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# Questioning the Constitutionality of the 99-year Lease Agreement Between Judicial Officers and the Government of Zimbabwe

Justice Alfred Mavedzenge

*The 2013 Constitution of Zimbabwe guarantees the independence of judicial officers. To maintain the independence of the judiciary, the Constitution requires judicial officers to abide by certain standards of moral and professional conduct, listed in section 165.<sup>1</sup> These include that judicial officers must be above reproach, and must not engage in conduct or any relationship that causes the appearance of impropriety in the eyes of a reasonable observer. A substantial number of judicial officers have been given land by the Government under the Fast Track Land Reform Programme. These judicial officers presently lease the land from the President under lease agreements which do not provide them with security of tenure because the President – in his capacity as the lessor – has the authority to repossess the land even after the lessee has made substantial investments in the land. This Article examines the impact of such lease agreements on the independence of the judicial officers who are the lessees. It also discusses the constitutionality of these lease agreements and suggests possible redress which Zimbabwean citizens may seek.*

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## Introduction

Since 1999, the Government of Zimbabwe has embarked on a land redistribution exercise also known as the Fast Track Land Reform Programme. This exercise saw the Government compulsorily acquiring land, mainly land used for commercial farming by white farmers, and redistributing that land to black Zimbabweans. The land reform process created two farming models: the A1 and A2 models. The A1 model is for small-scale, subsistence farms, while under A2 farms are large commercial enterprises. The majority of judges that benefit from the land redistribution programme run commercial farms, and therefore lease the land under the A 2 model. Individuals who have acquired land under the A2 model lease said land from the President and Government on the basis of what is known as the '99-Year Lease Agreement'.

The Government has justified this programme of land redistribution as necessary for the purpose of correcting historical imbalances regarding access to and ownership of productive agricultural land in Zimbabwe.<sup>2</sup> Whilst the statistics on the ratio of land ownership between black and whites remains a contested subject, there is no doubt that most of the commercially

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<sup>1</sup> The Constitution of Zimbabwe, s 165.

<sup>2</sup> Preamble to the 99-Year Lease Agreement.

productive land was in the hands of white farmers.<sup>3</sup> This paper seeks to explore certain aspects of the land reform programme which have not been otherwise studied; the debate on the land reform has largely focused on whether the land reform was necessary or not. Sufficient attention has not been given to the implications of the programme on judicial independence - an important principle under the envisaged constitutional democracy that comprises the Zimbabwean state.

The Government and those in support of the land reform process argue that given this imbalance and the unwillingness of the white commercial farmers to share access to land equitably, it was necessary to embark on a more radical land redistribution process.<sup>4</sup> Some of the critics of this process counter-argue that whilst land reform was necessary to achieve equitable access to the vital natural resource, the process could have been better conducted.<sup>5</sup> They argue that the process was unnecessarily violent and chaotic; that it should have been planned better to realise the maximum socio-economic benefits of the land. They also argue that the process became less focused on economically empowering black Zimbabweans, and instead became focused on entrenching the ZANU-PF's hold on political power.<sup>6</sup>

This Article does not seek to examine the credibility or soundness of either of these two views. That debate has already been explored thoroughly by more competent scholars. We instead seek to analyse the impact of the 99-Year Lease Agreement on the ability of judges and magistrates (who benefited from the land reform process under the A2 model) to be independent when adjudicating matters which involve the President and Government. It also seeks to examine the impact that the 99-Year Lease Agreement has on the public's confidence in the ability of the judges and magistrates to be impartial when adjudicating matters involving their landlord: the President and/or the Government. To achieve this purpose, the Article discusses the concept of judicial independence and how it has been entrenched in the 2013 Constitution of Zimbabwe. We then discuss the 99-Year Lease Agreement, pointing out the weaknesses of the agreement which have a negative impact on the capacity of judges and magistrates to be impartial and to be viewed as impartial by the public when they adjudicate in matters which involve the President and the Government. Finally, we consider the constitutionality of the 99-Year Lease Agreement, and examine opportunities for legal reform to enhance the independence of judges and magistrates who are leasing farms from the President and Government.

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<sup>3</sup> Sam Moyo, *Land Policy, Poverty Reduction and Public Action in Zimbabwe* (ISS/UNDP Land, Poverty and Public Action Policy Paper, 11, 2005) 4. See also L Mazingi and R Kamidza, 'Inequality in Zimbabwe' in Muchena (ed), *Tearing Us Apart: Inequalities in Southern Africa* (OSISA 2011) 324-5; Charles Paradzayi, 'Land Tenure in Zimbabwe's Post Agrarian Reform' (2005) FIG <[http://www.fig.net/resources/proceedings/fig\\_proceedings/fig2007/papers/ts\\_3a/ts03a\\_03\\_paradzayi\\_1384.pdf](http://www.fig.net/resources/proceedings/fig_proceedings/fig2007/papers/ts_3a/ts03a_03_paradzayi_1384.pdf)>.

