

**THE APPOINTMENT OF THE CHIEF JUSTICE AND THE JUDGE PRESIDENT OF
THE COURT OF APPEAL BY THE PRESIDENT OF THE REPUBLIC OF
BOTSWANA: PRESIDENTIALISM OR CONSTITUTIONALISM?**

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GLORIA D. MOTLALENG

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by the President of the Republic of Botswana: Presidentialism or Constitutionalism?**

By

Gloria D. Motlaleng

Student Number: 200704953

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Supervisor: Prof G. Mokhawa

DECLARATION

This Research Essay is my own original. I have not used the material in this Essay in any of my other researches and as such, I have not presented it for a degree in any other University. I have not allowed and will not allow anyone to copy my work with the intention of passing it off as his/her own work.

Signature.....

Date.....

DEDICATION

This research is dedicated to my husband, Batsile Kitsiso Motlaleng, having allowed me to pursue my studies and having been supportive throughout. My gratitude extends to my mother, Mrs Chuna Kgwarae and my father Albert Kgwarae for having been there for me during my studies; my children Segametse, Joy, Mpho, Moemedi, Itumeleng, Motheo and Thabiso who supported me throughout my studies. My dedication also goes to Mrs. Bazibi Ndlovu who helped me with typing.

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ABSTRACT

The major aim of this research was to examine the process of appointing the Chief Justice and the Judge President of the Court of Appeal in Botswana. This was accomplished by considering whether there is political manipulation in the appointment of the Chief Justice and the Judge President of the Court of Appeal. In addition, the research sought to establish what the law says about the appointment of the Head of the Judiciary and the President of the Court of Appeal. It also sought to establish if there is liberty in exercising the judicial functions by the head of the Judiciary and the head of the Highest Court of the Land. The research also sought to determine if there is separation of powers amongst the three arms of government and to determine if there is independence of the Judiciary in Botswana. A qualitative research approach was employed supported by an exploratory research design. Data was collected through document analysis i.e. secondary data were used to conduct the research. Thematic qualitative analysis was employed to analyse the gathered information. The research concluded that the appointment of the Chief Justice and the Judge President of the court of appeal by the President of the Republic Botswana is constitutional. There is no political manipulation in the appointment of the Chief Justice and the Judge President of the Court of Appeal as this is guided by the constitution. There are laws that give the President Powers to appoint the Head of the Judiciary and the President of the Court of Appeal. There is liberty in exercising the judicial functions by the head of the Judiciary and the head of the Court of Appeal in Botswana. This research also established that there is separation of powers amongst the three arms of the government and there is independence of the Judiciary in Botswana. However, the President can appoint the Chief Justice and the Judge President of the Court of Appeal without any consultations and in this case this research recommends that the Constitution can be amended to give provision to the President for consultation prior to the appointments of the Chief Justice and the Judge President of the Court of Appeal. Also it was recommended that an independent body and not the President can do the appointments or the government can benchmark with other countries which are doing the appointments differently.

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CHAPTER 1: INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The Judiciary is formed through the constitution as one of the three branches of the government. In accordance to the constitution of Botswana, the characteristic of the Judiciary is to adjudicate both civil and criminal cases involving citizens and the nation as conferred by the constitution. The high court, the Court of Appeal and the magistrate's court make the Judiciary. The Judiciary is independent from other arms of the government; being the executive and the legislature. To improve the independence of the Judiciary and to be certain that it is covered from interference from different arms, the Constitution creates the Judicial Service Commission (JSC). The JSC considers and recommends officers for judicial positions. These appointments are made by the President, only after recommendations of the JSC except for the appointment of the Chief Justice and the Judge President of the Court of Appeal.

The appointment of the Chief Justice and the Judge President of the Court of Appeal is done by the President without any consultation. Section 96 (1) of the Constitution offers that the chief justice shall be employed by the president and section 100 (1) of the Constitution offers that the President of the Court of Appeal shall, except the office is held ex-officio through the Chief Justice, be employed by the President.

According to Dingake (2000) the Constitution does not provide for the participation of JSC in the appointment of the Chief Justice and the Judge President of the Court of Appeal. The President does the appointment of these two senior positions in his absolute discretion. Furthermore Dingake (2000) stipulates that the Constitution does not offer any consultation process which gives the President the ability to act alone in appointing the Chief Justice and the Judge President of the court of appeal. According to Dingake (2000) this appointment is different from other jurisdictions such as in Ghana and other states where the appointments are done by the President with consultation.

According to Dingake (2000) the appointment of judicial officers who consist of the Chief Justice and the Judge President of the Court of Appeal is fundamental in ensuring that the independence of the Judiciary is achieved. In addition, Quansah and Fombad (2008) mentioned that judicial independence stays as one of the foundations of democracy and

constitutionalism. The authors further argued that the independence of the Judiciary necessitates a freedom from influence or manipulation from the executive and legislative. The Constitution of Botswana puts in place three separate arms of government and gives each powers which act as checks and balances on the other arms. Most importantly the Constitution creates a Judiciary which administers justice which is impartial and free from political control.

The judges who encompass the Chief Justice and Judge President of the Court of Appeal answer solely to the Constitution in the performance of their responsibilities and not to any individual including the President. Dingake (2008) says, constitutional law is the basis of any legal system as it lays down the standards and processes involved in the formation of the government. Once the government has been created, the process of governance need to begin.

The High Court act Chapter 0402: (4) provides that the Chief Justice shall be the senior Judge of the Court and Puisne Judges shall take precedence after him according to the priority of their respective appointments. The Chief Justice is the head of the Judiciary and the Judge President heads the Court of appeal. These two senior positions are necessary in the administration of Justice. Dingake (2009) says that the function of the Judiciary is to decide on disputes that may occur and to have the final word on the interpretation of the law. Like other judges these two officers have the power of life and death over individuals through imposing the death penalty. They have the authority to prevent the enjoyment of the freedoms and privileges enshrined in the Constitution. Their mandate is to interpret the law and the Constitution. They also have the powers to overturn or endorse legislation approved by the legislature.

An example is the case of Unity Dow. In this case, women's organs of civil society took the government to Court on the Citizenship Act which was amended by the National Assembly in 1982. The dispute arose out of this modification and prompted a legal fighting between the state and a Motswana lady married to an American citizen. The change deprived females of their primary human rights to allow their citizenship to their children. The ruling of the High Court dominated in favour of Unity Dow which was a success of the rule of law, human rights and democracy in Botswana.

Dingake (2000) Emphasises that the Judge President and the Chief Justice have the power to incarcerate or endorse the powers of the executive. They employ the power to affect the day to day lives of all the people in Botswana and beyond. It is this power which ensures the importance of these two positions in the constitutional structure.

Nsereko (2004), states that when the legislation and Executive powers are integrated on one individual or body there can never be liberty. Again there is no liberty when Judicial powers are not separated from the legislature and the executive, there would be a stop to the whole thing if the same person or body, whether of noble or of people, had to exercise all the three powers.

In Botswana, there are three organs of the state which are interdependent from one another. This picture shows that there are three arms of government in Botswana (Legislature, Executive and Judiciary). According to Dingake (2000) each structure is accountable for the checks and balances on one another. The legislature checks the Judiciary and the Executive. The power of the Judiciary to interpret the law can also provide the necessary checks on the Executive and the Legislature. Nsereko (2004) has specified the role and importance of the Judiciary as to promote the resolution of disputes in courts and to deal with committed crimes and contributing to the maintenance of peace and tranquillity. The executive's power of the purse can be an active tool to keep different organs within their statutory limits. Furthermore, Bruce (2007) mentioned that an independent Judiciary is a fundamental aspect of democracy. There would be no separation of powers without the independence of the Judiciary. International treaties which include the universal declaration of human rights (1948), the international covenant on civil and political rights (1976) (ICCPR) and the African Charter on human and people's rights (1981) uphold the significance of this principle. For example article 14 of the ICCPR states that in the determination of any criminal charges against any individual or of their rights and duties in a suit at law, everyone shall be entitled to an honest and public hearing by a competent, independent and impartial tribunal established by the law.

