

# An assessment of the Judicial Service Commission in Zimbabwe's new Constitution

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## *Abstract*

The political turmoil that Zimbabwe has gone through in the last two decades has affected most of its institutions, especially the judiciary. It is thus no surprise that it was one of the targets for reform during the last constitution-building process that recently culminated in the adoption of a new Constitution. This paper attempts to assess the role that the Judicial Service Commission will play under the new constitution to restore the battered credibility of the Zimbabwean judiciary.

The mechanisms of judicial selection are an important element of an independent judiciary and a wide range of judicial selection systems are in use across the world. This in itself is a recognition of the fact that there is no perfect or ideal system of judicial selection. Zimbabwe's new Judicial Service Commission will be assessed against internationally recognised benchmarks. This paper will also examine the popular use of the judicial service commission model in the selection of judges across the civil and common law divide which are the leading legal traditions in the world. It starts by considering the emerging trends in the establishment of judicial service commissions generally before focusing on the key characteristics of judicial service commissions. The analysis of the new judicial appointments system is preceded by a brief overview of the pre- and post-independence judicial selection processes. In assessing the prospects for an efficient, competent and independent judiciary to emerge from the new judicial service commission, a number of issues such as its composition, the appointment of its members, the status of the commission and its operating procedures are examined. The paper concludes that if implemented fully, Zimbabwe's new judicial selection process offers better prospects for enhancing the independence of the Zimbabwean judiciary.

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## INTRODUCTION

The mechanisms for judicial selection are one of the key elements of an independent judiciary. Various international and regional guidelines have been formulated whose primary objective is to recommend the basic elements that are constitutive of an independent judiciary. However, none of these instruments can be said to prescribe an ideal model that guarantees the independence of the judiciary through the judicial appointment processes. This is hardly surprising as countries utilise a wide range of judicial selection mechanisms which basically reflect the different conceptions of judicial independence.<sup>1</sup> The general trend in common law and civil law countries has been the use of judicial selection commissions or councils. The form and competences of these commissions have varied across jurisdictions. The use of a judicial selection commission is also common in Africa. Several African countries have in one form or another adopted the use of judicial selection commissions especially during the so called ‘third wave’ of democratisation.<sup>2</sup> It is recognised that the use of a judicial service commission does not necessarily guarantee an independent and impartial judicial selection process. Much will invariably depend on the composition and competences of the commission in the judicial selection processes.

This article focuses on the mechanisms of judicial appointment in Zimbabwe’s new Constitution of 2013. The Zimbabwean judiciary has been plagued by problems in the last two decades largely due to its judicial appointment process. The post 2000 political developments reinforced the suspicion that the executive was packing the judiciary with political appointees.<sup>3</sup> The political turmoil in the last decade necessarily led to increasing calls for judicial reforms especially in the manner of appointing judges. This is why the judiciary was one of the institutions targeted for reform in the constitution making exercise that culminated in the adoption of the new Constitution. The aim of this article is to critically assess the potential effectiveness of the judicial service commission provided for in

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<sup>1</sup> Ginsburg & Garoupa ‘The comparative law and economics of judicial councils’ (2008) 27/1 *Berkeley Journal of International Law* 53.

<sup>2</sup> See Fombad ‘A preliminary assessment of the prospects for judicial independence in post-1990 African Constitutions’ 2007 *SA Public Law* 233–257.

<sup>3</sup> Matyszak ‘Creating a compliant judiciary in Zimbabwe’ in Malleson & Russell *Appointing judges in an age of judicial power, critical perspectives from around the world* (2006) 334.

this new Constitution.<sup>4</sup> The use of a judicial selection commission is not a new phenomenon in Zimbabwean legal history. The defenders of the new Constitution have pointed to the new judicial selection commission as a step in the right direction. It is necessary therefore to see if there are improvements to what preceded it. The major criticism of the old judicial selection process was that there was a general lack of transparency coupled with little or no checks on executive manipulations of the appointment process.<sup>5</sup>

This article will start by providing an overview of judicial selection commissions focusing on the emerging global trends. It then explores the evolution of judicial selection commissions in Zimbabwe before delving into a detailed analysis of the main components of the new judicial selection commission. The evolution of judicial selection commissions is traced from the 1923 Southern Rhodesia Constitution<sup>6</sup> up to the Lancaster House Constitution of 1980.

#### **AN OVERVIEW OF JUDICIAL SERVICE COMMISSIONS AND EMERGING TRENDS**

Judicial service commissions are increasingly becoming an important feature of most judicial appointment systems.<sup>7</sup> In order to put this discussion into perspective, it is necessary to briefly review the manifestation of the judicial service commissions worldwide. Such an overview necessarily leads to an analysis of the emerging trends in the establishment of judicial service commissions. Importantly, such an analysis enriches the discussion of the judicial service commission in Zimbabwe's new Constitution which is the main focus of this article as it provides the framework for a comparative assessment.

#### **An overview of judicial service commissions**

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<sup>4</sup> The Zimbabwe Constitution Select Committee (COPAC) draft constitution was overwhelmingly endorsed at a referendum conducted on 16 March 2013. The constitutional bill was gazetted on 28 March 2013. After the expiration of the constitutional thirty-day period, the bill was tabled before Parliament before being assented to by the President on 22 May 2013.