<sup>4</sup> Moyo (n 3).

<sup>5</sup> Human Rights Watch 'Zimbabwe: Background' (2002) <[https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm#P110\\_20153](https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm#P110_20153)>.

<sup>6</sup> *ibid.*

This discussion is conducted in a legal context where the Constitution categorically requires judges and magistrates to always act independent of undue influence when exercising their judicial functions. In addition, it also specifically requires judges and magistrates to refrain from conduct and/or entering into any relationship which causes the public to view them as incapable of being impartial when adjudicating over matters.

### **Duty to Act Independently and to Maintain a Public Image of Impartiality**

The principle of judicial independence is derived from Montesquieu's separation of powers doctrine, which demands that power not be concentrated in a single organ of State but instead shared between the legislature, the judiciary, and the executive; with each of these three branches checking against abuse of power by the others.<sup>7</sup> One of the roles of the judiciary in the separation of powers model is to ensure that the other two branches of the state comply with the law. The judiciary performs this function by adjudicating over the disputes that are brought before it by citizens or other organs of the state. In order to perform this function effectively, the judiciary must be an independent institution with independent judicial officers.<sup>8</sup>

The concept of judicial independence has been explained in the Bangalore Principles of Judicial Conduct (2002) as a principle which requires a judicial officer to:

exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.<sup>9</sup>

Thus judicial independence requires a judicial officer to execute his or her judicial functions free from interferences and influences other than the law which he or she is supposed to apply.

Senior judicial practitioners such as Ismael Mohamed (the former Chief Justice of South Africa and Namibia) have summarised the essence of judicial independence as follows:

What judicial independence means in principle is simply the right and duty of judges to perform the function of judicial adjudication, through an application of

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<sup>7</sup> Lovemore Chiduzo, 'Towards the Protection of Human Rights: Do the new Zimbabwean constitutional provisions on judicial independence suffice?' [2014] 17 PELJ 370.

<sup>8</sup> The Bangalore Principles of Judicial Conduct 2002, art 1.

<sup>9</sup> *ibid.*

their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution.<sup>10</sup>

Thus, Mohamed views judicial independence as a principle which includes judicial integrity and impartiality. This view is also supported by Brazier<sup>11</sup> who argues that judicial independence requires that, 'in general the public must feel confident in the integrity and impartiality of the judiciary: judges must therefore be secure from undue influence and be autonomous in their own field'. Similarly, Lord Bingham<sup>12</sup> makes the point that judicial independence includes judicial impartiality when he argued that:

Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision-making role, should not be independent of government.... [But] They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever.

The Constitutional Court of South Africa, in the *Certification case*, affirmed the view that judicial impartiality is an element of judicial independence when it held that what is vital to judicial independence is that, 'the Judiciary should enforce the law impartially.'<sup>13</sup> The views of the Constitutional Court of South Africa – as a superior foreign court – have persuasive value in the Zimbabwean legal system.<sup>14</sup> Therefore, the Court's view that judicial independence encompasses judicial impartiality has persuasive value in a discussion on judicial independence in Zimbabwe. Therefore, there is a strong view expressed both in law and literature that judicial independence includes the values of judicial impartiality, integrity and propriety.

The principles of judicial integrity and propriety require judicial officers to ensure that their conduct is above reproach in the view of a reasonable observer,<sup>15</sup> while impartiality is the idea that judicial officers must execute their judicial functions without favour, bias, or prejudice.<sup>16</sup>

Mohamed, Brazier, and the Constitutional Court of South Africa are all correct to argue that the principle of judicial independence includes judicial propriety and impartiality as the concept of judicial independence rests on the ability of individual judicial officers to apply the law without fear, favour, or any bias when adjudicating a matter. Furthermore, it is necessary

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<sup>10</sup> Ismael Mohamed, 'The Role of the Judiciary in a Constitutional State' [1998] 115 S African LJ 111.

<sup>11</sup> Rodney Brazier, *Constitutional Reform* (3rd edn, OUP 1991) 172.

<sup>12</sup> Tom Bingham, *The Business of Judging*, (OUP 2009) 61.

<sup>13</sup> *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, 1996 (4) SA 744 (CC) [123].

<sup>14</sup> The Constitution of Zimbabwe, s 46(1)(e).

<sup>15</sup> Bangalore Principles (n 8), art 3(1).

