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**DISCUSSION ON THE CONCEPT OF JUDICIAL ACCOUNTABILITY AND  
JUDICIAL INDEPENDENCE: A COMPARATIVE EXPERIENCE ON REGIONAL  
AND JURISDICTIONAL STANDARDS ON JUDICIAL ACCOUNTABILITY**

**BY**

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## **INTRODUCTION**

Judicial independence and accountability are pervasive principles that are relevant in all legal systems regardless of their affinity for common law or civil law systems. Adherence to these principles ensures that the Judiciary is fully empowered to dispense its justice function. Zimbabwe is no exception to this position where judicial independence and accountability are entrenched in the Constitution. This highlights their centrality to the attainment of the objectives of the Judiciary. Thus, this paper will highlight the theoretical framework set out in the Constitution and the practical application of the principles, primarily through the work of the administrative organs of the Zimbabwean Judiciary. Overall, judicial independence and accountability are highlighted as corresponding principles that aid the Zimbabwean Judiciary in its operation as the arbiter of justice.

## **CONCEPTUALISATION OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY**

Independence and accountability when properly construed are in essence symbiotic principles when one considers them in the context of the Judiciary. In some quarters, they are considered as being inescapably in conflict due to their supposedly contrary connotations.<sup>1</sup> Treated at face value, the principles appear to be in conflict. Independence hints at self-sufficiency which ordinarily would be

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<sup>1</sup> David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 Clev. St. L. Rev.1 (2009).

antagonistic to the principle of accountability which is permeated with a sense of subservience. Thus, reconciling judicial independence and judicial accountability may prove inherently problematic when due recognition of their fundamental purpose is disregarded.

Judicial independence, simply put, is the concept that the Judiciary needs to be kept away from the other Branches of Government. Courts should not be subjected to improper influence from the other Branches of Government or from private or partisan interests. Judicial independence is therefore vital and important to the idea of separation of powers.<sup>2</sup>

The International Commission of Jurists (“ICJ”) defined judicial independence to mean:

“That every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducement or pressures, direct or indirect, from any quarter or for whatever reason.”<sup>3</sup>

Sir Ninian Stephen said:

“What its precise meaning must always include is a state of affairs in which judges are free to do justice in their communities, protected from the power and influence of the state and also made as immune as humanly possible from all other influences that may affect their impartiality.”<sup>4</sup>

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<sup>2</sup> Adapted from the paper by the Hon. L. Malaba, *Judicial Independence*, (Harare: Judicial Service Commission, 2020) at pp. 2 – 3.

<sup>3</sup> 25026 *CJIL Bulletin*, April-October 1990.

<sup>4</sup> N. Stephen “*Judicial Independence: The Inaugural Oration in Judicial Administration*”, The Australian Institute of Judicial Administration Incorporated, 21 July 1989.

Suffice it to mention, judicial independence is a concept that enjoys universal recognition in the modern era where democracy is widely celebrated as the minimum standard for sovereign states.

Judicial independence in its simplest form relates to the absence of dependence, which is to say complete autonomy and immunity to external guidance, influence or control. It is a concept that enjoys universal recognition in the modern era where democracy is widely celebrated as the minimum standard for sovereign states.

Judicial independence is important because it is an essential precondition to the Judiciary playing its appropriate and meaningful role as an impartial and fair arbiter of disputes, and protector of rights.

The concept is relevant in Zimbabwe where the Judiciary occupies a third of the tripartite arms of the State. Thus, any discussion of the utility of the Judiciary invariably turns towards its autonomy as a way of guaranteeing its non-partisan character. This is relevant when one considers the contrast between the Judiciary and the other arms of State such as the Legislature and the Executive, whose mandate is derived from periodic nominations expressed through the medium of general elections. The selection of members of the Judiciary is seldom influenced by political concepts such as the popular vote but by the undertaking to observe principles such as impartiality, transparency and equality in addition to the requisite competencies.

For the foregoing important reasons, section 164 of the Constitution contains special provisions applicable to the principle of judicial independence and impartiality.<sup>5</sup>

In subsection (1) of section 164 of the Constitution, it is expressly provided that the courts are independent and are subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice. Not only is it made clear to members of the Judiciary that they are independent, the public is also left in no doubt that judicial independence is a fundamental value to be upheld. The meaning of judicial independence is set out, in that it is made clear that the Judiciary is guaranteed independence to ensure that in the adjudication and making of judicial decisions it obeys the law only.

Subsection (2) of section 164 of the Constitution declares in unequivocal terms that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance. As a result, section 164(2)(a) of the Constitution prohibits any kind of interference with the functioning of the courts by the State or any institution or any agency of the Government at any level or by any person. The subsection establishes an important judicial independence guarantee that prohibits any attempt to improperly influence a judicial officer in the performance of judicial functions. This means the prohibition of any acts towards a judicial officer aimed

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<sup>5</sup> Adapted from the paper by the Hon. L. Malaba, *Judicial Independence*, (Harare: Judicial Service Commission, 2020) at p. 4.

at preventing him or her from carrying out his or her professional duties or making him or her biased in order to produce an unjust decision. The prohibition of any improper influence applies to the judicial officer's full term in office. The goal of judicial independence is an impartial judgment under law, the kind of judgment not dependent upon any other person or body of persons apart from the Judge.<sup>6</sup>

The norms on providing members of the Judiciary with material means and welfare and social protection as the integral part of their conditions of service to improve their status are a constitutional imperative because of the specific characteristics of their professional responsibilities.

Every judicial officer in Zimbabwe accedes to the judicial office by appointment. The method of selection of members of the Judiciary is an important ingredient in the establishment and maintenance of judicial independence. Judicial officers should not have to compromise their independence to interpret and apply the law without fear, favour or prejudice to achieve or retain judicial office. The judicial selection process is designed to identify and appoint the most qualified candidates possible with minimum politics in the process.<sup>7</sup>

In this vein, judicial independence is not just a jurisprudential notion. It is an expression of the commitment of the people to freedom. The nature and scope of the safeguards a constitution provides for judicial

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<sup>6</sup> *"Judicial Independence"*: Lecture BY LORD PHILLIPS, LORD CHIEF JUSTICE, at The Commonwealth Law Conference, Kenya, September 2007.

<sup>7</sup> Adapted from the paper by the Hon. L. Malaba, *Judicial Independence*, (Harare: Judicial Service Commission, 2020) at pp 5 – 6.

independence will ordinarily indicate how serious a society is about commitment to the rule of law, constitutional government and democracy. As a result, judicial independence is a matter of national and international law. The rules by which judicial independence is guaranteed are part of the rule of law, which must be obeyed by all Branches of Government, including the Judiciary. In other words, an independent and impartial Judiciary is an institution of the greatest value in a democratic society required by law. It is an essential pillar of liberty and the rule of law.<sup>8</sup>

When a perusal of a Constitution reveals standards for the protection of judicial independence which fall below the level of those acceptable in other constitutional democracies, an impression may be created that there is no political will to uphold the rule of law and respect for fundamental human rights. It is not just the guarantees for judicial independence a constitution provides that matter. The actual conduct of the Judiciary in the exercise of judicial authority in administering justice in individual cases and the reaction of the other Branches of Government or the parties involved in the proceedings to unfavourable court decisions matter a lot in building and maintaining public confidence in the independence of the Judiciary.<sup>9</sup>

Judicial independence is guaranteed because of the realisation that Judges will sometimes have to make difficult decisions that the law requires but which are unpopular with a majority of the citizenry.

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<sup>8</sup> *Ibid* at p. 6.

<sup>9</sup> *Ibid* at p. 7.

Without the protection afforded to the Judiciary by the Constitution, courts may not be able to issue decisions that have a dramatic impact on the life of citizens and law and thereby contribute to the social, political and economic development of the country. Independence is the foundation of the Judicial Branch of Government.<sup>10</sup>

Judicial independence does not mean acting arbitrarily. It does not mean judicial immunity from criticism. Criticism of the Judiciary is an expression of a fundamental right.<sup>11</sup> It should not be muzzled through threats of contempt of court as long as it is not based on false information, known to be false and intended to undermine public confidence in the Judiciary. The position was set out clearly by LORD ATKIN in a Privy Council decision in 1936 thus:

“Whether the authority and position of an individual judge, or the administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”<sup>12</sup>

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<sup>10</sup> C. M. Larkins: “*Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis*” The American Journal of Comparative Law. Vol 44 (1996)

<sup>11</sup> *Craig v Harney* 331 US 367, 376 (1947)

<sup>12</sup> *Ambard v Attorney-General for Trinidad and Tobago* [1936] 1 ALL ER 704. See also: *R v Commissioner of Police of the Metropolis ex parte Blackburn* (No 2) (1968) 2 QB 150, 155

MAHOMED CJ, in an address on the “Role of the Judiciary in a Constitutional State” published in 1998 (115) SALJ at 112, had this to say about the independence of the Judiciary:

“The exact boundaries of judicial powers have varied from time to time and from country to country, but the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundation of the civilization which it protects. What judicial independence means in principle is simply the right and the duty of the judges to perform the function of the judicial adjudication, on an application of their own integrity and the law, without any actual or perceived, direct or indirect, interference from or dependence on any other person or institution.”<sup>13</sup>

The reason why judicial independence is of public importance is that a free society exists only so long as it is governed by the rule of law - the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law.<sup>14</sup>

Judicial accountability closely trails the concept of judicial independence as a medium of ensuring that the Judiciary is cognisant that its autonomy is borne out of a duty to the citizenry. This concept ensures that the Judiciary retains its liability to the will of the people in spite of its independence from external influences in the observance of

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<sup>13</sup> The excerpt is cited in Hon. L. Malaba, *Judicial Independence*, (Harare: Judicial Service Commission, 2020) at p. 10.

