

## A Critique of the Recent Developments on the Judges' Appointment Process in Zimbabwe

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### I. INTRODUCTION

Zimbabwe passed a new Constitution in 2013 which brought fundamental changes to the process of appointing judges. The new Constitution introduced a system of public interviews for judges. The first interviews of judges using the new appointment system commenced in 2014 in Harare.<sup>1</sup> The excitement from members of the public could be noted as the interview room was packed to full capacity. It is only six years since the Constitution came into effect and already the Judicial Service Commission (JSC) has introduced an additional process for appointment of judges which is not provided for in the Constitution. The JSC has incorporated pre-interview exams. This new feature of the judges' interview negatively impacts on the constitutional principles of transparency, justice and accountability.

In addition to the introduction of pre-interview examinations, the manner of conducting interviews, particularly, the kind of questions put to candidates, need a close scrutiny. Some of the questions appear not to be thought through and have an implication on the violation of the fundamental human rights enshrined in the bill of rights. It is critical to point out that the JSC, in line with its mandate, has a duty to ensure that all issues that have an impact on the integrity of a judge are laid out in the open for public scrutiny. Section 11(3) of the Judicial Service Commission Guidelines on the Appointment of Judges<sup>2</sup> provides that candidates may be questioned during interview on adverse comments received from the public in relation to the candidate's probity. The procedure of asking candidates questions that relate to their personal conduct is a common feature of judges' interviews. However, the 2016 interviews for the Supreme Court and the High Court vacancies brought in a lot of personal issues that could have been out of line. This article analyses how pre-interview examinations introduced by the JSC impact on constitutional principles, such as, transparency, accountability and justice.

### II. APPOINTMENT OF JUDGES AS A DETERMINANT OF THE INDEPENDENCE OF THE JUDICIARY

The independence of the judiciary is one of the cornerstones of democracy and a major contributor to the principle of separation of powers. The principle of separation of powers demands that different arms of government should not interfere in the running of one another. Sufficient constitutional safeguards should be in place to avoid encroachment of the executive arm into the independence of the judiciary. Appointment process for judges is one of the factors that determine the independence of the judiciary. However, it is not the sole factor as issues of remuneration and removal from office are equally important.

The independence of the judiciary can be construed in two facets: institutional independence and individual independence. Institutional independence refers to the non-interference with the judiciary as an institution by the executive and the legislature. This implies that decisions of the judiciary should be respected by all persons. Individual independence is the 'freedom of every judge to decide matters before him or her in accordance with his or her assessment of the facts and understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason.'<sup>3</sup> However, judicial independence does not in

<sup>1</sup> The Judicial Service Commission is mandated to administer the appointment of judges in terms of section 180 of the Constitution.

<sup>2</sup> Hereafter referred to as the JSC guidelines

<sup>3</sup> O'Donnell D., 'The Independence of Judges and Lawyers: U.N. Standard Setting and the Siracusa Draft Principles on the Independence of the Judiciary' Proceedings of the Annual Meeting 330.

any way detract the duty to be accountable, but rather, is complemented by ‘genuine accountability and by meaningful communication between the judiciary and the executive under law and under the Constitution.’<sup>4</sup>

Article 1 of the United Nations Basic Principles on the Independence of the Judiciary provides that ‘the independence of the judiciary should be guaranteed by the State and enshrined in the Constitution or the law of the country.’ In Zimbabwe, the independence of the judiciary is guaranteed in section 164 of the Constitution which provides that the judiciary is subject to the courts and the law which must be applied without fear or favour. The executive is on record for making public pronouncement that might have the effect of undermining the independence of the judiciary. A female High Court judge delivered a judgement which allowed the continuation of demonstrations after the Zimbabwe Police had issued a ban on all demonstrations in the capital city.<sup>5</sup> The judge ruled that the applicants had a right to demonstrate as provided in the Constitution. The then President of Zimbabwe, Robert Mugabe heavily criticised the judiciary for being reckless in passing this judgement. He stated that:

In light of the violence that we had earlier on, surely they should have taken note to the fact that when permission was given four days ago, there was violence; when it was given two days ago, there was violence. To give permission again when they (judges) are to the full knowledge that it is going to be violent or (there is a) probability that there is going to be violence is to pay reckless disregard to the peace of this country. We hope now they have learnt a lesson (the judges).<sup>6</sup>

In light of these statements, it becomes crystal clear that the judiciary is targeted for compromise by the utterances of the most senior and powerful member of the executive. As a result, no other judge would want to go against the grain and give judgements that have the effect of upsetting the executive. The majority of the judges who are currently sitting were appointed by the President in unclear circumstances under the old system of appointment of judges which excluded public and other stakeholders’ participation save for the JSC. Therefore, it is critical that the appointment process of judges be transparent and independent to avoid cases of appointment of candidates who serve the interests of the political elite.