<sup>16</sup> *ibid*, art 2(2).

for judicial officers to safeguard their integrity and to conduct themselves with propriety in order to safeguard their independence from sources which could take advantage of impropriety to influence the judicial officer's decisions. Failure to safeguard judicial integrity and propriety undermines the confidence of the public in the independence of the judicial officer. Thus there is justification in viewing judicial independence as inseparable from the ideas of impartiality, propriety, and integrity because these are the values judicial officers must adhere to in order to safeguard their independence.<sup>17</sup>

It is also important to note that judicial independence should be understood as twofold in nature. Firstly, it is explained as the ability of the individual judicial officer to be independent in fact; and secondly, it is the requirement to ensure that the public has confidence in the ability of a judicial officer to be impartial. This is clear in both Mohamed and Brazier's explanations of judicial independence as the principle that the judicial officer must, 'perform the function of judicial adjudication, through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference...'<sup>18</sup> and that the, 'general public must feel confident in the integrity and impartiality of the judiciary'.<sup>19</sup> The Bangalore principles also underscore this view by requiring judges to be independent, impartial and conduct themselves with integrity both in fact and in appearance.<sup>20</sup> Thus at the international level and in literature, judicial independence is interpreted as the requirement to apply the law free of any influences, to act impartially with integrity and propriety both in fact and in appearance. The 2013 Constitution of Zimbabwe entrenches judicial independence in the same manner, as will be subsequently shown.

## **The Constitution of Zimbabwe and the Independence of the Judiciary**

The Constitution of Zimbabwe guarantees the independence of the judiciary. The judiciary consists of the Chief Justice, Deputy Chief Justice, and all judges and magistrates who preside in all the courts established by the Constitution or any Act of Parliament.<sup>21</sup> The Constitution defines judicial independence as the principle that, 'the courts are independent and are subject only to [the] Constitution and the law which they must apply impartially, expeditiously and without fear, favour or prejudice'.<sup>22</sup> Thus, in line with the Bangalore Principles, the Constitution entrenches impartiality as one of the values which must underpin the independence of the judiciary in Zimbabwe. Therefore, when exercising their judicial functions, all judges and magistrates in Zimbabwe are required to make their decisions impartially, without being influenced by anyone or anything bar the law.

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<sup>17</sup> *ibid*, art 1.

<sup>18</sup> Mohamed (n 11).

<sup>19</sup> Brazier (n 12).

<sup>20</sup> Bangalore Principles (n 8), arts 2(2), 3(1), 3(2), 4(1).

<sup>21</sup> The Constitution of Zimbabwe, s 163.

<sup>22</sup> *ibid*, s 164(1).

In order to protect the independence of the judiciary, the Constitution establishes certain principles and standards in section 165, which outlines the manner in which judges and magistrates execute their judicial mandate and conduct themselves outside of the courts.<sup>23</sup> These include the principle that, 'members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.'<sup>24</sup> In addition, the Constitution prescribes that, 'Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.' These two principles require that judges must not only be independent and impartial when exercising their judicial functions but they must also appear to be independent and impartial. It therefore may be argued that the Constitution of Zimbabwe has domesticated both the Bangalore principles and the views of eminent scholars (Mohamed, Brazier) that judicial independence requires judges and magistrates to act independently in fact and to maintain a public image of independence. Therefore, it is not adequate for judicial officers in Zimbabwe to be impartial in fact but they must also cultivate the appearance of impartiality, which necessarily requires ensuring that their conduct in and out of court maintains and enhances the confidence of the public in the impartiality of the judge and of the judiciary as an institution. Furthermore, it is not enough for them to hold themselves with propriety in fact. Their obligation on judicial propriety stretches beyond that as they are required not only to avoid impropriety, but to also avoid any appearance of impropriety in the eyes of a reasonable observer.

There is a very important reason why the Constitution has required judicial officers to be independent both in fact and in appearance: judicial officers must inspire public confidence in their ability to act impartially when executing their judicial mandate, which includes adjudicating over legal disputes. Various reasons have been suggested both in case law and literature as to why it is necessary that the public must have confidence in the impartiality of judicial officers. In *Baker v Carr*<sup>25</sup>, Frankfurter J explains the rationale as follows:

The Court's authority ... possessed of neither the purse nor the sword ... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Thus, it is suggested by Frankfurter J that for the judiciary to sustain its authority, its officers must hold themselves with high propriety and integrity to ensure that the public continues to render its confidence in their ability to protect the citizen's rights, freedoms and other entitlements. Otherwise, when judicial officers become entangled in impropriety or the

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<sup>23</sup> *ibid*, s 165.

<sup>24</sup> *ibid*, s 165(5).

<sup>25</sup> [1962] 369 US 186.

appearance thereof, the judiciary will lose its legitimacy in the eyes of the public. Frankfurter J's view holds true in Zimbabwe, and has found expression in various provisions of the Constitution.