<sup>14</sup> “*Judicial Independence*”, A paper delivered by the Honourable Sir Gerard Brennan (Chief Justice of Australia), Australian Judicial Conference, University House, Australian National University, 2 November 1996.

its duties. United States District Judge John L Kane sagely notes that: “We must all understand that judicial independence is not for the protection of judges, but for the protection of the public.”<sup>15</sup> This illuminates the two concepts as mutually compatible in their purpose rather than the rudimentary view that they exist in conflict. Due focus on accountability also ensures that the Judiciary does not ostracise itself from society through an overbearing emphasis on judicial independence which threatens to leave it insensitive to the justified demands of society.

The interplay between judicial independence and accountability serves to ensure that the Judiciary retains the ability to provide fair, transparent and effective justice in litigation.<sup>16</sup> The full import of this obligation also includes a responsibility to protect minority rights in pertinent instances from the majority view. Judicial accountability guarantees that the Judiciary pursues its mandate as an independent arbiter of justice with a certain minimum standard of integrity. It provides transparency which ultimately fuels confidence in the independence of the Judiciary in the long run.

Therefore, judicial independence and accountability are complementary means to an end of delivering effective justice. When the optimum balance between the two principles is obtained, the

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<sup>15</sup> Judge John L Kane, Jr, Keynote Address at the National Association of Administrative Law Judges 1997 Annual Meeting and Conference in Denver, Colorado: Public Perceptions of Justice: Judicial Independence and Accountability (Sept. 29, 1997).

<sup>16</sup> David Pimentel, *Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand*, Pacific Basin Law Journal [Vol. 33:155], 2016.

Judiciary will be imbued with the continued consent of the governed to dispense its arbiter function.<sup>17</sup>

In simple terms, the Judiciary's privileged status as the primary authority in the interpretation of laws and articulation of fundamental human rights and freedoms retains credibility amongst its subjects. When a symbiotic relationship between the two is adequately cultivated, faith in the processes of the Judiciary is retained even in the face of adverse decisions during litigation.

## **INTERNATIONAL STANDARDS<sup>18</sup>**

It is imperative to advert to the international standards on the concept of judicial independence. Given the global acceptance of judicial independence, international standards on the subject inform the manner in which each jurisdiction will contextualise it to its circumstances.

Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") is the "hard" law basis of the international law definition of judicial independence.<sup>19</sup> The Article is to the effect that all persons are equal before courts and tribunals, and that all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal.

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<sup>17</sup> Stephen B. Burbank, *Judicial Independence, Judicial Accountability & Interbranch Relations*, Vol. 137, No. 4, On Judicial Independence (Fall, 2008).

<sup>18</sup> Adapted from the paper by Hon. L. Malaba, *Judicial Independence*, (Harare: Judicial Service Commission, 2020) at pp. 11 – 16.

<sup>19</sup> Choudhry, Sujit and Stacey, Richard, "*International Standards for the Independence of the Judiciary*" (2013). The Center for Constitutional Transitions at NYU Law & Democracy Reporting International Briefing Papers (with R. Stacey) (2013). Available at SSRN: <https://ssrn.com/abstract=3025990>

The United Nations Human Rights Committee provides an authoritative interpretation of the article in General Comment No. 32,<sup>20</sup> which yields the following working definition of judicial independence:

“(1) Courts must treat all parties impartially without discrimination.

(2) Courts must display no bias or favour towards particular parties.

(3) Courts must not pre-judge cases (i.e., there is no prejudice).

(4) Courts must be politically independent; they must not be beholden to, or subject to manipulation or influence from the executive, administrative or legislative branches of government, which will often be parties before the courts.

(5) Courts must be able to fulfil their functions without fear: courts cannot act independently if they face retribution for judgments unfavourable to private parties or government.”

The United Nations Basic Principles on the Independence of the Judiciary bring these elements of judicial independence together in a succinct definition in para 2 thereof.<sup>21</sup> It states:

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

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<sup>20</sup> UN Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007.

<sup>21</sup> UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan 26 August - 6 September 1985, endorsed by General Assembly Resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985, para 2.

The Universal Declaration of Human Rights (“UDHR”) is a non-binding declaration of the United Nations General Assembly, although some of its provisions are considered customary international law. The UDHR affirms the right to a fair trial before an independent and impartial tribunal (Article 11), the right of accused persons to be presumed innocent (Article 11), and the guarantee that all are equal before the law and enjoy all rights and freedoms equally. The UDHR imposes no legal obligations on countries, but is an important interpretive guide to the ICCPR and other international treaties that do impose obligations of rights protection and judicial independence.

Further to that, the United Nations Special Rapporteurs are individuals who bear either a thematic or a country-specific mandate from the United Nations Human Rights Council to investigate human rights issues on behalf of the United Nations. Since 1994 the United Nations has appointed a Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur has filed Annual Reports.

Alongside the Annual Reports, the Special Rapporteur also undertakes periodic missions to selected countries. The reports compiled on the basis of these missions are in-depth case studies of judicial and legal institutions in individual countries, and an assessment of how those structures and institutions succeed or fail in upholding the principles of judicial independence. Both kinds of documents offer useful analyses of how principles of judicial independence can be translated into practice in domestic contexts. At the same time, the documents offer

warnings of how domestic judicial and legal systems can fail to uphold principles of judicial independence.

The reports of other thematic Special Rapporteurs are also valuable as soft law sources for judicial independence. For instance, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights developed the Draft Principles Governing the Administration of Justice through Military Tribunals.<sup>22</sup>

Other global standards on the independence of Judges are espoused in several instruments, such as the Bangalore Principles of Judicial Conduct.<sup>23</sup> One of the tenets contained therein is the value that judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial and that a Judiciary shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. Further, the Universal Charter of the Judge<sup>24</sup> also has provisions to the same effect.

On a regional scale, Article 26 of the African Charter on Human and Peoples Rights (“ACHPR”) places an obligation upon State parties to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the

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<sup>22</sup> *“Draft Principles Governing the Administration of Justice through Military Tribunals”*, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/2006/58, 13 January 2006.

<sup>23</sup> *“The Bangalore Draft Code of Judicial Conduct 2001”* adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002

<sup>24</sup> Approved by the International Association of Judges on 17 November 1999

promotion and protection of the rights and freedoms guaranteed by the ACHPR.

## **FURTHER STATUTORY EVIDENCE OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN ZIMBABWE**

The attainment of a balance between judicial independence and accountability is reflected in the will of the people as articulated in the Constitution of Zimbabwe. In our jurisdiction, the Constitution as the supreme authoritative text entrenches both judicial independence and accountability. The Constitution makes it apparent from the onset that all State organs including the Judiciary are subservient to its edicts. This is highlighted in terms of section 2 as follows:

### **“2 Supremacy of Constitution**

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(2) **The obligations imposed by this Constitution are binding on every person**, natural or juristic, including the State and all executive, legislative and **judicial institutions** and agencies of government at every level, and **must be fulfilled by them**.” (the emphasis is mine)

The above-referenced section highlights the Constitution’s express authority as superseding any actions by any actor including the three arms of the State. There is no room for derogation from the obligations that are entrenched therein. The Judiciary and its relevant stakeholders are compelled to adhere to the standards set out as binding in the Constitution.

The existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. Thus, the principles of judicial independence and accountability are embedded in the articulation of the founding values in section 3 of the Constitution. This vital provision provides the following relevant values concerning judicial independence and accountability. It states:

### **“3 Founding values and principles**

(1) Zimbabwe is founded on respect for the following values and principles —

- (a) supremacy of the Constitution;
- (b) the rule of law;
- (c) fundamental human rights and freedoms;
- ... (abridged)
- (h) good governance; and
- ... (abridged)

(2) The principles of good governance, which bind the State and all institutions and agencies of government at every level, include —

- ... (abridged)
- (e) observance of the principle of separation of powers;
- (f) respect for the people of Zimbabwe, from whom the authority to govern is derived;
- (g) transparency, justice, accountability and responsiveness.”

The above founding values and principles underpin the trajectory that a competent Judiciary ought to embrace. They serve as a moral

exhortation for the Judiciary to embrace its role as an independent repository of effective justice whilst retaining its accountability under the Constitution. It is suited to clarify that the concept of accountability needs to be construed in its appropriate context. The Judiciary does not report to every citizen but rather to a common standard that is entrenched in the Constitution. This common standard gives expression to the will of the people and ensures that judicial independence is not diluted with unchecked indulgence that ultimately abuses its purpose.

