed on 07 March 2015]

Mavedzenge, J. (2012). *Thematic Analysis of Zimbabwe's Proposed Draft Constitution*. Freedom House. Available at: <https://freedomhouse.org/site/default/files/Thematic-Analysis-of-Zimbabwe's-Draft-Constitution.pdf> [accessed: 15 March 2015]

Manyatera G, and Fombad, M. (2014). *An Assessment of the Judicial Service Commission*

Mayo,H.(2015). Mugabe Remarks Assault on Judiciary. Available at:www.theindependent.co.zw/2015/03/13[accessed on 12 April 2015]

Mouton,J. (2001). *How to Succeed in your Master's and Doctoral Studies In South African Guide and Resource Book* . Pretoria: Van Schaik Publishers

Nyawanza,T. (2009). *Immigration and You: Justice Mangwira and Judicial Independence*. Available at:www.newzimbabwe.com/pages/immigration8-13403.html [accessed: 12 November 2014]

Oliver, P. (2006). *Purposive Sampling*. Available at: www.srmo.sagepub.com/view/the-sage-dictionary-of-social-research-methods/n162.xml [accessed on 21 February 2015]

Parson,J.A. Key Informant. Available at: www.srmo.sagepub.com/view/enclopaedia-of-research-methods/n260.xml [Accessed on 12 February 2014]

Redish,M.H.(1999). *Judicial Discipline, Judicial Independence and the Constitution: A Textual and Structural Analysis* Available at: www.usc.edu/dept/symposia/judicial/pdf/redish.pdf [accessed 12 March 2015]

Rouse,M.Data Collection. Available at: <https://www.seachcio.target.com/definition/data-collection>www.newzimbabwe.com/pages/immigration8-13403.html [accessed: 12 November 2014]

Robertson, G.(2014).*Judicial Independence: Some Recent Problems on Judicial Independence in Zimbabwe*. Available at: www.ibanet.org/Article/Detail.aspx?ArticleUid=15acea39-ae4e-46ef [accessed: 21 November 2014]

Rugege, S.(2007). *Judicial Independence in Rwanda*. Available at: www.mcgeorge.edu/Documents/Conferences/JUDIND-RUGEGER-MASTER.pdf [accessed: 22 November 2014]

Waldron. (2013). *Separation of Powers in Thought and Practice?* Boston College Law Review. Volume 54: 433. bclawreview.org/files/2013/03/01-waldron.pdf

Winsker, G. (2001). *The Postgraduate Research Handbook*. New York: Palgrave Macmillan

<https://www.bcps.org/offices/lis/researchcourse/develop-writing-methodology-limitations>

[Accessed: 06 April 2015]

CASES

S v Mamabolo (e.tv and Others Intervening) 2001 (3) SA 409 (CC)

Commercial Farmers Union v Minister of Lands and Others 2000 (C) ZLR 469 (S)

The National Constitutional Assembly (NCA) v Others v The President of the Republic of Zimbabwe & Anor. 2013

Tsvangirai v Registrar General of Elections & Others S-20/2002.

CONSTITUTIONS

Constitution of Zimbabwe . Amendment (No 17). 2005

Constitution of Zimbabwe. Amendment (No 20). 2013. Harare: Government Printers

The Constitution of the Republic of South Africa .1996

The Constitution of the Republic of Uganda. 1995

INTERNATIONAL PRINCIPLES FOR JUDICIAL INDEPENDENCE

The Beijing Statement of the Principles of the Independence of Judiciary. (1982)

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

The Latimer House Guidelines on the Three Branches of Government. (2003)

The Guide to Judicial Conduct. (2013)

INTERVIEWS

Professor Sachikonye. 2015. New Commerce Building. University of Zimbabwe. Harare

Professor Madhuku. 2015. Faculty of Law. University of Zimbabwe

Mr. Linington. 2015. New Commerce Building. University of Zimbabwe. Harare

Mr. Pinduka. 2015. Faculty of Social Studies-T room 1. University of Zimbabwe. Harare

Mr Munyoro. 2015. Lawyer. Harare

Mr. Matinenga.

APPENDIX A: INTERVIEW GUIDE

MIDLANDS STATE UNIVERSITY

STUDENT NAME/ INTERVIEWER: Delight Makono

**TOPIC: AN ANALYSIS OF THE IMPACT OF THE 2013 CONSTITUTION ON
JUDICIAL INDEPENDENCE: THE CASE OF ZIMBABWE (2008-2014)**

NAME.....

MINISTRY.....

POSITION/OCCUPATION.....

QUESTIONS

What is your understanding of the term judicial independence ?

.....
.

What is the nexus between judicial independence and the constitution?

.....

What has been the state of judicial independence prior to the 2013 Constitution?

.....

How far does the 2013 Constitution seek to improve judicial independence or does the 2013 constitution adequately cater for judicial independence?

.....

What other factors challenges being faced by the judiciary in executing its duties autonomously?

.....

What measures can be implemented to improve judicial independence in Zimbabwe.....