The Constitution prescribes that the supremacy of the Constitution and the rule of law should be the foundation of Zimbabwean governance<sup>26</sup> The preamble to the Constitution clearly affirms this commitment and section 165(1)(c)<sup>27</sup> prescribes that one of the roles of the judges and magistrates is to safeguard and enforce the rule of law. In section 164(2), the Constitution acknowledges that, 'the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance'.<sup>28</sup>

There is a nexus between the duty to uphold the rule of law and the need for judges to act independently and maintain a public image of independence at all times. It is necessary for judges and magistrates to maintain a public image of independence so that the public they serve will have confidence that the judiciary will always act fairly and on the basis of the law, without fear or favour. In section 69(3), the Constitution guarantees members of the public the right of access to the courts for the resolution of any legal dispute.<sup>29</sup> If the judges and magistrates appear in any way partial, the public is likely to hesitate to come to the courts for the resolution of disputes because they lack confidence that their disputes will be resolved fairly, on the basis of the law, and without bias. When the public lacks confidence in the capacity of the judiciary to act impartially and fairly, there will be a break down in the rule of law. Any break down in the rule of law gives the public no option other than to engage in catastrophic self-help, wherein they take the law into their hands. Inevitably, this will lead to violations of fundamental rights, which in turn is likely to culminate in a civil crisis with catastrophic political, social, and economic consequences. This is what the Constitution seeks to avoid by stating that in order to maintain the rule of law<sup>30</sup>, judges and magistrates have the duty to inspire and maintain public confidence in the ability of the courts to apply the law independent of any other influences. Therefore, when judges and magistrate fail to maintain a public image of independence they are in violation of the Constitution, particularly section 165(2) read together with sections 165(3), 3(1)(c) and 69(3) of the Constitution. This is a serious violation which undermines the very foundation of Zimbabwe's constitutional state - the rule of law.

The Constitution does not only require the judges and magistrates to act independently and maintain a public image of independence, but it also requires the state and all institutions of government to support the judiciary in cultivating independence and maintain the required public image of impartiality. The Constitution seeks to achieve this by entrenching a number of obligations which the state must fulfil. These include that, 'the State, through legislative and

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<sup>26</sup> The Constitution of Zimbabwe, s 3(1)(a) and 3(1)(b).

<sup>27</sup> *ibid*, s 165(1)(c).

<sup>28</sup> *ibid*, s 164(2).

<sup>29</sup> *ibid*, s 69(3).

<sup>30</sup> *ibid*, s 165(1)(c).



other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165,' which includes the duty to maintain public confidence in the judicial system.<sup>31</sup> In this regard, the state has two kinds of duties. First is the negative duty to refrain from acting in any way which interferes with the judicial functions of judges and magistrates.<sup>32</sup> This includes the duty to refrain from acting in any way which appears to compromise the independence of the judges and magistrates. Second is the positive duty to implement measures to enhance the independence of the judiciary and the public confidence in the judges and magistrates.<sup>33</sup>

Such measures include awarding competitive salaries and other benefits to judicial officers. In terms of section 188(1), judges and magistrates are entitled to receive salaries, allowances and other benefits fixed from time to time by the Judicial Services Commission (JSC) with the approval of the President, given after consulting the Ministers for Justice and Finance. The nature of the salaries and benefits, as well as the manner in which they are awarded, must be consistent with the principle that judges and magistrates must be financially secure from external interference. Therefore, one of the positive measures to be undertaken by the State is to ensure that the judges and magistrates are awarded competitive salaries and benefits at all times and that these salaries and benefits must be awarded in a manner which does not compromise – or appear to compromise – judicial independence. Thus, the manner in which salaries and benefits are awarded to the judges and magistrates must inspire rather than undermine public confidence in the independence of the judges and magistrates. One of the benefits which a substantial number of judges and magistrates in Zimbabwe have received from the State, is commercial farming land. Although the land was not allocated to them as part of their package of benefits as judicial officers, they received this land as beneficiaries of the land reform program and therefore it is a benefit which they have accrued from Government. This has implications on their independence in fact and in appearance, examined below.

### **The 99-Year Lease Agreement and the Independence of Judges and Magistrates**

Since 1999, the Government has been appropriating land from mainly white commercial farmers and redistributing it to black citizens. Various justifications have been provided in defence of this exercise, with equally numerous criticisms levelled against it.<sup>34</sup> The focus of this Article – as mentioned earlier – is not to explore these, as so much has already been written on this subject. This Article attempts to examine the impact of the land tenure system (introduced

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<sup>31</sup> *ibid*, s 165.

<sup>32</sup> *ibid*, s 164(2)(a).

<sup>33</sup> *ibid*, s 164(2)(b).

<sup>34</sup> Ian Scoones, *Zimbabwe's Land Reform: Myths and Realities* (Weaver Press 2010).

after the redistribution of land) on the independence of judges and magistrates. It also attempts to examine the constitutionality of this system.

