

ABUSE OF POWER AND AUTHORITY: RAPE BY COERCION¹

By GEOFF FELTOE²

INTRODUCTION

People in positions of power and authority often abuse their power and authority to try to coerce females to have sexual relations with them. They prey on vulnerable women and girls over whom they have power or authority. A prime example is the notorious case of Hollywood Film producer, Harvey Weinstein. Over 90 women have accused Weinstein of sexual harassment, indecent assault and, in eighteen cases, of rape over a period from 1980 to 2015. Weinstein would allegedly invite young actresses or models into a hotel room or office on the pretext of discussing their careers, and then demand massages or sex. He told them that complying with his demands would help their careers and, conversely, implied that non-compliance with his sexual demands would be fatal to their careers. These activities were allegedly enabled by employees, associates, and agents who set up these meetings, and lawyers and publicists who suppressed complaints with payments and threats. Weinstein has denied that what happened was non-consensual.

After the initial accusations against Weinstein many more women, who had previously been apprehensive about making accusations against a powerful person like Weinstein, have come forward to accuse Weinstein of sexual assaults upon them. This has also led to a further spate of accusations of sexual abuse by other persons in authority in America such as sports coaches and team doctors. For example, a sports doctor

¹ The title reflects the focal point of this paper which is rape by coercion, although other types of rape are canvassed in order to show the difference between coerced sex and, for instance, rape by deception.

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Larry Nassar, has been charged with sexually molesting numerous female gymnasts. Allegations have been made by female athletes that their coaches threatened to wreck their athletic careers unless they agreed to have sexual relations with their coaches.

It has also been alleged that male dominated bodies which could have taken action against their members who were known to be abusing their authority covered up or failed to take action against their members and were therefore complicit in allowing the malpractices to continue.³ It is incumbent upon controlling bodies to ensure that situations of power imbalance do not result in sexual abuse of vulnerable persons.

It is important to decide how the law of Zimbabwe should deal with situations when it can be proven that the only reason the complainant had sexual relations with the accused was because of the coercion brought to bear upon her and which caused her to submit to the accused's advances. It must be stressed that the concern here is to deal with proven cases of abuse and not with unfounded accusations. However, it must also be emphasized that all allegations should be fully investigated to determine whether there is substance in the allegations.

RAPE AND CONSENT

Section 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code) provides that a male person is guilty of rape if he knowingly has vaginal or anal sexual intercourse with a female person who has not consented to have sexual intercourse and the male knows she has not consented or realizes that there was a real risk or possibility that she may not have consented. The maximum penalty for this offence is life imprisonment.

The Criminal Law Code does not provide a definition of "consent" whereas the South African sexual offences

³ The conspicuous failure of the Catholic Church to take effective action by Catholic priests who were sexually abusing children is well known.

legislation defines consent as “voluntary or uncoerced agreement” to have sexual relations.⁴ However, section 69(a) provides that a person will be deemed not to have consented to sexual intercourse for the purposes of rape, aggravated indecent assault and indecent assault where the accused uses, *inter alia*, intimidation or pressure to induce the complainant to submit to the sexual act.

Section 84 of the Criminal Law Code creates a separate criminal offence which includes the use of coercion to enable a person to have unlawful sexual relations with another. This offence encompasses the use of threats or intimidation. The penalty for this offence is a fine not exceeding level ten or imprisonment for a period not exceeding five years or both. The proviso to this offence says that nothing in this section precludes a person from being charged with or convicted of rape if the facts support such a charge or conviction. It will be submitted below that coerced sex should constitute rape and should be charged as such rather than the lesser statutory offence.

FORCED SEXUAL RELATIONS

The absence of consent will be patently obvious where a person who is a stranger to the woman grabs her when she is out walking and drags her into some bushes and forcibly has sexual relations with her by beating her up to overcome her resistance or by brandishing a knife and threatening to kill her if she does not submit to sexual intercourse. Lack of consent will also be apparent in a situation when a man has invited a woman to his house and when he asks her to have sexual relations with him, she emphatically refuses or when he tries to have sexual relations with her she physically resists and he uses force to overcome her resistance. Even where the parties have previously had sexual relations, it is rape if, on the present occasion, the man has sexual relations with her against her will. Under the current law a husband who forcibly has non-

⁴ Section 1(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines consent as “voluntary or uncoerced agreement” to have sexual relations. (“the South African Sexual Offences Act”.)

consensual sexual intercourse with his wife can be charged with rape.⁵

COERCED SEXUAL RELATIONS

There is a common misperception that rape can only be committed if a man uses physical violence to overpower a non-consenting woman and that the woman has physical injuries to prove that she resisted. As will be seen below, rape can be committed in a whole range of situations where there has been no actual physical violence or threats of violence. One such situation is where the man uses coercion to induce a woman to submit to having sexual relations with him.