### III. APPOINTMENT OF JUDGES BEFORE THE 2013 CONSTITUTION

#### 3.1 The 1889 Charter of the British South Africa Company

Prior to the 2013 Constitution, Zimbabwe went through Constitutional transitions which made different provisions on the appointment of judges. The first Constitution in the then pre-colonial Zimbabwe was introduced by the British South African Company (hereinafter referred to as the BSAC) in 1889 when the company was chartered.<sup>7</sup> The Charter dealt with administrative, legislative and judicial powers. Article 10 of the Charter gave the company legislative and judicial powers. It provided as follows:

The Company shall to the best of its ability preserve peace and order in such manners as it shall consider necessary and may with that object make ordinances to be approved by the British Secretary of State, and may establish and maintain a force of police.

On the basis of article 10 of the Charter, the Company appointed judicial officers with the approval of the British Secretary of State.

#### 3.2 The Matabeleland Order in Council

On the 24<sup>th</sup> of May, 1894, the BSAC and the British government entered into an agreement pertaining Matabeleland and Mashonaland. This was in the form of the Matabeleland Order in Council of 1894. Although, it was termed Matabeleland Order in Council, it applied to all the territories including Mashonaland and Manicaland.<sup>8</sup> The Matabeleland Order in Council was a constitutional document which clearly spelt out the legislative, executive and judicial system in the territory. In terms of section 52 of the Matabeleland Order in Council, judges were appointed by the secretary of state with the recommendation of the BSAC. The Company would nominate potential candidates for appointment and send them to the Secretary of State for approval. The Secretary of State was, however, at liberty to make appointments of people not contained in the list forwarded. The Secretary could only exercise this right in the event that the Company failed to avail further names to him.<sup>9</sup>

<sup>4</sup> Lehohla, M. L., ‘Sustaining the independence of the judiciary, The Dangers of Politicizing the judiciary’ (2010) Southern African Chief Justices’ Forum conference.

<sup>5</sup> Case of *National Election Reform Agenda v Officer Commanding Police* (2016) HC 8645.

<sup>6</sup> President Mugabe’s speech available at <<http://nehandaradio.com/2016/09/04/mugabe-takes-swipe-judges-allowing-protests-zimbabwe/>> accessed on 28<sup>th</sup> November, 2016.

<sup>7</sup> Charter of the British South Africa Company 1889.

<sup>8</sup> Palley C., *The Constitutional History and Law of Southern Rhodesia 1888 -1965 with Special Reference to Imperial Control* (Clarendon Press Oxford 1966).

<sup>9</sup> This is in terms of section 53(a) of the Matabeleland Order in Council. Under this section, a High Court which had both civil and criminal jurisdiction was set up. This High Court also had an appellate jurisdiction.

### 3.3 The 1923 Constitution and Subsequent Constitutions

Rhodesia had another Constitution in 1923 which came in the form of the Letters Patent of 1<sup>st</sup> September, 1923.<sup>10</sup> This Constitution established Southern Rhodesia as a self-governing territory even though it was still under British control. It was called the Responsible Government Constitution. Under this Constitution, judges were appointed by the Governor in Council.<sup>11</sup> After the 1923 Constitution, the 1961 Constitution introduced a new appointment mechanism which was different from the previous Constitutions. As pointed out by Manyatera and Fombad,<sup>12</sup> the 1961 Constitution was a marked departure from the 1923 Constitution as far as judicial selection was concerned. It outlined for, the first time, the qualifications for appointment of judges.<sup>13</sup> Under this Constitution, judges were to be appointed by the Governor on the advice of the Prime Minister and with the agreement of the Chief Justice. Other Constitutions that followed the 1961 Constitution, such as the 1966 and 1969 Constitution, maintained the appointment process of judges similar to the 1923 Constitution. Under these Constitutions, judges were appointed by the executive with the recommendation of the Judge President of the particular division.<sup>14</sup>

The key feature that should be noted from the previous Constitutions is that the appointment of judges was purely dominated by the executive. It was only in the Zimbabwe- Rhodesia Constitution of 1979 where the JSC model was adopted.<sup>15</sup> Section 82(1) of the 1979 Constitution provided that the Chief Justice and other judges of the High Court were to be appointed by the President. The appointment would be based on the advice of the Judicial Service Commission. In terms of section 88(1) of this Constitution, members of the JSC were all presidential appointees. These were the Chief Justice, the Chairperson of the Public Service Commission and one other member appointed by President acting on the advice of the Chief Justice.