<sup>5</sup> Matyszak n 3 above.

<sup>6</sup> Present-day Zimbabwe was known as Southern Rhodesia in the colonial era.

<sup>7</sup> See Volcansek 'Exporting the Missouri Plan: judicial appointment commissions' (2009) 74 *Missouri Law Review* 785–786. See also Malleon & Russell n 3 above.

Judicial service commissions have come in different configurations across legal systems in the world. The most notable distinction is between the civil and common law legal systems which are the dominant and most influential legal traditions in the world. Variations of the commission model are also evident within the civil and common law traditions themselves. Such variations are hardly surprising considering the different conceptions of judicial independence across jurisdictions. By their nature, judicial selection commissions in both civil and common law systems are designed to insulate the functions of appointment, promotion and discipline of judges from the partisan political processes while ensuring some level of accountability.<sup>8</sup> Evidently, judicial service commissions have increasingly become popular as an important mechanism of judicial selection. Israel is credited with having the oldest judicial appointment commission which sought to create a judicial system insulated from an otherwise politicised society.<sup>9</sup> The following discussion begins by an analysis of international and regional instruments which address judicial appointments. This is followed by an overview of the trends in the judicial service commission model in several jurisdictions across the world which basically bring to the fore the increasing use of the commission model in the selection of judges.

Most international and regional guidelines on the independence of the judiciary advocate for an independent judiciary whose members are appointed solely on merit.<sup>10</sup> However, none of these instruments purport to do anything more than suggest and recommend some of the best practices leaving it to each jurisdiction to determine its own appointment mechanisms.<sup>11</sup> Some of these instruments make reference to the use of a selection commission. For example, the Latimer House Guidelines state that the 'Judicial Service Commission should be established by the Constitution

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<sup>8</sup> See Ginsburg & Garoupa 'The comparative law and economics of judicial councils' (2008) 27/1 *Berkeley Journal of International Law* 53 204.

<sup>9</sup> See Volcansek n 7 above at 785 786.

<sup>10</sup> See also art 10 of the Universal Declaration of Human Rights (1948); art 7 of the African Charter on Human and Peoples' Rights (1981); the UN Basic Principles on the Independence of the Judiciary (1985), the Beijing Principles on the Independence of the Judiciary (1995), the Latimer House Guidelines on the Independence of the Judiciary (1998), the Universal Principles of Judicial Independence for the SADC Region (2004); the Universal Charter of the Judge (1999), the Bangalore Principles on Judicial Conduct (2002); the International Bar Association Minimum Standards of Judicial Independence (1982); the Syracuse Draft Principle on Independence of the Judiciary (1981); Montreal Universal Declaration on the Independence of Justice (1983); the International Covenant on Civil and Political Rights.

<sup>11</sup> See for example Principle 10 of the United Nations Basic Principles on the Independence of the Judiciary, 1985.

or by statute, with a majority of members drawn from the senior judiciary.’ This formulation can be criticised for failing to address the pertinent issues relating to the commission’s form and competences. At the regional level, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA<sup>12</sup> region goes much further and states:

In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Service Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Service Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.<sup>13</sup>

In Africa, several countries have resorted to the use of such a commission in selecting judges. However, there are significant differences in the selection commissions in civil and common law Africa. A recent study shows that the executive dominates the appointment process in the Higher Judicial Councils in Francophone Africa but not in the Judicial Service Commissions in Anglophone Africa.<sup>14</sup> There are however exceptions to this in relation to some Anglophone countries as will be seen in the later discussion on the evolution of judicial selection commissions in Zimbabwe. Judicial selection commissions are also an important feature of the judicial selection processes in old democracies such as Britain, France and the United States.<sup>15</sup> An interesting phenomenon is that even old democracies such as the United Kingdom which pioneered the executive appointment system have recently moved towards consolidating the role of the judicial selection commission in their selection process.<sup>16</sup> The Constitutional Reform Act of 2005 created a new judicial appointment commission which now plays a crucial role in the selection of judicial candidates. The new selection system curtailed the role of the Lord Chancellor in the selection process.<sup>17</sup> Despite the fact that most of the Lord Chancellors had appointed meritorious

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<sup>12</sup> The Law Association For Asia and The Pacific.

<sup>13</sup> Article 15 of The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

<sup>14</sup> See Fombad n 2 above at 233–257.

<sup>15</sup> See Volcansek n 7 above at 785–786.

<sup>16</sup> See the United Kingdom Constitutional Reform Act of 2005.