There are a whole range of situations where a male with power, influence or authority over a female can abuse that power, influence or authority in order to have sexual relations with the female. Such cases should be charged as rape as the female has been coerced into having sexual relations when she does not wish to do so. Because of gender inequalities and gender discrimination, it is predominately males who are in a position to abuse their authority to sexually exploit female and sometimes even their male subordinates.⁶ However, females who are in positions of authority over males could also coerce men into having sexual relations with them.

The South African Sexual Offences Act in section 1(3)(b) addresses situations where there has been abuse of power or authority by the accused to the extent that the complainant “is inhibited from indicating ...her unwillingness or resistance to the sexual act...” The abuse of power or authority to force

⁵ Section 68(a) read with section 65 of the Criminal Law Code. One situation of marital rape is where a wife suspects that her husband may have HIV and she insists that he wear a condom before they have sexual relations but the husband refuses to wear a condom and has unprotected sexual relations with her against her will. If the husband went ahead knowing that he would infect his wife, he could also be charged with deliberately transmitting HIV in contravention of section 79 of the Criminal Law Code.

⁶ In America a whole succession of allegations have been made that actor Kevin Spacey abused his power and influence to sexually exploited male, including several in their teens.

the complainant to submit sexual relations means that there is no valid consent and the abuser should be found guilty of rape or other sexual offences.

The following are some of the situations in which there is abuse of power or authority:

The accused owns a company and he has the power to hire and fire staff. He approaches an attractive female employee in the company and asks her to have sexual relations with him. When she refuses, he threatens to terminate her employment if she does not do what he asks of her. Desperate not to lose her job, she reluctantly submits to the man's sexual demands. Later she is so disgusted with what has happened that she reports the matter to the police.⁷

The accused owns a company and he has the power to hire and fire staff. A woman applies to the company for a job. She is interviewed by the accused who informs her that he will only employ her if first she has sexual relations with him. The woman has been unemployed for a long time and she desperately needs a job so she reluctantly submits to the man's sexual demands. Later she is so disturbed with what has happened that she reports the matter to the police.

The accused is a municipal housing officer who is in charge of allocating houses to persons who have applied for municipal accommodation. A woman who has been trying to get municipal accommodation for a long time, applies again to the housing officer. He tells the woman that he will only allocate a house to her if first she has sexual relations with

⁷ In this regard Burchell at p 620 of *Principles of Criminal Law* 5th ed has this to say:

In the case of *S v Volschenk* 1968 (2) PH H 283 (D) "the court said that a threat by an employer to dismiss an employee was in a 'different category.' The court did not elaborate on the difference. The crime of rape exists to protect women in their dignity, so why should a man - who knows that a woman has agreed to have sex with him because he has threatened to dismiss her - be allowed to escape liability, but not if he threatens to assault her? In short, why should the type of duress employed make a difference when the woman has had to endure sexual intercourse or penetration against her wish?" Burchell's comments are clearly correct.

him. She reluctantly submits to his sexual demands but later she is so disgusted with what has happened that she reports the matter to the officer's superiors.⁸

The accused is a municipal housing officer who is in charge of allocating houses to persons who have applied for municipal accommodation. He also has the power to order the eviction of persons who have been allocated houses where they have breached the terms of their occupancy. A female who has been allocated a house has fallen behind on the rentals for the house. The accused threatens to evict her but says he will not do so if she has sexual relations with him. To avoid eviction, she reluctantly submits to his sexual demands but later she is so disgusted with what has happened that she reports the matter to the officer's superiors.

The accused is a university lecturer. He wishes to have sexual relations with one of his female students but she refuses his overtures. He then threatens to fail her in her upcoming examination unless she has sexual relations with him. She is desperate to pass the examination, so she reluctantly submits but later is so disgusted with what has happened that she reports the matter to the lecturer's superiors. (The same sort of scenario could arise in a school where the headmaster or a teacher threatens to expel a pupil or to fail her in the examinations unless she has sexual relations with the headmaster or teacher.)

A police officer abuses his authority to intimidate a woman into having sexual relations with him. There are a number of cases in South Africa where police officers have been convicted of rape where they have abused their authority. In *S v Volschenk* 1968 (2) PH H 283 (D) a policeman induced consent to sexual intercourse by threatening to take an arrested woman to the police station if she did not have sexual relations with him. The court found that the policeman had abused his lawful authority and the fear he had induced in the woman had vitiated consent. He was found guilty of rape. In *S v S* 1971 (2) SA 591 (A) a police constable arrested a young woman and

⁸ A similar scenario could arise where a person with the power to allocate land abuses that power to induce a woman seeking land to have sexual relations with him.

placed her in a car. He ordered her to lie on the back seat. When he went to have sex with her she said she was ill. Nonetheless he had sex with her. No force or threat was used but the sexual intercourse was against her will and desire. She simply complied as she was afraid as she believed he had the power to harm her. The constable used his authority to overbear her lack of consent and he was thus guilty of rape.⁹

A father abuses his parental authority to coerce his young daughter to allow him to have sexual relations with him. He should found guilty of rape.¹⁰

It should be noted that males are also susceptible to sexual abuse by those that have authority over them. There are many examples of Catholic priests sexually abusing boys who are in orphanages run by the Catholic Church.¹¹ Males can also fall prey to sexual demands by women who abuse their authority over the males to coerce them to have sexual relations with them, In Zimbabwe such women would have to be charged with aggravated sexual assault as women cannot themselves commit rape.