### 3.4 The Lancaster House Constitution

The Lancaster House Constitution, in its original form before various amendments, provided that judges were to be appointed by the President in consultation with the Judicial Service Commission.<sup>16</sup> The only exception was the Chief Justice who was appointed in consultation with the Prime Minister.<sup>17</sup> The process was shrouded in secrecy and this gave room for the President to appoint his allies. The Lancaster House Constitution still enabled the executive to manipulate the whole process as all members of the Judicial Service Commission were appointed by the President and chances of them recommending Presidential allies were very high. Even though the criterion for appointment was laid down, the process still lacked transparency. The process was out of the public purview. All pre-appointment processes were done in secret.

## IV. APPOINTMENT OF JUDGES UNDER THE 2013 CONSTITUTION

Zimbabwe's 2013 Constitution saw the coming in of a new Judicial Service Commission. This is a thirteen-member body composed of judges, the attorney general, the chairperson of the Civil Service Commission, practicing lawyers, accountants, professors of law and the Chief Magistrate. It is quite remarkable to note that the composition of the new JSC reflects diversity of professions and might reduce the President's influence over the Commission. However, one cannot hold breath for that as six of the members of the Commission are appointed by the President including the chairperson who is the Chief Justice and wields a lot of power over other members.<sup>18</sup> The Chief Justice never went through the public interview system to assess his suitability. Professor Madhuku's comment on the old composition of the JSC still remains relevant in the current JSC composition. Madhuku stated that '...with this composition, a powerful president is unlikely to get an adverse response from the Judicial Service Commission if he were to insist upon his choice.'<sup>19</sup> Another setback is that

<sup>10</sup> Palley C., *The Constitutional History and Law of Southern Rhodesia 1888 -1965 with Special Reference to Imperial Control* (Clarendon Press Oxford 1966).

<sup>11</sup> Section 38(1) of the 1923 Constitution.

<sup>12</sup> Manyatera G. and Fombad C. M., 'An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution' (2014) XLVII CILSA 100.

<sup>13</sup> Section 50(3) of the 1961 Constitution provided that in order to qualify for appointment, a prerequisite experience of at least ten years as an advocate or being a judge of a superior court in a country where Roman-Dutch law was the common law and English was the official language was a requirement.

<sup>14</sup> Manyatera and Fombad (n12).

<sup>15</sup> Ibid.

<sup>16</sup> The Lancaster House Constitution was amended nineteen (19) times.

<sup>17</sup> Section 84 of the original Lancaster House Constitution.

<sup>18</sup> The six members appointed by the President are the Chief Justice, Deputy Chief Justice, Judge President of the High Court, the Attorney General, one judge nominated by other judges, and the chairperson of the Civil Service Commission.

<sup>19</sup> Madhuku L. The Appointment Process of Judges in Zimbabwe and its Implications for the Administration of Justice, page 347. Madhuku further argues that there have not been any disagreements between the JSC and the

the new JSC has been in existence for a period of five years now and a professor of law who is supposed to be part of the Commission is yet to be appointed. Of interest, is the fact that the JSC has a non-renewable term of six years. This limitation is geared towards eliminating the danger of cliques that may undermine the independence of the judiciary.<sup>20</sup>

Sometime in October 2016, the JSC published a shortlist of nominated candidates for the vacancy of High Court Judge. The shortlist had 45 candidates who were to be interviewed against 6 vacancies for High Court judges. Before the candidates could be interviewed as per the procedure in terms of the Constitution, the JSC invited the candidates to write a pre-interview test on judgement writing. In his address to the press and candidates, the Chief Justice stated that only 14 candidates out of 45 shortlisted had passed this test with at least a five out of ten mark.<sup>21</sup> Although these pre-test interviews can be hailed for encouraging quality assurance, it is sceptical if it is not another way introduced by the JSC to manipulate the process. Section 180 of the Constitution lays out a clear process for judicial appointments. In addition, the JSC guidelines on appointment of judges also outline the road map that should be followed in interviewing judges. The 2013 Constitution provides for a transparent process of appointing judges which mandates the JSC to adopt the following procedures in appointing judges:

#### 4.1 Advertising

The JSC is mandated to advertise the positions.<sup>22</sup> Section 2 of the JSC guidelines stipulate that the positions should be circulated in the daily and weekend newspapers in order to get wide circulation. The advertisement should also be posted on the JSC website. The JSC needs to be applauded so far for complying with this provision. In all the vacancies that have arisen, the JSC made the advertisement and invited the public and the President to make nominations.<sup>23</sup> Whilst the idea of the public participation in the nomination process is encouraged, the President should not have been given the prerogative to nominate candidates. This is because of the fact that the President is the one who eventually appoints the judges upon recommendation of the JSC. There is room for manipulation of the process by ensuring that the ones whom he nominates are on the final list. The majority of the members of the JSC are Presidential appointees, hence, the room for executive manipulation of the appointment process is still high. The Constitution should have only allowed the President to appoint the final list without the power to nominate a candidate. In addition, the Constitution also gives the President the power to influence the selection process by allowing him to reject a list of candidates sent to him for appointment.<sup>24</sup> One wonders why this provision was left open leaving room for the President to reject some candidates who would have gone through the selection process and proved their worth before the 13 member panel. This constitutional provision is yet to be tested as the President has not rejected any candidate so far.

#### 4.2 Short listing

The next stage after nomination is assessment of the candidates. The JSC requests for comments from members of the public and the law associations on the integrity of the candidates. Thereafter, a short list is prepared. This short list of candidates is published and public interviewees are conducted.<sup>25</sup> The written test are not provided for anywhere in the Constitution. Neither do the JSC guidelines give room for such. Section 180 (1) of the Constitution provides as follows:

The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section...

2) Whenever it is necessary to appoint a judge, the Judicial Service Commission must-

- a) Advertise the position
- b) Invite the President and the Parliament to make nominations
- c) Conduct public interviews of prospective candidates
- d) Prepare a list of three qualified persons as nominees for the office; and

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President because of the composition of the JSC who are all his appointees. Madhuku's article was written before the passing of the 2013 Constitution and his comments on composition referred to the old JSC.

<sup>20</sup> Shonge M and Mafukidze T., *An Analysis of Judicial Selection and Appointments in Zimbabwe*, (Zimbabwe Lawyers for Human Rights Publication Sable Press Harare 2015).

<sup>21</sup> On the 24<sup>th</sup> of October, 2016, the Chief Justice gave an opening address where he informed the media and members of the public about the outcome of the pre-interview examinations. Chief justice's speech is available at <[www.chronicle.co.zw/29-aspiring-judges-flunk-interview-4-chicken-out/](http://www.chronicle.co.zw/29-aspiring-judges-flunk-interview-4-chicken-out/)> accessed on 29<sup>th</sup> October, 2016.

<sup>22</sup> Section 180(2) (a) of the Constitution.

<sup>23</sup> Section 180(2)(b) provides that after the advertisement, the President and members of the public are then invited to make nominations.

<sup>24</sup> Section 180(3) provides that if the President considers that the candidates submitted to him are not suitable, he can cause the JSC to submit another list.

<sup>25</sup> Section 180 (2) (c) of the Constitution.



e) Submit the list to the President

The principle of constitutionalism demands that ‘the government of a state should derive its powers from the law, which is mostly to be found in the form of a written constitution, and further, that such government’s powers should be limited to those powers that are set out in the law and the constitution.’<sup>26</sup> It follows that the JSC should follow the Constitution strictly. The process of pre-interview test of candidates for judicial appointment is a violation of the principles of transparency, openness and responsiveness which are the main values of constitutionalism. The Chief Justice in his opening address at the interviews stated that the markers of the test did not even know the names of the candidates as each candidate was given a personal identification number which was only known by the JSC’s information technology department. They never used their real names. Hence, the markers’ result could not have been influenced.<sup>27</sup> Further, the Chief Justice highlighted that three markers assessed the scripts differently and came to the same conclusion. The use of personal identification numbers for candidates and not their names can never be foolproof at all as the markers could have easily identified the candidates as the process was outside the public scrutiny. The identities of the markers were not known. For the sake of transparency, the scripts should have been open for inspection to the general members of the public or at least to the associations of lawyers who have a better appreciation of legal issues.