Reverting to the importance of constitutional values and principles, Admark Moyo advances the following:<sup>25</sup>

“Founding values are normative ideals upon which the state is founded. In most post-colonial states, they play an important role in promoting the achievement of an egalitarian or just society. They are broadly designed to be responsive to socio-economic challenges confronting citizens, especially those living on the margins of society and to ensure that the government is anchored on such timeless principles such as democracy and the rule of law. Founding values are largely shared by the generality of the population and transcend social divisions based on race, gender, political affiliation or other prohibited ground for discrimination ... There is an inherent link between the idea of transformative constitutionalism and the majority of the founding values, for example good governance, equality and gender equality. **Thus, constitutional values and principles prescribe how state functionaries and key government institutions or agencies are to perform the functions and exercise public power.**” (the emphasis is mine)

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<sup>25</sup> Dr Admark Moyo, *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights*, (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2019)

The learned author's observations are entirely apposite in highlighting the aspect of accountability attendant on the exercise of judicial authority. This is brought out, particularly in terms of section 3(2)(g) of the Constitution which exhorts accountability *inter alia* as a critical principle in the conduct of State functionaries such as the Judiciary. Judicial independence is not omitted from the founding values and principles, as the attainment of justice and the promotion of fundamental human rights and freedoms in section 3(1)(c) of the Constitution implicitly highlight its existence.

Enforcement of fundamental human rights and delivery of justice for all can only be attained when an independent Judiciary is in place. The interplay of these values also ensures that judicial independence is perceived by the population or, as suggested in the Bangalore Principles, by "a reasonable observer", to exist.<sup>26</sup> This is apt particularly due to the import of section 3(2)(d) of the Constitution which advocates respect for the rights of all political parties. It is through this medium that the Judiciary ensures that there is a smooth transition of power during periodic general elections that necessitate changes in the composition of the Legislature and the Executive. By observing the rights of all political parties, the Judiciary reaffirms its independence from external stimulus.

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<sup>26</sup> See *Bangalore Principles on Judicial Conduct*, Article 1.3: A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free thereof.

A common criticism of the values and principles articulated in section 3 of the Constitution is that there is no concrete definition of the exactitude of a value or principle in the Constitution.<sup>27</sup> However warranted the criticism is, it cannot be used to dispute the existence of judicial independence and accountability in the constitutional framework. This is because section 164 of the Constitution explicitly entrenches the concept of judicial independence as a central tenet of the Constitution as follows:

**“164 Independence of judiciary**

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

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

(a) **neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;**

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

(3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.

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<sup>27</sup> Dr Admark Moyo, *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights*, (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2019)

(4) Nothing in this section is to be construed as preventing an Act of Parliament from vesting functions other than adjudicating functions in a member of the judiciary, provided that the exercise of those functions does not compromise the independence of the judicial officer concerned in the performance of his or her judicial functions and does not compromise the independence of the judiciary in general.” (the emphasis is mine)

The aforementioned provision builds upon the founding values and principles in section 3 of the Constitution to reaffirm both judicial independence and accountability. In terms of section 164(1), the Judiciary is granted complete autonomy in the dispensation of its mandate as an arbiter of justice. However, in the same vein, it is qualified as being subject to the supremacy of the Constitution and the law which it must apply in a non-partisan manner. The second leg of this rider provides insight into the interplay of the Judiciary with the Legislature. When the Legislature promulgates a law that is consistent with the Constitution, the Judiciary is compelled to give effect to it, there is no scope for derogation.

This has been given practical effect by the courts such as in the authoritative case of *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor S-3-20*, wherein at p 7, the following was stated:

“It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given the ordinary grammatical meaning. However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning. There is enough authority for this rule of interpretation.”

Moreover, section 164 of the Constitution introduces the concepts of institutional and individual independence as having validity in the jurisdiction of Zimbabwe. Institutional independence of the Judiciary is embedded in terms of section 164(2)(a), which mandates a separation of authority by barring the other arms of State from interfering in judicial outcomes.

When the Judiciary exercises its mandate, the other arms of the State are mandated to take a subservient role in respect of its primacy. This guarantees its independence from institutions that are within its proximity. The provision means that the Executive and the Legislature, like all other State institutions, have a duty to respect and abide by the judgments and decisions of the Judiciary. This constitutes a safeguard against disagreements or alternative views over judicial decisions by other institutions and their potential refusal to comply with them.

Another form of independence, functional independence, is also guaranteed in terms of section 164(4) of the Constitution. The provision provides that an individual Judge's ability to exercise his or her independence ought not to be compromised by any other assigned function in terms of the law. This highlights that the individual independence of Judges and other judicial officers runs concurrently with the institutional independence of the Judiciary.

Arising from the foregoing discussions on the union between accountability and independence as well as the international standards

on judicial independence, there are clearly two forms of judicial independence which emerge. I discuss them below.

## **INSTITUTIONAL INDEPENDENCE<sup>28</sup>**

Institutional independence means that the Judicial Branch is independent from the Legislative and Executive Branches of Government, as a consequence of the operation of the principle of separation of powers.<sup>29</sup> In Zimbabwe one of the safeguards for judicial independence is provided under section 186(6) of the Constitution, which prohibits abolition of the office of a Judge during his or her tenure of office. The effect of the constitutional provisions guaranteeing to a Judge security of tenure of office is that he or she is not removable from office, except in the specific circumstances prescribed under section 187(1) of the Constitution, and only after compliance with the specific procedure prescribed under subsections (2) to (8) of section 187.

It is clear that the purpose of providing a Judge with security of tenure of office is to ensure that he or she is not a victim of fear of losing the job should he or she make a decision unfavourable to the State. In that way, a Judge is required and expected to act in accordance with the freedom secured and decide cases as justice demands, without fear of being fired should he or she make an unpopular decision. The

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<sup>28</sup> Adapted from the paper by Hon. L. Malaba, *Judicial Independence*, (Harare: Judicial Service Commission, 2020) at pp. 17– 25.

<sup>29</sup> Inter-American Commission on Human Rights Report 1994 (OEA/Ser.L/V/11.85) (1995) pp 92-93

guarantee for judicial independence is significant for prevention of illegal interference in the activities of the Judge.

Inextricably linked to the safeguard for security of tenure of office for the purposes of protecting judicial independence, is the prohibition under section 188(4) of the Constitution of reduction of salaries, allowances and benefits of members of the Judiciary while they hold or act in the office concerned.

Section 188(1) of the Constitution provides that Judges are entitled to the salaries, allowances and other benefits fixed from time to time by the Judicial Service Commission with the approval of the President, given after consultation with the Minister responsible for justice and on the recommendation of the Minister responsible for finance. Section 188(3) provides that the salaries, allowances and other benefits of members of the Judiciary are a charge on the Consolidated Revenue Fund. The purpose of the remuneration provision is to prohibit the Executive from tampering with Judges' salaries and benefits as a means of diminishing the authority of the judicial Branch of Government. The power to reduce judicial salaries and benefits would create the most danger to the independence of the Judiciary.

The purpose of guaranteeing financial security to members of the Judiciary during the continuance of office, is to ensure that the judicial officer is free of fear of financial loss should he or she decide a case before him or her on the basis of the facts and the relevant law contrary to the interests of a State party. In other words, it was realised that

consideration of loss of the job or reduction of remuneration for judicial service may overcome a Judge's ability to obey the obligation to exercise judicial authority in accordance with the Constitution and the law only. The remuneration provision is designed to benefit the public interest in a competent and independent Judiciary, not the Judges as individuals by ensuring a real income purchasing power for them. The purpose is to preserve judicial independence.

Inherent and implicit in the characterisation and essence of institutional independence is the concept of financial independence. An independent Judiciary is one that receives enough funding to run the courts in order to protect the rights of citizens. It is only a Judiciary that is truly independent which decides matters impartially without fear, favour or prejudice, and is impervious and immune to extraneous influences. It is only a truly independent Judiciary which can withstand the pressure exerted by the demands of the principle of the rule of law.

Where the Judiciary does not have an independent source of income, its independence is dependent on the other organs of State from which it obtains its funding. JUSTICE KING in the article "*Current Challenges to the Federal Judiciary*", Louisiana Law Review, Vol. 66, No. 3, 2006 at page 662, captured the problem well. She remarked:

"The Constitution mandates that the powers of the federal government be separated among three independent branches: executive, legislative and judicial. But the Judiciary is financed, like all other parts of the federal government, through appropriations bills passed by Congress and signed by the President. You have heard that the Judiciary does not have the

power of the purse. Indeed, it does not; it is dependent for its financial livelihood on Congress and the President. **So our independence must always be understood as qualified by our dependence on the other branches for our money.**” (my emphasis)

The Judiciary should not have to rely on the Executive or the Legislature for its livelihood. There is therefore a critical need to ensure financial independence, without which there can be no absolute judicial independence.