But care needs to be taken to distinguish a case where coercion is used to induce submission from a case where there is no abuse his power or authority used to pressure the complainant to have sexual relations with him. Take the case of a woman

⁹ There have been reports that some police officers have coerced sex workers to have sexual relations by threatening to arrest them unless they comply with their sexual demands.

¹⁰ If the daughter is below the age of 12 she is incapable of giving consent but even if she is of an age where she is capable of giving consent the consent is vitiated by the coercion. Rape is the correct charge and not sexual intercourse within a prohibited degree of relationship (formerly called Incest) in contravention of section 75 of the Criminal Law Code which carries a maximum sentence of only five years' imprisonment. See also *S v Muwombi* HH-164-16 on when "incest" should be charged instead of having sexual intercourse with a young person, in contravention of s 70 of the Criminal Law Code where a father has consensual sexual relations with his daughter who is under 16.

¹¹ If a man forces a boy to engage in anal sex in Zimbabwe he would be charged with aggravated sexual assault in terms of section 66 of the Criminal Law Code.

who is caught by a police officer committing a crime. What would happen if, without any inducement or pressure from the police officer, the woman offers to have sexual relations with him if he does not arrest her and the police officer takes up the offer? Even though the police officer knows that the woman has offered sex to avoid arrest and prosecution, on a charge of rape can it be said that the consent to sex was non-voluntary? A case of an influential film producer who threatens to wreck the career of one of his actresses if she refuses his sexual advances is different from the case of an actress determined to get a part in an upcoming movie who seduces the producer and has sexual relations with him to try to persuade him to give her the part. In the second scenario no coercion is used. Another possible situation is where a female student freely has sexual relations with a male lecturer and then threatens to report the matter to the university authorities if she does not pass his examination.

CASES INVOLVING DECEPTION

Cases of obtaining consent to sexual intercourse by fraud or deception are different from situations of coercion. The only time that fraud vitiates consent and the accused would be guilty of rape is where a man has sexual relations with a woman after deceiving her into believing that he is her husband or sexual partner¹² or where the man persuades the female that the act he is a medical procedure and not sexual intercourse.¹³

It is not rape where a man falsely promises to marry woman or to give her some jewelry if she has sexual relations with him and she willingly has sexual relations in order to obtain the promised benefit. Snyman adds that "if X falsely represents to Y that he loves her, that he is famous pop star, a sports hero, the owner of a flashy sports car or a multimillionaire and Y believes the story and on the strength of such a

¹² Section 69(1)(c) of the Criminal Law Code. See *S v C* 1952 (4) SA 117 (O) 121. Unless the woman is drugged or intoxicated it is most unlikely that she will be deceived.

¹³ See section 69(1)(b) and (c) of the Criminal Law Code, *S v Williams* [1923] ! KB 340 and *S v Notito* [2011] ZACA 198. Again this is an unlikely situation unless it involves a young naive girl who is sexually inexperienced.

misrepresentation she agrees to intercourse with X, her consent is valid and rape is not committed.”¹⁴

USE OF DRUGS OR INTOXICANTS

Section 69(1)(e) of the Criminal Law Code provides that a complainant shall be deemed not to have consented to sexual intercourse for the purposes of rape, aggravated indecent assault or indecent assault if she was incapable of giving consent because she was intoxicated from the consumption of drugs or alcohol and she had not consented to the sexual action prior to becoming intoxicated. Again, however, there is a further section, section 84 of the Criminal Law Code that provides that if a person applies drugs or intoxicating liquor to the complainant to enable the accused to engage in unlawful sexual conduct with that person, he is guilty of an offence, the maximum penalty for which is imprisonment for ten years. This section provides that nothing in this section will preclude a charge of rape being brought against the accused. It is submitted that the correct charge in these circumstances is rape and not the lesser charge under section 84.

CONCLUSION

It is necessary to deter influential persons from abusing their power and authority to coerce women into succumbing to their sexual advances. Where it is clear that the complainants have not engaged in sexual relations voluntarily but only because of the pressure applied to them by those who have the power to cause them harm or prejudice if they do not comply, the only appropriate charge is rape and not the lesser offence under section 84 of the Criminal Law Code. It is necessary to apply the full force of the law to deter powerful persons from abusing their power to obtain sexual favours.

¹⁴ Snyman *Criminal Law* 5th ed p 366. Interestingly, Snyman argues that under the South African provisions relating to fraud treats as rape the following situation: a man is HIV infected and a woman is not HIV infected X acquires consent by misrepresenting to her that he is not HIV infected and he ends up infecting her with HIV. If it is clear that the woman would never have agreed to have sexual relations with the man if she had known that he was HIV infected. Snyman contends that in the light of the severe consequences flowing from the misrepresentation the consent should not be regarded as valid consent.