The rationale behind public interviews is to ensure transparency by giving the public an opportunity to nominate and also be present during the interview process. While public interviews do not guarantee that people with political connections are not appointed, it certainly reduces clear cases of incompetent persons being handpicked.<sup>28</sup> Neither does the process absolutely guarantee judicial independence. In any event, the public’s participation is very limited. A reading of section 180 reveals that the public only participates in the nomination of candidates by observing the interviews without any further meaningful participation. There is no guarantee that those who find their way into the shortlist would have been nominated by the public or that the whole short list would not be composed of Presidential nominees. The nomination forms disclose the nominating person but this is only seen by the JSC.

Section 6 of the JSC guidelines stipulates that a list of all nominations received will be open for inspection by members of the public at the JSC offices and at provincial magistrates. This process, however, does not totally eliminate the manipulation of the process as the final short listing is done by the JSC in private. There is a need for further safeguards of the process to ensure transparency. The final list that is forwarded to the President for appointment should be published. While the public cannot determine who passed or not, it needs to know at least the scores awarded as well as the final list forwarded to the President.

## V. THE JSC INTERVIEWS VIS-A-VIS PRINCIPLES OF GOVERNANCE

### 5.1 Introduction

Section 3 of the Constitution stipulates that transparency, justice, accountability and responsiveness are the key principles of governance. The Constitution provides that these principles are binding on all institutions, private or government. An open, transparent and credible process weeds out corrupt elements.<sup>29</sup> It fosters a culture of accountability. The principle of accountability entails that government officials should explain laws or conduct if called upon to do so.<sup>30</sup> The duty to account to citizens does not bind government officials only but is inclusive of private institutions.<sup>31</sup> It is in light of this obligation that the JSC was mandated to subject the process of pre-interviews to public scrutiny in compliance with the above stated principles. The constitution provides for a clear transparent process of appointment of judges that needs to be followed but the JSC introduced a new procedure which is not even in its own guidelines. The pre-interview test process itself resulted in the violation of the principle of transparency as members of the public were shut out from this process.

### 5.2 The Concept of Justice

According to Bekink,<sup>32</sup> the concept of justice is composed of the following elements:

- a) The quality or fact of something being just

<sup>26</sup>Bekink, B., *Principles of South African Law* (Lexis Nexis 2012) 32.

<sup>27</sup> Chief Justice’s opening remarks at the Judges’ interviews on the 24<sup>th</sup> of October, 2016, the speech is available at <[www.chronicle.co.zw/29-aspiring-judges-flunk-interview-4-chicken-out/](http://www.chronicle.co.zw/29-aspiring-judges-flunk-interview-4-chicken-out/)> accessed on 29<sup>th</sup> October, 2016.

<sup>28</sup> At the first JSC public interviews, one candidate dismally failed to answer a basic legal question and was not appointed. It was very clear that appointing such a person who fails such simple questions would highlight the manipulation of the system by the executive.

<sup>29</sup> Dakas C. J., ‘Reform of Judicial Appointment Procedures: Developments in Selected Commonwealth Jurisdictions and lessons for Nigeria’ 6.

<sup>30</sup> Bekink B. (n26) 38.

<sup>31</sup> Bekink (n26) 38.

<sup>32</sup> Bekink (n26) 43.

- b) The principle of fairness in that similar cases should be treated alike
- c) The administration of the law according to prescribed and accepted principles
- d) Conformity with the law
- e) Treating or judging something or someone fairly.

An application of the above principles to the JSC's conduct of subjecting some candidates and not others to a pre-interview test under the same model provided in the Constitution resulted in unjust treatment of candidates. Since the enactment of the Constitution in 2013, the candidates for the vacancy of a judge were never subjected to this kind of assessment. Even the candidates who were interviewed for the Supreme Court vacancies in 2016 were never treated in this manner.<sup>33</sup> While the JSC has been given all the powers necessary to promote independence and accountability, those powers should not violate pertinent constitutional principles such as justice.<sup>34</sup> The Constitution further mandates the JSC to conduct its business in a just, fair and transparent manner.<sup>35</sup> Justice should be the core value cherished by the JSC since it is an organ that regulates the administration of justice. Further, on the principle of conformity with the law, one would conclude that the JSC deliberately failed to conform to the dictates of the Constitution which simply state that public interviews should be held without any provision for pre-interview tests which are shrouded in secrecy and gave room for manipulation of the system.