<sup>17</sup> While the British system operated fairly and impartially and resulted in the appointment of the best candidates, the system needed to be changed to conform to international standards on judicial appointment. Despite the desirable results of the old system, there remained some suspicion due to the dominance of politicians in the selection process.

candidates to the Bench, the British saw it necessary to reform their appointment system by substituting it with a judicial selection commission which did not entirely depend on the integrity of one man, the Lord Chancellor.<sup>18</sup>

Judicial selection commissions are also widely utilised in several states in the United States of America since the 1960s.<sup>19</sup> The origin of judicial selection commissions in the United States is generally attributed to the ‘Missouri or Merit Plan’ which entails selection by a commission followed by a retention election.<sup>20</sup> The ‘Merit Plan’ commissions are basically constituted by judges, lawyers and political appointees. The competences of the Merit Commissions vary with some responsible for nominating judicial candidates exclusively while in some states, the commissions shortlist candidates from which the Governor makes the appointments.<sup>21</sup> Judicial selection commissions have also become popular in Latin America since the mid 1980s.<sup>22</sup> These have appeared in countries such as Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama and Paraguay.<sup>23</sup>

It is instructive at this juncture to briefly examine some of the arguments which have been made by proponents of the use of selection commissions.<sup>24</sup> Most recent literature on this topic puts forward a number of arguments in support of the use of judicial selection commissions.<sup>25</sup> These arguments can

<sup>18</sup> See Kentridge ‘The highest court: selecting the judges’ (2003) 62(1) *Cambridge Law Journal* 64. See also Woodhouse ‘United Kingdom. The Constitutional Reform Act 2005 – defending judicial independence the English way’ (2007) 5/1 *I CON* 159.

<sup>19</sup> See Garoupa & Ginsburg ‘Guarding the guardians: judicial independence’ 2009 *American Journal of Comparative Law* 57 212.

<sup>20</sup> See Volcansek n 7 above at 786.

<sup>21</sup> See Garoupa & Ginsburg n 19 above at 212.

<sup>22</sup> *Ibid.*

<sup>23</sup> See Volcansek n 7 above at 788.

<sup>24</sup> For a discussion of the commission model, see Harris ‘Appointments to the Bench – the role of a Judicial Services Commission’ 1993 *Adel Law Review* 15, 191. See also Evans & Williams ‘Appointing Australian judges: a new model’ (2008) 30 *Sydney Law Review* 295.

<sup>25</sup> See Tien Dung ‘Judicial independence in transitional countries’ 2003, UNDP Report available at:

<http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30543/0291Judicial%20Independence%20in%20Transitional%20Countries.pdf?sequence=1> (last accessed 30/10/13). See also Akkas ‘Appointment of judges: a key issue of judicial independence’ (2004) 16/2 *Bond Law Review* 200; Bell ‘Judicial cultures and judicial independence’ (2002) 4 *Cambridge Yearbook of European Studies* 47; Fombad n 2 above at 233–257; Russell & O’Brien *Judicial independence in the age of democracy: critical perspectives from around the world* (2001).

be summarised as follows. Firstly, judicial selection commissions have a better chance of appointing meritorious candidates by providing for a stronger form of scrutiny of prospective judicial candidates.<sup>26</sup> Secondly, these commissions lend an apolitical appearance to the whole selection processes. Thirdly, these commissions are better placed to champion representativeness and transparency in the selection of judges. Transparency entails several processes which include public tenders and interviews using a body representative of key stakeholders in the justice delivery system. Lastly, these commissions offer better prospects for an independent judiciary.<sup>27</sup>

Generally, the literature suggests that the use of judicial appointment commissions might reduce political patronage through open and transparent mechanisms in the appointment processes. Judicial selection commissions are also assumed to have better prospects of achieving other desirable ideals such as representativeness and diversity on the bench. This is particularly important for countries in transition or emerging democracies, especially in Africa, which are still grappling with transforming their judiciaries so that the bench is reflective of their demographic patterns. Broadly speaking, the overarching objective of the use of a judicial selection commission is to enhance the prospects for judicial independence as they are better placed to achieve the delicate balance between judicial independence and accountability. Judicial accountability ensures that the judiciary maintain some level of responsiveness to society as well as a high level of professionalism within its ranks.<sup>28</sup> However, it needs to be emphasised that the mere fact that a selection commission is in place does not necessarily guarantee judicial independence. Commissions in some jurisdictions have been used to simply rubberstamp executive preferences as is the case in Uganda where the selection commission is dominated by presidential appointees.<sup>29</sup> It is apparent that a judicial service commission operates within the confines of the larger political environment. Invariably, such a commission fares much better in a political context which respects and upholds the rule of law.

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<sup>26</sup> See generally Van de Vijver *The judicial institution in Southern Africa: a comparative analysis of common law jurisdictions* (2006). See also Akkas n 25 above at 200 208; Corder 'Judicial authority in a changing South Africa' (2006) 24/1–2 *Legal Studies* 260.

<sup>27</sup> See Volcansek n 7 above at 797. See also Du Bois 'Judicial selection in post-apartheid South Africa' in Malleson & Russell n 3 above at 280.

<sup>28</sup> See Garoupa & Ginsburg n 19 above at 204.

<sup>29</sup> See Madhuku 'Constitutional protection of the independence of the judiciary: a survey of the position in Southern Africa' (2002) 4 *Journal of African Law* 238.