JUDICIAL APPOINTMENT IN ZIMBABWE: DEFINING THE CONCEPT OF “FIT AND PROPER PERSON”

BY CHAKA MASHOKO¹

INTRODUCTION

As in other progressive jurisdictions,² the Constitution of Zimbabwe provides that a person to be appointed to the office of a judge must be “a fit and proper person”³ although this concept is not defined in the Constitution. No guidance is given by the Constitution to the Judicial Service Commission (JSC) in determining what criteria to apply in selecting candidates and to ensure that the candidate for judicial appointment or promotion has all the necessary attributes. Constitutions have numerous open-ended definitions to allow the legislature and other subordinates to creatively formulate a comprehensive meaning of the open-ended terms. This allows for flexibility rather than rigidity in interpretation.

In Zimbabwe, the Courts have defined the concept in respect of the admission and re-admission of legal practitioners.⁴ The Courts have opined that the requirement alludes to personal qualities of the applicant or candidate, with the object of maintaining the integrity and honour of the profession.⁵ The Courts decide whether the applicant is fit and proper in relation to such matters as prestige, status and dignity of the profession, and the integrity, standards of professional conduct and responsibility of legal practitioners. However, in practice, courts do not actually interrogate whether a candidate for admission as an attorney or legal practitioner has a good character or not. In the absence of objections, it will be assumed that the candidate is of good standing.

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³ See Sections 177(2); 178(2) and 179(2).

⁴ See *In re Chikweche* 1995(1) ZLR 235 (S); See also *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T).

⁵ *In re Chikweche* supra, p 244.

As regards appointment of judges, it is submitted that given the public importance of judicial office which is a public trust (since judicial authority derives from the people), there must be a more proactive approach from both the recommending authority and the appointing authority which should interrogate whether a candidate for appointment to the bench is suitable for and deserving of such a position.

The word 'fit' has been taken to mean 'qualified or suited to purpose, competent and deserving', whilst the word 'proper' has been taken to mean 'excellent, admirable, commendable, fine, goodly, of high quality, of good character or standing, honest, respectable, worthy, fit, apt, suitable'.⁶ The main consideration in this context is therefore whether in relation to the prestige, status, and dignity of the profession, and the responsibility, standards of professional conduct and integrity of practitioners, the applicant or candidate has shown himself or herself to be a fit and proper person.

It is submitted that the above definition of 'fit' and 'proper' can also be applied to the selection and appointment or promotion to judicial office, having regard to international standards and principles relating to the judiciary. Historically, judges were appointed exclusively from the ranks of advocates (legal practitioners) with good standing.

Although there is no agreement in international law as to the method of appointment, States are required to appoint judges through strict selection criteria and in a transparent manner. Although the Constitution of Zimbabwe does not expressly detail the content of these criteria, we are called upon to interpret them having regard to the nature and function of the judicial office as well as the powers that vest in the judiciary. To a large extent, international standards and principles also assist in this regard.⁷

In this paper, the author proposes to deal with the most pertinent ethical considerations, having regard to international

⁶ Kaplan (*supra*), p 783.

⁷ See (i) The Commonwealth (Latimer House) Principles on the Three Branches of Government, 2009; (ii) The Universal Charter of The Judge, 2009; (iii) The Bangalore Principles of Judicial Conduct, 2002.

standards and principles as well as the constitutional provisions and, lastly, with the physical and mental attributes of the candidate.

Most of the standards and principles to be discussed here, such as integrity, independence, equality, impartiality, competence and diligence, have already been given recognition to and found expression in the Judicial Service (Code of Ethics) Regulations, 2012⁸, and in the Judicial Services Act [*Chapter 7:18*]. The former provides for the standards and principles *in extensor*,⁹ whilst the latter provides for service regulations prescribing the codes of ethics for judicial officers.¹⁰ To that extent, the norms pertaining to “fit and proper”, in the context of this paper, have been codified. It would appear therefore that there may be no need for further legislative intervention in this regard since the provisions of these instruments appear to conform to the Constitution, and to international standards and principles.

APPROPRIATE QUALIFICATIONS

Sections 177, 178 and 179, respectively, of the Constitution of Zimbabwe deal with the qualifications of judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court. A person who is not appropriately qualified in terms of these provisions of the Constitution may not be appointed as a judge.

The UN Basic Principles establish that:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, sex, religion, political or other opinion, national, or social origin, property, birth or status, except that a requirement that a candidate for office must be a

⁸ Statutory Instrument 107/2012.

⁹ See Part II sections 4 to 20.

¹⁰ See section 18 of the Act.

national of the country concerned, shall not be considered discriminatory¹¹.

The African Principles and Guidelines on the Right to a Fair Trial state that:

The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability. No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their function.¹²

Similarly, the Universal Charter of the Judge stipulates that:

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualifications.¹³

The above principles relate to, among others, the candidate's professional qualifications as an important criterion for appointment to, or promotion on the bench. This selection criterion is based on merit having regard to the candidate's qualifications, skills, experience, ability and efficiency in assessing legal matters and applying the law. The candidate must have the ability to adequately fulfil their judicial function by virtue of the appropriate training and learning.