As part of the land redistribution exercise, the Government created two landholding systems: the A1 and A2 models. Those who were given land and resettled under the A1 farm model are essentially smallholder farmers living in a villagised or self-contained manner.<sup>35</sup> The A2 model is composed of individual plots of land that are classified as small, medium, and large-scale commercial schemes.<sup>36</sup> These farms require a high amount of investment to prove productive: an A2 farmer may be legally required to pay annual rentals as high as \$152,830, develop and implement a five-year development plan, and establish home and accommodation for employees within three months of occupying the farm.<sup>37</sup> By 2009, about 2295 farms had been acquired for resettlement under this model, and 16,386 beneficiaries had accessed approximately 2,681,642.00 hectares of land under this model.<sup>38</sup> These figures have obviously since increased given that land redistribution is ongoing. The true beneficiaries of this model of land redistribution are contested; some critics allege that the beneficiaries are largely political elites who are connected to the Harare regime in one way or another, while other scholars have claimed that the 'politically connected' constitute between 5 to 26% of the beneficiaries.<sup>39</sup> The real figures will probably not be known at this point given that the beneficiaries are in most cases unwilling to identify themselves or reveal their political allegiance.<sup>40</sup> However, what has been ascertained is that there are a substantial number of senior judges and magistrates who are beneficiaries under the A2 farm model.<sup>41</sup>

The hallmark of the A2 farm model is that the beneficiary leases the land from the Government under a 99-Year Lease Agreement which is concluded between the Government and the land holder. The beneficiary farmer is not an owner of the land but is a lessee while the owner of the land is the Government, represented by the President as the lessor.<sup>42</sup> Therefore, it can reasonably be argued that the judges and magistrates who are beneficiaries of the land reform exercise under the A2 model are leasing the land from the Government. Though *prima facie* appearing to be an ordinary business arrangement similar to a judge renting property from

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<sup>35</sup> P Matondi and M Dekker, 'Land Rights and Tenure Security in Zimbabwe's Post Fast Track Land Reform Programme' (African Studies Centre and Ruzivo Trust 2011) 6

<[http://www.landgovernance.org/assets/2014/07/Zimbabwe\\_RuzivoTrust\\_ASC\\_0.pdf](http://www.landgovernance.org/assets/2014/07/Zimbabwe_RuzivoTrust_ASC_0.pdf)>.

<sup>36</sup> *ibid.*

<sup>37</sup> 99-Year Lease Agreement, cls 4 and 5.

<sup>38</sup> Matondi and Dekker (n 37) 6-7.

<sup>39</sup> Scoones (n 36).

<sup>40</sup> Matondi and Dekker (n 37) 7.

<sup>41</sup> David Smith, 'Mugabe And Allies Own 40% Of Land Seized From White Farmers – Inquiry' *The Guardian* (Johannesburg, 30 November 2010)

<<https://www.theguardian.com/world/2010/nov/30/zimbabwe-mugabe-white-farmers>>; Feluna Nleya, 'Judges Demand Farms' *NewsDay* (25 June 2014)

<<https://www.newsday.co.zw/2014/06/25/judges-demand-farms/>>.

<sup>42</sup> 99-Year Lease Agreement, cl 1.1.

any other person, this view is conclusively rejected with a closer look at the nature of the parties to this lease arrangement, as examined against Constitutional demands of professional and moral judicial conduct.

On the lease agreement, the Government is represented by the acquiring authority, who per the Land Acquisition Act<sup>43</sup> is the President. Therefore, all the judges and magistrates who have been allocated land under this model are, in effect, leasing the land from the President.

The President is the Head of the Executive<sup>44</sup>, whose decisions and policies are from time to time brought for review in the courts, and these same judges and magistrates are required to pronounce on the legality of those decisions and policies. Therefore, when a citizen approaches the court to review the President's decision or policy, in reality, the citizen is asking for a judge (who is a lessee of the President) to review the decision made by the President (who is the lessor to the judge). As mentioned earlier, the lessees are required to make huge investments in the form of capital and human resources on these farms. For instance, they may have to pay up to \$152,830<sup>45</sup> in non-reimbursable annual rental. In addition, the lessee must develop and implement a five-year development plan which involves a substantial capital investment.<sup>46</sup> Having made such investments, there can never be any doubt that judges and magistrates have a substantial interest in maintaining the lease to realise the profits of their investment. This substantial interest surely has a bearing on their mind when adjudicating disputes, especially sensitive matters involving the President and/or the Government. Thus the lessee/lessor relationship between the judge or magistrate and the President is an untenable one which undermines the ability of the judge or magistrate to be independent of undue influence from the President and/or his Government when adjudicating disputes involving the President and/or his Government.