There is an integral relationship between the remuneration provision and the tenure provision. Without the provision guaranteeing undiminished remuneration, the provision as to tenure of judicial office would be nugatory and indeed a mere mockery. The two provisions are inextricably tied to one another in the pursuit of securing judicial independence. By reducing Judges’ salaries and benefits the political Branches of Government could force Judges to leave the Bench, thereby achieving what they cannot achieve directly under the tenure provision.<sup>30</sup>

The guarantee of non-removability of a member of the Judiciary from office is not absolute under the Constitution. The non-removability of members of the Judiciary by the Executive during their tenure of judicial office must, in general, be considered as a corollary of their independence. The very existence of the power to remove a Judge from office is a sufficient threat to judicial independence, notwithstanding

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<sup>30</sup> Charles D. Cole: “*Judicial Independence in the United States Federal Courts*” (1988) *Journal of the Legal Profession* Vol 13:183 pp. 193-194.

the limited exercise of the power in practice and irrespective of whether its exercise would be an issue in a concrete case<sup>31</sup>.

Non-removability of Judges obviously does not mean that a Judge can never be removed from office. Section 187(1) of the Constitution provides that a Judge may be removed from office only for –

- (a) inability to perform the functions of his or her office, due to mental or physical incapacity;
- (b) gross incompetence; or
- (c) gross misconduct.

A Judge cannot be removed from office except in accordance with the specific procedure prescribed under section 187.

The formal recognition of non-removability in the law implies the existence of judicial independence as provided for by the Constitution. The level of protection for judicial independence is clear from the fact that none of the grounds which may give rise to a question of removal of a Judge from office have anything to do with the Judge having made a decision in accordance with the facts and relevant law.

The grounds for removal of a Judge from office relate to a failure of a serious nature to exercise judicial authority. Not only is judicial independence protected from possible improper invasion by limiting the exception to the guarantee of non-removability to the three narrowly defined grounds for removal, the only procedure which would

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<sup>31</sup> M. Kuijter p. 35 citing *Bryan v United Kingdom* ECHR 22 Nov. 1995 (Series A -335- A) para. 38

have to be complied with for the removal of a Judge from office ensures that the involvement of the Executive is minimised.

The Constitution not only recognises that courts are independent and impartial, but also provides important institutional protection for the courts. The State is obliged under section 164(2)(b) of the Constitution, through legislative and other measures, to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165. The State is obliged to provide the funding and maintain the environment necessary to ensure the proper functioning of the Judiciary.

## **INDIVIDUAL INDEPENDENCE<sup>32</sup>**

While it constitutes a vital safeguard, institutional independence is not sufficient for the protection of the independence of the Judiciary. Unless individual Judges are free from unwarranted interference when they decide a particular case, the concept of judicial independence is always at risk and cannot be fully realised.

One way to promote judicial independence is by granting life-tenure or long tenure for members of the Judiciary, which ideally frees them to decide cases and make rulings according to the rule of law and judicial discretion, even if those decisions are politically unpopular or opposed by powerful interests.<sup>33</sup>

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<sup>32</sup> Adapted from the paper by Hon. L. Malaba, *Judicial Independence*, (Harare: Judicial Service Commission, 2020) at pp. 26 – 34.

<sup>33</sup> Judicial Independence: [Wikipedia.en.m.wikipedia.org/wiki/Judicial\\_Independence](https://en.m.wikipedia.org/wiki/Judicial_Independence)

It is accepted that security of tenure is an important factor for the measurement of a judicial officer's independence in the exercise of judicial authority. Long term tenure in judicial office is certainly conducive to the facilitation of independent judicial decisions. The general principle is that the longer the term of office to be served by a judicial officer fixed by law governing judicial appointments the greater the guarantee for judicial independence. The time limit strengthens a judicial officer's belief in his or her independence due to the inviolability of his or her activity over a long period of time. A solid basis for that independence is that a judicial officer appointed for a constitutional term of office is not only an officer with judicial rights and duties, but he or she enjoys the social protection guaranteed as well.<sup>34</sup>

Section 186 of the Constitution makes provision for tenure of office of Judges. Under section 186(2) all Judges hold office from the date of assumption of office until they reach the age of seventy years when they must retire, except for Judges of the Supreme Court and the Constitutional Court who may choose on a clean bill of health upon production of a medical report to proceed to seventy-five years. Judges of the Constitutional Court are appointed for a non-renewable term of not more than fifteen years, but they must retire earlier if they reach the age of seventy years or seventy-five years.

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<sup>34</sup> Michael D. Gilbert "*Judicial Independence and Social Welfare*" Michigan Law Rev. Vol 112. No. 4 (2014)

Further to the above, judicial independence is guaranteed by denying Judges the enjoyment of the right to political association. Section 165(4) of the Constitution prohibits members of the Judiciary from engaging in any political activities, holding office in or being members of any political organisation, soliciting funds for or contributing towards any political organisation or attending political meetings. In that way, judicial independence is protected from improper political influences on the Judiciary which would otherwise emanate from political association.<sup>35</sup> The denial of rights of political association to members of the Judiciary is justified on the ground that those who bring cases to courts for determination belong to different political parties and are entitled to equal protection of the law. They are entitled to expect that they shall be subjected to the same standard of adjudication, requiring the Judiciary to decide cases on the facts proved and the relevant law.

Judicial independence is not a right. It is a duty. It is guaranteed to enable members of the Judiciary to administer justice. The concept expresses the sum of the values of integrity and freedom. It is not enough that members of the Judiciary be guaranteed an environment of freedom according to the law when performing judicial functions. They are required and expected to meet certain standards in the performance of judicial functions.

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<sup>35</sup> Peter H. Russel *"Towards a General Theory of Judicial Independence"* books.google.co.zw/books id = MADgmkdYMBsC&p.

Section 165 of the Constitution requires members of the Judiciary to do justice to all in the exercise of judicial authority, irrespective of status. They are not to delay justice. As Francis Bacon, the LORD CHANCELLOR OF ENGLAND, remarked in 1617, “fresh justice is the sweetest”.<sup>36</sup> To that end, members of the Judiciary are expected to perform their judicial duties efficiently and with reasonable promptness.

Members of the Judiciary are required and expected to give their judicial duties precedence over all other activities. They are required not to engage in any activities which interfere with or compromise their judicial duties. They must always bear in mind that the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.

In order to be able to discharge their judicial functions efficiently and effectively, members of the Judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law. The reason is that the Judicial Branch of Government not only tests and enforces the law, it judges the laws created by the Legislature according to the standards implicit in the Constitution. Thus, unlike the Legislative and the Executive Branches, the sources of judicial authority derive in part

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<sup>36</sup> See Francis Bacon, “Delay in reasons for Judgment: Justice Delayed is justice denied”, *duhaime.org*. Available at <https://www.duhaime.org/Legal-Resources/Civil-Litigation/ID/1270/Delay-in-Reasons-for-Judgment-Justice-Delayed-is-Justice-Denied>. Accessed on 8 February 2020.

from the will of the people and in part from standards of justice that are not bounded by national views and circumstances and are more universal in nature.

Section 165(2) of the Constitution imposes an obligation on members of the Judiciary, individually and collectively, to respect and honour their judicial office as a public trust. Judges must strive to enhance their independence in order to maintain public confidence in the judicial system. It is clear that members of the Judiciary are required and expected to always bear in mind that the power they exercise is vested in the courts by the people to be exercised for their benefit.

It behoves members of the Judiciary to conscientiously uphold their independence and exercise judicial authority for the purposes it is intended to be used. In that regard, section 165(3) of the Constitution imposes an obligation on a member of the Judiciary, when making a judicial decision, to make it freely and without interference or undue influence. By prohibition of any kind of undue influence on a member of the Judiciary when making a judicial decision, the Constitution provides a tangible safeguard to secure the independence of the Judiciary and ensures that members of the Judiciary are bound by the sole governance of law in performing their duties.

We need Judges of the calibre envisaged by Donald R. Cressey when he said:

“We need judges learned in the law, not merely the law in books but something far more difficult to acquire, the law as applied in action in the courtroom, judges deeply versed in the mysteries of

human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest and equally important believed by all men to be independent and honest; judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman, and child that may come before them to preserve individual freedom against any aggression of government; judges with humility born of wisdom, patient and untiring in the search for truth and keenly conscious of the evils arising in a workaday world from any unnecessary delay.”<sup>37</sup>

In the Canadian case of *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC), quoted with approval by the Constitutional Court of South Africa in *De Lange v Smuts N.O. and Others* 1998 (3) SA 785 (CC), DICKSON CJC stated the following in relation to what constitutes an independent and impartial court:

“Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider, be it government, pressure group, individual or even another judge, should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.”