However, academic qualification on its own does not suffice to satisfy this criterion. Legal knowledge, skill and experience must form part of that requirement. The following might be used as a guide: forensic skills, intellectual capacity, writing and analytical skills, ability to handle complex issues, knowledge and understanding of the law and its underlying principles, application of the law to the facts, knowledge of courtroom procedures, language skills, capacity of articulation, communication skills, administrative skills and breadth of professional experience.¹⁴ The latter includes quasi-

¹¹ UN Basic Principles and Guidelines on the Independence of the Judiciary, Principle 10.

¹² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A.

¹³ Universal Charter of the Judge, Article 9.

¹⁴ Susannah Cowen, *Judicial Selection in South Africa* (University of Cape Town Democratic Governance and Rights Unit. Working Paper Series, p. 37.

judicial experience relating to administrative or arbitration tribunals. In addition, the candidate's appreciation of the judicial role in resolving disputes according to the facts and the law as well as in protecting individual rights should also be taken into account. These skills would ensure that the candidate will perform their duties with the requisite competence, diligence, efficiency and punctuality, and to enable improvements to the weaknesses and imperfections existing in the system of administration of justice, thereby fulfilling the judicial function. The assessment and views of professional colleagues, organisations that play a role in the administration of justice, and other relevant interest groups are also useful for the enquiry.

INTEGRITY

'Integrity' may be defined as: moral uprightness; honesty; wholeness; soundness.¹⁵ Members of the judiciary are associated with, among other things, honour, honesty and integrity and for these reasons they are viewed with special respect from society.

In his address to the meeting of judges and resident magistrates held in Arusha, Tanzania on 5 March, 1984, the late President Julius Nyerere had this to say:

There are jobs in our society which can be done by undisciplined people whose personal integrity can be called into question; being a Judge or Magistrate is not among them.¹⁶

Judges must show high moral character not only in the discharge of their duties but also in their private life, so as to protect the good reputation of their office. They must act honourably and avoid all conduct which would damage their reputation. The integrity of judicial officers serves to re-affirm the public's faith in the judiciary and to uphold its reputation of honour. For the public to have confidence in the judiciary, the Bench should be free from blemish.

¹⁵ *Concise Oxford Dictionary of Current English* (8th Edition)

¹⁶ See *Daily News* (Tanzania), 16 March, 1984, p. 1.

In his paper titled "The Rule of Law and Human Rights: A Case Study of Kenya", presented to the Law Society of Zimbabwe,¹⁷ Otiende Amollo cites the case of the removal of the then Deputy Chief Justice of Kenya, Nancy Baraza, from the judiciary. The case related to her conduct at a shopping mall in Nairobi, Kenya, on 31 December, 2011 where she allegedly by-passed a security personnel conducting body-screening, pinched her nose and threatened to shoot her. Following a public outcry, a tribunal was set up to investigate the conduct. The tribunal subsequently made a report to the President of Kenya with a finding that the Deputy Chief Justice was unfit to hold office on account of gross misconduct. Although she had appealed, she later opted to resign.

In the United States, Oklahoma judge, Donald Thompson is reported to have been convicted of using a sex toy for his in-court masturbation!¹⁸ In the matter of *Barak Singh v Jyoti Basu*,¹⁹ India's Supreme Court had this to say:

Integrity is the hallmark of judicial discipline, apart from others. It is high time the judiciary took utmost care to see that the temple of justice does not crack from inside, which will lead to a catastrophe in the judicial-delivery system resulting in the failure of public confidence in the system.

Further, in re *Bombay v Uday Singh*,²⁰ the High Court of Judicature stated as follows:

Acceptability of judgements depends upon the credibility of the conduct, honesty, integrity and character of the officer. The confidence of the litigating public gets affected or shaken by lack of integrity and character of the Judicial Officer.

Thus, where a candidate for judicial office has previously engaged in or is likely to engage in any dishonourable or improper conduct, such as conflict of interest to advance

¹⁷ On the Walter Kamba Rule of Law Day Harare - Zimbabwe, 6 December, 2012.

¹⁸ *Sydney Morning Herald*, 30 June, 2006 "Judge convicted of using penis pump in court".

¹⁹ (2005) 1 SCC 201.

²⁰ (1997) 5 SCC 129.

personal interest or those of family members or associates, soliciting for or accepting bribes, corruption, engaging in business or financial dealings that adversely reflect on their character or standing in society, disclosure of confidential information for the purpose of furthering or advancing personal financial or business dealings, or those of family members or associates, misappropriation of trust funds, subverting the law, or some other gross misconduct, he or she would not be a fit and proper person for appointment to judicial office or elevation.²¹

A candidate for judicial appointment or promotion must have a good record of trustworthiness, candour, honesty, avoidance conflict of interest, deference to the rules of recusal,²² and honouring his or her word. Integrity checks which include criminal record, lawsuits and civil judgments (including sequestration orders) against the candidate, findings of disciplinary and administrative tribunals relating to the candidate, business and financial dealings, financial propriety/probity or malfeasance, sources of extra income or livelihood (bequests, gifts and loans received), lifestyle, social networks and social habits, would illuminate the integrity of the candidate. The assessments and views of professional colleagues are also useful for the evaluation of the candidate.

