RE-IMAGING PRESIDENTIAL ELECTION PETITIONS: A COMPARATIVE ANALYSIS OF THE APPROACH OF ZIMBABWEAN AND KENYAN JURISDICTIONS TO PRESIDENTIAL PETITIONS.

WEBSTER JITI

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE MAGISTER LEGUM

FACULTY OF LAW

UNIVERSITY OF ZIMBABWE

AUGUST 2020

SUPERVISOR: PROFESSOR L. MADHUKU

TABLE OF CONTENTS

CHAPTER THREE

CONTEXT AND SCOPE OF PRESIDENTIAL ELECTIONS AND PETITIONS

CHAPTER FOUR

PRESIDENTIAL PETITIONS: APPROACH OF THE COURTS

ABSTRACT

But man, proud man
Dress'd in a little brief authority
Most ignorant of what he is most assur'd
His glassy essence – like an angry ape
Plays such fantastic tricks before high heaven
As makes, the angels weep!

Measure for Measure
William Shakespeare

DEDICATION

To all the brave hearts, those who are prepared to square up to all the obstacles, those ready to fight those who fight for their rights, keep on the fight!

ACKNOWLEDGEMENTS

This work has been completed courtesy of hearty efforts and unwavering support of many people. It is indeed a milestone and I owe so many people who assisted me in reaching this scholarly feet.

To the entire LLM Class of 2020, am so grateful for all the assistance and the academic exchanges which enhanced my appreciation of so many issues , you collectively broadened my horizons in many things beyond the province of law. Thanks *in extenso*.

To Dr Mavedzenge and Dr Mufakose , thank you for the reviews and faithful comments.

To Madzoka, Saunyama, Mutukwa and many others in law practice and Zimbabwe Lawyers for Human Rights, I am forever grateful for the generous input in my academic journey and my practice .

To my "cockpit" cabal, Asali Abudabi, Albert Damion, Chris Chidzenga, Tunga Chinhengo (sometimes a nuisance) , Clemence Chimbari , etc, thank you guys for all the debates, the academic exchanges and a job well done. Thank you Don Ndirowei for the unwavering support with cases and materials.

To all the staff at Jiti Law Chambers, thank you for the support and commitment. Stronger we will grow.

I am also grateful to my supervisor, Professor Lovemore Madhuku. This has been an exciting academic journey. Thank you for the hard work and inspiration.

To my family, all of you in numbers, I am grateful for the support and prayers.

CHAPTER ONE

INTRODUCTION

1.0 Background to the study

Electoral petitions in general and presidential petitions in particular remain hotly contested terrains the world over. It is accepted that of all constitutional law concepts, elections are one of the most subjective and value laden feature given their inevitable and almost immediate political, economic and legal consequences on any society. Thus, an election is an indispensable centrepiece of constitutionalism.

In the same vein, the study of electoral law takes due regard to the politics, economic and social and other extra-legal features obtaining in a particular state or country. It is also important to take into proper context the legal system that prevails from country to country as this is a key determinant in the approach a country will likely adopt.

In the study for electoral law, particularly electoral petitions, it is more important to recognise and appreciate the multiple varied approaches applied from jurisdiction to jurisdiction and the relevant legislation which. The manner in which a approaches in a presidential petition is therefore heavily underpinned by political theory and jurisprudential aspects prevailing in the given country. The courts in most cases have emphasised that challenges to national leadership elections are not ordinary matters but one which require utmost diligence and scrupulousness. Such thinking seems to resonate well with the narrow basis which obtains in setting aside elections in general. The courts have also made it clear that presidential elections ought to be settled by the people and not by the courts[1] wherein the court stated that

> : **"….[the court] stands in admiration of the Constitution's design to leave the selection of the President to the people…and the political sphere"**.

[1] Bush v Al Gore et al 531 U.S 98(2000)

On the other hand, the same courts have made it clear that where there is violation of the Constitution, they are ready to review any such decision.[2] It is not in dispute that Constitutional supremacy has been asserted in electoral matters[3].

In its own right, a court will determine whether an election withstands the tests of the challenge and if it fails, then it will be nullified. Therefore in its protective form, a petition tests whether the citizens' right to participate in the formation of a government of their choice is protected in its prescriptive mode. A presidential petitions tests the conduct of the election itself, whether any of the rules of the electoral system prevailing in a given country has been violated, and the extent thereof and the consequences. It is this latter point which this research seeks to elaborate with primary reference to Zimbabwe and Kenya.

1.1 **Statement of the Problem**

The emphasis on elections as a yardstick for measuring both the extent to which citizens participate in choosing their political leaders and the extent to which a country subscribes to democratic norms is almost indisputable. It will have to be assessed however whether any election protects the voter's fundamental right to decide on his or her leadership of choice and whether the electoral processes are consistent with democratic elections.

Free, fair and democratic elections have been embraced as a cornerstone for democracy and the Universal Declaration of Rights and several other regional charters such as Southern African Development Community and Africa Union have since come to underscore the need for free and fair elections and the importance of such elections as cornerstones of democracy. The right to vote is therefore a fundamental human right which various constitutional instruments of other countries embraces and endeavours to implement albeit in different styles and approaches.

---

[2] **Marbury v Madison 5 U.S 137 (1803**)

[3] See section 2 of the Zimbabwean Constitution and Article 3 of the Kenyan Constitution.

The right to free and fair elections embraced by the Zimbabwean Constitution in Section 67 and the Kenyan Constitution in Article 38 and many other constitutions the world over finds its ultimate fulfilment in the fair and satisfactory conduct of elections and determination of electoral disputes. Correlative to the right to vote is the fact that "**the right to vote is indispensable to, and empty without, the right to free and fair elections"**[4]

Key considerations that emerges from the foregoing problem is the test of a free and fair election. Invariably, it becomes the duty of the judiciary to decide whether an election is free and fair and whether it was conducted in a manner prescribed in the constitution and the enabling statutory instruments prescribing the processes of an election.

The general rule the world over where elections are held is that voters must determine the winner in an election and the courts must only come in to set aside an election where it is unavoidable[5]. To this end, there exists very narrow parameters for setting aside an election[6] and the test for annulling an election varies from legal system to legal system.

Courts have generally evolved a test of what are called substantive principles of electoral law and trivial principles of electoral. The instructive authority in **Morgan vs Simpson**[7] wherein Lord Denning articulated the test as follows:

> **"If the election was conducted so badly it was not substantially in accordance with the law as to the elections, the election is vitiated irrespective of whether the result was affected. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistaken at the polls, provided that the breach did not affect the result of the election."**[8]

[4] I Currie and J.D Waal, *The Bill of Rights Handbook* , Juta, 2013 pp354 .
[5] **Bush v Al Gore***, supra*, **Chilima and Chakwera v Prof Mutharika and Anor CR 1 OF 2019.**
[6] Professor L. Madhuku, Comparative Constitutional Law (lecture notes, 2019 , unpublished).
[7] **(1974) 2 ALL ER 722**
[8] Supra.

The Lord Denning approach, creates two limped approach to test to the validity of a petition: (a) if there is lack of compliance with substantial provisions the election must be set aside regardless of the result and (b) if the mistake or breach is trivial, the election cannot be impugned unless the triviality would affect the result.