In Zimbabwe, the Judicial Service (Code of Ethics) Regulations (Statutory Instrument 107 of 2012) require in section 5 that judicial officers be independent and perform their duties without fear or favour. Further, it is also a requirement that a judicial officer shall at all times exhibit and promote high standards of judicial conduct in order to foster

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<sup>37</sup> D R Cressey “*Crime and Criminal Justice*” Quadrangle Books Chicago 1971 p.263

public confidence, which is universally accepted as a fundamental ingredient to the maintenance of judicial independence. This bolsters the notion that justice must not only be done but must be seen to be done.

## **INTERACTION OF THE PRINCIPLES OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY WITH:**

### **A. SEPARATION OF POWERS**

Separation of powers is a fundamental principle on which any constitutional and democratic system of government is based. It postulates that State authority ought to be balanced between three arms. In respect of the Judiciary, all the powers constituting judicial authority are vested in the courts and must be exercised solely by the Judiciary because it is duty-bound to administer justice. The essence is that State authority ought not to be concentrated in one centre. Legal systems where law-making authority, enforcement and adjudication mechanisms are concentrated in one source are generally synonymous with autocratic rule. Thus, the separation of powers principle is not merely a matter of constitutional architecture for the sake of the rational organisation of powers. It is a matter of liberty for each person and society as a whole. It is a basic pre-condition for the effective protection of individual rights and liberties, in order to assure each individual an effective remedy against any breach of her or his rights.<sup>38</sup>

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<sup>38</sup> Marta Cartabia (Vice President of the Italian Constitutional Court) "*Separation of Powers and Judicial Independence: Current Challenges*" European Court of Human Rights - The Authority of the Judiciary, Seminar in the occasion of the Solemn Hearing of the Court Strasbourg, January 26<sup>th</sup>, 2018

The doctrine can be traced to the genesis of the contemporary concept of democracy. In the fourth century BC, Aristotle in his treatise titled “Politics”, described three agencies of Government - “the general assembly, the public officials, and the judiciary”.<sup>39</sup> In *Book XI* of the *Spirit of Laws* (1748) Montesquieu states:

“Again, there is no liberty if the judiciary power be not separated from the legislature and executive. Were it joined with the legislature, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and aggression. There would be an end of everything, were the same man and the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing public resolutions and of trying the causes of individuals.”<sup>40</sup>

The Constitution of Zimbabwe strives to maintain a separation of power amongst the tripartite arms of the State. Section 3(2)(e) of the Constitution recognises the separation of powers as a hallmark of the good governance of Zimbabwe. This promotes the maintenance of balance, with the three distinct bodies providing a check to the unfettered authority of each other. The independence and accountability of the Judiciary become relevant as they ensure that the Judiciary provides a check to the authority of the Executive and the Legislature.

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<sup>39</sup> Sam J Ervin Jr: “Separation of Powers: Judicial Independence” available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3279&context=lcp>

<sup>40</sup> *Book XI The Spirit of Laws* (1748) Montesquieu

This is given effect through section 167(2)(d) of the Constitution, in terms of which the Constitutional Court as the apex court is granted exclusive authority to hold Parliament or the President accountable for failure to fulfil their constitutional obligations. By delegating this duty to the highest court in constitutional litigation, the Constitution provides a safeguard for the exclusive exercise of Judicial power by the Judiciary. It conveys the message that although the Judiciary is engaged in the exclusive application of constitutionally prescribed limits to Legislative and Executive powers, the function ought not be exercised capriciously.

Thus, the Constitutional Court is tasked with ensuring that the Judiciary recognises the limits of its role in compliance with the doctrine of the separation of powers. Its constitutional mandate ought not to ordinarily overlap the functions of the other arms of the State. However, judicial accountability entails that the Judiciary does not usurp the functions of the other two arms of the State. The sole prerogative of the Judiciary is to undertake a constitutional review of complaints, laws and statutory power which in appropriate circumstances results in the curtailment of the actions of the other arms of the State in instances where their activities are unlawful or contrary to the standards espoused in the Constitution.

The importance of adhering to the constitutional standard cannot be understated. It is only through such an application that the Judiciary's interference with other arms of State can be justified. In the case of *Mawarire v Mugabe N.O. & Ors* 2013 (1) ZLR 469 (CC), at p 499

paras B–C, the Constitutional Court confirmed the above observations as follows:

“The tripartite structure of the State is the keystone of every constitutional democracy and the need to safeguard the attendant separation of powers is unquestionably paramount. However, as was recognised in *Mike Campbell (Pvt) Ltd and Anor v Minister of Lands and Anor* 2008 (1) 17 (S) at 33-35, the clear words of a Constitution must be construed to override any doctrine of constitutionalism predicated on essential features or core values.”

## **B. RULE OF LAW**

The rule of law is one of the guiding principles of the administration of justice.<sup>41</sup> It undergirds the provisions of section 2 of the Constitution, in that every person or juristic entity is compelled to respect the obligations contained in the Constitution. It is an important component of judicial accountability, particularly because it also ensures that the Judiciary is held accountable under valid standards. Every decision made in the exercise of the administrative and judicial functions of the courts must be justifiable based on consistency with the rule of law. There should be no room for arbitrariness in institutionalised decision-making.

By placing everyone under a common standard, the rule of law also fortifies judicial independence, as the Judiciary simply gives effect to the accepted legal norms as permissible under the Constitution.

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<sup>41</sup> Speech by The Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe, On The Occasion of The Official Opening Of The 2019 Legal Year

Concomitantly, the principles of judicial independence and accountability give effect to the observance of the rule of law.

This is supported by the conception of the rule of law. The definition proffered by Dicey provides that sanction should only come after for violating pre-existing laws and after sentencing by regular courts, and that rights are protected by ordinary legal processes.<sup>42</sup> It follows that the rule of law can only be observed by a Judiciary that is fully independent and aware of its obligations to adhere to the constitutional standard. These observations are consistent with the recognition of the rule of law as a foundational value in terms of section 3(1)(b) of the Constitution.

## **RELATIONSHIP BETWEEN JUDICIAL ACCOUNTABILITY AND DEMOCRATIC GOVERNANCE**

Accountability, in as far as it relates to the Judiciary, refers to a set of mechanisms designed to ensure that judicial officers perform the duties required by their job in order to fulfil or further the goals set by the Constitution. It also refers to full disclosure on the use of public resources and the consequences of failing to meet stated performance objectives. The Judiciary (as with the other two arms of the State) provides a public service. It is axiomatic that it should account (in the sense explained above) to the society it serves.

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<sup>42</sup> Jane Stromseth et al., *Can Might Make Rights?: Building the Rule of Law After Military Interventions* 70 (2006).

As stated in the speech on the occasion of the official opening of the Zimbabwe 2020 Legal Year, themed “Judicial Transparency and Accountability”:

“The Judiciary’s accountability to society is made operative first and foremost by ensuring that judicial officers are accountable to the law. That means that they are required to explain their decisions based on the application of legal rules, through legal reasoning and findings of fact that are based on evidence and analysis. Their decisions can be reviewed and, if necessary, corrected by the judicial hierarchy through a system of appeals.”

Such is the importance of accountability that the preamble to the Constitution lists it amongst the values which need to be entrenched to guide institutions of the State at every level in the discharge of constitutional obligations. The preamble states that there is "the need to entrench democracy, good, transparent and accountable governance and the rule of law”.

In tandem, the principles of good governance highlighted in the foundational values under section 3(2) of the Constitution are binding on the Judiciary as an institution. This means that the Judiciary ought to be transparent in its activities including outside the sphere of litigation. This necessitates the imposition of the same standards of accountability in the operations of its administrative organs. Resultantly, an additional layer of protection is provided to the citizenry who rely on the machinations of the Judiciary to acquire justice.

Judicial accountability also requires judicial officers to provide reasons for their decisions through written judgments. Reasons for judgments enable litigants and members of the public to comment on the rationale of decisions. Members of the public are afforded empowered to form their own opinion on the efficiency and effectiveness of the judicial system. This is especially so in cases of public interest.

The Constitution of Zimbabwe also gives prominence to the need for accountability in the administrative affairs of the Judiciary through section 190(2) which provides the following in respect of the principal administrative organ of the Judiciary:

“(2) The Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose.”

Section 191 mandates the Judicial Service Commission to conduct its business in a just, fair and transparent manner. When properly construed, these provisions highlight the need to safeguard judicial independence and accountability, as they are essential for the dispensation of the Judiciary’s justice function.

Section 191(2) of the Constitution clarifies judicial independence and accountability as complementary principles that facilitate the dispensation of quality justice devoid of interference from external interference whilst acquiescent to the will of the people as pronounced in the Constitution. In summation, therefore, the Judiciary has the responsibility of demonstrating to the other powers of the State and to

society at large the use to which its power, authority and independence have been put.

## **THE ZIMBABWEAN EXPERIENCE ON THE STANDARDS OF JUDICIAL ACCOUNTABILITY**

The foregoing section covered the definitions, nature, scope, limits and purposes of judicial independence and judicial accountability. However, the discussion was largely confined to the conceptual underpinnings of judicial independence and judicial accountability. The concepts defining accountability and independence do not, in themselves, fully portray the real, practical and relatable standards of judicial accountability.