In addition, the candidate's appreciation of ethical rules and duties designed to protect the integrity of the bench should also be assessed.

TEMPERAMENT

This refers to the manner of thinking, behaviour, or reaction expected of a judge,²³ and to his or her demeanour. A fit and proper person for judicial office or promotion is one who recognises that judges hold office as a public trust, and that the courts belong to the people. He or she must recognise that the courts administer the law as a public service and the public must feel that their disputes will be resolved fairly and impartially. Therefore, with regards to the candidate's

²¹ See *Paradza v Minister of Justice and Others* 2012 (1) ZLR 1 (S).

²² See *S v Paradza* 2004 (2) ZLR 324 (S).

²³ Susannah Cowen, *supra*, p.47.

temperament, the evaluation must consider his or her industriousness, diligence, dignity, humility, courtesy, patience, open-mindedness, receptiveness, and freedom from bias. The Bangalore Principles of Judicial Conduct (2002) regard the courtesy and patience with which a judicial officer treats litigants, witnesses, lawyers and others as an essential part of his or her competence and diligence.²⁴ Whilst a judicial officer is expected to be thorough and decisive, animosity, unnecessary interruptions, ill-tempered remarks, and arrogance have no place on the bench.²⁵ Equally, sloth and tardiness in disposing of matters the candidate is seized with should not be tolerated.

The evaluation of a candidate must therefore aim at ascertaining whether he or she embodies these ethical values and will be guided by them in performing his or her judicial functions.

EQUALITY AND IMPARTIALITY

A fit and proper person for judicial appointment should recognise the diversity and pluralism in society, and the equality of all persons before the law. Since the law applies to all regardless of rank, status or standing within society, differences arising from race, ethnicity, colour, gender, religion, culture, belief, language, conscience, national origin, disability, age, marital status, sexual orientation and economic status are not material to, or determinative of any issue with which a judicial officer is seized.²⁶

In his article,²⁷ Lubert remarked:

In a democracy, the enforcement of judicial decrees and orders (of courts) depends upon the public cooperation. The level of cooperation, in turn, depends upon a widely held perception that judges decide cases impartially. Should the citizenry conclude, even

²⁴ See Article 6.6.

²⁵ See *Jesse v Pratt & Anor* 2001 (1) ZLR 48 (H); *S v Musindo* 1997 (1) 395 (H), 412H-413B.

²⁶ See Section 165(1)(a) Constitution of Zimbabwe.

²⁷ Lubert S, 'Judicial Ethics and Private Lives' (1984-85), 79 *NW University Law Review*, 983.

erroneously, that cases were decided on the basis of favouritism or prejudice rather than according to law and fact then regiments would be necessary to enforce judgements.

A judge must not adjudicate over matters he or she has an interest in, whether personal, financial or morally. Where he or she sees that he or she may have a potential bias or interest in a matter, he or she must recuse himself or herself²⁸

There can be no place within the judiciary for discriminatory attitudes, and if a judge is to dispense justice in a diverse and pluralist society, he or she needs to have respect for difference.²⁹

The evaluation of the candidate should ascertain whether the nominee recognises diversity and plurality; will be guided by ethical considerations, and treat all that appear before him or her equally.³⁰

COMMITMENT TO CONSTITUTIONAL VALUES

Judges are custodians of the Constitution. The values underlying our Constitution, such as supremacy of the Constitution, the rule of law, fundamental human rights and freedoms, recognition of the inherent dignity, worth and equality of each human being, gender equality, good governance, the principle of separation of powers, justice, accountability, and due respect for vested rights are expressed in s 3 thereof. A fit and proper person for judicial appointment must be personally committed to those values and to their realisation. Further, he or she must commit to the promotion, advancement, safeguarding and realisation of the fundamental human rights and freedoms provided for in Chapter 4 of the Constitution.³¹

²⁸ *ANZ (Pvt) Limited & Anor v Diamond Insurance Co. (Pvt) Ltd* 2001 (1) ZLR 226 (H).

²⁹ Susannah Cowen, *supra*, p.51.

³⁰ See (i) *S v Musindo* (*supra*), 412C-G; (ii) *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R.624 (iii) *President of RSA Rugby Football Union* 1999 (4) SA 147 (CC).

³¹ See Section 165(1)(c) Constitution of Zimbabwe; Judge Cynthia A Baldwin 'Pursuit of Liberty: A Legal Career' *Legal Forum* Vol.6 No.4 December, 1994, p.9.

Commitment to constitutional values also entails safeguarding and upholding the rule of law³² which judicial officers apply in resolving disputes through equal application of legal standards to all, based on the rules and principles that form the fabric and substance of the law.