It may be counter-argued that the lessee/lessor relationship between the judges and the President or Government does not automatically imply that the judges and magistrates cannot be independent when adjudicating over cases which involve Government. However, as discussed earlier, the Constitution does not demand of judges and magistrates to be independent in fact only but also to refrain from entering into relationships which undermine public confidence in their ability to be independent when executing their judicial functions. The fact that the judges and magistrates are lessees to the President and that they have substantial interests in maintaining the leaseholds casts suspicions on their ability to act impartially in cases which involve the President and/or his Government, especially politically and economically sensitive ones.

It may also be counter-argued that the lessor/lessee relationship between the President and the judges and magistrates who benefited under the A2 landholding model does not compromise

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<sup>43</sup> Land Acquisition Act 1992, s 3.

<sup>44</sup> The Constitution of Zimbabwe, s 88(2).

<sup>45</sup> 99-Year Lease Agreement, cl 4.

<sup>46</sup> *ibid*, cl 9.

– or should not appear to compromise – the independence of the judges and magistrates involved. The lease agreement provides adequate security of tenure, which guarantees the land holder to remain on the farm even if they make an adverse judgement in a matter which involves their lessor. This argument is unfounded because the reality is that the 99-Year Lease Agreement (which is the agreement between the landholder and the President) read together with the Land Acquisition Act (the principal legislation) does not guarantee security of tenure for the lessee. Clause 20 of the 99-Year Lease Agreement prescribes that:

The Lessor may, at any time and in such manner and under such conditions as it may deem fit, repossess the Leasehold or any portion thereof if the repossession is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public.<sup>47</sup>

This is a broad provision which gives the President and or his Minister (as an acquiring authority) the leeway and rights to repossess the entire farm or part of it from the judge and or magistrate concerned at any time. All the President needs to do is to provide the judge and or magistrate with a notice of 90 days<sup>48</sup> and any reasons which fit within the aforementioned broad categories of promoting or safeguarding the interests of defence, public safety, public order, public morality, public health, town and country planning. For instance, the President may decide to give the judge or magistrate 90 days notice to vacate the farm because Government has designated the farm for the establishment of a military base or for the expansion of a town. The judge or magistrate may be relocated to another less lucrative farm.

However, what makes the lessee's tenure even less secure is that the 99-Year Lease Agreement must always be interpreted together with the Land Acquisition Act because the lease agreement is an instrument which seeks to give effect to the policy and legislative objectives enshrined in the Act.<sup>49</sup> Therefore, the above cited clause 20 of the 99-Year Lease Agreement must be read together with section 3 of the Land Acquisition Act which states that:

(1) Subject to this Act, the President, or any Minister duly authorised by the President for that purpose, may compulsorily acquire –

(a) any land, where the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public;

(b) any rural land, where the acquisition is reasonably necessary for the utilization of that or any other land –

(i) for settlement for agricultural or other purposes; or

<sup>47</sup> *ibid*, cl 20 (emphasis added).

<sup>48</sup> *ibid*, cl 22.

<sup>49</sup> Long Title to the Land Acquisition Act [Chapter 20:10] 1992.

- (ii) for purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or
- (iii) for the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph (i) or (ii).<sup>50</sup>

When clause 20 of the 99-Year Lease Agreement is interpreted in the context of section 3 of the Land Acquisition Act, the implication is that the President may at any time repossess the land from the lessee on account that the land has been designated for any other use including resettling other people. Therefore, it is possible that a judge or magistrate, after issuing an adverse decision or remarks in a matter which involves the President and/or Government, may be removed from their farm and either be left with no land, or be relocated to less lucrative land. Thus it is not true that the 99-Year Lease Agreement provides security of tenure to the judges and magistrates who are leasing the land from the President. The reality is that the lease agreement and the Land Acquisition Act places the tenure of the judge or magistrate on the land at the mercy of the President and Government. This exerts undue influence on the judge or magistrate when adjudicating over a matter which involves the President and/or the Government. Furthermore, it puts the judge or magistrate in a relationship which diminishes public confidence in their ability to act fairly and impartially in a matter which involves the President and/or Government.

### **Implications on the constitutional validity of the 99-Year Lease Agreement**

The 99-Year Lease Agreement may therefore be unconstitutional where the judges and magistrates are the lessees and the President and Government are the lessors. As discussed earlier, the 99-Year Lease Agreement does not provide security of tenure for the lessees as it allows the lessor to repossess the land at any time. The 99-year lease is therefore unconstitutional because it compromises the independence of the judiciary by putting the leaseholder judge or magistrate in a conflicting and vulnerable position, where they hold land at the mercy of the President and Government and yet are required to adjudicate fairly and impartially on matters which involve the President and the Government. In order to secure their tenure on the farms leased to them by the President and Government, judges and magistrates are likely to be biased in favour of the President and Government when they adjudicate over sensitive matters involving their landlord.