With this in mind, it is observed that it is more likely than not that citizens will talk about the concepts of judicial independence and judicial accountability within the context of their interaction with the courts. They will consider the service delivery, the impartiality of the judicial officers and the efficiency of the justice system in finalising matters among other measures of the Judiciary's accountability to its constitutional mandate. There cannot be any meaningful discussion of both judicial accountability and judicial independence that does not set out the actual means by which accountability and independence are given effect. This being the case, it is important to relate to the actual means by which the Judiciary's accountability is achieved and measured.

## **DIGITISATION OF THE COURTS**

The integration of information and technology in the courts, which is often referred to as “judicial informatisation” or “digitisation and automation of the courts”, involves the creation of a judicial decision-making process that is supported by “algorithms and big data analytics, conducted in an online judicial ecosystem where most tasks are automated, and Judges are aided by technology to make more accurate, consistent, and transparent decisions”.<sup>43</sup>

In Zimbabwe, an electronic case-tracking and management system known as the Integrated Electronic Case Management System (“I.E.C.M.S.”) presently stands out as a means towards digitisation of the courts. The I.E.C.M.S. is a computer-based and web-based system that manages and tracks all aspects of cases filed in the courts. In its final stage of implementation, the I.E.C.M.S. will have integrated all the courts in Zimbabwe. Currently, it has integrated superior courts such as the Constitutional Court, the Supreme Court and the High Court (Commercial Division). The I.E.C.M.S. also allows on board the key players in the justice delivery system such as the Zimbabwe Anti-Corruption Commission, the Ministry of Justice, Legal and Parliamentary Affairs, the Legal Aid Directorate, the Zimbabwe Republic Police, and the Zimbabwe Prisons and Correctional Services. These stakeholders enjoy access to specified information and services

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<sup>43</sup> See Papagiannenas, Straton. "Towards Smarter and Fairer Justice? A Review of the Chinese Scholarship on Building Smart Courts and Automating Justice." *Journal of Current Chinese Affairs* 51, no. 2 (2022): p. 328.

in addition to the e-filing and e-payment services featured on the I.E.C.M.S..

The I.E.C.M.S. has yielded numerous positive results for the Judiciary in Zimbabwe and the justice delivery system. Top on the list of positive results is that it has expedited service provision in the courts because case filing is now automated. Correspondingly, it has also reduced registry backlogs. It is also noteworthy that challenges related to corruption in court registries and cases of missing documents are now virtually issues of the past. The system has cut out the human element that would often manipulate systems for personal gain. In this way, the I.E.C.M.S. concretises the obligation to be accountable that is imposed upon all members of the Judicial Service. It is evidence of the Judiciary's willingness to utilise technology and adopt measures that guarantee justice delivery in an accountable manner.

## **OPEN COURTS AND OPEN DAYS**

The concept of open courts envisages a court system in which the public and the media have free admittance to courtrooms. In Zimbabwe, section 69(1) of the Constitution provides that “every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court”. In addition to the foregoing human right, open courts are also given effect by section 15 of the Constitutional Court Act [*Chapter 7:22*], section 31 of the Supreme Court Act [*Chapter 7:31*], section 49 of the High Court Act [*Chapter 7:06*] and section 5(2)(a) of the Magistrates

Court Act [*Chapter 7:10*]. All the cited provisions of the above Acts of Parliament provide that the proceedings in the Courts to which they relate shall generally be in open court except as otherwise provided in the rules of court or any other law.

There also have been judicial pronouncements interrelated with the importance of open courts. One such decision is that of the Constitutional Court in the case of *Chamisa v Mnangagwa & Ors 2018 (2) ZLR 251 (CC)*, wherein the Court permitted the live-streaming of a hearing concerning a challenge to a presidential election. At p 262, paras F-G of the judgment, the Court held that:

“Once it is accepted that the proceedings before the Court were not only limited to the parties’ interests but extended to those of all citizens to a free, fair and credible Presidential election, it is clear that it was in the interests of justice to allow the live streaming through national television of the proceedings. Members of the public had an interest in having knowledge of the evidence produced by the disputants. They had an interest in witnessing how the Court handled the matter and what decision it reached. They had an interest in deciding whether, in their own objective assessment, the decision of the Court was fair and just.”

Live-streaming of court proceedings is, in itself, a progressive and expansive approach to open courts. Pre-eminently, the above *dictum* speaks to the fact that the Constitutional Court was alive to its obligation to be accountable to the people by broadcasting the proceedings. The fact that live-streaming court proceedings results in accountability is manifest in the globally growing trend of live-streaming matters of public importance.

In addition to the open courts, the Judicial Service Commission has also introduced and implemented the concept of Open Days. During Open Days members of the public are provided with information that enables them to understand the operations and services provided by the courts as well as to provide feedback on their interaction with the courts. Through Open Days, the Judicial Service Commission is also empowered to measure the effectiveness of its operations.

The very act of inviting members of the public to interact with court staff is a significant step towards accountability. Open Days familiarise the Judicial Service Commission with the views of the public concerning its work and compel it to look into as well as address the concerns raised by the public. Ultimately, the process of interacting with the public through Open Days is evidence of a willingness of the Judiciary to meet the legitimate needs of people from whom judicial authority is derived in its dispensation of justice.

## **VIRTUAL COURT HEARINGS**

According to N. R. Oji, a virtual or remote hearing refers to a court hearing conducted by audio-visual means, whereby proceedings are conducted virtually or remotely without the need for the parties or their counsel to attend the court physically.<sup>44</sup> Virtual hearings depend on the available video or teleconferencing methods, which are generally

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<sup>44</sup> See Oji, Ngozika Rosemary. "Virtual/Remote Hearing: The Impact of Covid-19 Pandemic on the Justice Sector in Nigeria." See also Aneke, Peter Chidera. "The Legality Of Virtual Court Hearing In Nigeria: The Way Forward." *Madonna University, Nigeria Faculty OF Law Law Journal* 6, no. 2 (2021) at 1. Available at: <https://journals.ezenwaohaetorc.org/index.php/MUNFOLLJ/article/viewFile/1538/1582>. Accessed on 17 October 2022.

commonly used, such as Microsoft Teams, Skype for Business, Zoom or any other appropriate video teleconferencing platform.<sup>45</sup>

The first setup of virtual court hearings that are employed by Zimbabwean courts is mostly common in criminal proceedings. The Judicial Service Commission first commissioned virtual courts on 07 February 2022 in the Harare High Court, the Harare Magistrates Court, the Harare Remand Prison and the Chikurubi Maximum Prison. Suffice it to mention that the Harare Remand Prison and the Chikurubi Maximum Prison represent the largest prisons in Zimbabwe. In this setup of virtual hearings, the presiding officer, who is either a Judge or a Magistrate, prosecutors and lawyers convene in a courtroom with video/teleconferencing equipment while the accused person participates from prison or any other designated detention centre. This form of virtual court hearings was borne out of the barriers caused by the COVID-19 pandemic-induced lockdowns to access to the courts for accused persons who were in custody. To date, the Judicial Service Commission has expanded the virtual courts to all ten Provinces.

The second setup of virtual courts relied on in Zimbabwean courts is based on the I.E.C.M.S. It is predominantly used in all hearings, whether criminal or civil in nature, that are virtually held in the Constitutional Court, the Supreme Court and the High Court's Commercial Division. In this setup, the presiding judicial officer, the litigants and/or their legal representatives as well as the court staff

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<sup>45</sup> Ibid.

convene using features on the I.E.C.M.S. A session link is generated by the registrar of the court concerned and it is shared with all the intended participants. All that a participant requires is a stable internet connection as well as a device compatible with videoconferencing.

The inherent benefit of virtual courts and hearings is that they facilitate the carrying out of court proceedings that would have otherwise been impeded by physical and socio-economic barriers to access to justice. Through virtual courts, the Judiciary fulfils its obligation to the people to provide various and feasible means of accessing the courts, thus taking full responsibility for its role in the delivery of justice.

## **LEGISLATIVE MEASURES**

In certain instances, legislation is enacted or passed as a means of establishing a standard on judicial accountability. Various pieces of legislation in Zimbabwe contain provisions that aid the attainment and fulfilment of both judicial independence and accountability.

One such piece of legislation is the Judicial Service Act [*Chapter 7:18*] – “the Judicial Service Act”. In terms of section 16 of the Judicial Service Act, persons presiding over courts are given freedom from arrest or search on court premises. The section reads:

### **“16 Freedom of persons presiding over courts from arrest or search in court premises**

No arrest or search of the person presiding over a court, in pursuance of any proceedings shall -

- (a) in the case of an arrest, be made within his or her chambers or within the precincts of a court over which he or she is presiding; or
  - (b) in the case of a search, be executed within his or her chambers or within the precincts of a court over which he or she is presiding, except with his or her consent;
- whether or not the person presiding over the court is conducting any proceedings therein.”

By giving judicial officers immunity from either arrest or search within the precincts of the courts over which they preside, the Judicial Service Act gives practical effect to the standard of judicial independence. This, in turn, enable judicial officers to be able to dispense justice accountably without fear of an arrest or search.