The courts in Zimbabwe, Kenya, Ghana and Malawi and many other countries in which the presidency is decided directly by the electorate are therefore unremittingly grappling with an elusive constitutional dilemma when it comes to determination of electoral petitions. The tests clearly are never uniform and of key consideration is the fact that 'extra-legal' dynamics inherent in the process are never settled and continue to mutate and evolve, thus rendering the process of deciding a petition an uncertain process.

It is therefore cardinal for this research to locate the manner in which various jurisdictions approach presidential petitions, taking into context the various legal systems and the social economic issues prevailing in the various countries. It conceded that presidential petitions cannot be discussed outside other fundamental features of the constitution such a separation of powers, rule of law, judicial review and constitutional supremacy.

This research will discuss the critical questions:

1. What are the normative and philosophical underpinnings of electoral law in general and presidential petitions in particular?
2. What are the approaches of the courts in Zimbabwe and Kenya to presidential petitions?
3. How effective have been the approaches of the courts in Zimbabwe and Kenya in upholding the supremacy of their respective constitutions in Presidential petitions and protecting the right to vote?
4. What is the impact posed by the independence of the judiciary in deciding presidential petitions?
5. What are the factors taken into account by the courts in deciding a presidential election petition?

1.2 **Objectives**

1. To explore the approaches of various jurisdictions to presidential petitions, particularly Zimbabwe and Kenya.
2. To discuss the various philosophical schools of thought which influences elections in general and the attitude of the courts in presidential petitions.
3. To explore the relationship between the concept of free and fair elections, the constitutionally entrenched right to vote and the various approaches adopted by the courts in different jurisdictions.
4. To critically consider the factors underpinning the attitudes of the courts in deciding presidential petitions.
5. To discuss recommend effective approaches to electoral disputes which balances between the right to vote and fair and transparent determination by the courts.

1.3 **Delineation / Delimitation of the Study**

The forms of this study are our analysing on a comparative basis, the approach of the various jurisdictions to presidential election petitions. The case studies are Zimbabwe and Kenya. It is conceded that reference is made to jurisdictions such as South Africa, particularly because of the jurisprudential history shared by the two countries over and above a very similar historical narrative. Reference will also be made to other countries such as United States of America because of her arguably rich history in terms of constitutional supremacy and constitutionalism in the modern day. Also, the United States of America is arguably the leading country in terms of establishing a strong system of constitutional review, a plaint under which presidential petitions falls under in the realms of constitutional law.

The petitions and approaches of the court considered herein are limited to the period post the constitution of Zimbabwe, Amendment No. 20, which came into force in 2013 and under which all the presidential electoral petitions of 2013 and 2018 where considered. Previous decisions on presidential petitions in Zimbabwe will also be referenced, subject to their relevance to the discourse but it is fair to highlight now that the history of Zimbabwean presidential petitions prior to the 2013 Constitution is very

frugal. One notable presidential petition prior to 2013 Constitution is the **Tsvangirai vs. Mugabe & Anor** petition of 2002 which is still pending at the courts.[9]

The Kenyan comparative analysis is also based on the period post the Kenyan 2010 Constitutional dispensation which replaced the 1968 Constitution. Only two decisions have been handed down by the Kenyan Supreme Court post the 2013 Kenyan election and this is the famous[10]**,** popularly referred to as the **First Raila Odinga judgment of 2013** and the **Raila Odinga judgement of 2017** which for the first time in the history of Africa nullified a presidential election .The choice of the countries and the periods of time under consideration are by no means coincidental. Both countries share a lot of experiences which sharing begins with the sharing the same colonial master, during colonial times till the attainment of independence on the background of protracted armed conflicts, Kenya, attaining its independence 1968 and Zimbabwe attaining its independence in 1980. The constitution of Kenya from 1968 to 2010[11], barring sweeping amendments in between was similar to that of Zimbabwe in 1980.

Both countries also share relatively new and similar constitutional dispensations, Kenya successfully changed its Constitution in 2010 and Zimbabwe in 2013 and both constitutions were changed under the stewardship of unity governments and there is strong contention that the Constitutions were negotiated by the dominant political players in the two respective countries.[12] The choice of periods after the two new constitutions in both countries was persuaded by the fact that these two constitutions accords extensive regard to constitutional review and contains more articulate Bill of Rights than the previous ones. It is further compounded by the fact that both countries have had two presidential petitions apiece, something that few countries have attained

[9] The court is yet to handover a judgement in this matter and many academics render it academic as several elections have been conducted since then.

[10] **Raila Omolo Odinga vs Uhuru Kenyatta and Ors Petition 5 of 2013 and Raila Omolo & ORS v Uhuru Kenyatta & ORS, Petition No. 1 of 2017**

[11] Kenya became a one party state, de jure between 1982 and 2002. See also Widner, Jennifer A*, The Rise of a Party State in Kenya: From "Harambee!" to "Nyayo!* Berkeley: University of Califonia, 1992. http://ark.cdlib.org/ark:13030/ft9h4nb6fv

[12] See the general concerns raised by National Constitutional Assembly in *Newsday* issue of 23 September 2010 which quotes Prof Madhuku, then its Chairperson calling for the disbanding of COPAC.

in the past few years and a situation which sets the tone for an in depth comparative analysis of the two. It is indeed an exciting legal experience to put the two countries, Zimbabwe and Kenya under an academic study.

1.4 **Limitations**

Admittedly there is a dearth of written texts on constitutional law, particularly electoral law in Zimbabwe. Most of the materials had to be sourced from South Africa and United Kingdom, amid costs constraints. Electoral material from Kenya was also difficult to attain and most of the material, had to be sourced via the internet. It was also difficult to access first hand political experiences of Kenyans other than the written commentaries available online to that end, political dimensions in Kenya did not have sufficient analytical back up. It was also virtually impossible to travel to Kenya on the background of an unfunded research, more so given the time constraints and most of the material was sourced via the internet.

1.5 **Definition of terms**

This research is qualitative in nature and is primarily focussed on concepts. Definitions will be dealt with in the course of the research. It is however conceded that there are no technical words beyond those ordinarily applied in legal parlance.

1.6 **Assumptions**

This study presupposes the following:

1. Presidential petitions are key features of democracy and are key safeguards of the concepts of universal suffrage, and consequential protection of the right of citizens to participate in the governance of their countries.
2. That the Constitutions of Zimbabwe and Kenya allows for judicial review in the context of presidential petitions, with the highest courts in the two respective countries being clothed with the mandate to decide the presidential petitions.
3. That the determination of presidential petitions in intricately linked to judicial review and this inevitably puts issues of the independence of the judiciary, separation of powers and rule of law under consideration.

1.7 **Significance of the Study**

A presidential election is a constitutional function. The right to vote and freedom of choice which a petition seeks to protect is entrenched in the Constitution. It is regulated in terms of the constitution, the timing, the key components of the processes are, according to the Zimbabwean and Kenyan constitutions peremptory.[13] It follows that the determination of any dispute emanating from the constitution is primarily resolved in terms of the constitution peremptory. It follows that the determination of any dispute emanating from the constitution is primarily resolved in terms of the constitution.[14]

A comparative analysis of the approaches of Zimbabwe and Kenya offers a comprehensive and decisive insight into the underpinning jurisprudential, political and socio-economic considerations taken into account by the courts in arriving at their decisions.