**Emerging trends in the establishment of judicial service commissions**

The literature on the topic clearly shows that the use of a judicial service commission in the judicial appointment processes is becoming very popular across the civil and common law divide. The question that this gives rise to is whether there is anything emerging which suggests an agreement on the elements constitutive of an effective and efficient judicial service commission. The reality is that countries utilise a wide variety of judicial selection systems which reflects the different conceptions of judicial independence.<sup>30</sup> This has resulted in several models of judicial selection commissions in which the composition and competences reflect the general concerns about the judiciary.<sup>31</sup> Malleson aptly underscored this point when she states that:

A wide range of different commissions is in use around the world ... The powers, procedures and membership of these bodies differ considerably, reflecting the fact that a commission is not an 'off the shelf' product which can be adopted wholesale but is a system that must be constructed to accommodate the particular legal, political and cultural conditions of the country.<sup>32</sup>

Nevertheless, a survey of the literature on judicial selection systems and constitutions of countries in the common law and civil law traditions reveal some standard elements characteristic of judicial service commissions.<sup>33</sup> While the detailed attributes of each of these elements have varied depending on the jurisdiction concerned, it appears that the core elements for an effective judicial service commission boil down to the commission's status, its composition including the manner of selecting its members and the judicial selection procedures adopted by the commission.<sup>34</sup> Each of these elements will now be briefly commented upon.

Firstly, the status of a judicial selection commission is an important determinant of its effectiveness. It is desirable that the commission be established in terms of the Constitution. Constitutional entrenchment of the

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<sup>30</sup> See Ginsburg & Garoupa 'The comparative law and economics of judicial councils (2008) 27/1 *Berkeley Journal of International Law* 53.

<sup>31</sup> *Ibid.*

<sup>32</sup> See Malleson 'Creating a judicial Appointments Commission: which model works best?' 2004 *Public Law* 102–121.

<sup>33</sup> See generally Volcansek n 7 above at 786. See also Du Bois n 27 above at 280.

<sup>34</sup> For an overview of judicial selection commissions generally, see Volcansek n 7 above at 785.



role and functions of the commission goes a long way towards insulating it against political pressures which may interfere with its work. In this respect, the status of selection commissions have varied across jurisdictions with some having a greater role in the selection processes. An example of a commission with a greater role is the South African Judicial Service Commission.<sup>35</sup>

Secondly, the composition of the commission including the selection of its members is a critical determinant of its independence from political players. A commission dominated by political appointees is less likely to make independent judgments on the merits or otherwise of prospective judicial candidates than one with few political appointees. Commissions staffed by political appointees tend to dance according to the whims of the executive. Generally, the composition of selection commissions include executive, legislative, legal profession and other stakeholder representation. In Anglophone countries for example, the South African Judicial Service Commission has 25 members,<sup>36</sup> the Namibian commission has 5 members<sup>37</sup> and the Ugandan commission has 9 members.<sup>38</sup> The South African Judicial Service Commission is representative of four interest groups namely the legal profession, the legislature, the executive and lastly civil society.<sup>39</sup> On the other hand, the United Kingdom Judicial Appointment Commission has 15 members 5 of whom are lay persons.<sup>40</sup> Finding the right balance in the composition of the judicial selection commissions has been the subject of scholarly debate with no definitive answer.<sup>41</sup> Recently, there have been calls for increased representation of the legal profession on the commissions.<sup>42</sup> The main argument has been that members of the legal profession including

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<sup>35</sup> See s 174 of the South African Constitution which stipulates the role of the Judicial Service Commission in the selection of judges. This can be contrasted with the Zimbabwean Judicial Service Commission under the Lancaster House Constitution which provided a limited role for the commission in the selection of judges.

<sup>36</sup> See s 178 of the South African Constitution.

<sup>37</sup> See art 85(1) of the Namibian Constitution.

<sup>38</sup> See s 146(2)(a) of the Ugandan Constitution.

<sup>39</sup> See s 178 of the South African Constitution.

<sup>40</sup> See Schedule 12 of the Constitutional Reform Act of 2005. All commissioners are recruited and appointed through open competition with the exception of three judicial members who are selected by the Judges' Council. Membership of the Commission is drawn from the judiciary, the legal profession, the magistracy and the public.

<sup>41</sup> See Ginsburg & Garoupa n 30 above

<sup>42</sup> It must also be noted that there are arguments against increased representation of the legal profession on the commission the notable one being that the commission must also reflect the diversity of the society in general.

judges are better placed to assess the merits and demerits of potential judicial candidates such as currently obtains in India.<sup>43</sup>

Lastly, the processes adopted by the commission are an important factor in promoting transparency and accountability. Such processes have varied, but the use of the open tender system and interviews is gaining popularity.<sup>44</sup> This entails advertising judicial vacancies by the commission followed by public interviews of potential candidates. These processes are regularly used in common-law countries where qualifications and legal practice experience are prerequisites for judicial appointment. On the other hand, the Higher Judicial Councils in civil law countries entail judicial advancement through promotion. Entrance into the judiciary is based on enrolling into a school of magistracy and passing the qualification examinations.

While it is beyond the scope of this article to engage in a detailed comparative analysis of these key elements, the identified elements are important indicators in the assessment of the new Zimbabwean Judicial Service Commission, the subject matter of this article. Before delving into the analysis of the Judicial Service Commission in Zimbabwe's new constitution, it is necessary to provide a general background of the mechanisms of judicial selection in colonial Zimbabwe. Such a background will put the subject matter of this article in its proper historical perspective.

### **EVOLUTION OF JUDICIAL SERVICE COMMISSIONS IN ZIMBABWE**

The new judicial selection mechanisms in Zimbabwe and in fact, the recent constitutional reforms are the product of evolution shaped by contextual political, economic and legal developments that have taken place over the years. We will briefly review the mechanisms of judicial selection from the 1923 Southern Rhodesia Constitution up to the Lancaster House Constitution which has been in place since Zimbabwean independence in 1980.