Pertinently, the Judicial Service Act also provides for the prescription of Judicial Service Codes of Ethics by service regulations. It is necessary to cite the particular provision in full:

**“18 Code of ethics**

Service regulations may prescribe one or more Judicial Service codes of ethics providing for —

- (a) the requirement of strict impartiality of judicial officers when performing their duties;
- (b) the requirement of judicial officers to discharge duties with propriety without being influenced by -
  - (i) any partisan interest, or public clamour or fear;
  - (ii) family, personal, social, political or other interests;
- (c) the requirement of judicial officers not to make any public comment that may affect or may reasonably be construed to

affect the outcome of any proceedings or impair their fairness, or make any comment that might compromise a fair trial or hearing;

- (d) the prohibition or limitation of gifts to judicial officers or to members of their families residing with them that may influence or reasonably be construed to influence the execution of the duties of judicial officers;
- (e) the definition of any other corrupt practices or acts of improper behaviour on the part of judicial officers.”

Self-evidently, the core objective of the prescription of the Judicial Service Codes of Ethics is to delineate the ethical boundaries for judicial officers that enable judicial independence and accountability at the individual level. In this regard, the Judicial Service (Code of Ethics) Regulations, 2012 are a prime example of the standards of judicial accountability and judicial independence in Zimbabwe. In section 5 thereof, independence is prescribed as one of the main ethics and standards binding on judicial officers. The provision reads:

#### *“Independence*

5. (1) A judicial officer shall uphold the independence of the judiciary and the authority of the courts and shall, in keeping with his or her judicial oath, perform all duties without fear or favour.

(2) A judicial officer shall at all times exhibit and promote high standards of judicial conduct in order to foster public confidence, which is universally accepted as a fundamental ingredient to the maintenance of judicial independence.

(3) A judicial officer shall be faithful to and maintain professional competence in the law, and shall not be swayed by partisan interests, public clamour or fear of criticism.”

Crucially, section 25 of the Judicial Service (Code of Ethics) Regulations, 2012 also provides for a hierarchical and intra-institutional system of accountability while also safeguarding the Judiciary's independence. The provision reads thus:

*“Implementation and accountability*

25. (1) ...

(2) Subject to the Constitution, the Judicial Service Act [Chapter 7:18] (No. 10 of 2006), any other enactment and this Code, judicial officers shall not be accountable or answerable to any other State or non-State organ, entity or authority.

(3) All legitimate complaints against any judicial officer shall be dealt with as follows —

- (a) complaints against the person of the Chief Justice shall be directed for the attention of the President and shall not be subject to this Part;
- (b) complaints against the person of the Deputy Chief Justice and the other judges of the Supreme Court, the Judge President of the High Court, the Senior President of the Labour Court, and the Senior President of the Administrative Court shall be directed for the attention of the Chief Justice;
- (c) complaints against the other judges of the High Court shall be directed for the attention of the Judge President;
- (d) complaints against the other Presidents of the Labour Court shall be directed for the attention of the Senior President of the Labour Court; and
- (e) complaints against the other Presidents of the Administrative Court shall be directed for the attention of the Senior President of the Administrative Court:

....

(4) Where the Judge President or a Senior President, as the case may be, arrives at the opinion that the complaint appears to have merit, the head of the court concerned shall forthwith refer such complaint to the Chief Justice, who shall, in turn, determine whether the complaint merits reference to a disciplinary committee under this Part.”

The above provisions have the dual purpose of rendering Judges accountable to their superiors while protecting them from supervision by persons who are not members of the Judiciary.

Legislation that is intended to bolster judicial accountability breathes life into and generates a greater public understanding of the constitutional demand for judicial accountability. This is because legislation specifies the exact ways by which the Judiciary is expected to be accountable.

The fact that legislative measures are generally considered to be effective due to their binding nature on all persons hardly requires to be emphasised. Given this fact, the various legislative measures which have been taken in Zimbabwe to entrench judicial accountability are reflections of the fundamental constitutional underpinnings of judicial accountability. Thus, the concerted efforts to put in place legislative measures such as the Judicial Service (Code of Ethics) Regulations, 2012 for judicial accountability are a reflection of the conscientiousness within Zimbabwe to adhere to the demands of accountability.

## **ADOPTION OF SYSTEMS OF ACCOUNTABILITY**

The Judiciary in Zimbabwe has created procedures and principles through which its members should continuously account for the discharge of their important constitutional function.

The Judicial Service Commission implements a robust system of accountability for judicial officers. These mainly comprise reporting procedures for judicial officers. In all the courts, judicial officers provide statistical reports of their work which cover the number of matters which they would have finalised in a given period and the number of matters in which judgment was reserved. Statistical reporting by judicial officers enables them to keep their work in check and remain accountable by endeavouring to hear and finalise matters expeditiously.

## **RESTRICTIONS AGAINST DIMINISHING JUDICIAL OFFICERS' SALARIES**

What constitutes a judicial officer's salary must be construed rather broadly. A judicial officer's salary consists of the cash emoluments, perks and fringe benefits that a judicial officer is entitled to by virtue of his or her station.

The Constitution of Zimbabwe, 2013 has elaborate provisions on the conditions of tenure of members of the Judiciary. In section 188 it states that:

### **“188 Conditions of service and tenure of members of judiciary**

(1) Judges are entitled to the salaries, allowances and other benefits fixed from time to time by the Judicial Service

Commission with the approval of the President given after consultation with the Minister responsible for justice and on the recommendation of the Minister responsible for finance.

(2) An Act of Parliament must provide for the conditions of service of judicial officers other than judges and must ensure that their promotion, transfer and dismissal, and any disciplinary steps taken against them, take place —

(a) with the approval of the Judicial Service Commission; and

(b) in a fair and transparent manner and without fear, favour or prejudice.

(3) The salaries, allowances and other benefits of members of the judiciary are a charge on the Consolidated Revenue Fund.

(4) The salaries, allowances and other benefits of members of the judiciary must not be reduced while they hold or act in the office concerned.”

The Constitution of Zimbabwe clearly specifies the nature and source of the remuneration of judicial officers as well as the restrictions on reducing the salaries, allowances and other benefits of members of the Judiciary.

The prohibition against the reduction of judicial officers’ salaries is a safeguard against encroachment onto the Judiciary’s independence as well as a means to ensure that Judges are always in a position to remain accountable. As the International Commission of Jurists notes:

“Heavy caseloads, unethical practices, absent or ineffective accountability mechanisms, insecurity of tenure and lack of capacity building have all been put forward as factors that contribute to judicial corruption. But the most commonly identified cause in developing countries is low salaries. This

factor is a particular challenge for governments and legislatures in developing countries, where increases to judges' salaries may present a significant budgetary and public-perception challenge especially when considered relative to the immediate impact of budget increases or decreases in other sectors."<sup>46</sup>

While it is accepted that fiscal challenges may undermine a government's ability to adequately remunerate its Judiciary, the provisions of the Constitution of Zimbabwe on conditions of service for the Judiciary safeguard against the erosion of judicial independence through poor remuneration. In effect, the provisions of section 188(4) place judicial independence and accountability on a firm standing for the stated reasons. The Judiciary is enabled to perform its mandate independently and accountably without fear of reprisals.

## **COMPLAINT MECHANISMS**

Complaint mechanisms refer to the means or set of procedures by which any person dissatisfied or aggrieved by the service that is given to him or her or it by the Judiciary or its supporting staff complains about his or her or its maltreatment to the appropriate authority for investigation and redress.

As a means of attaining the standard of judicial accountability, the Judicial Service Commission of Zimbabwe put in place elaborate complaint mechanisms. The establishment of complaint mechanisms is demanded by subsection (2) of section 190 of the Constitution, which

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<sup>46</sup> International Commission of Jurists, *Judicial Accountability - An Adaptation of Practitioners Guide No. 13 for Zimbabwe*, (Geneva: International Commission of Jurists, 2020) at pp. 157 – 158.

sets out the functions of the Judicial Service Commission. In its terms, the Judicial Service Commission must promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice in Zimbabwe.

There is no better way to promote the Judiciary's accountability and independence as well as the effective, efficient and transparent administration of justice than through the establishment of complaint mechanisms. The starting point is to observe that in terms of section 5(1)(d) of the Judicial Service Act, one of the functions of the Judicial Service Commission is "inquiring into and dealing with complaints or grievances made by or against members of the Judicial Service". On a proper reading of section 5(1)(d), one notes that it contemplates that complaints may be made by both persons within the Judicial Service and those who are outside it.

The Judicial Service (Code of Ethics) Regulations, 2012, gives effect to the Judicial Service Commission's complaint-handling mandate by prescribing the procedure to be followed. That procedure, which appears in section 25 of the Code of Ethics, has already been adverted to above. Critically, it directs any person with a legitimate complaint against a judicial officer to the appropriate recipient.