The independence of the judiciary will inevitably come under scrutiny in this research, and that will inevitably touch the separation of powers concept in the two countries *vis* the rule of law and respect of the independent institutions constitutionally mandated to administer elections, Zimbabwe Electoral Commission (ZEC) in Zimbabwe and the Independent Electoral and Boundaries Commission (IEBC) in Kenya.

The research will answer critical questions on the role of the courts in shaping the electoral landscape and protecting the right to vote. The electoral field period prior to the elections and after the elections will be illuminated, with a view to unravel the role of the courts and political actors *vis* their constitutional rights. Various stakeholders in the legal profession, electoral supervisory commissions, political actors and the general public will find the research of extreme importance and informative on presidential petitions. The legislature and executive will also find the research useful since it offers insights in presidential petitions and identifies areas of reform, over and above clarifying the approaches of the courts, from a conceptual perspective.

[13] See sections 155, 156, 157,158 and 159 of the Constitution of Zimbabwe and Articles 136,137 and 138 of the Kenyan Constitution.

[14] **Tsvangirai vs Mugabe CCZ 20/17** pages 10-11.

1.8 **Theoretical Framework**

While the acceptance of free and fair elections as a cardinal feature of democracy is almost universal and agreed upon, various theories of law are equally applicable, albeit offering different explanations and rationales on the phenomenon of elections.

In order to bring out approaches of the courts in presidential elections more clearly and elaborately, various theoretical perspectives have been applied. Admittedly the writer is an ardent admirer of the Marxist approach to law, nonetheless, other relevant philosophical perspectives have been employed to give the research balance and an exhaustive thrust on analysis of the subject at hand. It is also the researcher's considered view that the philosophical theories complement each other rather than compete against each other as no single philosophical perspective can account for the development in law on its own.

In the final analysis, Marxist perspective on law will be evaluated alongside natural law theorists such as Dicey and von Hayck whose philosophy presents a formidable target for attack from Marxists. Views of Professor Joseph Raz, Professor Ron Fuller among others will also the invoked to illuminate the approach of courts in election petitions along with Professor's Rauls approach.

CHAPTER TWO

THEORETICAL AND PHILOSOPHICAL FOUNDATION UNDERPINNING ELECTIONS

2.0 Introduction

This chapter seeks to analyse the theoretical and philosophical dynamics underpinning the concept of free, fair and credible elections. Democracy entails that the mandate to govern is obtained from the people through a free, fair and credible suffrage system. The electoral laws of Zimbabwe and Kenya finds themselves entrenched in the two countries respective constitutions, and are amplified by statutory laws[15]. Disputes

emanating from the presidential plebiscite automatically become a function of the constitution which constitution gives the elections its parameters in the first instance.

2.1 Definition of Key Concepts

It is important that this research proffers a definition of a constitution, it being clear and not in dispute that a presidential petition is a function of the constitution, and it's form and procedures are laid out in the Constitution. [16]

According to Professor Hilaire Barnet[17], a *constitution* is

> **"something which is prior to government,…. 'antecedent' to government, giving legitimacy to the government and defining the powers under which a government may act".[18]**

From the foregoing, it is clear that a constitution defines the legality of power and this notion is most pronounced in countries with a written constitution and a superior court imbued with the jurisdiction to rule on the legality of government action or any

[15] Electoral Act *[Cap 2:13*], Zimbabwe and the Elections Act , Act 24 of 2011, Kenya
[16] H. Barnet, *Constitutional and Administrative Law*, 6th Ed , Routledge, 2006 p 6.
[17] Barnet (n 16 above).
[18] Ibid.

institution created by the constitution. This is the obtaining phenomenon between Zimbabwe and Kenya.

> A complex definition of a constitution is given by Thomas Paine[19] **"A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right. A constitution is a thing antecedent to a government, and a government is only a creature of the constitution"**

The above definitions offers an insight into the approach of this research on a constitution. It is agreed that a constitution is the founding and enabling document of any country, particularly when it is written and when there is a court to provide an oversight role on the observance of the constitution. [20] Wherein the court asserted its duty to the Constitution ahead of popular public opinion as follows:

> **'Public opinion may have some reverence to the inquiry but by itself, is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were decisive, there would be no need for constitutional adjudication through which it can be vindicated.'[21]** The origins of the written constitutions which Zimbabwe and Kenya have can be traced to the American War of Independence (1775 – 1783) and the French Revolution (1789). The initial constitutions of Zimbabwe and Kenya post-independence were derived from the former colonial power,[22] though subsequently repealed and replaced via each country's own process.

'*Constitutionalism'* is the doctrine which governs the legitimacy of government action[23]. By constutionalism is meant conformity with the broad constitutional and philosophical values within a State. A more insightful perspective has been rendered

---

[19] T. Paine , *Rights of Man (1792 Part II)*, 1984, Collins H (ed), Penguin,p 93
[20] **S v Makwenyane and Anor (1995) 3 SA 391**
[21] Supra.
[22] Zimbabwe Act of 1979. Kenya Act of 1968
[23] See Barnett (n 16 above) p 5

by Professor Barnet[24] who posits that the concept of constitutionalism implies something far more important than the idea of 'legality' which requires official conduct to be in accordance with pre-fixed legal rules. He strongly argues that a power may be exercised on legal authority, however that fact is not necessarily determinative of whether or not the action was 'constitutional'.

An *electoral system* is now given that in a democratic state, the electoral process determines who holds political office. Power to govern is conferred on the office bearers by the electorate. The Constitution of Zimbabwe ensures the right to the vote [25] and the Kenyan Constitution has a similar provision.[26]

It would appear bother the Zimbabwean Constitution embodies the following similar features albeit in different words;

(i) the right to vote is guaranteed, subject to limited restrictions

(ii) Equality of the valid notes cast is respected.

(iii) The entire process of the elections from campaign to petitions is constitutionally and legislatively regulated in an effort to protect the fundamental right to vote and fairness. See in that regard **Baker vs Carr[27]**

(iv) The electoral system is modelled in such a way as to get a legislative representative of electorate and a government with absolute majority.

---

[24] Ibid.

[25] section 67 which accords citizens very broad political rights and section 67 (3) (a) which specifically grants the right to vote.

[26] *Article 38 which provides 38. (1) Every citizen is free to make political choices, which includes the right—*
(a) to form, or participate in forming, a political party;
(b) to participate in the activities of, or recruit members for, a political party; or
(c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
(a) any elective public body or office established under this Constitution; or
(b) any office of any political party of which the citizen is a member. (3) Every adult citizen has the right, without unreasonable restrictions—
(a) to be registered as a voter;
(b) to vote by secret ballot in any election or referendum; ……)

[27] ***369 US 186 (1962*).**

In the final analysis an electoral system is a combination of many aspects of electoral law and they do not exist in the isolation. Many countries now combine features of majority electoral system and proportional representation which are called mixed electoral systems. This is however different in the presidential election challenges which the research is focusing on.

Presidential petition refers to a court challenge by a losing presidential candidate or candidates, challenging the outcome of an election. This court process tests the validity of the election results based on non-compliance with the substantive electoral laws, irregularities during the election process and fraud on the part of winning candidate among other concerns which taints the election process. In most cases, the petition alleges corrupt practices in the run up or during the election process. In Zimbabwe, section 93 elaborately lays out the petition the process of instituting a presidential petition, the jurisdiction of the court among other key aspects.