A candidates' understanding and appreciation of the constitutional values and track record as a legal practitioner, state counsel, academic, magistrate or sitting judge can be a useful indication of commitment to the rule of law, the principles of democracy and to the upholding and promotion of constitutional values. Such information can be ascertained from law reports, court records, academic writings, and observations by professional colleagues as well as civic society.

CONTRIBUTION TO THE DEVELOPMENT OF JURISPRUDENCE

Ideally, a candidate for judicial appointment or promotion must have contributed significantly to the development of national jurisprudence, particularly constitutional and human rights jurisprudence, and in relation to the advancement of social and economic justice.

In this regard, the candidate's track record as a legal practitioner in private practice, as state counsel, as an academic, as a magistrate or sitting judge, can provide a useful insight into his or her contribution.

Such a record can be gleaned from the law reports on civil or criminal cases in which the candidate represented litigants or the state, of argument filed with the courts, or from the candidate's academic writings or publications, or from judgements rendered as a magistrate or sitting judge.

INDEPENDENCE

'Independence' assumes 'not subject to the control of any person, free to act as one pleases, autonomous, not influenced or affected by others',³³ or 'freedom from control or influence of another or others'.³⁴

³² See Section 165(1)(c) Constitution of Zimbabwe.

³³ Shorter Oxford English Dictionary.

³⁴ WordWeb Dictionary.

In Uganda, President Museveni, in a televised address, mounted a direct attack on the Constitutional Court which had struck down an inconsistent Act of Parliament, accusing the judges of “usurping the power of the people”, and claiming that “the major work for the judges is to settle chicken and goat theft cases but not to determine the country’s destiny”. The government of Uganda orchestrated a large demonstration against the court.

However, Honourable Bernard L. Shientag argues that:

There can be no government of law without a fearless, independent judiciary. The independence of the judge is the chief of all the cardinal judicial virtues. He must be entirely free from all external influence and subservient only to his conscience.³⁵

Judges must be accorded the independence to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, or any other source of state power and influence that may possibly bear upon them.³⁶

In the case of *Paradza v Minister of Justice & Ors*³⁷, Malaba J.A., stated as follows:

There are two components of judicial independence. There is individual independence, which relates to the judge when he or she is performing adjudicatory functions of the State, that is to say, hearing cases and deciding upon the facts. There is the institutional independence, which secures the judiciary office, or courts, from the other organs of the State.

Reference to the personal independence of the individual judge is assured through s 165(3) of the Constitution, which provides that “when making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence”.

³⁵ Benjamin N. Cardozo Memorial Lectures.

³⁶ Geoffrey Robertson Q.C. - Judicial Independence: Some Recent Problems, October, 2011; see also *Union of India & Ors v Pratibha Bonnerjea & Anor* (1995) 6 SCC 765.

³⁷ 2012 (1) 1 (S) ,25.

It is imperative that judges are not subordinated to the executive, the legislature, or to any external control or influence. It is crucial that judicial officers have both the courage and the disposition to act with an independent mind³⁸ and they are duty-bound to uphold the law without trace of fear, favour or prejudice, independently of any adverse consequences which may personally ensue.³⁹ Judicial independence has been described as “the bedrock upon which the rule of law fundamental to a democratic society rests.”⁴⁰ The candidate must understand the doctrine of separation of powers and appreciate the boundaries of judicial powers.

Individual independence and an appreciation of the rationale or philosophical basis for such independence is a requirement for a candidate for judicial appointment, alongside the desire to benefit the public. It “is a quality which must come from within the heart ..., a quality which is part of the very fabric of existence of the Judge.”⁴¹ It goes beyond substantive and procedural independence to include the independence of mind of the judicial officer which entails a grounded knowledge on constitutionalism.⁴²

Such independence is not meant to shield judges from legitimate public scrutiny for they are accountable to the public, whom their independence will protect. The object of the enquiry should therefore be to ascertain or establish:

³⁸ Susannah Cowen, *supra*, p.17.

³⁹ Gubbay, C. J: Speech delivered at the Opening of Legal Year of the High Court, Bulawayo, on 13 January,1992-*Legal Forum* Vol. 4, No. 2, March,1992, p.4.

⁴⁰ The Hon. Catherine A Fraser, Chief Justice of the Supreme Court of Alberta ,Canada ‘Judicial Independence, Impartiality and Equality: A Canadian Perspective’ paper presented during the Judges Conference in Harare, Zimbabwe on 27 April,1998 *Legal Forum*, Vol.10, No.3, September, 1998, p.54.

⁴¹ Gubbay, C.J. ‘The separation of powers, with particular reference to the role of the Judiciary’ Speech delivered to the Joint Commonwealth Parliamentary Association/Inter-Parliamentary Union on 21 August,1991 - *Legal Forum*, Vol.3, No.4, December,1991, p.15.

⁴² Otiende Amollo ‘The Rule of Law and Human Rights: A Case Study of Kenya” op cit note 17.

- whether the candidate is well-informed and understands the constitutional imperative of judicial independence and its value in the public interest; and
- whether the candidate will have the courage and the disposition to act with an independent mind.