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<sup>43</sup> See generally Choi & Gulati 'A tournament of judges?' (2004) 92/1 *California Law Review* 299–322. See also Jackson 'Packages of judicial independence: the selection and tenure of article III judges' 2007 *Georgetown Law Journal* 95.

<sup>44</sup> See generally Du Bois n 27 above at 280.

It appears that the judicial appointment processes in Rhodesia were a complete departure from the British colonial tradition.<sup>45</sup> The British colonial tradition entailed advancement to the bench through the magistracy ranks and transfer of law officers from other colonies.<sup>46</sup> Any meaningful analysis of the colonial judicial selection mechanisms cannot ignore the different constitutional designs in the colonial era. Such an analysis will invariably focus on the 1923 Southern Rhodesia Constitution,<sup>47</sup> the 1961 Rhodesia and Nyasaland Federation Constitution, the 1966 and the 1969 Rhodesian Constitutions, the 1979 Zimbabwe Rhodesia Constitution, the 1980 Lancaster House Constitution and lastly the rejected 2000 draft constitution. The 1923 Southern Rhodesia Constitution introduced what it termed a ‘Responsible Government’ in the colony and this meant that Southern Rhodesia became a self-governing colony under the British Empire. Section 38(1) of this Constitution provided that the judges of the High Court were to be appointed by the Governor in Council at his sole discretion. However, a marked departure from the 1923 Constitution as far as judicial selection is concerned is found in the 1961 Constitution which provided for the first time the qualifications for appointment to judicial office as well as making a distinction between the appointment of the Chief Justice and the rest of the judges. The appointment of all judges with the exception of the Chief Justice were done by the Governor on the advice of the Prime Minister and with the agreement of the Chief Justice. In terms of section 50(3) of this Constitution, a person qualified for appointment as a judge, if he had been a judge of a superior court in a country where Roman-Dutch law was the common law and English was the official language. Alternatively, he must have been qualified to practice as an advocate for not less than ten years in Southern Rhodesia or in a country in which Roman-Dutch law was the common law and English was the official language. The involvement of the Chief Justice was probably meant to check executive manipulation of the judicial selection process.

The 1966 Rhodesian Constitution retained the same qualification requirements as its predecessor and the only change related to the appointment of the Judge President and the rest of the judges of the High Court. In terms of section 59(3) of this Constitution, the Prime Minister was obliged to ‘consult’ the Chief Justice in the appointment of the Judge

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<sup>45</sup> See Redgment ‘Plus ça change ...: fifty years of judges in Southern Rhodesia, Rhodesia and Zimbabwe’ 1985 *SALJ* 102, 529.

<sup>46</sup> *Id* at 530.

<sup>47</sup> Present-day Zimbabwe retained the name Southern Rhodesia until 1965.

President and in the case of other judges of appeal, the Chief Justice and the Judge President were to be consulted. The 1966 judicial selection mechanisms were retained in the 1969 Rhodesian Constitution.<sup>48</sup> In essence, judges were appointed by the executive on the recommendation of the Judge President of the division concerned.<sup>49</sup> The Judge President of the division and the Minister of Justice played pivotal roles in the judicial selection process and the system depended heavily on their ability to be impartial and apolitical.<sup>50</sup>

The first manifestation of a judicial service commission model in Zimbabwe's legal history is found in the short-lived Zimbabwe Rhodesia Constitution of 1979.<sup>51</sup> Section 82(1) of this Constitution provided that the Chief Justice and the other judges of the High Court were appointed by the President acting on the advice of the Judicial Service Commission. The commission was composed of three members namely, the Chief Justice, the Chairperson of the Public Service Commission and one other member appointed by the President on the advice of the Chief Justice.<sup>52</sup> Much of what was contained in the Zimbabwe Rhodesia Constitution never saw the light of day as the twists in the liberation war culminated in the Lancaster House negotiations which ended the war and brought about Zimbabwe's independence in 1980.

A number of observations can be made about the judicial selection processes in colonial Zimbabwe. Firstly, most of the colonial judicial appointments were from members of the bar and experience at the bar as an advocate was a very important factor in securing appointment to the bench.<sup>53</sup> This is hardly surprising considering that the bar was very small hence the heavy reliance on foreign jurists. Secondly, appointments were not only confined to nationals. Quite a number of foreign jurists especially South Africans were appointed to the bench. It appears that there was a general bias in favour of appointing candidates with a Roman-Dutch law background with one notable exception being the appointment of Justice Fieldsend from the United Kingdom.<sup>54</sup> Thirdly, it appears politics played little part in the

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<sup>48</sup> See ss 64 and 65 of the 1969 Rhodesian Constitution.

<sup>49</sup> See Redgment n 45 above at 102, 529.

<sup>50</sup> See Claassen 'Retain the Bar and Side-bar' 1970 *SALJ* 25.

<sup>51</sup> After the internal settlement between the Smith regime and moderate Africans, present-day Zimbabwe was renamed Zimbabwe Rhodesia.

<sup>52</sup> See s 88(1)(a–c) of the Zimbabwe Rhodesia Constitution.