In the end, an election may be set aside if a petition is successful among other consequential relief as the constitutional court my grant.

2.2 **Theoretical and Philosophical Aspects of Free and Fair Elections**

2.2.1 **Communist Theories of Law**

The Communist theories on law are headlined by Marxism, Leninism and others. They insists that law represents the interests of the powerful classes within society. This philosophical school of thought further posits that law is an ideological device employed by the powerful class within a society and the correlative powerlessness of the ordinary citizens. Law is thus a subterfuge designed to mask injustice and protect the interests of the powerful with society.

Marxism which itself is largely influenced by dialectical materialism also strongly posits that law in any given society is a reflection of economic power, a power which is consequently used to exploit this powerless within society[28]. Thus, the notions of rule of law, under which this concepts of the free and fair elections falls are just grand

[28]K Marx, *Introduction to the Critique of Political Economy*, 1979 , (ed M.Dobb), Progress Publishers.

sloganeering, designed to create a society where the poor are kept complainant within notions of democracy which in essence do not exist[29]

Communists theories of law further attacks western liberalism of freedom and equality, with the major target being Dicey and von Hayek[30] by advancing that ideas of freedom and equality before the law, parliamentary democracy and impartial judiciary are mere frauds which serve as instruments of class rule" [31] Effectively for Communists /Marxists, law is a rational instrument of oppression and the State is in reality a dictatorship. This particular perspective illuminates a significant component of the issues to do with the presidential plebiscites in Zimbabwe and Kenya.[32] It must also be appreciated that the communist theories of law are a radical departure from the classical bourgeois theories of law which views law and State as a means of protection of private property, achieved by obtaining consent of the subjects. The consent of the subjects in only obtained via electoral processes and judicial process which acts as a check of the electoral process. In its own right, communist theories of law argue that the State emerged as a means to curb class antagonism with conflicting interests and it is a power above the society that would alternate the conflicts and maintain order.[33] The process of an election becomes a necessary ingredient and formation to power to the ruling class.

Elections in any context, according to the communist theory of law, becoming a rule. It becomes a means of protecting the interests of a particular class ahead of others. Consequently issues of dispute resolution post an election or wherein the dispute is related to the election are all part of the misrepresentation posited by those who wish to control the means of production and mention the hold of private property.

---

[29] Barnett (n 16 above),

[30] Ibid

[31] Marx (n 28 above).

[32] Business moguls such as Meikles Family, Econet and some indigenous Zimbabweans have reportedly funded election campaigns for both ruling party and opposition in Zimbabwe before, see an article by Jonathan Moyo on www.techzim.co.zw dated 8th June 2019 and Zimbabwe Independent article on ZMDC and Meikles dated 11 January 2013.

[33] F Engels ,*Origins of the Family, Private Property and State*, Marx& Engels Selected Works, vol III 1970 page 327

2.2.2 **Classical Bourgeoisie Theory of Law**

These theoretical narratives generally follows from Natural Law Philosophy and were much more pronounced by the medieval scholars such as Plato[34] wherein he articulated the idea of a social contract. The principle is captures as follows; [35]

Later medieval writers such as John of Salisbury, John of Paris and Thomas Aquinas followed the same contention, arguing that legal authority comes from the people not from the arbitrary will of their ruler.[36]

Professor W. Friedman[37] summaries the essentials of the Social Contract more eruditely, he sums it up as follows;

> **"The essential features of the doctrine of social contract are these; from a state of nature, in which they have no law, no order no government, this state of affairs appears to some writers as a paradise, to others as chaos-men have at same time passed to a state of society, by means of contract in which they undertake to respect each other and live in peace (pactum unionis). To this contract is added simultaneously or subsequently a second pact by which the people thus united undertake to obey a government which they themselves have chosen (pactum subjectionis)"[38]**

These words to dovetails quite accurately with the electoral systems of the two countries under study and perhaps, with every other legal order where elections are held as a means of ensuring that the consent of the subject is sought and obtained by the ruling class. Accordingly, the State is a creation of the legal will of the governed. Thus, the whole concept of the social contract is the forerunner to the concept of democracy.

Other important natural law philosophers include Hobbes (1588-1679), John Locke (1632 -1704) and Rousseau (1712 – 1788). Whilst all these philosophers did not agree

---

[34] *Republic Book 2 358* (Lindsay Trans)
[35] W Friedman , *Legal Theory*, 5th Ed, Stevens & Sons, 1967

[36] This research focuses more on the medieval scholars and their successors, nonetheless natural law theory can be traced as a way back to Ancient Greek philosophers such as Heraclitus.
[37] W. Friedmann , (n 35 above)
[38] Ibid.

on their perception of Natural Law, they nonetheless influenced the modern set up of governments particularly on the concept of separation of powers, issues to do with equality and modern concept of constitutionalism. Of particular note is that Rousseau continues to justify the peoples sovereignty "*volonte generale"* on the one hand and the original and inalienable rights of all men on the other. Locke, on the other hand assesses the social contract in its double function, first as *puctum unionis*, "the original contract by which men agree to unite into one political society, which is all the compact that is, as needs to be between the individuals that enter into or make a commonwealth"[39]

Secondly, Locke (1632-1704) asserts that[40], a majority agreement is identical with an act of the whole Society, as the consent by which each person agrees to join a body politic obliges him to submit to the majority agreement is identical with an act of the whole society, as the consent by which each person agrees to join a body politic obliges him to submit to the majority.

According to Locke, majority represents the only means by which other rights can be taken away. There may be palpable flaws in Locke's theory, especially on the contention of the compatibility of individual rights with majority rule and the inability of a person to recall a government, notwithstanding that a government, according to him is only a trustee.

However, his theory finds more relevance with the modern day electoral law and is fortified by other philosophers such as Hobbes who believed in a powerful government for the protection of individual rights[41] and also discouraged civil disobedience.

Later philosophers of natural law includes Professor Lon Fuller (1964) who strongly argued on the "morality of law". Professor Fuller is largely viewed as the extension of the natural law philosophers. Professor Fuller lays down the requirements which needs to be met not only for a system to prescribe to the 'rule of law" but for it to be "legal".[42]

---

[39] Of Civil Government, Book 2 s 99
[40] Cited in W. Friedman (n 35 above) p 122-123
[41] See De Civic 1644
[42] Barnett (n 15 above), 77

These prerequisites form the "morality of duty" or the inner morality of law" and are the very basis of a legal system.

Professor Fuller further argues that it is a duty of every government to create a free environment for its citizens so that they can have a platform to plan the life they want to live and all the government's plans must be directed to the good of its citizens and a government that fails in a material degree to meet these standards may fail to deserve the little "legal system". In essence, that which is "good' is central to Fuller. Legitimacy is key to every government hence it has to do the right thing otherwise, the government will be illegitimate. [43] While Professor Hart (1958) disagrees with Professor Fuller on the "morality of law" arguing that a dictatorial regime with no regard for fundamental rights can still meet the minimum prerequisites of legality prescribed by Fuller. Notwithstanding the criticism, however Fuller provides an interesting advancement of the earlier philosophers as well as an adjusted perspective of natural law and its influence on modern democratic elections. Legitimacy becomes a key factor and the role of the court becomes so important. Whether legitimacy is derived from the courts or not is debatable, what is clear is the law now provides for recourse to the courts to evaluate where the validity of an election has been questioned, a position which is consistent with the normative natural law theories.