In accordance to African Charter, Article 26 mentions that parties existing in the charter have a role to make sure that Courts are independent and shall allow the formation and development of relevant national institutions which shall be given duties to shield and promote human rights and freedom. Bruce (2007), clarifies that judicial independence is

intertwined with the doctrines of separation of powers and checks and balances, both of which are usually considered to be defining characteristics of a democracy. Madison (1788) mentioned that the idea of separation of powers stems from the belief that the best way to control government power is to distribute it amongst the various arms of government (Legislature, Executive and Judiciary). The three branches of the government should be functionally separate and abstain from interfering with the functions of one another Madison (1788).

THREE ARMS OF GOVERNMENT

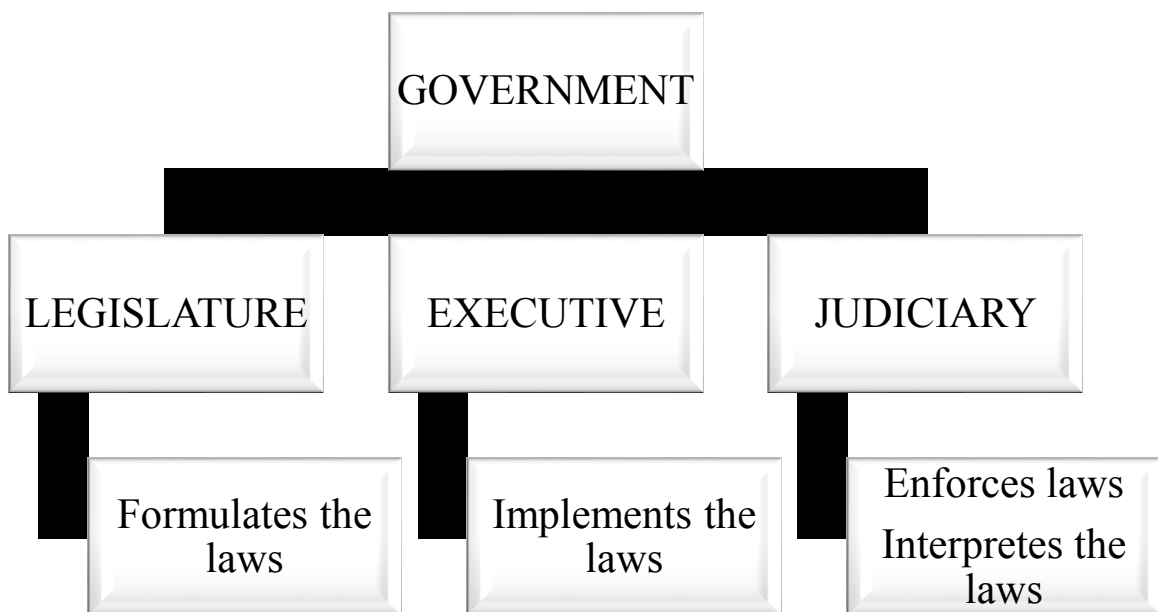


Figure 1 (This picture shows the mandate of each arm government in Botswana).

Separation of powers is not unique to Botswana. Other international countries such as South Africa, Namibia and Zimbabwe have the same arrangements. Separation of powers and independence of the Judiciary are considered crucial to good political control under the African Union (AU).

1.2 STATEMENT OF THE PROBLEM

The appointment of the senior judicial officers, particularly the Chief Justice and the Judge President of the Court of Appeal by the President is a contested issue. As per the Constitution, the President appoints both the Chief Justice and the President of the Court of Appeal. As an active politician and leader of a ruling party, scholars content that such appointments are inspired by using political expediency and the said officers are possibly to toe the line of the appointing authority than the Constitution. This essay sees no basis for this contestation and maintains that the appointments are constitutional as per section 96 and 100 of the Constitution of Botswana.

Without mutual trust and conviction the procedure of appointing the Judges is not charged through political manipulations, vital stakeholders in the legislative arm of the government as well as others who are convinced that the procedure is not fair, as it is likely not to render the appointed Judges the esteem they deserve. This paper serves to shed light on the process and prove that the process is not politically motivated and secretive.

1.3 OBJECTIVES OF THE STUDY

1.3.1 Main Objective

The major objective of this paper is to examine the process of appointing the Chief Justice and the Judge President of the Court of Appeal in Botswana.

1.3.2 Specific Objectives

The overarching objective will be achieved by the following specific objectives:

1. To determine whether there is political manipulation in the appointment of the Chief Justice and the Judge President of the Court of Appeal.
2. To establish what the law says about the appointment of the Head of the Judiciary and the President of the Court of Appeal.
3. To establish if there is liberty in exercising the judicial functions by the head of the Judiciary and the head of the Highest Court of the Land.
4. To determine if there is separation of powers amongst the three arms of government.
5. To determine if there is the independence of the Judiciary in Botswana.

1.4 RESEARCH QUESTIONS

1. Is there any political manipulation in the process of appointing the Chief Justice and the Judge President of the Court of Appeal?
2. What does the law say about the appointment of the Head of the Judiciary and the President of the Court of Appeal?
3. Is there liberty in exercising the judicial functions by the head of the Judiciary and the head of the Court of Appeal?
4. Is there proper separation of powers amongst the three branches of government?
5. Is the Judiciary in Botswana independent?

1.5 SIGNIFICANCE OF THE STUDY

This paper is relevant as it is very critical to understand whether the politicians manipulate the Chief Justice and the Judge President of the Court of Appeal placing the independence of the Judiciary at risk. As such it will help in knowing whether Botswana is complying with the set requirements of the United Nations and African Union (AU). It will subsequently assist in having records from various sources.

Crucially, this essay will fill in the gap in the literature particularly on the process of appointing Chief Justice and the Judge President of the Court of Appeal. The study consequently will present further research on the topic especially touching on to relationships amongst the arms of the government to consolidate the democratic reputation of Botswana as a country.

1.6 CONCLUSION

This chapter introduced the research topic by looking at the background information. It additionally outlines the research objectives and the questions. The importance of the scope has additionally been explored. The following chapter discusses literature review.

CHAPTER 2: LITERATURE REVIEW

2.0 INTRODUCTION

The chapter will look at various works that examine interaction between the three branches of the government by studying what is written by others. It will also discuss how different jurisdictions that have similar systems like the one that exists in Botswana and how they have managed to preserve their democracy.

2.1 UNDERSTANDING THE CONSTITUTIONAL MAKE-UP

According to Dingake (2000) the Constitution of Botswana was passed in 1965 and it commenced on 30th September 1966. Edge and Lekorwe (1998) contend that before Botswana was colonised, *molao* as it was called, was recognised as a set of rules to govern the people who made it. A constitutional committee of the joint advisory of the first formal constitution came into operation in 1960. And in 1963 consultations for a new constitution started. The 1965 general elections were conducted using the constitution which took the nature of Westminster system. When Botswana obtained its full independence on the 30th September 1966 the current constitution was put into effect. The Constitution recognises separation of powers.

2.1.1 Separation of Powers

Dingake (2000) argues that separation of powers refers to the division of responsibilities of branches to limit any one branch from exercising the core functions of another. The intent is to inhibit the concentration of unrestricted power by providing checks and balances. Montesquieu (1748) described the numerous forms of distribution of government amongst the Legislature, Executive and Judiciary. Montesquieu (1748) took the view that the Romans had powers separated so that no one ought to have absolute power. Separation of the three arms of the government is essential for the efficiency of the government and the liberty of the people. Additionally, as Mojapelo (2013) states, separation of powers requires that there be a principle of separation of personnel which requires that the same person should not be a member of more than one of the three organs of the government. This implies that the Cabinet Ministers should not be members of Parliament. Secondly, it is required that none of the organs infringe upon the powers and work of the other. It is further required that the holders of office in one organ should not owe their tenure to the mercy of other organs rather,

their tenure ought to be at the will of their electorate. In Botswana separation of powers is founded in the Constitution. The Constitution distributes the power to govern the country between the three arms of government subject to checks and balances by the other branches to prevent manipulation.