### 5.3 The Case of the Visually Impaired Candidate

One of the candidates for 2016 High Court judges' interviews was visually impaired. He failed the pre-interview test. During the interviews, the Chief Justice asked him to justify his presence at the interviews after the poor performance at the pre-assessment test. The candidate explained that the conditions under which he wrote the exam were uneven. As a visually challenged person, the laptop which was designed for the visually impaired that he had used had no case law and statutes. As a result, he could not research well like the other candidates. The Chief Justice was quick to point out that the markers were not even worried about the content but just the structure of judgement writing. Therefore, the fact that his laptop which was braille-friendly had no statutes and case law was not a reason for him to fail. The view by the Chief Justice can be faulted on two aspects. Firstly, the content of the judgement certainly has an effect and determines how you structure your judgement. It would be inappropriate to divorce the two and still claim that one could have written a solid judgement without being able to research on the relevant legislation and case law. It is implausible to think someone can be judged on the basis of the structure alone without taking into account the content. If that was the position, how then did the markers rank the candidates according to positions without considering content? The chief Justice contradicted himself. During his opening address, the Chief Justice indicated that the markers took into account the following in coming up with an outcome:

- a) A summary of the relevant facts
- b) Legal issues to be determined
- c) Applicable law
- d) Disposition of the matter

Later on, when the visually impaired candidate raised the issue of not being able to access case law and legislation, he stated that content was immaterial to the assessment.

Secondly, there is no one size-fit-all way of writing judgements. In the case of these pre-interview examinations, it is not even clear if the candidates failed to write the essentials of a judgement. Even the candidates were not aware of what they failed. This was reflected in Chief Justice's remarks during interviews when he told candidates their mark and position. It follows that content of the judgement was very material and hence the failure by the JSC to provide a candidate with the materials whereupon he could carry his research and write a well-structured judgement was an injustice to the candidate.

The JSC's conduct of not taking into account the special needs of a disabled client flies in the face of section 22(2) of the Constitution which states as follows:

The State and all institutions and agencies of government at every level must, within the limits of the resources available to them, assist persons with physical or mental disabilities to achieve their full potential and to minimise the disadvantages suffered by them.<sup>36</sup>

<sup>33</sup> These can, however, be distinguished on the basis that they were already sitting judges and, therefore, had the requisite skill of judgment writing.

<sup>34</sup> Section 190(2) of the Constitution provides that 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.

<sup>35</sup> Section 191 of the Constitution.

<sup>36</sup> Section 22(2) falls under the national objectives and not in the bill of rights. The Constitution of Zimbabwe, however, makes the national objectives to be justiciable by providing that all the state and all institution should be guided by the national objectives in implementation of laws. Section 8(2) of the Constitution further provides

This was a clear case where the JSC did not take any necessary measures to minimise the disadvantage suffered by a person living with disability. The disability acted to his prejudice. To compound the injustice, the JSC's line of questioning to this candidate reflected the need for all institutions to be sensitive to the plight of the disabled. It exposed the judiciary for its failure to appreciate the constitutional provisions on disability rights despite being protectors of the same. The Chief Justice questioned the candidate on how he would be able to assess the demeanour of the witness given the fact that he was blind. While this question is really important so as to avoid prejudice to the litigants, it certainly reflects the lack of sensitivity of the judiciary. What they could have asked is what they think would be needed to make his working condition favourable in the interests of justice. The work environment should be disability-friendly and it is the obligation of the employer and not the employee to ensure favourable working conditions. In simple terms, that line of questioning was simply drawing the analogy that if one is visually impaired, he or she can never be a judge because of the inability to assess demeanour as if demeanour is the only consideration for assessing a witness' credibility.

The Convention on the Rights of Persons with Disabilities<sup>37</sup> imposes an obligation on states to ensure that persons with disabilities are entitled to have their special needs taken into consideration at all stages of economic and social planning.<sup>38</sup> The Convention entitles persons with disabilities to the right to economic and social security and to a decent level of living. They have the right, according to their capabilities, to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions. Zimbabwe ratified this convention and is bound to implement its provisions.