2.2.3 **Positive theories of law**

The most influential pioneers of this theory is John Austin (1750-1859) and his work remains the most comprehensive and important attempt to formulate a system of analytical legal positivism in the context of a modern state. According to Austin, law exist separately from justice and is not based on the ideas of what is good, morality and acceptability but law is based on the power of the superior. This analysis of law appears to find resonance with the Zimbabwean and Kenyan situations when it comes to the

[43] Some political commentators have ascribed the political and economic crisis in Zimbabwe to the legitimacy issues which arises after elections, with massive allegations of rigging being reported. See M. Hove and G. Harris *" Free and Fair Elections in Zimbabwe : Mugabe and the challenges facing elections in Zimbabwe*, 2015, International Journal of Human Rights and Constitutional Studies.

interpretations of electoral legislation. Who is a winning candidate in the event of a dispute is a question decided by the apex courts in both countries[44].

According to Austin laws are made by political superiors, either supreme or subordinate. Political subordinates also makes laws as delegated legislation. All the laws, Austin argue, have four critical elements, which are; command, sanction, duty and sovereignty. Thus, Austin's analytical positivism is aptly captured as follows in one of his works.[45]

> **'Laws properly so called are a species of commands. But, being a command , every law properly so called flows from a determinate source…whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear, and the latter is obnoxious to an evil which the former intends to inflict in case the wish be disregarded….every sanction properly so called is an eventual evil annexed to a command … Every duty properly so called supposes a command by which it is created …and duty properly so called is obnoxious to evils of the kind…''[46]**

In essence, all positivists agree that science of jurisprudence is concerned with positive laws or with laws strictly called, independent of their goodness or badness.[47]

Professor H.L.A. Hart further amplifies Austin's philosophical findings[48]. Hart argues that laws are commands of human beings and there is no necessary connection between laws and morals. Just like Austin, Hart further argues that a legal system 'is a closed logical system'[49] in which correct legal decisions can be deducted by logical means from predetermined legal rules without reference to social aims, policies, moral standards among other considerations.

---

[44] See section 93 in Constitution of Zimbabwe and Article 140 of the Kenyan Constitution.
[45] W. Friedmann (n 35 above)
[46] Ibid
[47] Lectures on Jurisprudence, op cit at 176
Lectures on Jurisprudence, op cit at 176
eq (1963)
[49] W. Friedman*, p 257*

Hart has been criticised as equally to relativistic and non-cognitivist, particularly on his argument that moral judgment cannot be established nor defended and are not factual. However, his philosophical expositions, offers a lot of insight in light of the laws which governs elections in Zimbabwe and Kenya and this is arguably shared among other jurisdictions such as the United Kingdom and United States of America. Electoral law remains decisively uncertain, particularly in Zimbabwe where it is the most amended legislation since 1980[50]

Kelsen also sought to restate positivism as given by Austin though Kelsen's theory differs with Austin's utilitarianism. Kelsen was more radical in approach arguing that a pure theory of law must not be contaminated by politics, ethics, sociology and history. According to Kelsen, **"the science of law is a hierarchy of normative relations not a sequence of causes and effects like natural science"[51]**

Just like Austin, Kelsen preoccupied himself with the law, not what the law ought to be. This is very critical when it comes to the determination of presidential petitions, especially in situations where the law has already provided, at the very supreme level, the procedure and the substance in the challenge against the validity of a presidential election. This, applying Kelsen ought to be followed because that is the law.

Kelsen further argues that, the aim of a theory of law, as of any science, is to reduce chaos and multiplicity to unity. In this sense, Kelsen argues that legal theory is a science and not volition and what matters is what the law is and not what it ought to be. Thus, the law is a normative not a natural science and a theory of law is formal, a theory of ordering changing contents in a specific way. It is quite easy to follow the cardinal points of Kelsen, based on the *grundnorm*. The legal norm derives its validity from an external source and the threat of sanction cannot be separated from the 'authority' which is the external force. It is also comparatively easy to follow the Kelsenian approach to

[50]L. Madhuku , *Electoral Law in Zimbabwe*, Zimbabwe Law Review, 1999,vol 16, University of Zimbawe.
[51] W. Friedmann ibid.

effective control, or authority in post-election period and even in the pre-election period.[52]

2.2.4 **Dworkin's Philosophy**

Perhaps it would be inconclusive to expose various philosophical schools of thought and omit Professor Ronald Dworkin.

Professor Dworkin is most famous for his criticism of the Hart's positivism views and he joins other groups of America scholars such as Oliver Wendell Holmes. Dworkin's theory is more 'interpretive' arguing that law is whatever follows from a constructive interpretation of the institutional history of the legal system. Law does not exist in isolation but is given an interpretation in its own context.

Of Dworkin's relevance to this present study is his perhaps most controversial articulation that "*the law properly interpreted will give an answer"*. To this end Dworkin creates a metaphorical judge called 'Hercules' who has an answer to every legal question and who acts on a premise that the law is a seamless web. Hercules J, according to Dworkin is able to apply his mind and construct a theory that is best applicable to the facts and is justifiable in deciding any particular case. According to Dworkin, Hercules J always comes to the right answer, not that it is agreeable to everyone, but nonetheless would be justifiable in the same manner. For Dworkin, judges like any other people, chooses between options and values that were supposed to be incommensurable.

Dworkin's approach on the role of values and options on judges is an indictment on positivism. This theory is striking like a pikestaff when taken in his context of Zimbabwean and Kenyan presidential petitions. It would appear that in the midst of the constitutional provisions and statutory provisions on elections, the judges would have the final say on whether the elections stands or falls, situation that prompted Dworkin

[52] The Montlante Commission on the killing of 8 protesters in Harare on 1 August 2018 following the announcement of 2018 Presidential Election Results in Zimbabwe and the acceptance speech of Raila Omolo Odinga in Kenya following the decision of the Supreme Court in the 2013 Presidential elections.

to argue that the judges will always discover the law and ultimately do what they like.[53] Whether the judges are compromised or influenced is a question to be decided on by another philosophical approach.

Dworkin has been fairly criticised. His theory clearly neglects porous political systems where the appointment and removal of judges compromises them. Dworkin concedes the values of any society may reflect the views of the most dominant class, a factor which can still compromise justice.[54]

2.3 **Conclusion**

What comes out of the various philosophical schools of thought discussed in this chapter is their contributory relevance to this research. Clearly, no legal system can be identified with one school of thought and it would appear that what ultimately is revealed is a 'counterpoint' of various schools of thought. Natural law theories of law answers certain aspects of the research. Communist theories of law answers some critical components of the research and positivism fills in the gaps, as does others. While it was not necessary to discuss all the philosophers in each category, those discussed herein still represents the major stance of each particular category. In the end, the various schools of thought are more contributory and they complement each other in unravelling the various questions of law and philosophy posed by this research.

CHAPTER THREE

[53] R. Dworkin ,*Taking Rights Seriously*, Havard University Press, 1977
[54] Ibid.