2.1.1.1 Legislature

According to Dingake (2000) legislature is a regulation maker of the government. Kesler (2007) emphasises that at the constitutional conversion in 1787 the framers of the US constitution resolved the problem of reconciling a strong and robust separation of powers with republican central government. They wanted to retain the liberty of men or women citizens and ensure that the government did not abuse power (ibid). Power was distributed between three separate branches of government namely the legislature, the executive and the judiciary. The legislative branch encompassed a variety of legislative agencies that support congress that carry out its duties. In Botswana, the Parliament is the supreme Legislative authority. It was established on the 1st March 1965 under Chapter V section 57-76 of the Constitution. According to Edge and Lekorwe (1998) Botswana parliament is charged with duties of making laws and oversight, it consists of 63 members. Legislative powers is vested in both the government and the parliament of Botswana. The legislature consists of the national assembly and the President who consult with the House of Chiefs on tribal matters.

2.1.1.2 Executive

According to Dingake (2000) the executive branch is the administrative arm of government or the administrative branch of government with most employees as it operates, implements and enforces all the laws formed by the legislative branch as interpreted from time to time by the judiciary. The executive executes and enforces laws of the country. Members of the Executive, some of whom are Ministers, are also individual members of legislature who play the necessary function of formulating and amending laws. In a Presidential System the leader of the Executive is both the head of state and the head of Government. In a Parliamentary system ministers are accountable to the legislature. The President is the head of government. During civil war, Abraham Lincoln used government orders for Habeas Corpus in 1861 and enacted his emancipation proclamation in 1863. In Botswana the executive power is exercise

of authority. The Constitution of Botswana offers for a President who both is head of state and government with robust executive powers.

2.1.1.3 Judiciary

English Common law influenced Botswana's legal system post British colonial system. According to Nsereko (2004) the criminal law of Botswana originated from the English and evidence based on South African law. The legal system has been developed over years by statues passed by parliament and judicial decisions. The origins of the law can be traced back to the founding of Bechuanaland Protectorate. However it was not until 1891 when a formal administration was established. The Judiciary was established under the Constitution as an independent arm of the Government. The head of the Judiciary is the Chief Justice. Under him are Judges, Registrars and Magistrates.

2.1.1.3.1 Rule of Law

The expression can be traced back to the 16th century. John Locke (1689) defined the rule of law as freedom that is regulated by laws in both the state and civil society. Freedom of life is under no restraint except from standing rules that are uniform to all people in the society and made the law-making power established in it. Persons have a right or liberty to comply with their personal will in all matters that the laws have not prohibited and not be subjected to the inconsistent, uncertain, unknown, and arbitrary wills of others. The rule of regulation implies that every citizen is subject to the law, including lawmakers themselves.

In this sense, it stands in contrast to dictatorship or oligarchy where the leaders are held above the law. Pilon (2000) states that the rule of law is an ambiguous term that can mean diverse things in different frameworks. According to Pilon (2000) in one context, the term means rule in terms of the law. The author also states that no person can be ordered by the government to pay civil damages or suffer criminal punishment except in accordance with clearly defined laws and procedures. In addition the term means rule under the law. Government branches are not above the law, and no public officer may act arbitrarily or unilaterally outside the law. In a third context the term means rule in accordance to advanced law.

The rule of law suggests that every citizen is subject to the law. According to Nsereko (2004) the rule of law has been viewed as one of the significant dimensions that regulate the quality and good governance of a country. He further referred the rule of law as the influence and authority of law within society as a constraint upon behaviour which includes behaviour of government officials. As such as Komesar (2001) provides government official should act pursuant to an express provision of a written law, hence the rule of law. However when a government official acts outside any law, he or she does so by the force of personal will and power. According to Dingake (2000) under the rule of law, no person may be prosecuted for an act that is not punishable by law. When the government seeks to punish any person for an offence that is not deemed criminal at the time it was committed, the rule of law is violated.

2.1.1.3.2 Judicial Independence

Nsereko (2004) argues that judicial independence is the concept that the Judiciary is independent from other branches of government. According to him, courts are supposed to be independent and not be subjected to any influence by other institutions or individual's as this idea is critical for the separation of powers. According to Tacha (1994) this philosophy can be drawn to 18th century in England. He argued that the first traces of modern-day Judiciary can be considered emerging in the 12 Century AD. This is the time when the enterprise of the royal family grew more specialised and it became possible to identify a small group of court officers who had specific experience in advising the king on settlement of disputes (ibid). From this group of officials emerged justices who administered a mixed administrative issues and judicial authority (ibid). For over 200 years the independence of federal Judiciary would have been an effective tool in guiding the Constitution and the rights of individuals (ibid).

The doctrine of judicial independence reflects sensitivity to interferences with the Judiciary branch by other branches. This presupposes the relational component between the Judiciary with other branches of the government which are the executive and the legislature. This should also translate into personnel both professionals and non-professional staff, that is, they are supposed to be separate from the personnel of other branches. The independence of the judiciary should evidence in its decisions; that is, it should not be subject to the control, orders or influence of either the Executive or the Legislature. It should be autonomous such

that in making decisions it should be guided solely by the law and the dictates of Justice. Where the government of the day has some interest in the result of any matter, the Judiciary does not act merely as the government's spokesperson.

According to Quansah and Fombad (2008) the administration of Justice in Botswana, as in all modern states, is governed by a number of values. There are two important ones which deserve to be mentioned such as; the principle of the independent and unbiased Court and that of open Justice. These two are enshrined in the Constitution. In this regard, Section 10 of the Constitution of Botswana states that any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognised by law and shall be unbiased and impartial. However where the proceedings for such determination are instituted privately, the case shall be given a fair hearing within a judicious time. The agreement of all the parties for all proceedings of each court and proceedings for the determination of the existence or extent of any civil right or duty before any other court, including of the pronouncement of the ruling or other authority, shall be held in public. Quansah and Fombad (2008) argue that, the way courts act cannot be concealed from the public ear and eye and this offers a safeguard against judicial arbitrariness and maintains the public confidence in the administration of Justice. They similarly say the principle of open Justice may only be departed from by the need to shield the administration of Justice or where an Act of Parliament creates an exception.

2.1.1.3.3 Appointment of Judges in Perspective

According to Fombad (2005) judicial appointment differs in each state. The discussion has extensively been talked about by numerous students handling it from a number of different angles. This document address the judicial system in multiple countries.

Gosh (1997) argues that in a number of states the President is the one who appoint judicial members. He added on to say that in countries such as United States of America, United Kingdom and India, the Executive branch plays a major function in appointing Judges. Article 124 and 217 of Indian Constitution gives the President power to appoint after serious evaluation with all frankness and integrity.

Similarly, Gildenhuis (2014) points out that in Canada, Ireland and New Zealand, the appointment of the Chief Justice and the Judge President of the Court of Appeal is carried

out through the President after a list of nominated candidates is presented. In the case of Belgium, the King is responsible for the appointment. In South Africa, the state President on advice of the Judicial Service Commission will appoint the judges (ibid). The system is slightly different in France whereby Judges are appointed on the nomination of Judges by the High Council of the Judiciary consisting of the President, Minister of Justice, two nominees by the President and representatives of the Judiciary chosen by the National Council (Ibid).

In Zimbabwe, a comparable method happens in regard to the appointment of high level Judges. As Hatchard and Slinn (1999) argue that, if any proposed appointment is not in accordance with the Judicial Service Commission, the President is quickly ordered to explain to the parliament motives for such selections. This scenario gives a picture of checks and balances in the appointment of such high calibre Judges as compared to other jurisdictions mentioned earlier (Ibid).