<sup>53</sup> See Redgment n 45 above at 102, 529.

<sup>54</sup> *Id* at 539. See also Linington *Constitutional law of Zimbabwe* (2001) 171.

motivations for judicial appointments. Redgment notes the failure by Reggie Knight, a Minister of Justice, to have himself appointed to the bench as generally indicative of the fact that political persuasion did not matter much in judicial selection.<sup>55</sup>

The next stage in the evolution of judicial service commissions came at independence with the 1980 Lancaster House Constitution in its original form before it was subsequently amended nineteen times. In terms of section 84 of the 1980 Lancaster House Constitution, the President appointed the Chief Justice on the advice of the Prime Minister while the rest of the judges were appointed by the President on the advice of the Judicial Service Commission. The Judicial Service Commission was composed of four members, namely, the Chief Justice or the most senior judge of the Supreme Court, the Chairperson of the Public Service Commission, a highly experienced lawyer and one further member appointed by the President acting on the advice of the Prime Minister.<sup>56</sup> It has been suggested that the rationale for the composition of the commission was to insulate it from political machinations.<sup>57</sup> However, a close analysis of the commission composition shows its domination by Presidential appointees casting serious doubt on its apolitical nature.

Fundamental changes in the manner of judicial selection were ushered in by Constitutional Amendment Number 7 which created the executive presidency in Zimbabwe. In terms of the new changes, the President appointed all the judges including the Chief Justice after consultation with the Judicial Service Commission the only caveat being that in the event of disagreement, the President would inform Parliament.<sup>58</sup> The reconstituted Judicial Service Commission was composed of five or six members namely the Chief Justice, the Chairperson of the Public Service Commission, the Attorney General and no less than two or more than three other members with legal qualifications appointed by the President.<sup>59</sup> The new composition of the Judicial Service Commission in essence meant that the commission was dominated by presidential appointees. All the members of the commission were appointed directly or indirectly by the President. Such a

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<sup>55</sup> See Redgment n 45 above at 532.

<sup>56</sup> See s 84(1)(b) of the Lancaster House Constitution.

<sup>57</sup> See Madhuku 'The appointment process of judges in Zimbabwe and its implications for the administration of justice (2006) 21 *SAPR/PL* 348.

<sup>58</sup> See s 84(1)(2) of the Constitution of Zimbabwe as amended.

<sup>59</sup> See s 90(1)(2) of the Constitution of Zimbabwe as amended.

composition provided weak checks against purely political appointments in that a powerful President would face little resistance from the Judicial Service Commission if he or she insisted on a particular choice.<sup>60</sup>

An attempt was made to revise the Zimbabwean Constitution in the year 2000 but the draft constitution was rejected in a national referendum. One of the thorny issues which was addressed by the draft constitution related to the mechanisms of judicial appointment. In terms of the 2000 draft constitution, the President was supposed to appoint the Chief Justice after consulting the Judicial Service Commission.<sup>61</sup> All other judges were to be appointed by the President from a list of names submitted by the Commission.<sup>62</sup> However, all judicial appointments were subject to the approval of Senate.<sup>63</sup> The proposed Judicial Service Commission was composed of nine members namely, the Chief Justice, the Judge President, the Attorney General, a member of the Public Service Commission and five other members appointed by the President with the approval of Senate.<sup>64</sup> The five presidential appointees were made up of two legal practitioners one nominated by the Law Society of Zimbabwe and the other a lecturer in law, two persons chosen for their experience or professional qualifications and lastly a traditional leader.<sup>65</sup> A major criticism of this Judicial Service Commission related to its composition. Like the Lancaster House Constitution, the proposed commission's membership was dominated by presidential appointees. The only safeguard against purely political appointments was the requirement of Senate approval for all judicial appointments. This again would have been a weak check on executive manipulations of the judicial selection process if the President's political party held the majority of the seats in Senate.

This discussion will not be complete if reference is not made to the crises which gripped the Zimbabwean judiciary in the last two decades and which ultimately led to the targeting of the judiciary for reform. The post-2000 political turmoil resulted in the purging of superior court judges with the most notable example being the forced resignations of Chief Justice Gubbay

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<sup>60</sup> See Madhuku n 57 above at 347. See also Harris n 24 above at 203.

<sup>61</sup> See art 5.2.2 of the 2000 Constitutional Commission draft Constitution.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> See art 5.4.1 of the 2000 Constitutional Commission draft Constitution.

<sup>65</sup> *Ibid.*

and Justice Ebrahim.<sup>66</sup> Furthermore, there was also a strong suspicion that both the Supreme and High courts were reconstituted with politically compliant judges.<sup>67</sup> The executive manipulation of the judicial selection process invariably reinforced the perception that the Zimbabwean judiciary was not independent.

Despite the failed attempt to adopt a new constitution in 2000, political developments since then largely underscored the need for a new constitution. While the new 2013 Constitution has its defenders and critics, we will only focus on the new Judicial Service Commission provided under it in order to assess its prospects for enhancing the independence and effectiveness of the Zimbabwean judiciary.