CONTEXT AND SCOPE OF PRESIDENTIAL ELECTIONS AND PETITIONS

3.0 **Introduction**

The Zimbabwean and Kenyan president is directly elected by the electorate via a two-round system.[55] A direct election means that a voter chooses directly a candidate which he or she prefers. In both countries, the process of voter registration is governed by the constitution and related statutes and as a consequence voting is restricted to registered voters, who meet the registration criteria. It is also critical to note that the majority of countries which have experienced presidential electoral petitions are those in which a president is directly elected by the electorate as opposed to where the president is elected indirectly via an electoral college or delegates. Examples of countries that elects the president via the absolute majority are Zimbabwe, Botswana, Namibia, Malawi, Kenya, Zambia in Southern Africa all countries elects the president directly except South Africa and Swaziland. In the United States of America, the president is elected via the Electoral College process. Nonetheless there has been a contest of the legitimacy of the winner in the 2000 elections[56]. A petition may still be lodged in a country which does not elect its president directly if there is an infraction on the electoral laws and processes.

The right to vote is enshrined in the Constitution of Zimbabwe in terms of section 67 (3) (a)[57]A similar provision appears in the Kenyan Constitution in terms of the article 38[58]. As Constitutional democracies, elections are held regularly and in the people elects their leaders, and once elected, a leader will assume office for a prescribed period.

---

[55] The **two-round system** (also known as the **second ballot**, **runoff voting** or **ballotage**) is a voting method used to elect a single winner, where the voter casts a single vote for their chosen candidate. Despite its name, the two-round system may resolve an election in a single round if one candidate receives enough of the vote, usually a simple majority.[1] If no candidate receives enough of the vote in the first round, then a second round of voting is held with either just the top two candidates.

[56] See **Bush vs Al Gore** (n 1 above)

[57] This provision provides that every Zimbabwean citizen has a right to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret;

[58] See article 38 of the Kenyan Constitution.

It has been said of the right to vote that it lies at the very heart of any democratic electoral system. In **Haig vs Canada** [59] it was stated that:

> "**All forms of democratic systems are founded upon the right to vote. Without the right democracy cannot exist. The marking of a ballot is the mark of destination of citizens of a democracy. It is a proud badge of freedom."**[60]

This chapter will discuss the scope and context of elections in the two countries, Zimbabwe and Kenya. The manner in which elections are conducted will also be discussed alongside the political context of elections in the two countries.

3.1 Historical Context

It is critical to give the historical context which underpinned the constitutional development in the two countries so as to properly place the research. Both countries share a similar political past, both were colonised by the British in the 19th century. Protracted armed struggles resulted in the liberation of the two countries from colonial domination. However the two countries' legal development differs in many material respects. Zimbabwe has the Roman Dutch Law as its common law and the Roman and Dutch common law was imposed on colonisation and Kenya has the English Law as its common law which common also came along with the colonisation. Other fundamental differences are demonstrated below.

3.1.1 Zimbabwe

Much of the legal and political history of Zimbabwe begins with the colonial annexation of the territory. Prior to the colonisation, various chiefdoms occupied the land and had no other laws save for the African customary law which varied from Chiefdom to Chiefdom.

The legal basis for British penetration in Zimbabwe is heralded by the 1888 Moffat Treaty, a treaty concluded between Lobengula and Moffat wherein Lobengula agreed

[59] 16 CRR 193
[60] Ibid.

to refrain from entering into any treaty with other foreigners without the knowledge of Her Majesty's High Commissioner in South Africa. The annexation of Zimbabwe was sealed by the Rudd Concession[61]. Acting upon the Rudd Concession, the British South Africa Company (BSAC) was granted a Royal Charter in 1899 and Zimbabwe was colonised in 1890. The Charter gave the BSAC the power, aiming other things, to establish government power and administer the territory[62]

The major significant event which was to shape Zimbabwean legal development was the proclamation of 06 June 1891 to the effect that the law applicable in the colony as at that date is the law applicable at the Cape of Good Hope as at that date. Effectively, Zimbabwe become largely a Roman Dutch common law jurisdiction. It is important to observe that while the common law at the Cape of Good Hope was largely, Roman Dutch, the commercial law was English Common Law.

Laws in Zimbabwe were thus formulated under the Royal Charter which provided two main law making process: the first being by the ordinances promulgated by the Secretary of State in Britain on the advice of the Board of directors of the BSAC. Secondly, by the proclamations issued by the High Commissioner at the Cape of Good Hope. The country was thus subjected to private company rule, which company would initiate ordinances and was subject to proclamations of Her Majesty's High Commissioner at the Cape of Good Hope.

A new order which was effectively racist was then set in motion. Major features of this new legal and political order were the systematic segregation, exploitation and deprivation of black people by the settler regime. Primitive accumulation legislations and machinery were set in motion, blacks being disposed of their land and other means of livelihood such as cattle and goats. A brutal tax regime which targeted blacks to compel them to provide cheap labour was also activated and a cocktail of racially discriminatory laws were passed.

[61] A treaty concluded between Charles Rudd and Lobengula on 30 October 1888
[62] L Madhuku, Labour Law in Zimbabwe, Weaver Press, 2015 page 12

The oppression suffered by the blacks gave rise to the early trade union movements and political parties such as the Rhodesian Bantu Voters Association, The Rhodesian Railway Workers Association, The African National Congress and the National Democratic Party. These early movements were born out of the need to create equal opportunities between the blacks and the whites in the minority.

A critical event during the colonial domination is the Unilateral Declaration of Independence by Ian Douglas Smith, the Prime Minister from 1965 -1979 which led to a protracted legal challenge by one Madzimbamuto who argued that the UDI was illegal. The matter was decided by the Rhodesian Appellate Division and was appealed all the way to the Privy Council in the United Kingdom. The Privy Council ruled against Madzimbamuto[63]applying the Kelsen's theory of effective control.

The 1960s saw rapid sprouting of African political parties such as ANC, ZAPU, ZANU of National Democratic Party (NDP). The minority rule met these new parties with a lot of repressive legislation, banning of the parties and imprisonment of the political leaders. A protracted armed struggled began in the late 1960s and various negotiation platforms of 1975 failed to deliver an amicable solution until the Lancaster House Conference of 1979 which culminated the independence of Zimbabwe in 1980.

At the independence, Zimbabwe was adopted a constitution, negotiated at the Lancaster House Conference by the dominant political forces, that is ZAPU, ZANU, Rhodesian Front and the British as the former colonial master. The constitution of Zimbabwe was thus posited on it.[64] Clearly the Constitution of Zimbabwe in the 1980 had some provisions which the dominant political class was not comfortable with, since it was a negotiated document.[65] There were also clear cases of ring-fencing of property rights such as land, [66] the white representatives in Parliament among others. Between 1980 - 2013, before the new and current constitution came into force, the Lancaster House Constitution was amended nineteen times. While these amendments may appear like power retention mechanisms, they serve to explain that law is reflection of the will of

[63] Madzimbamuto vs Lardner Barke & Anor 1968 (1) RLR 203 (A)
[64] *See* Zimbabwe Act, (*Cap 60)* passed by British Parliament in 1979
[65] See the provisions on land in the Lancaster House Constitution.
[66] section 16 of the now repealed Lancaster House Constitution.

the ruling class and is the Marxist approach on property rights is not far-fetched when one considers the centrality of land.