Dingake (2009) states that in Ghana, High Court Judges are appointed by the President with recommendations from the Ghana Judicial Council as like in most of the African countries including Botswana. From the above examples, a tendency can be clearly seen that there is confidence and power on the serving President to make the best choice about high court Judges in the respective countries. He further states that in Malawi, President Peter Muntharika received a robust media response from the public following the appointment of four Judges which he appointed when he was in New York. In Malawi, the appointment of high court Judges has to be confirmed by the public seal (Ibid). Questions were asked as to why the President appointed these officers outside the country.

2.1.1.3.3.1 Appointment of Judges in Perspective

2.1.1.3.3.1.1 England

In England the Civil Division hears appeals from the High Court, County Courts and other tribunals such as Employment Appeal Tribunal and the Immigration Appeal Tribunal. Its President is the Master of rolls. A case is normally heard by three judges consisting of the Lord Chief Justice or President of the Queen's Bench Division or one of the Lords Justices of Appeal together with two High Court Judges and one specially nominated Senior Circuit Judge.

The state has a Judicial Appointment Commission (JAC) which is an impartial commission that selects candidates for the judicial position in courts and tribunals. The JAC extends to Scotland or Northern Ireland and recommends the appointment of candidates for senior posts such as the Lord Chief Justice of England and Wales Master of Rolls, President of the Queen's Bench Division, Chancellor of the High Court and Lords Justices of Appeal. In addition, the Lord Chancellor may request the JAC's assistance in connection with other appointments that the Lord Chancellor considers tremendous (Judiciary.gov.uk, 2017).

The Head of the Judiciary of England and Wales and the President of the Courts of England and Wales is the Lord Chief Justice. The role started on 3rd April 2006 when the Lord Chancellor's judicial functions were transferred to the Lord Chief Justice under the Constitutional Reform Act of 2005. The Criminal Justice is headed by the Lord Chief Justice. Under the Constitutional Reform Act of 2005, the Lord Chief Justice has 400 statutory (required by law) duties. His key tasks include; imparting the views of the Judiciary of England and Wales to Parliament and Government, the welfare, training and practise of the Judiciary of England and Wales. The Lord Chief Justice discusses with Government the provision of resources for the Judiciary, which are distributed by the Lord Chancellor. The Lord Chief Justice is also accountable for the deployment of Judges and allocation of work in courts of England and Wales apart from sitting on criminal, civil and family cases.

He or she pronounce judgments and lays down procedures in most significant enchantment cases and shares accountability with the Lord Chancellor for the office for Judicial Complaints. This is a body which investigates complaints made against judicial officers. He or she presides over the sentencing council and the independent organisation is set up to support consistency in sentencing. The Lord Chief Justice chairs the judicial executive board and the judges' council, which help him in managing his responsibilities. He or she is also president of the magistrates' association. The President of the Courts of England and Wales can hear matters in any English or Welsh court including magistrates' courts. The Lord Chief Justice and the senior judicial officers are supported by a group of civil servants who form the judicial office for England and Wales (Judiciary.gov.uk, 2017).

2.1.1.3.3.2 Court of Appeal in England

In England, the Court of Appeal's divisions are headed by Judges. Appeals from the Crown Court are heard by Criminal Division. Its President is the Lord Chief Justice. Here cases are

also heard by three Judges, consisting of the Lord Chief Justice or the President of the Queen's Bench Division or one of the Lords Justices of Appeal, two High Court Judges and one specially nominated Senior Circuit Judge. In the Divisional Court heads of Divisions and Lords Justices of Appeal sit on occasion with one or extra High Court Judges, to hear appeals from the High Court and magistrates' courts and review cases at first instance.

2.1.1.3.3.3 The United States of America

Section 2, Article II of the United States Constitution states that: 'The President shall nominate Judges of the Supreme Court and additional officers with the recommendation and consent of the Senate. The method of appointment of a federal Judge can be done when there is a judicial vacancy. The Department of Justice and the White House staff recommends judicial nominations to the President. If the President approves the nomination, he/she signs and submits to the Senate. Judicial nominees are referred to the Senate Judiciary Committee by the Senate. Nominees will be investigated, affirmed and the nomination voted in the Committee. Committee seats are managed by the majority party in the Senate. The voting outcomes on the Committee are usually representatives of the voting wish in the Senate.

Approval of judicial appointments entails a majority vote of the Senate. All nominations have to be acted on in a session or cease at the end of the session. If a nomination is not acted upon the Senate must inform the President. When the Senate gives its advice and consent, the President signs the judicial commission which appoints the person officially. The strength of Senators in deciding on nominees lies in the Senators' potential to endorse possible nominees. There after the Senators will be requested to recommend nominees for a district Court post in their area. The President can also take Senators recommendations into account for political reasons in the scenario of the Supreme Court or circuit courts candidates. The requirements of judicial appointments consist of among others experience, integrity, and expert competence, and judicial temperament, service to the law and contribution to the high-quality administration of Justice.

In his article, Odland (2016) explains why it is necessary for judges to be appointed and not elected in the United States. Appointment-based systems better serve the purpose when complemented through evaluation commissions. According to Odland (2016) in 17 states of the US, such commissions' behaviour is conducted through examinations of Judges. The overall performance in the course of their terms is a move which ensures overall

performance and realistic independence of the Judiciary. Criteria generally embraces understanding of appropriate law, administrative prowess, and judicial temperament. As one study reports, public confidence in judicial candidates and the Judiciary as a whole is bolstered when voters receive information through judicial performance evaluation programs. States can look to Arizona, who's Commission on Judicial Performance Review conducts routine assessments and even develops assessment reports that the public can view, as a model.

2.1.1.3.3.4 Ghana

According to the Constitution of Ghana Article 145 (2) (A), the Supreme Court consists of the Chief Justice and at least 9 other Judges. In accordance with this article the responsibilities of the Chief Justice are as follows: He/she presides on all sittings of the Supreme Court each time he or she is present, oversees the administration of the Court of Appeal as he or she is the most senior member. He or she is also a member and administrator of the High Court and the Regional Tribunals. The Chief Justice is the chairman of the Judicial Council .The council is anticipated to advocate judicial reforms to the Ghana government to assist improve standards of administration of Justice and productiveness in the Judiciary. In Ghana the Chief Justice is expected to enhance the administration of Justice and administer the Presidential oath and the Vice Presidential oaths before parliament prior to assuming their offices. He/she also administers the oath of obligation and the judicial oath to all Justices of the Superior Courts.

It is provided for in the Constitution of Ghana that the Chief Justice is a chairman of the Rules of Court Committee which makes rules regulating the practice and procedure of all courts and sets up a tribunal to decide on grievances against the Electoral Commission of Ghana. He/she convenes and chairs a tribunal to oversee proceedings concerning the removal of the President of Ghana from office and appoint judicial officers on the recommendation from the Judiciary. As already pointed out, the appointment of such Judges is monitored by the Judicial Council of Ghana.

2.1.1.3.3.5 South Africa

According to Dingake (2000) South Africa has an independent Judiciary subject to the Constitution and the law. The Constitution is the supreme law of the country and binds all

legislative, executive and judicial branches of the country at all tiers of the government. No man or woman or structures of government is allowed to encroach with the functioning of the courts. An order or Judgement of a court is to be complied with by all organs of state and societies to whom it applies (southafrica.info, 2017). The Department of Justice and Constitutional Development is accountable for guaranteeing an accessible Justice system that upholds and safeguards social Justice, fundamental human rights and freedoms, as a result providing a transparent, approachable and accountable justice for all.

In accordance with Chapter 8 of the Constitution of the Republic of South Africa, the Judiciary is the body of Judges and Magistrates who preside over all matters before courts. The Heads of Courts is the term used to describe the collective management of the Judiciary in the country. Heads of Courts consist of the Chief Justice as the Head of the Constitutional Court; the President of the Supreme Court of Appeal; the Deputy President of the Supreme Court of Appeal in his capacity as the Head of the Electoral Court; the President of Judges the various divisions of the High Court and Courts of corresponding repute like the Labour Court and the Land Claims Court. In terms of Section 174 (3) of the Constitution the President as head of the national executive, after consulting with the Judicial Service Commission and the leaders of parties in the National Assembly; hires the Chief Justice and the Deputy Chief Justice. The Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal after consultation with the relevant government. In terms of Section 174 (6) of the Constitution the President appoints Judges of all Courts, with the exception of the Constitutional Court with the recommendations of the Judicial Service Commission. In appointing Judges of the Constitutional Court, the JSC is required to submit to the President a list of nominees with three names which is more than the number of appointments to be made. Judges are then appointed from the list by the President, as Head of the National Executive, after consulting the Chief Justice and leaders of the parties represented in the National Assembly.