In addition, the lease agreement is unconstitutional insofar as it places lessee judges and magistrates in a contractual relationship with the President and Government, arguably diminishing public confidence in the independence of the judiciary. As demonstrated above, the Constitution requires that the members of the judiciary, 'must strive to enhance their independence in order to maintain public confidence in the judicial system'.<sup>51</sup> In addition, the Constitution instructs that, 'members of the judiciary must not solicit any gift, bequest, loan or

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<sup>50</sup> Land Acquisition Act 1992, s 3.

<sup>51</sup> The Constitution of Zimbabwe, s 165 (2).

favour that may influence their judicial conduct or give the appearance of judicial impropriety'.<sup>52</sup> The appearance of judicial impropriety includes conduct or entering into relationships which causes a reasonable observer to view the judge as incapable of being impartial.<sup>53</sup> By accepting to be a lessee on a lease agreement, which involves a substantial economic interest with no security of tenure, judges and magistrates place themselves in a relationship which results in the public having diminished confidence in their ability to enforce the law without bias, especially in matters that involve the judge's landlord. Judges who are lessees on the 99-Year Lease Agreement are therefore in violation of sections 165(2) and 165(5) of the Constitution. They have failed to live up to the constitutionally required standard of judicial propriety and integrity, entrenched in section 165(5) of the Constitution. As discussed earlier, judicial propriety and integrity means that a judicial officer must ensure that their conduct is above reproach in the view of a reasonable observer.<sup>54</sup> Therefore, a judicial officer must not involve themselves in relationships with any party – including the Government – which causes the reasonable observer to view them with reproach, as that undermines public confidence in the impartiality of the judicial officer as an individual and the judiciary as an institution.

It has often been argued that judges and magistrates are citizens of Zimbabwe and therefore have a legitimate right and expectation to benefit from a lawful government programme such as the land redistribution programme.<sup>55</sup> This argument is problematic as it assumes that judicial officers are ordinary citizens, when they are not. The Bangalore Principles say the following about the status of judicial officers in Article 4.2:

As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.<sup>56</sup>

Thus, there is international recognition that under international law, judges are not ordinary citizens by virtue of the role they play in society as adjudicators of the law. This view is affirmed in the Constitution of Zimbabwe, where it prescribes specific standards according to which judicial officers must live by.<sup>57</sup> As discussed earlier, one of those standards is that they must be careful about how they relate with fellow citizens and their own government and must refrain from giving any appearance of impropriety or reproach.<sup>58</sup> The past Chief Justice of the Constitutional Court of Zimbabwe, Godfrey Chidyausiku, said it aptly when he remarked

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<sup>52</sup> *ibid*, s 165(5).

<sup>53</sup> See Bangalore Principles (n 8) art 4.

<sup>54</sup> Definition derived from Bangalore Principles (n 8) art 3(1).

<sup>55</sup> See Nleya (n 44).

<sup>56</sup> Bangalore Principles (n 8) art 4(2).

<sup>57</sup> The Constitution of Zimbabwe, s 165.

<sup>58</sup> *ibid*, s 165 (5).

that, 'Like Caesar's wife, a judge has to be beyond reproach'.<sup>59</sup> Therefore, judicial officers are held to a higher standard of moral and professional behaviour by the Constitution and therefore, a thing that was appropriate for any citizen to do may be improper for a judicial officer to do. Whilst it might be constitutional for ordinary citizens to benefit from the land reform programme as a lessee on the current 99-Year Lease Agreement, the same is not true for judicial officers by virtue of their role in society. They have been entrusted by the Constitution to enforce the rule of law and to apply the law impartially in fact and in appearance, and therefore cannot be lessees on an agreement which does not guarantee them security of tenure from undue interference (by the President and Government) with their judicial functions. In addition, they may not be lessees on an agreement which does not give them security of tenure and thereby undermine public confidence in their ability to adjudicate impartially.

It may as well be argued that what this Article suggests is tantamount to discriminating against judicial officers by advocating restrictions on judicial officers which do not apply to other citizens. Whilst it should be acknowledged that what this Article is suggesting is discriminatory in nature, one would argue that it is discrimination which is sanctioned by the Constitution and is therefore lawful. The Constitution does not prohibit all forms of discrimination, instead outlawing unfair discrimination. Discrimination is unfair if it is based on any of the grounds listed in section 56(3) of the Constitution, a list which includes socio-economic status.<sup>60</sup> However, the fact that discrimination is based on any of these prohibited grounds does not automatically mean that such unfair discrimination is unconstitutional.<sup>61</sup> If the discrimination is based on any of the grounds listed in section 56(3) but it is sanctioned by the Constitution itself, then such discrimination may be unfair but nevertheless constitutional. Therefore, although what this Article suggests may amount to unfair discrimination on the basis of the social standing of the judicial officer, such discrimination is sanctioned by the Constitution through section 165 which imposes a higher standard of moral and professional behaviour for judicial officers, which is not necessarily applicable to the rest of the citizens.<sup>62</sup> In that regard, it should be acknowledged that it is the Constitution, through section 165, which restricts judicial officers from leasing government land on the basis of an agreement which does not accord them security of tenure. Therefore, if such discrimination is sanctioned by the Constitution, it cannot be deemed to be unconstitutional.