The most significant of the Mugabe amendments to the Constitution was the 1987 Amendment Number Seven which created an executive President wherein Mugabe enjoyed the benefits of the American type of presidency and retained the Westminister kind of the parliament. The second most popular amendment under President Mugabe was the Amendment under 17 of 2005 which gazetted all land as specified and it stated categorically that Government was not going to compensate for the improvements.

Following hotly disputed elections in 2008 in which Mugabe lost to Morgan Tsvangirai by 47.8% to 43%, an inclusive government was formed via what was called the Global Political Agreement. The three political parties with representation in parliament came together and created a government of national unity and one of the key mandates of this government was to draw up a new constitution. The demand for a new people driven constitution was not novel, having started in the late 1990s with the formation of the National Constitution Assembly which successfully mobilized the people to reject the Chidyausiku Constitutional Commission Draft in 2000. A new vehicle was thus set in motion to oversee the drafting of the people driven constitution, Constitution Parliamentary Select Committee (COPAC). It was led by three co-chairs, who represented three main political parties and it came up with the current constitution in 2013 which has since been the nipped once.[67]

Zimbabwe's political narrative has always been marred by violent elections. In 2000 Parliamentary elections, at least 30 people were reported to have died due to the political violence and over 5000 harassed.[68] In the 2002 presidential elections more than 50 opposition supporters were also killed via political violence[69]and up to date, the petition by Tsvangirai for challenging the result of 2002 is still pending. In 2008 following Mugabe's loss of the election, more than 300 people, mainly opposition supporters are reported to have died[70]and Morgan Tsvangirai subsequently withdrew from the

[67] See the Constitutional Amendment Number 1 of 2017, gazetted on 7th September 2017.
[68] T. Lodge *et al* *Zimbabwe*: *Compendium of Elections in Southern Africa* (2002), EISA, 445-447.
[69] See GlobalSecurity.com for detailed discussion on this subject.
[70] Report by Crisis Zimbabwe Coalition on Zimbabwe Election Violence

elections citing an unfair playing field as thousands of his supporters had been displaced. The above dynamics and historical facts played a critical role in influencing the letter and spirit of the new constitution. The new Constitution reflects an effort to correct some historical anomalies and a fusion of the demands of the dominant political players, particularly the opposition.

3.1.2 **Kenya**

The Kenyan historical and political narrative is different from the Zimbabwean, though similarities can be drawn between the two countries as indicated above.

Kenya was annexed by the British in1880, and what is modern day was not like what it is but it consisted of various territories of a number of communities and ethnicity was a major issue from the outset[71]. According to Charles Hornsby [72] pre-colonial Kenya was an artificial creation, delineated by the British for their own purposes lumping together neighbours, enemies and some communities that had previously no contact whatsoever. This annexation was to give rise to tribalism later on and much of Kenya's constitutional and political narrative has been dominated by ethnicity and calls for devolution[73].

Independence in Kenya was attained in 1962, following many years of British occupation and colonial legislation which deprived the Kenyans a number of political and human rights as well as segregated on the land distribution and usage[74]. The independence of Kenya came on the back of an armed struggle, mainly led by Kenyan Africa Democratic Union (KADU) and Kenyan Africa National Union (KANU). Jomo Kenyatta was the first president of independent Kenya and he ruled Kenya till 1975 when he died and was replaced by Daniel Arap Moi.

It has been argued that between them, Kenyatta and Moi, they managed to destroy democracy, used excessive violence against people opposed to their leadership.[75] This

---

[71] See a detailed article by Yash Ghai and Jill Cottrell Ghai *Constitutional Transitions and Territorial Cleavages: The Kenyan Case.* Forum Federations, Vol 32, 2019.

[72] C. Hornsby , *Kenya A History Since Independence* , 2014, vol ,47 No 1.

[73] Supra.

[74] Ghai and Ghai (n 69 above) states that at independence Europeans numbered 55 759 but they occupied 16% of arable land

[75] Ibid.

allegation has also been given on Zanu PF in the post-independent Zimbabwe wherein the ruling Zanu PF has been accused of emasculating state power and vicious attack on the voices of dissent.[76]

Upon the elevation of Daniel Arap Moi (he was Kenyatta's deputy) to the Presidency in 1978, the quest for devolution was suspended and new wave of repression ensued. The Constitution was amended and a new clause, Section 2A was inserted into the constitution [77] This signalled the lawful entrenchment of a one party State, parallels may be drawn between the Amendment number seven to the Lancaster House constitution in Zimbabwe wherein then President Mugabe assumed executive presidency and became a de facto dictator. This transposition in the two countries effectively resonates with Professor Hart's positivism approach. Clearly the correctness or morality of the law at some stage in both countries' history was non consequential.

In 1992, the country reverted to multiparty democracy and in the elections of 1992, President Moi won the election. He was later to lose to Mwai Kibaki in 2002. Though multiparty democracy was retained in Kenya in the period extending from 1992 to date, the regime was still criticized for combining elements of democracy and autocracy and has been criticised for violating minimum standards of democracy.[78] Just like in Zimbabwe elections in Kenya have been characterised with violent clashes between supporters of various political formations and several allegations of electoral malpractices have been raised in both countries and the most similar political events are those of the election of 2007 in Kenya wherein violence erupted following a disputed election won by Mwai Kibaki against Raila Odinga. The post electoral death rate topped 1 500 people. There were delays in announcing the results and that undermined the credibility of the Electoral Council. Eventually a grand political coalition, culminating in the formation of a coalition government which created new executive posts, including that of the Prime Minister. This narrative also obtained in Zimbabwe in 2008, an election in which Robert G. Mugabe lost to Morgan Tsvangirai. Results

[76] See the Gukurahundi conflicts and debates among the civic society organizations in Zimbabwe.
[77] This clause effectively banned multi-party democracy and Kenya became a one party State, **de jure**
[78] See Ghai and Ghai, supra

were delayed amidst widespread fears of manipulation of same by ZEC and in the run up to the run off Tsvangirai withdrew from the election citing violence against his supporters and over 200 people lost their lives. Just like with Kenya, a coalition government was created, with Tsvangirai getting the newly created executive post of Prime Minister.

Kenya finally managed to have the new constitution in 2010 following years of lobbying. The major highlight of the lobbying being the rejection of the draft constitution by the referendum in 2002. On the other hand Zimbabwe also had a new Constitution in 2013, following years of intense lobbying for the civil society, particularly NCA which also saw the rejection of the Chidyausiku Draft Constitution in 2000. All the presidential elections in Zimbabwe and Kenya from 2011 have been conducted under the countries' respective new constitutions. However the elections have been hotly disputed.