The enquiry must also have regard to the candidate's political allegiance or affiliation, sympathies and activities, business and commercial interests (including directorships and partnerships), membership of both private and public organisations, as well as social networks. A fit and proper person must be able to transcend these allegiances and interests.

PHYSICAL AND MENTAL FITNESS

The candidate for judicial appointment or promotion, whether or not he or she suffers from some physical handicap, must be physically and mentally fit to be able to withstand the rigours of judicial office and to effectively carry out his function.

THE APPOINTMENT PROCESS

Where a vacancy on the bench arise, the JSC announces the vacancy by advertising in the Press, indicating the number of posts available, and inviting members of the public to nominate suitably qualified persons to fill the positions.⁴³ The advertisement will state the qualifications of judges as stipulated in the Constitution, including the requirement of "fit and proper person to hold office as a judge". Members of the public intending to nominate candidates are required to complete and submit to the Commission, nomination forms to which must be attached the nominee's curriculum vitae. The nominator simply completes a one-page form without giving the merits or demerits of the nominee but providing the nominee's personal details guided by the provisions of the Constitution relating to qualifications.

After the nomination process, the JSC Secretariat compiles a comprehensive master-list with details of the profiles of the candidates that satisfy the qualifications provided for in the

⁴³ See *Daily News*, Thursday, 23 June, 2016, p.15.

Constitution. They then draw up a shortlist of candidates using the constitutional qualifications provided.⁴⁴ No guidance is given to the Secretariat as to the criteria for “fit and proper person”.

The interviewing panel consists of thirteen Commissioners only, all professionals, including the Chief Justice, the Attorney General, the Chief Magistrate, the Chairperson of the Civil Service Commission, representatives of the legal profession, a legal academic, a public accountant, and a human resources professional.

There is no standard questionnaire for a pending interview. The set of questions for every interview is prepared and agreed upon by the Commissioners in a pre-interview meeting with a consultant on the day of the interview. This is meant to prevent the leaking of questions to the candidates before the interview and to prevent “fishing” by potential candidates for an impending interview. The Commissioners then agree on which questions each Commissioner will ask the candidate(s), after which process any member of the interviewing panel can pose any relevant question or require the candidate to expand on the answers given.

The Chief Justice commences the interview based on the questions agreed upon in the pre-interview meeting. Thereafter, he will call upon the panellists, one by one, in the order agreed, to pose questions to the candidate. The panel will ask relevant questions, including those of a personal or social nature or of a technical nature to assess the level of knowledge and appreciation of the law and legal processes as well as any others relevant to the core duties of the position.

It has been suggested that, from the interviews conducted to date, candidates should have an idea of what questions they should expect to be asked at the interview. It is submitted that there is no need for a law that obligates the JSC to publicise the criteria for selection, other than the qualifications stipulated in the Constitution, or for the candidates to know in advance the kind of questions to expect. By agreeing to nomination, and to submit themselves for

⁴⁴ See ss 177, 178, 179 of the Constitution.

selection and interview, the candidates ought to know whether their personal attributes and professional qualities qualify them as “fit and proper” persons to hold office as judge.

Deliberations after the interview are held in camera and a vote is taken if there is no consensus among the panellists, with each member being entitled to one vote per candidate. Following the interviews, the JSC selects the best three candidates for each position and presents the list to the President, whereupon he must appoint one of the nominees to the judicial office concerned. In the event that the President does not consider any of the persons on the list suitable for appointment, he must require the Commission to provide another list, in which case the President must appoint one of the nominees on the new list. It does not appear that the President is required to give reasons to the Commission for declining the initial list of nominees. It is presumed (and hoped) that he will have objectively and properly applied his mind to the constitutionally stipulated qualifications.

CONCLUSION

There is a need for regulations to guide the judicial selection process in Zimbabwe, and in that regard, it is necessary to mobilise all stakeholders – the JSC, the judiciary, legal practitioners, academics and civil society – to meet, debate and develop the criteria for short-listing and selection, as well as the guidelines for the judicial appointment process, within the confines of the Constitution, but having regard to the foregoing ethical values and standards. The Commission will be able to develop credible criteria for judicial appointments that will ensure that the judicial selection process not only selects the best candidates on merit, but is also non-controversial and readily acceptable to the public. One hopes that in this endeavour, the Commission will be able to garner the views, support and contributions of all relevant stakeholders, in order to come up with the correct criteria for “fit and proper person”.

Whilst the Law Society of Zimbabwe has since 2014 been requested by the JSC to submit misconduct clearances for some of its members who have put themselves forward as candidates for judicial appointment, no comments have been

received from senior counsel from the advocates chambers. Further, there has been no contribution from the faculties of law in the local universities as well as from civil society organisations such as the Zimbabwe Lawyers for Human Rights. It would be desirable for these organisations and bodies to actively assist the Commission, particularly with regards to integrity checks.

There has been criticism of the lack of transparency in the post-interview deliberations. However, it is submitted that the lack of publicity of the deliberations and final decisions is perhaps necessary to encourage robust debate so that the Commissioners freely express their views of the candidates.