According to Section 174 to 178 of the Constitution Judges are appointed by the President of South Africa on the recommendations of the Judicial Service Commission. This includes the appointment of the Judge President and the Chief Justice. The President as head of the national executive, after consulting with the Judicial Service Commission and the leaders of parties represented in the National Assembly the President appoints the President and Deputy President of the Constitutional Court. It is vital for the Judicial Service Commission

to consult before appointing the Chief Justice and Deputy Chief Justice. Judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the President of the Constitutional Court and the leaders of events represented in the National Assembly.

Section 178 of the Constitution provides that, 'the Judicial system in South Africa consists of the Constitutional Court, the Supreme Court of Appeal, the High Courts, inclusive of any High court of Appeal based on an Act of Parliament to hear the appeals from High Courts, the Magistrates' Courts and any other court established in terms of the Act of Parliament including any court similar to the High Courts or the Magistrates' Courts.

According to section 178 of the Constitution, the Constitutional Court consists of the President, the Deputy President and nine Judges. The Constitution of South Africa provides that matters before the Constitutional Court have to be heard by at least eight Judges. It additionally demands that the Constitutional Court is the highest Court in all constitutional matters. It may determine constitutional matters and issues related to constitutional matters; and make the final Judgement. Only the Constitutional Court may decide disputes between organs of the state in the national or provincial sphere regarding their constitutional status, powers or functions of any of the organs to adopt the constitutionality of any parliamentary or provincial bill. But may do so in Section 79 or 121. The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional. It should affirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force. National legislation or the rules of the Constitutional Court must permit an individual in the interest of Justice and with leave of the Constitutional Court to appeal directly to the Constitutional Court or to appeal directly to Constitutional court from any court. A constitutional matter consists of any matter concerning the interpretation, protection or execution of the Constitution.

Section 179 of the Constitution provides that the Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice and a number of Judges determined by an Act of Parliament. A matter before the Supreme Court of Appeal have to be decided by a number of Judges determined by way of an Act of Parliament. The Supreme Court of Appeal may hear appeals in every matter.

According to section 178 of the Constitution of Republic of South Africa the High Court may also decide any constitutional matter assigned by means of an Act of Parliament to any other court of a status similar to a High Court; and any other matter not assigned to another court by an Act of Parliament. In the Republic of South Africa the Judicial Service Commission includes the Chief Justice, the President of the Constitutional Court and the Minister of Justice. It is a significant representative body, with the transformation of the Judiciary remaining one of government's significant priorities.

2.1.1.3.3.6 Nigeria

According to Section 230 of the Constitution of the Federal Republic of Nigeria (1999) there shall be a Supreme Court of Nigeria which shall consist of the Chief Justice and Justices of the Supreme Court who are not more than twenty-one as prescribed by an Act of the National Assembly. Section 231 affords that the appointment of a person to the office of Chief Justice of Nigeria shall be made by the President on the recommendations of the National Judicial Council subject to affirmation of such appointment by the Senate just like in many of the African countries. It also states that the appointment of a man or a woman to the office of a Justice of the Supreme Court shall be made through the President on the recommendation of the National Judicial Council subject to approval of such appointment by the Senate. However the Constitution specifies that a person shall not be qualified to hold the office of the Chief Justice of Nigeria or of a Justice of the Supreme Court, until he is qualified to practice as a legal practitioner in Nigeria and has been qualified for a period of not less than fifteen years.

Further the Constitution of Nigeria provides that if the office of Chief Justice of Nigeria is vacant or if a person holding this office for any reason is unable to execute the tasks of the office, unless a person has been appointed and has assumed the duties of that office, or until the person the office has resumed those functions, the President shall appoint the most senior Justice of the Supreme Court to perform those functions. In addition, it is stated that besides the advice of the National Judicial Council, an appointment to the provisions of subsection (4) of this section shall come to an end to have effect after the cease of three months from the date of such appointment, and the President shall not re-appoint an individual whose nomination has lapsed.

Although nations have different methods of appointing their most senior officers of the Judiciary this does not mean that Botswana is doing something wrong. For example, in South Africa their Constitution provides that, the President appoints Judges of all courts on the recommendation of the Judicial Service Commission. In England there is the Judicial Appointment Commission that selects candidates for the judicial office in courts and tribunals which extends to Scotland. In Ghana it is the President who appoints but with the approval of the National Judicial Council subject to approval by the Senate. The President of Botswana derives the absolute appointment from the Constitution. As the President he is the custodian of the Constitution and cannot be seen to be violating it. He should lead by example.

The above mentioned cases gives a general picture that Judiciary is not genuinely independent as the procedure of appointing the senior judicial officers and Chief Justices and the Judge Presidents of the Court of Appeal in particular compromises the doctrine of the separation of powers and the independence of the Judiciary. Therefore, the President as being active in politics can be tempted to appoint someone who toes the political line of the ruling party in his judicial decisions. Such an appointment could never be democratic, lacks transparency and compromises the doctrine of separation of powers as well as the independence of the Judiciary. For example Nsereko (2004) contends that the method of appointing the Chief Justice and the President of the Court of Appeal has merits and demerits. While he maintains that appointing the two officers lends democratic legitimacy to the process, he equally contends that such appointment compromises the doctrine of separation of powers as well as the Judiciary's independence whereas Quansa and Fombad (2008) states that the independence of the Judiciary is of paramount significance in a democratic state like Botswana. However according to them it is undemocratic/dictatorship for the two most senior judges who head the two highest possible courts to be appointed by the President without any consultation.

2.2 GAPS IN THE LITERATURE

There is no sufficient and precise literature that discusses on the manipulation of the Constitution in the appointment on the Chief Justice and Judge President.

2.3 CONCLUSION

This chapter has attempted to deal with the doctrine of the separation of powers and the independence of judiciary. The rule of law has also been attempted. Democratic states were discussed as good governance which promotes distribution of power to discourage tyranny. The mandates of the Legislature, the Executive and the Judiciary were defined in such a way that they create mutual checks and balances without interfering with the operations of one another. Like other countries such as United States, Botswana has separation of powers with three arms of government (Legislature, Executive and the Judiciary). The chapter also looked at the independence of the Judiciary and appointments of judicial officers. The subsequent chapter looks at the methodology.

CHAPTER 3: METHODOLOGY

3.1 INTRODUCTION

This chapter discusses the methodology employed in this study. Methodology is a sequence of choices and selections about what statistics and information to gather. The methods section describes actions that were taken to investigate the research problem and the rationale for the application of specific procedures or techniques used to identify, select, process, and analyse information applied to understanding the problem, thereby, allowing the reader to critically evaluate a study's overall validity and reliability. In this study methodology refers to how the research was carried out and its logical sequence. The main centre of attention of this research is about the appointment of the Chief Justice and the Judge President by the President of Botswana.

According to Kothari (2004) there are a number of research strategies for researchers to utilise depending on the research phenomenon. One approach might also emerge more appropriate, usable and helpful than another. He further state that the researcher's ability to designate a most appropriate research approach is a key point in identifying the reliability and validity of the research results. Therefore this research is a desk research which is based on and adopted a pure qualitative research design.