#### **THE NEW JUDICIAL SERVICE COMMISSION: ASSESSMENT OF ITS MAIN COMPONENTS**

The judicial selection mechanisms preceding the new Constitution had largely been discredited as having led to the creation of a compliant judiciary in Zimbabwe.<sup>68</sup> In order to properly evaluate the judicial selection mechanisms in the new Constitution, we will examine the Judicial Service Commission which is a constitutionally entrenched body and is required to play an important role in judicial appointments. The new Judicial Service Commission is established in terms of sections 189 to 191 of the 2013 Constitution. Four aspects of the commission will be examined namely, its composition, the appointment of its members, its constitutional status and its judicial selection processes.

##### **The composition of the Judicial Service Commission**

The composition of the Judicial Service Commission is provided for in section 189(1)(a–k) of the Constitution. Section 189 establishes a thirteen member Judicial Service Commission headed by the Chief Justice.<sup>69</sup> The

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<sup>66</sup> For a detailed discussion of political victimisation of judges, see Van de Vijver n 26 above at 252–272.

<sup>67</sup> See also a report to the International Council of Advocates and Barristers by five Common Law Bars into the state of justice in Zimbabwe available at: [www.barcouncil.org.uk/media/144602/7351\\_bhrc\\_zimbabwe\\_report.pdf](http://www.barcouncil.org.uk/media/144602/7351_bhrc_zimbabwe_report.pdf) (last accessed 14/06/13).

<sup>68</sup> See also Matyszak n 3 above at 334.

<sup>69</sup> The Judicial Service Commission is composed of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court, one judge nominated by all the judges of the superior courts, the Attorney General, the Chief Magistrate, the Chairperson of the Civil Service Commission, three legal practitioners of at least seven years' experience nominated by the Law Society of Zimbabwe, a professor or senior lecturer of law, one

members' tenure is limited to a single non-renewable term of six years.<sup>70</sup> The Commission is made up of three types of members, namely judges, lawyers and others chosen for their professional qualifications. It is not without any practical significance that the new commission is a marked departure from the commission in the amended Lancaster House Constitution. The new commission is staffed with a minimum of ten members with legal qualifications. Moreover, there is a careful balance between the members of the judiciary and members of the legal profession. It appears that there was a deliberate attempt not to have the commission constituted by a majority of members of the judiciary. The composition of the new commission is largely representative of the legal fraternity from which pool the judicial candidates emanate. Such a composition might augur well for the assessment of judicial candidates as most of the commission members are well placed to critically scrutinise the suitability or otherwise of judicial candidates.

#### **Appointment of members**

Just as important as the composition of the commission is the question of how they are appointed and by whom.<sup>71</sup> As we pointed out earlier, methods of appointing commission members are varied across jurisdictions. In the absence of widely accepted formula, the only feasible determinant of the commission's independence is the extent to which the appointment of members is insulated from purely political influences. Typologies of judicial selection commission membership generally include selection by the executive, legislature, ex officio members, and nominating bodies representative of key groups.<sup>72</sup>

The new Judicial Service Commission is composed of six ex officio members, five persons nominated by representative bodies of lawyers, law lecturers, accountants and auditors, a judge nominated by an association of superior court judges and lastly an executive appointee. This in practical terms means that the executive appoints directly or indirectly seven members of the thirteen member commission and thus a majority. Invariably, this new system can only function independently of political influences if the ex officio members discharge their constitutional mandate in a fair, transparent

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person qualified as an auditor or public accountant and one person with at least seven years' experience in human resources management.

<sup>70</sup> See s 189(3) of the new Zimbabwean Constitution.

<sup>71</sup> See Maleson 'n 3 above at 50.

<sup>72</sup> See judicial appointments commission consultation paper for New Zealand available at [www.justice.govt.nz/publications/global-publications/a/](http://www.justice.govt.nz/publications/global-publications/a/) (last accessed 29 April 2013).



and objective manner. Nevertheless, there is still a strong possibility of executive interference judging from past experiences wherein commission members directly or indirectly owed their appointment to the President.<sup>73</sup> Moreover, the very nature of the appointment of commission members created a strong possibility of caucusing to adopt common positions over particular judicial candidates.

### **The status of the commission**

Just like its predecessor, the new Judicial Service Commission is a constitutionally entrenched body responsible for matters relating to the judiciary and the administration of justice.<sup>74</sup> Unlike the Lancaster House Constitution, the new Constitution goes much further in recognising the powers and sphere of influence of the Judicial Service Commission. Section 190(2) 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.’

Whilst constitutional prescriptions alone are not enough, the fact that the competences of the commission have clearly been spelt out goes a long way in insulating the commission from unwarranted interferences in the discharge of its constitutional mandate. This therefore opens the possibility for the commission and the public at large to litigate in cases where there is interference in the commission’s work. The importance of the commission is underscored by the fact that the Government is now constitutionally obliged to pay due regard to the advice of the Commission in matters relating to the judiciary and the administration of justice.<sup>75</sup>

### **The commission’s procedures**

The judicial selection procedures adopted by a Judicial Service Commission are a critical determinant of transparency and fairness in the selection processes.<sup>76</sup> Unlike the old commission whose selection processes were

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<sup>73</sup> See Madhuku n 57 above at 345; Matyszak n 3 above at 334; Saller ‘The judicial institution in Zimbabwe’ 2004 (Siber Ink in association with the University of Cape Town).