However, the Judicial Service Commission's complaints handling protocols and procedures are not limited to complaints against the members of the Judiciary only. Complaints may be made against any person within the Judicial Service. A policy was adopted that mandates

the thorough investigation of and timeous response to complaints. Correspondingly, the Judicial Service Commission's complaints-handling policy entitles a complainant to direct his complaint to either the Office of the Chief Justice, the Head of a Court or the Judicial Service Commission's Secretariat, as may appear most appropriate to the complainant. The Judicial Service Commission endeavours to provide the most appropriate responses to complaints including taking disciplinary action against errant members. The complaints-handling policy provides a practical standard on attaining accountability.

### **REVIEW PROCEDURES: A “SELF-CORRECTING” SYSTEM**

Put simply, a review is the “consideration, inspection, or re-examination of a subject or thing”.<sup>47</sup> In Zimbabwe, review procedures and remedies against irregular proceedings or decisions of a court are generally available from the next higher court. Thus, for example, a review of a decision of the Magistrates' Court may be sought in the High Court. In fact, it may be noted that the Constitutional Court Act [*Chapter 7:22*], the Supreme Court Act [*Chapter 7:13*] and the High Court Act [*Chapter 7:06*] bestow review jurisdiction on the related courts.<sup>48</sup> One significant characteristic of the review jurisdiction enjoyed by these courts is that it may be exercised whenever an irregularity which has occurred within the proceedings of an inferior court comes to the notice of the respective court or a Judge therein,

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<sup>47</sup> See *Black's Law Dictionary*, 8<sup>th</sup> Edition, (2008), at p. 4114.

<sup>48</sup> See sections 19 of the Constitutional Court Act [*Chapter 7:22*]; 25 of the Supreme Court Act [*Chapter 7:13*] and 26 of the High Court Act [*Chapter 7:06*]

even though such proceedings may not be subject to an appeal or application in that court.<sup>49</sup>

There is another form of review power which may solely be exercised by the Constitutional Court on an application made to it. This is normally referred to as “constitutional review”. In the context of proceedings or decisions of the Supreme Court, such review may be understood against the background that the Supreme Court is the final court [of appeal] in non-constitutional matters. The Supreme Court, however, loses its claim to the finality of its decisions if it violates a decision of a litigant in the process of hearing a matter. For this reason, the Constitutional Court held in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Limited & Anor* 2018 (2) ZLR 743 (CC) at 750A-B that:

“The individual constitutional complaint against infringement of fundamental rights and freedoms is a procedure for constitutional review that is separate from but additional and complementary to the other constitutional remedies.”

Further, in the case of *Mwoyounotsva v Zimbabwe National Water Authority* CCZ-17-20 at p 12, para 33, it was stated that:

“The theory of constitutional review of a decision of the Supreme Court in a case involving a non-constitutional matter is based on the principle of loss of rights in such proceedings because of the court’s failure to act in terms of the law, thereby producing an unlawful decision. There must, therefore, be proof of the failure

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<sup>49</sup> See section 25(2) of the Constitutional Court Act [Chapter 7:22], section 25(2) of the Supreme Court Act [Chapter 7:13] and section 29(4) of the High Court Act [Chapter 7:06].

to comply with the law. The failure must be shown to have violated a fundamental right protected by the Constitution.”

Although not unique to the Zimbabwean jurisdiction, the provision of review remedies against decisions of an inferior court by a superior court is meant to ensure judicial accountability. The position that such a review may be carried out at the instance of the court or a Judge upon notice to it or him or her is actually a means by which senior members of the Judiciary such as Appellate Judges are able to maintain accountability and adherence to the rule of law within the entire judicial system.<sup>50</sup> Additionally, the confirmation of the susceptibility to constitutional review of proceedings in the Supreme Court by the Constitutional Court is also evidence of the keen desire to ensure accountability in the Judiciary.

## **TRAINING OF JUDICIAL OFFICERS AND ANCILLARY STAFF**

Judicial training is borne out of the recognition that the development of an ideal judicial officer is a continuous process characterised by imparting the right skills and knowledge. On this, in a report on Judicial Training and Judicial Reform, Linn Hammergren makes the following point:

“Regardless of its form, development and cultural context, a judicial training program is normally intended to improve judicial performance by:

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<sup>50</sup> See the case of *Chombo v National Prosecuting Authority & Ors* CCZ–8–22 at p. 9, wherein MAKARAU JCC affirmed the power of the Supreme Court to review decisions of the High Court, even though the High Court is also a superior court of record. A pronouncement of this nature shows that the Zimbabwean Judiciary leaves no stone unturned in guaranteeing accountability at all its levels.

- Preparing newly appointed judges for their duties
- Guaranteeing greater uniformity and predictability of decisions
- Updating judges in new methods, laws, and related areas of knowledge required in their work.

A fourth function, more common in civil code countries, is as a means of screening candidates to the judiciary. While generally not used to this end in common law systems, successful completion of entry-level training may be used to screen other judicial professionals and support staff.

In reform programs, training may have additional purposes: to build a reform coalition within the judiciary or overcome resistance to reform; to introduce new methods and practices; to introduce new values, outlooks, and attitudes; to identify problems which may have to be resolved by other reform interventions; [and] to build solidarity and a sense of common purpose.”<sup>51</sup>

In Zimbabwe, judicial training derives its importance from the Constitution itself. In terms of section 165(7):

“(7) Members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law.”

To buttress the above constitutional imperative, section 25(2) of the Judicial Service Act provides that service regulations may be made and provide for “training and development courses for members of the Judicial Service and the attendance of such members thereat”. The bases upon which the Judicial Service Commission gives effect to that

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<sup>51</sup> Hammergren, Linn. "Judicial training and justice reform." *US Agency for International Development: Bureau for Global Programmes, Field Support and Research. Washington: USAID (1998)* at p. 1.

function come to light upon consideration of section 42 of the Judicial Service Regulations, which provides:

***“42. Training***

The Commission may train and develop its members in order to

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- (a) impart knowledge and skills;
- (b) enhance existing skills;
- (c) inculcate appropriate values and attitudes;
- (d) motivate members;
- (e) increase organisation productivity;
- (f) develop the organisation.”

An analysis of the above objectives for training members of the Judicial Service Commission shows that the golden thread running through them is the transformation of the member for efficient and effective justice delivery. In view of the salient obligation of the Judicial Service Commission to train its members, it launched a standalone training institute, known as the Judicial Training Institute of Zimbabwe (“J.T.I.Z.”). The J.T.I.Z. operates with the backing of the Judicial Service Commission. It facilitates and promotes the training and capacity development of all staff members within the Judicial Service, including Judges and magistrates. In fact, the establishment of the J.T.I.Z. actualises the provisions of section 165(7) of the Constitution, which place an important obligation on members of the Judiciary to take reasonable steps for continuous professional training. Having properly trained and nurtured members of the Judicial Service is one of the direct ways to judicial accountability.

## INVESTIGATIVE TRIBUNALS

Tribunals are synonymous with the power reposed in any person or institution to judge or adjudicate. In Zimbabwe, a Judge may be susceptible to removal for the inability to perform the functions of his or her office due to mental or physical incapacity; gross incompetence; or gross misconduct. In terms of section 187(3) of the Constitution, the President is obliged to appoint a tribunal to enquire into a question concerning the removal of a Judge, which question arises upon the advice of the Judicial Service Commission. A tribunal appointed to enquire into the suitability of a Judge to remain in office must enquire into such question, report its findings to the President and recommend whether the Judge should be removed from office.<sup>52</sup>

The constitutional provision of a procedure for removing errant Judges from office is a deterrent that keeps members of the Judiciary accountable. Thus, in the case of *Paradza v Minister of Justice, Legal and Parliamentary Affairs & Ors S-46-03* at pp 35–36, the Supreme Court had occasion to comment on what judicial independence means *vis-à-vis* the obligation of Judges to act lawfully and remain accountable:

“There is no doubt that judicial independence is a fundamental principle in any democratic system of government. That, however, does not mean that the judiciary is protected from all forms of relationships with other organs of the State. What is clear is that the judiciary is protected against those relationships that may have the effect of interfering with its adjudicating

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<sup>52</sup> See section 187(7) of the Constitution of Zimbabwe, 2013.

authority and function. The judiciary is protected in the exercise of the authority and function conferred upon it by the Constitution to the exclusion of the other constitutional functionaries.

...

It cannot be argued that when a judge commits a criminal offence at a time when he is not involved in the adjudication of a case he cannot be arrested and charged with that offence on account of the principle of judicial independence. Sole reliance on the power of removal to deal with such cases is clearly unrealistic.”

The recognition and affirmation of the susceptibility of Judges to arrest and removal when they have acted improperly or incompetently is, therefore, confirmation of the respect of the standards on judicial accountability.

## **CONCLUSION**

In conclusion, Zimbabwe has a comprehensive constitutional framework providing for the complementary norms of judicial independence and judicial accountability. As shown above, there is a range of inter-connected provisions of the Constitution which entrench judicial accountability and judicial independence. In addition, several mechanisms have been implemented to give practical effect to Zimbabwe’s constitutional demand for judicial independence and accountability.