#### 5.4 The Case of the Pregnant Candidate

The JSC's line of questioning in the case of one candidate who was an expectant mother was also prejudicial and could be interpreted as discriminatory in nature. One of the commissioners made insinuations on the candidate's pregnancy as a handicap. It is trite that discrimination on the basis of sex and pregnancy is outlawed in international and regional instruments to which Zimbabwe is a signatory. Article 11 of Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>39</sup> stipulates that states have an obligation to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights. CEDAW further implores states to take appropriate measures in protecting women from discrimination on the grounds of marriage or maternity and to ensure their effective right to work.<sup>40</sup>

Article 9 of the International Labour Organisation (ILO) Maternity Protection Convention 2000 (N0 183)<sup>41</sup> on maternity, prohibits discrimination on the grounds of pregnancy in employment. Article 9 imposes an obligation on states to adopt appropriate measures to guarantee protection of women from discrimination based on pregnancy. In terms of ILO Convention 183, the issue of pregnancy would not amount to discrimination for recruitment in cases where there is a recognized or significant risk to the health of the woman and child.<sup>42</sup> It is very clear that the duties of a judge do not fall under the kind of jobs that result in the said risk to the health of the mother or the child.

The Constitution of Zimbabwe outlaws discrimination of women on the basis of pregnancy in section 56(3). Section 65(1) of the Constitution also guarantees everyone's right to fair labour practices. Zimbabwe's Labour Act Chapter 28:01 also prohibits discrimination on the basis of pregnancy.<sup>43</sup> The Commissioner's exact question was as follows; 'pregnancy may place you in a difficult condition' and that the 'timing might be wrong'. It can safely be concluded that the Commissioner's questions were discriminatory. In any event, history has shown that all the appointed judges are grown women who are no longer childbearing. This practice reflects the societal stereotypes against pregnant women and seems to reinforce the Commissioner's position. Pregnant women are perceived as lazy and incapable of performing their duties. The candidate rightly pointed out to the Commissioner that pregnancy is not a permanent condition and, thus, she could deliver her duties well. It is

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that "Regard must be had to the objectives set out in this Chapter when interpreting the State's obligations under this Constitution and any other law".

<sup>37</sup> The Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13<sup>th</sup> December, 2006 and entered into force on 3<sup>rd</sup> May, 2008; Zimbabwe acceded to the convention on 23<sup>rd</sup> September, 2013.

<sup>38</sup> Article 8 of CRPD.

<sup>39</sup> Convention on the Elimination of all Forms of Discrimination against Women. CEDAW was adopted by the United Nations General Assembly on 18<sup>th</sup> December, 1979 and entered into force on 3<sup>rd</sup> September, 1981. Zimbabwe ratified CEDAW in the 13<sup>th</sup> of May 1991.

<sup>40</sup> Article 11(2).

<sup>41</sup> Hereinafter referred to as the ILO Convention 183. Zimbabwe has not ratified this convention.

<sup>42</sup> Article 9 of the ILO Convention 183.

<sup>43</sup> Section 5 of the Labour Act

important to highlight that 21<sup>st</sup> century women are choosing to advance their career first and then give birth later in life. Therefore, pregnancy should not be a hindrance to women's professional development.

### 5.5 The Supposed Hostile Questioning

It has been said that:

A corrupt judge is more harmful to the society than a man who runs amok with a dagger in a crowded street. The latter can be restrained physically. But a corrupt judge deliberately destroys the moral foundation of society and causes incalculable distress to individuals through abusing his office while still being referred to as 'honourable'.<sup>44</sup>

A judicial officer should be a person of high integrity and should not at all be associated with corrupt activities. During one of the interviews of a candidate for the vacancy of a Supreme Court Judge, the JSC stressed the need for judges to be corruption free. However, the JSC's questioning of this candidate was perceived as an act of hostility to the candidate. Prior to the interview, this candidate had ruled that the executive decision to impose a two week ban on demonstrations was unconstitutional.<sup>45</sup> The questioning of the candidate on corruption charges was perceived as an act of punishment by the JSC for the judge's boldness in passing a judgement against the executive. It was alleged by the JSC that one litigant had submitted a complaint that this candidate had solicited a bribe of United States Dollars 20,000 so that she could pass judgement in the litigant's favour. The litigant alleged that his refusal to pay the bribe proved costly as judgement was given against him. The candidate denied the allegation and stated that the litigant in question was mentally deranged and was taking anti-depressant medication.