3.2 RESEARCH APPROACH

Creswell (2014) posit that there are three research approaches which are quantitative, qualitative and mixed methods research approach. This research adopted a qualitative research approach. Qualitative research emphasizes on the way people explain the meaning of something, and justify their experiences to appreciate the social reality of individuals (Mohajan, 2018). The author added that qualitative research is exploratory in nature as it "seeks to explain 'how' and 'why' a particular social occurrence, or program, operates as it does in a particular circumstance". Qualitative researchers are interested in people's belief, experience, and meaning systems from the perspective of the people. The goal of the qualitative research is to gain a deep understanding of a particular phenomenon under study. Qualitative research attempts to widen and/or deepen our appreciation of how things came to be the way they are in our social world. The qualitative research approach uses or

generates a lot of text information through interviews, focus group discussions, document analysis, observations and other related methods (Mohajan, 2018).

3.3 RESEARCH DESIGN

Paton (1980) says that a qualitative methodology can symbolise flexible techniques, as it allows a whole exploration of the research phenomenon. The study employed the exploratory research design. Descriptive and explanatory designs were not relevant in this study because they cannot expose new and necessary factors of the phenomenon but instead searching to outline and describe the relationship between known variables. Through the adoption of a qualitative research design, the researcher used information looking into distinct sources to understand the entire process of appointing the Chief Justice and the Judge President of the Court of Appeal in Botswana. This allowed the researcher to dig out views, feelings, and opinions and share deeper experiences concerning the appointment of the Chief Justice and the Judge President of the Court of Appeal in Botswana.

The researcher conducted an exploratory research to find out about and explored the state of the appointment of the Chief Justice and the Judge President of the Court of Appeal in Botswana through inductive reasoning. Lewis and Ritchie (2013) mentions that the most important advantage of inductive reasoning is that, it works optimally in conditions when data is incomplete and where experience is very limited. Inductive reasoning helps us to draw effective conclusions.

3.4 RESEARCH STRATEGY

Jenny (2014) defines a research strategy as a step-by-step plan of action that gives track to your thoughts and efforts, enabling you to conduct research systematically and on schedule to produce quality results and detailed reporting. This enables one to stay focused, reduce frustration, enhance quality and most importantly, save time and resources.

The following strategy was followed to conduct this research:

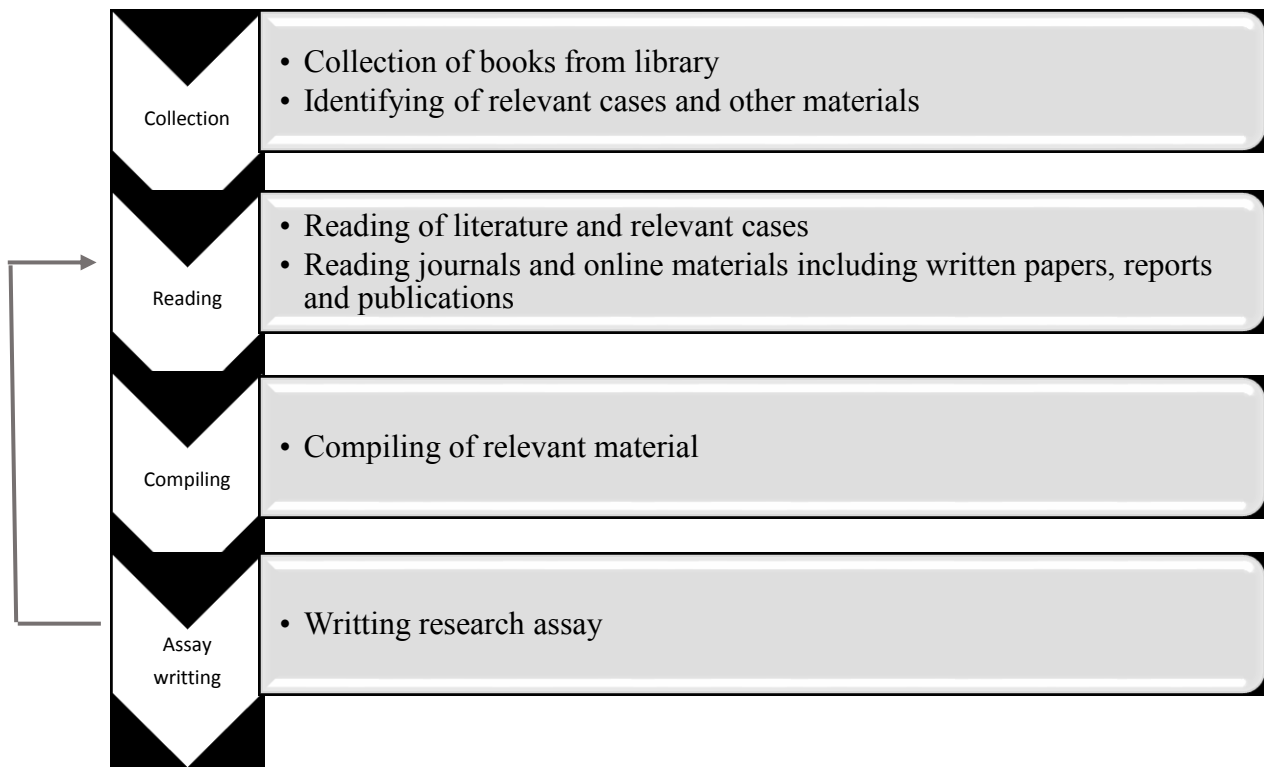


Figure 2 layout of the research strategy

Figure 2 gives a sequential layout of the research strategy that guided this research.

3.5 DATA COLLECTION METHODS

Data collection is an essential part of research. It is a method of gathering and measuring information on selected variables in a structure which then helps one to answer relevant research questions and evaluate outcomes. The study attempted to gather qualitative data and detailed secondary data was required to give clarity on the situation under investigation. According to Babbie (2006) secondary data is the data that is already gathered and recorded through anyone else and available from other sources. This study is based on the reading of journals, books, book chapters, published articles, research thesis and scholarly journals. Reviewed documents also included professional publications by Judges, presentation papers through Chief Justices, Judges, the Law Society, and the Attorney General including reading cases.

Thorough documents review data were gathered. This allowed the researcher to have a deeper understanding of the situation. Payne and Payne (2004) describe the documentary method as a technique used to categorize, investigate, interpret and identify the barriers of physical sources. In this study, official and public documents, consisting of reports from the Botswana Government, articles, newspapers and some official documents were used to give the researcher a deeper understanding of the subject under study. Document analysis provided access to empirical evidence based on previous studies conducted on the appointments of the Chief Justice and the Judge President of the Court of Appeal. The researcher additionally did note-taking to record information from the various sources consulted. Bowen (2009) presented that document analysis is a research method, which can be used in qualitative research when conducting in-depth investigations to produce rich descriptions of a single phenomenon, event, organisation, or program.

3.6 DATA ANALYSIS PROCEDURES

Secondary data was collected from reviewed documents and qualitative thematic analysis was conducted as a data analysis method (Neuman, 2013). Thematic material analysis was used to analyse data in order to allow the researcher to extract conceptual categories of data with similar meaning. This is called categorization in accordance with Kvale (1996). The researcher solicited for opinions, perceptions and expectations from the information gathered. These have been grouped according to their meaning. In this regard, categories were established, resulting into content themes, consistent with the value of thematic

qualitative analysis. The themes summarised the meaning of the data which addressed the reason of the study during interpretation. Creswell (2014) elaborated that the researchers in qualitative research analyse all of the gathered data, make sense of it, and organize it into categories or themes that cut across all of the data sources. Furthermore, Creswell (2014) and Neuman (2013) supported the notion that qualitative thematic analysis involves reading and re-reading of documents establishing similarities and differences that enable the researcher to organize the data into progressively more abstract units of information according to emerging themes, patterns and classes of gathered data. In this research, reading and re-reading of collected documents assisted in identification and interpretation of data according to themes, patterns and classes of information. The content analysis was also guided by the research aim and objectives. Themes, patterns and classes of information were generated from the content following the research aim and objectives and conclusions were made.

3.7 ETHICAL CONSIDERATION

The researcher was cleared of ethical issues concerning document analysis. This was so because the anonymization, confidentiality and consent issues were addressed to protect the original authors of the content. Proper citations and references for paraphrases and direct quotes were performed throughout this paper to keep away from copyright and plagiarism. In addition, the researcher was cautious that the obtained data was adequate, relevant and was not excessive (Tripathy, 2013). Thus according to Tripathy (2013) the collected data was assessed by looking at how it was collected, the time it was collected, the reason for which it was collected, correctness of the data and the content of the collected data.