Furthermore, unfair discrimination is constitutionally permissible if it is reasonable and necessary to achieve a purpose that is considered legitimate in a democratic constitutional

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<sup>59</sup> See Zvamaida Murwira, 'High Court Judge in Bribery Storm' *The Herald* (30 September 2016) <<http://www.herald.co.zw/high-court-judge-in-bribery-storm/>>.

<sup>60</sup> The Constitution of Zimbabwe, s 56(3).

<sup>61</sup> The Constitution of Zimbabwe, s 56(5). See also *Harksen v Lane* [1997] ZACC 12 [50]-[53] where the test for establishing unconstitutional discrimination is laid out. This is foreign case law which has persuasive force in this discussion because of the similarity of the provisions on discrimination under the Interim Constitution of South Africa (1993) and that of Zimbabwe, 2013.

<sup>62</sup> The Constitution of Zimbabwe, s 165.

state.<sup>63</sup> Judicial officers may be held to a higher standard of moral and professional behaviour on the basis of their social standing because they are responsible for enforcing the rule of law – a mandate which, as discussed earlier, they are only able to discharge if they are impartial both in fact and in appearance. It is a legitimate purpose entrenched in the Constitution,<sup>64</sup> and is therefore the kind of differential treatment acceptable within the confines of the Constitution.

### **Opportunities and Main Thrusts for Litigation**

Given that the independence of the judiciary has been weakened or appears to have been compromised by making certain judges and magistrates lessees on insecure lease agreements, the right of access to justice enshrined in section 69 of the Constitution is threatened. Where a right has been threatened, any holder of that right can approach the court to litigate in defence of the right.<sup>65</sup> Therefore, any citizen may challenge the constitutional validity of the 99-Year Lease Agreement on the basis that it is a threat to the right of access to justice and the rule of law in so far as the lease is a threat to the independence of the judiciary and it undermines public confidence in the judiciary. The matter may be heard by a judge who is not a lessee on the 99-Year Lease Agreement. The litigating citizen may be inclined to seek as relief a declaration of the constitutional invalidity of the 99-Year Lease Agreement in so far as it makes a judge or magistrate a lessee with no security of tenure.<sup>66</sup> In addition, the citizen may also apply for an order of the court which directs the President and Government to strike down clause 20 of the 99-Year Lease Agreement and replace it with a provision which provides the lease holders with security of tenure.<sup>67</sup>

### **Conclusion**

In Zimbabwe, judicial officers are required by the Constitution to maintain public confidence in their ability to perform their roles impartially and to adjudicate over matters without fear or favour. In order to maintain public confidence, judicial officers are required to adhere to certain standards of behaviour and conduct per section 165 of the Constitution, including refraining from impropriety or engaging in any conduct or relationship which causes a reasonable observer to suspect impropriety. Certain judges and magistrates are beneficiaries of the Zimbabwe land reform programme. Whilst judicial officers (like every other citizen of Zimbabwe) are entitled to have a fair share in the distribution and ownership of natural resources; the Constitution demands that the manner in which they should seek to benefit from government programmes should be above reproach. Many judicial officers who have benefitted from the land redistribution programme are lessees on 99-Year Lease Agreements, with the President as the lessor. The lessee/lessor relationship between the judges and the

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<sup>63</sup> *ibid*, s 56 (5).

<sup>64</sup> *ibid*, s 164 (2) read together with s 165(1)(c).

<sup>65</sup> *ibid*, s 69.

<sup>66</sup> This is in terms of The Constitution of Zimbabwe, s 85(1).

<sup>67</sup> This is allowed by The Constitution of Zimbabwe, s 167(3).



President undermines the ability of judges to adjudicate impartially in matters which involve the President or the Government. Further, an analysis of this lease agreement reveals that it does not offer security of tenure for judicial officers as the President has the power to repossess the land at any time. This scenario causes a reasonable observer to suspect that the judge will not be impartial when adjudicating over a matter which involves the President and/or the government. Therefore, by agreeing or seeking to be lessees on this agreement, judicial officers have violated the Constitution in the sense that they have engaged themselves in a commercial relationship which undermines their independence from the Executive and causes the public to have diminished confidence in the integrity and impartiality of those judicial officers. Further, the lease agreement is unconstitutional insofar as it seeks to make a judicial officer a lessee without offering the lessee security of tenure. Citizens may therefore challenge the constitutionality of the 99-Year Lease Agreement on such basis and may seek as redress a declaration of invalidity be pronounced and an order be given to the effect that the lease agreements should confer security of tenure to lease-holding judicial officers.

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