The pertinent question that needs to be addressed is whether the JSC's questioning was an act of persecuting the candidate for making decisions that upset the executive or whether it was simply an act of due diligence. The second issue is on whether the interview session was the correct forum to raise such allegations or the JSC could have undertaken investigations and requested the President to set up a tribunal to conduct disciplinary proceedings. The JSC was aware of these allegations before the interview and could have initiated investigations rather than wait to raise them to a candidate during an interview. It has been argued that the candidate's right to silence was violated given the fact that she was facing potentially criminal charges and had to answer these charges without legal representation.<sup>46</sup> Since it was an interview, the candidate could not exercise the right to silence. Given the fact that the issues raised were potentially criminal in nature, there was a need for her to consult with her counsel like anyone else facing a criminal charge. This is because what she said would have had a bearing on the impact of the investigations. In as much as it appeared that the candidate was being persecuted for her boldness, it was however imperative that these corruption allegations are put in the open for the candidate to comment, particularly, taking into account the fact that the candidate was heading towards appointment to the Supreme Court. It was necessary that, indeed, if the JSC had received such complaints, the candidate was supposed to comment on them. Section 11(3) of the JSC guidelines empowers the JSC to question a candidate during an interview about adverse comments received from members of the public. After all, the whole idea of public interviews is to ensure transparency and accountability as well as to instil public confidence in the system. The fact that the JSC decided not to investigate and recommend to the President to set up a tribunal could not stop it from asking the candidate about these allegations during an interview. That information should be in the public domain.

### 5.6 The Judge as a Litigant

The JSC raised issues on another candidate who had indicated that she had 3 pending cases before the High Court where she is suing other parties. Despite the fact that the candidate had voluntarily disclosed such information, one of the Commissioners felt that the JSC could be compromised by that fact. An analysis of this line of questioning is devoid of reasoning in the sense that everyone is entitled to the protection of the law. What this candidate did was simply to enforce her right to protection of the law by instituting litigation against other parties. The inference that can be drawn from this line of questioning is the prohibition of judges from enforcing their rights whilst on the job because of the perceived notion of interference. Such an approach would result in a violation of the right to protection of the law which is enshrined in the Constitution. It would also result in the violation of section 69(3) which provides for the right to access any courts and any tribunal for resolution of disputes. There are constitutional safeguards to ensure that the other party to litigation is not prejudiced by the

<sup>44</sup> Uwaifo, JSC, Valedictory Speech, *reproduced in* (2005) 1 SCNJ, at 20 as cited in Dakas CJ, Reform of Judicial Appointment Procedures: Developments in Selected Commonwealth Jurisdictions and Lessons for Nigeria 6.

<sup>45</sup> See the case of *DARE and Others v Newbert Saunyama and Others* HC 8940/16.

<sup>46</sup> See Magaisa, A., *The Limits of Law in Zimbabwe's Political Struggle*, the Big Saturday read available at <[www.bigsr.co.uk](http://www.bigsr.co.uk)> accessed on 20<sup>th</sup> October, 2016.



fact that the opponent is a judge. Section 68 of the Constitution provides for a right to administrative justice. It provides that:

- 1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

Further, section 69(3) provides for the right to a fair hearing before an independent and impartial court or tribunal. Therefore, while the concerns of the commission were quite valid the law has safeguards to ensure that rights of both parties are protected and justice is upheld.

## VI. CONCLUSIONS

The introduction of pre-interview exams by the JSC, though noble in ensuring the appointment of competent judges, is fraught with lack of transparency. If the JSC wants to continue with this procedure, the JSC guidelines should be amended to outline a transparent process that should be adhered to.

There is a need to ensure that members of the public and other stakeholders participate in the screening process. A committee that marks these tests should be appointed and it should be inclusive of the professors of law, members of the Council for Legal Education and the Law Society of Zimbabwe. There should be a comparison of examiners' mark allocation. To counter manipulation of the system, the committee should assess the performance of the candidates and compile reports that are accessible to the public.

The Judicial Service Commission needs to adopt guidelines on the types of questions that can be posed to candidates. These guidelines should be clear that issues such as political affiliation of the candidate, religion and other personal circumstances which do not have a bearing on the office of the judge should be excluded. Such guidelines should ensure that inclusion of questions that may result in perceived discrimination of candidates on whatever grounds are not permitted. These guidelines would assist in restricting the Commissioners to focus on material issues such as a candidate's competence and probity without dwelling on personal circumstances of a candidate which have no bearing to the office of a judge.