3.8 LIMITATIONS OF THE STUDY

The research was subject to some limitations. The challenges incurred were related to the research approach and data collection procedures. The study was carried out using qualitative research design. Data collection was time consuming due to the procedure for accessing some of the important literature/materials. This made the study to be more costly than expected in terms of transportation as the student was responsible for data collection and expenses. In particular document analysis was conducted to gather data which impacted on the trustworthiness of the research findings. This means that the research credibility, transferability, confirmability and dependability were affected. This made the research

findings to be difficult to generalise. In future, it will be good to consider the quantitative research approach where questionnaires will be used to collect primary data. This will be good as the prevailing situation will be captured and a number of concerned stakeholders like the president, the judges, parliamentarians, lawyers and other interested stakeholders can be involved to establish facts about the situation. This will provide a wide coverage of the research scope and for detailed information, interviews, focus group discussions and observations of the real processes can be done to really establish the position of Botswana in appointing the Chief Justice and the Judge President of the court of appeal by the President of the republic of Botswana.

3.9 CONCLUSION

This chapter discussed the research methodology which guided this research. It discussed the research approach, research design, research strategy, data collection methods, data analysis procedures and ethical considerations. This research employed a qualitative research approach which was supported by an exploratory research design. Document analysis was used to collect data. Data collection involved identifying literature sources, reading through the identified documents and extracting relevant information to support the research. Thematic qualitative analysis was employed to analyse the gathered information. Lastly, ethical issues which guided the research were considered. It is important to note that no specific population or sampling techniques were employed as document analysis was involved and as much as possible information was needed to capture and explain the phenomenon under discussion

CHAPTER 4: PRESENTATION OF FINDINGS

4.1 INTRODUCTION

The findings of this research study are presented in this chapter. Thomas (2016) says that the findings of a study are based upon the methodology applied to gather information as such the results section should state the findings of the research arranged in a logical sequence without bias or interpretation.

It is important to note that Botswana has a written Constitution stipulating on how the Chief Justice of Botswana and the Judge President are appointed by the President. Section 96(1) of the Constitution offers for the appointment of the Chief Justice and Section 100(1) affords for the Judge President of the Court of Appeal. There is no provision of consultation by the constitution. There is liberty in exercising the judicial functions as Judges presides over cases even those involving the Government. There is no clear separation of power between the legislature and the Executive, however the Judiciary is separate from the two branches of Government (legislature and Executive). The Judiciary is independent from legislature and Executive.

This paper argues that the Constitution is the supreme law of the land and has to be followed by all. The appointment of the Chief Justice and the Judge President of the Court of Appeal is stated for in the Constitution of Botswana and with such the President is complying with the constitution. This provision is mandatory and not optional. For as long as the Constitution remains the way it is, it has to be strictly followed unless and until the Constitution is amended.

Fombad (2005) argues that the supremacy of the Constitution is undisputed and cannot be opposed in a Court of law. In the case of *Minerva Mills's v Union of India*, it was argued that no one is above the law including the organs of the government which are the legislature, Executive and Judiciary are all bound by the constitution, which is the paramount law of the land and nobody is above or beyond the constitution.

Botswana Constitution recognises separation of the three organs of the government in separate and different provision. The Cabinet together with the President are responsible for the parliament and the Ministers are individually running their ministries. It should be

mentioned that the Cabinet Ministers seat in the Legislature and they also head ministries under the Executive. The President is also the Head of the Executive which makes it clear that there is no clear separation between the two. However the Judiciary is separate and independent from the two arms of the government (Legislature and Executive). This can be seen by the outcomes of the cases which involve the government where by the government loose some of its cases in court.

Courts should not be subject to influence by other branches of the Government. It is the responsibility of the Judiciary to interpret and safe guard the constitution. The Judiciary must be honest and unbiased in giving its Judgements and ought to be free from any control of the institution or individuals. Courts apply justice, settle disputes and punish regulation breakers in accordance to the law. Dingake (2000) argues that the Constitution is very crucial to the separation of powers between the three branches of the government as well as noble governance. In addition, Dingake (2009) contends that the Constitution is the supreme law of the land and does not serve only this generation but more generations to come. It cannot be allowed to be a white elephant. Courts have to keep it alive from time to time to ensure the strong growth and improvement of the state through it.

According to McLean and McMillan (2009) the Constitution is a set of indispensable regulations governing the politics of a state or subnational body. The Constitution is written, short, general, and entrenched. It is the important law of a member state regulating the organisation and functioning of the relations between public government and citizens' rights and fundamental freedoms and ways to guarantee them. Dingake (2009) Opines that the Constitution is the supreme law in the state, and it is the base of all legal document and legal regulations. Supremacy of the Constitution is ensured through a working instrument resulting in an official institutions' constitutionality of law controls, including all methods through which the confirmation of law compliance with constitutional provisions are obtained.

Fombad, (2005) said that the constitution and its supremacy are compulsory. As shown in the literature, free interpretation of constitutional provisions means violation of the basic law and democratic principles to the civilized world. The Constitution sets the parameters to determine which law is valid and which one is not and explains how political power is arranged and exercised. According to Edge and Lekorwe (1998) the President's powers are

restrained to those awarded by means of the Constitution and statutes. Fombad (2005) argues that in democratic countries governed by the rule of law, a Constitution is the piece anchor which the vessel of state and the freedoms of the people lean and get support. It is the Constitution that set up the Parliament, bestows it with legislative powers, and prescribes the technique of making laws. The Constitution takes precedence over all laws. In case of inconsistency between the Constitution and any laws, the Constitution prevails and the different regulation turns into void.

The work of the Judiciary, has been constitutionalised. Judges seek to identify violations of the constitution in their application of a number of codes, and to rewrite statutes that they consider unconstitutional. A written Constitution limits the supremacy of parliament. Edge and Lekorwe (1998) argue that it is the Constitution that creates the organs of the government, gives them powers, and in so doing restricts the scope within which they are to operate. The constitution operates with a supreme authority. They similarly say a constitution is a Constitution in the full sense and governs regular laws and forces ordinary law to conform to its principles. A Constitution can do that credibly if it is free from the risk of being overruled with the aid of regular law. It can be taken seriously as higher regulation only if it is entrenched, and cannot be changed by using the manner which makes and unmakes normal law.

Kesler (2007) says since the organs of the government are creatures of the constitution, they have to work out their powers in accordance with the Constitution which created them. In case of dispute or doubt, judges are the final arbitrators. It is in the exercising of these arbitration powers that the courts have contributed to constitutional developments. Fombad (2005) argues that the supremacy of the Constitution is undisputed and cannot be opposed in a Court of law. In the case of *Minerva Mills's v Union of India*, it was argued that no one is above the law inclusive of the organs of the government, legislature, Executive and Judiciary. The written Constitution is the 'ultimate regulation of the country's rule of law which cancels out the arguments claiming the sovereignty' with the aid of a number of structures of the nation to assist them to act in a manner that is basically unchecked and uncontrolled. The basis of power of all organs of the state is the Constitution, which created them.

Dingake (2014) is with the view that, the Constitution is the supreme law of the land and often referred to as the “soul” or “mirror” of the nation which contains the important rules in relation to the political system of a country. These include rules on the organizations of the government in the country, their powers and how they exercise those powers. The Constitution sets out a comprehensive framework of which power is divided and distributed between three branches of government namely the Legislature, the Executive and the Judiciary. See Attorney General V Dow (1992) BLR 166 and Clover Petrus and Another v The State (1984) BLR 14. The then Chief Justice Nganunu (2007) in his legal opening speech of February 2007, said any step by the organ of state or public authority that is out of step with the Constitution or any law that contravenes it is ultra vires and is null and void. This genuinely proves that the supremacy of the Constitution determines the rule of law, establishes validity, ensures certainty in the legal order, and act as a check arbitrariness. These two senior officers leading the Judiciary have sat in cases where the government lost in both the High Court and the Court of Appeal respectively (Dow’s case and others). The appointment of the Chief Justice and the Judge President of the Court of Appeal by the President of Botswana do comply with the Constitution.