<sup>74</sup> See s 190(1) of the 2013 Zimbabwean Constitution.

<sup>75</sup> *Ibid.*

<sup>76</sup> See generally Malleon ‘Assessing the performance of the Judicial Service Commission’ (1999) 116 *SA Law Journal* 32, 36.

shrouded in secrecy,<sup>77</sup> the judicial selection procedures for the new Judicial Service Commission have been constitutionally entrenched. The constitutional prescription of the commission procedures was clearly intended to leave no doubt as to the framework within which the commission has to fulfill its mandate. Section 180 of the new Constitution provides the appointment procedures for all judges of the superior courts. In the event of a vacancy, the Judicial Service Commission is constitutionally obliged to advertise the position, invite the President and the public to make nominations, conduct public interviews and submit a list of three nominees for a single vacancy from which list the President makes the appointment.<sup>78</sup> It necessarily follows that in the event of more vacancies on the bench, the commission must submit a list with two more names in excess of the advertised vacancies. If the President is not satisfied with the nominees submitted to him, the Judicial Service Commission is obliged to submit a further list of three qualified persons and the President has to appoint one of the nominees submitted.<sup>79</sup> Furthermore, section 190(3) of the new Constitution empowers the Judicial Service Commission to make regulations to enable it to discharge its functions.

One inescapable conclusion from an analysis of the new judicial selection procedures is that they are intended to ensure greater transparency and accountability in the selection of judges. This is underscored by the fact that section 191 of the new Constitution requires the Judicial Service Commission to conduct its business in a just, fair and transparent manner. Theoretically, the new judicial selection procedures will go a long way in enhancing public confidence in the selection of judges as the processes are now subject to public scrutiny. It augurs well for a participatory democracy to have as many stakeholders as possible having an input in the processes leading to the selection of members of the judiciary.

### **PROSPECTS FOR ENHANCING JUDICIAL INDEPENDENCE**

An analysis of the evolution of judicial selection mechanisms in Zimbabwe especially having regard to the role of the Judicial Service Commission in the appointment of judges under the new Constitution clearly shows a paradigm shift. Previous regimes of judicial selection in Zimbabwe had one common feature and that is a general lack of transparency in the selection of judges. However, the judicial selection procedures in the new Constitution

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<sup>77</sup> See Madhuku n 57 above at 345.

<sup>78</sup> New Zimbabwean Constitution s 180(2).

<sup>79</sup> *Id* at s 180(3).

have greater prospects for enhancing the independence of the judiciary as the Judicial Service Commission is no longer a body that will necessarily or easily rubber stamp executive directives. Moreover, the judicial selection process has been constitutionally entrenched and not deferred to ordinary legislation. In fact, the new Constitution has even gone much further in constitutionally entrenching the judicial selection commission's processes as compared to the South African Constitution which defers regulation of this to subordinate legislation.<sup>80</sup>

The fact that the commission is dominated by members with legal backgrounds coupled with the fact that executive discretion is limited to the list submitted by the commission goes a long way in guaranteeing the separation of powers and independence of the commission at the appointments stage. Such a constitutional arrangement necessarily enhances the prospects for the independence of the selection system from inappropriate politicisation and enhancing the chances for appointment of well qualified and competent judges.<sup>81</sup> It is still early to judge the prospects of this new commission but what remains to be seen is whether the new Judicial Service Commission will fulfill its theoretical promise for promoting an independent and efficient judiciary appointed using processes that are transparent, fair, and inclusive.<sup>82</sup> Invariably, much will depend on the prevailing political climate.

## CONCLUSION

It is apparent from the foregoing discussion that there is an increasing use of the judicial service commission model in several jurisdictions in both the common-law and civil law systems which are the dominant legal traditions in the world. A distinguishing feature of the judicial service commission model relates to the commission's composition and competences. This in turn has a significant influence on whether the commission is able to exercise its functions independent of political influences. A survey of the manifestation of judicial service commissions across the world provided the framework for a comparative assessment of Zimbabwe's new judicial service commission. In this respect, several conclusions can be drawn from an analysis of the commission in Zimbabwe's new constitution of 2013. The new commission offers better prospects for enhancing the independence of

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<sup>80</sup> See s 178(6) of the South African Constitution.

<sup>81</sup> See Malleson 'The New Judicial Appointments Commission in England and Wales: new wine in new bottles?' in Malleson & Russell'n 3 above at 40.

<sup>82</sup> *Ibid.*

the judiciary than the previous one under the Lancaster House Constitution. Its composition and competences are deliberately designed to insulate the judicial selection process from political influences. The constitutional entrenchment of the judicial selection process goes a long way in safeguarding it from being eroded by overbearing executives. It is however hoped that the new regime of judicial selection in Zimbabwe will usher in a new era in so far as the political culture of judicial selection is concerned. Consequently, the prospects for the new judicial selection process will depend very much on the prevailing political climate. The constitutional promise for a paradigm shift in judicial selection mechanisms in Zimbabwe now needs to be fulfilled in practice. It is not perfect but there is no perfect or ideal system of judicial selection. Although it does not automatically eliminate executive interference, it nevertheless limits the possibilities of this happening. If fully implemented, it is unlikely that the pre-2013 packing of courts with executive-minded judges will be repeated.