4.2 ANALYSIS

Most scholars are of the opinion that the Judiciary is not clearly independent as the process of appointing the senior judicial officers such as the Chief Justices and the Judge President of the Court of Appeal compromises the doctrine of the separation of powers and the independence of the Judiciary. Therefore the President as an active politician may be tempted to appoint any person who toes the political line of the ruling party, and may mirror its policies and desires in his judicial decisions. Therefore the conclusion is that such an appointment is undemocratic, lacks transparency and compromises the doctrine of separation of powers as well as the independence of the Judiciary. Nsereko (2004) consents with the scholars that the approach of appointing the Chief Justice and the Judge President of the Court of Appeal has merits and demerits. Quansa and Fombad (2008) mentioned that, it is extraordinary that the two most senior judges who heads the two highest courts of the land are appointed by the President alone. He further states that this appointment is undemocratic and compromises the independence of Judiciary and the separation of Powers. These arguments do concur and has comparable point of argument however, they do not inform us about the Constitution of Botswana.

Although the writers are complaining about the appointment of the two senior positions in the Judiciary, it is vital to observe that the constitution of Botswana gives the President Powers to appoint these two senior positions in the judiciary in his absolute discretion without any consultation. This research argues that the appointment procedure does not compromise on the separation of powers. What the President is empowered to do is enshrined in the Constitution and cannot be viewed as unconstitutional.

According to Dingake (2009), the Constitution of the Republic of Botswana came into effect during independence and provide for a Republican structure of the system with three organs of the government particularly the Legislature, the Executive and the Judiciary. The case of Attorney-General V. Dow illustrates the supremacy of the Constitution when the majority of Judges of the Court of Appeal agreed that the provisions of sections 4 and 5 of the Citizenship Act Cap. 01.1 is discriminatory and repugnant to section 3 of the constitution. This is an indication that the Constitution of Botswana is strictly followed. The independence of the Judiciary is enshrined in the Constitution under part 95-98 and 99-102. In the case of The Attorney General of Botswana vs. Umbrella for democratic Change (UDC), Botswana Congress Party (BCP) and the Botswana Democratic Party (BDP) the Independence of the Judiciary was emphasised. Attorney General of Botswana sought an order in relation to Parliament standing orders 6.1, 4.5 and 4.6 which she argued have been ultra-vires and contravene the provisions of the constitution to the extent that they introduced extra requirements not acknowledged by using the constitution, and extensively argued that an election by means of a secret ballot and ballot papers, were invalid and may want to no longer be put into practice. The manner of appointment of the Vice-President under 39 of the Constitution is one of the entrenched provisions in accordance with section 89(3) (a) of the constitution. This cannot be altered by the legislature introducing new and/or extra requirements such as vote casting by using secret ballot except in compliance with the stringent legislative processes set out in section 39 of the Constitution along with the requirement of a minimum threshold of not less than a two thirds of all members of the assembly.

4.3 CONCLUSION

The appointment of the Chief Justice and Judge President by using the President is constitutional. This study did not see any compromise of the independence of Judiciary and

separation of powers. What surfaced is that there is compliance of the constitution, there is separation of powers and judicial independence. The Judiciary is totally guided by the law, evidence, dictates of Justice and not with the aid of friendship or animosity, concern or favour and not affection or ill will. Therefore this research findings concludes that the appointment of the Chief Justice and the Judge President of the court of appeal by the President of the Republic Botswana is constitutional.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter presents the implications of the research, conclusions and recommendations as guided by the research objectives and the research findings.

5.2 IMPLICATIONS OF THE STUDY

This study has some implications to policy makers and in the body of knowledge in the area of politics and international relations. The findings of this research have a lot of significance in the field of politics and international relations as it has added new information to the body of knowledge in the area of political and administrative studies. The findings of this research give an in-depth understanding of the appointment of the Chief Justice and Judge President by the President in Botswana. Such a study will help policy makers as they consider the constitution of Botswana and the powers bestowed upon the President of the republic. The findings of this research can be used as a basis for considering a review of the constitution and making amendments. The findings of this research can also be used to review the constitution on the aspect of the appointment of the Chief Justice and Judge President by the national President in light of the fact that the national President is political.

The findings of this research can be used as a basis for further research into establishing the initial motivation behind giving the President of the country the powers to appoint the Chief Justice and Judge President. It is important to really establish how the President makes the decisions of who to appoint for the Chief Justice and Judge President. Another insight gained is the fact that appointments of the Chief Justice and Judge President can be constitutionalized without personal or political influence of the President.

5.3 CONCLUSIONS

Botswana is a democratic country with a written constitution. Nsereko (2004) argues that the Constitution is the mother of all the laws and it should be strictly followed. In Botswana, the Judiciary is headed by the Chief Justice and the Court of Appeal is headed by the Judge President. Their appointment has been provided for by way of the constitution such that the President has absolute power to appoint them. Although some writers and scholars are opposing such appointments as they say compromises the independence of the

Judiciary and the separation of powers, the President is using the powers conferred to him the Constitution of Botswana. This provision is mandatory and not optional therefore this power rests with him alone. Section 96 and 100 of the Constitution provides that it is the President who shall appoint these two senior positions.

In Botswana there is a clear separation of powers among the three organs of the state. The Judiciary is impartial from the legislature and the executive. Section 86 of the Constitution gives the legislature power of making laws for peace, order and excellent governance of Botswana whilst the Executive is the implementer of the policies and the power to interpret and enforcing the laws is entrusted with the Judiciary. Dingake (2009) argues that separation of powers is very important for the country as it ensures, among different things that the rights of people are protected by means of a written Constitution. He further says that the written Constitution establishes essential human rights and freedoms enforced by a Judiciary composed of men and women of knowledge and honour. These men and women execute their constitutional mandate in the right manner so that the high-quality prize that the Constitution sought to impenetrable for everybody, being liberty does not emerge as a victim.

Although the Administration of Justice is under the Office of the President, these are matters which can be changed, and it does not suggest that there is no separation of powers, no independence of the Judiciary and no rule of law. Minister of Justice can remedy this problem as he/she will directly represent the Judiciary in Parliament. The Chief Justice and the Court of Appeal are functioning efficiently and effectively as evidenced in judicial decision.

In summary, this research aimed to examine the process of appointing the Chief Justice and the Judge President of the Court of Appeal in Botswana. In conclusion, this research established that there is no political manipulation in the appointment of the Chief Justice and the Judge President of the Court of Appeal as this is guided by the constitution of Botswana. There are laws under the constitution of Botswana that give the President Powers to appoint the Head of the Judiciary and the President of the Court of Appeal. There is liberty in exercising the judicial functions by the head of the Judiciary and the head of the Highest Court of the Land. There is separation of powers amongst the three arms of government and there is independence of the Judiciary in Botswana.

5.4 RECOMMENDATIONS

Considering the findings of this research. It was established that in Botswana, the President can appoint the Chief Justice and the Judge President of the Court of Appeal without any consultations. In this regard, this research recommends that Botswana has options to amend the Constitution and this can help in amending the provision to appoint the Chief Justice and Judge President by providing a sub section of consultation prior to appointment. The appointment can even be done by an independent body and not the President of the Country. The government of Botswana can benchmark with other countries which have a different mode of appointing their Chief Justices and Judge Presidents.

It is also recommended that the legislature should be fully separated from the Executive. This is to say Cabinet Ministers should only head ministries and not sit in the parliament. The Minister for Justice should represent the interests of the Judiciary in parliament and see to it that the budget is divided between the three branches of the government. Currently the Judiciary is a Department under a ministry. The Judiciary should be a Ministry rather than a department under a ministry. It will strengthen the independence of the judiciary.

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