3.2 **Theoretical Features of Free and Fair Elections**

The Universal Declaration of Human Rights and International Covenant of Civil and Political Rights entrenched rights to political participation. According to this charter "**elections must be periodic, genuine, organised according to the universal suffrage and by secret ballot"** [79]

Overtime, the right to 'genuine' elections came to be interpreted as a 'right to free and fair election. The origins of the interpretation was explained by the South African Constitutional Court in **Kham & Others v Electoral Commission and Another**[80] wherein the court per Zondo CJ said:

> "**Free and fair election entered the general lexicon in 1978 when it featured in the United Nations Security Council Resolution 435 calling for the early**

[79] Article 21 of the Universal Declaration of Human Rights, 10 December 1948 Article 25 of the International Government on Civil and Political Rights, 16 December 1966.
[80] (2015) ZACC 37, 2016 (2) SA 338

independence of Namibia through free and fair elections under supervision and control of the United Nations"[81]

The right to free and fair elections is further entrenched in the African Charter in Elections, Democracy and Governance[82]. Article 11.4 of the African Union Principles on Election amplified this position by exhorting member states to conduct democratic elections 'freely and fairly', by impartial, all inclusive, competent and accountable national electoral bodies stuffed by qualified personnel".[83]The same principles have been embraced by SADC Principles and Guidelines Governing Democratic Elections. [84]

The Zimbabwean Constitution embraces international covenants on free and fair elections. The right to free and fair elections is the foundation of Zimbabwe's constitutional democracy. The Constitution of Zimbabwe begins by "*We the people of Zimbabwe…."* thus committing it to the will and wishes of the people of Zimbabwe.

Under section 3 (2) (b) of the Constitution of Zimbabwe, the right to free and fair elections is given as a founding value. The right to free and fair elections is given under section 67 (1) and under in terms of section 155 (1) of the constitution, it's a guiding principle of the electoral system.

In **Tsvangirai vs Mugabe and Ors[85]** the Constitutional Court of Zimbabwe held that

"a free, fair and credible election for any elective public office is an essence of democratic self-government"[86].

Similar sentiments have been echoed by the Kenyan Supreme Court when it also held that:

"**Elections are the surest way through which the people express their sovereignty. Our constitution is founded upon the immutable principle of the sovereign will of the people. The fact that it is the people and they alone**

[81] Ibid
[82] Article 17 commits State parties to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.
[83] Supra.
[84] Adopted on 20 July 2015, in Pretoria, South Africa.
[85] CCZ 20/17
[86] CCZ 20/17

in whom all power resides, be it moral, political or legal. And so they exercise such power, either directly, or through their representatives whom they democratically elect on free, fair, transparent and credible elections"[87]

Ultimately a free and fair elections appears to depend on the various aspects underpinning a legal system. In **Kham vs. Independent Electoral Commission**[88]. The South African Constitutional Court described the right to free and free election as follows:

*"***There is no internationally accepted definition of the term "free and fair elections". Whether any election can be so characterized must always be assessed in context. Ultimately it involves a value judgment…….it must be stressed that the judgment whether an election was free and fair has to be made in the specific context of the constitution. In certain instances it may be appropriate to be guided by identifiable international norms, where these exist. But the constitutional requirement is that the elections must have a free and fair. This is a single requirement not a conjunction of two separate and disparate elements. The expression highlights both the freedom to participate in the electoral process and the ability of political parties and candidates both aligned and non-aligned, to compete with one another on relatively equal terms…." [89]**

From the foregoing, it would appear that elections are founded on the concept of free and fair and what is "free and fair" is given effect to by the presiding court in light with the principle of separation of powers. Further, the concept of free and fair elections in Zimbabwe must be interpreted in the light of the international covenants in light of section 46 (1) of the Constitution it provides that:

"(1) ***When interpreting this Chapter, a court, tribunal, forum or body—***

(a) must give full effect to the rights and freedoms enshrined in this Chapter;

[87] Odinga & ORS EPP1/2017
[88] 2016 (2) SA 338 (CC)
[89] ibid

(b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;

(c) must take into account international law and all treaties and conventions to which

Zimbabwe is a party;

(d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and

(e) may consider relevant foreign law;

3.3 Constitutional Benchmarks to Free and Fair Elections

3.3.1 The right to vote

The right to vote is a very much contested terrain which has not been universally embraced notwithstanding the existence of the several international covenants committing State parties to observe same. The right to vote generally regarded as a product of western liberal notions.[90] According to L. Madhuku [91], the right is very much dependant on the nature of the electoral system. A direct election is one in which a voter directly elects a particular candidate in an election whereas an indirect election is one in which a voter chooses delegates/ electors to choose a candidate. While Professor Madhuku maintains that the right to vote is dependent on the nature of the electoral system, this research is more focused on whether the right to vote is exercised as per the letter and spirit of the constitution and whether it actually exists in practice and by who is the right taken or diminished.

In **Jelousy Mawarire vs Robert Mugabe and Ors** [92] the Constitutional Court of Zimbabwe generously extended the right to protection of the law under the previous constitution to the right to vote. The court also held in *obiter* that the Applicant's right

[90] Barnett, ibid
[91] L. Madhuku (n 6 above).
[92] CCZ1/13

to vote had been infringed by failure to proclaim election dates when they fell due and directed President Mugabe to proclaim elections.

The current Constitutional of Zimbabwe benchmarks the right to vote and participation in political affairs in section 67 (i) (a) and (b) .In Kenya, the right to vote is entrenched is the constitution under article 38(2) of the Kenyan Constitution.

It appears that much of the question of whether there exist the right to vote depends on the electoral modalities in place. These include the issues of voter registration, the issues of tabulation of votes and counting itself. Protection of the right to vote cuts across the whole electoral process, from voter registration right to the announcement of election results and consequently, a free and fair election in one that ultimately protects the right to vote at each and every stage of the electoral process.

In **Baker vs Carr**[93]it was held that the delimitation of constituencies must create substantially equal voting districts. The same principle was enunciated in the case of **Davis vs Bendemer**[94] where the issue of political gerrymandering came for the consideration in light with the equal protection of the law guaranteed by the fourth amendment to the American Constitution[95]

3.3.2 **Limitation to the right to vote**

The right to vote necessarily entails limitations on who can exercise it and it is not uncommon to have such limitation to the rights. The Constitution of Zimbabwe is however conspicuous about its silence on the limitations. A reading of section 67 reveals no derogation from the right. However the Zimbabwe Electoral law excludes certain categories of people from exercising this right to vote. Restrictions on the right to vote normally takes the following categories;

[93] 369US 186 (1962)
[94] 106 SC (1986)
[95] A Kirshner , *International Status on the Right to Vote*, Democracy Coalition Project, (Unpublished).

3.3.2.1 **Restrictions based on communities' membership**

These would include status of a citizen; aliens are not allowed to vote in Zimbabwe and Kenya.

Residence status of a person also affects his or her right to vote. In some countries, language is a sufficient basis to exclude the right to vote. Even Zimbabwean citizens who are resident outside the country do not have a right to vote. In **Gabriel Shumba & 2 Ors vs Minister of Justice and Legal and Parliamentary Affairs & 6 ORS** [96] the Constitutional Court rejected an application by Zimbabwean citizens resident in other countries to exercise the right to vote. Canada[97]among other countries imposes a residency restriction on voting.

3.3.2.2 **Restrictions based in competency / autonomy**

The Zimbabwean and Kenyan electoral systems places an age restriction on the right to vote. The minimum age requirement is eighteen years of age[98]. The age is not specified in the Constitutions but the respective Acts appears to do gap filling for the Constitution. Mental Health patients are also precluded from the voting though this doubtful given the absence of machinery to detect same during voting process in Zimbabwe, particularly on registration to vote and on polling days.

3.3.2.3 **Restriction as a form of punishment**

Prisoners are not allowed the right to vote. While the Constitution does not specify them as excluded, the Acts in the respective countries restricts this. The constitutionality of this restriction is very questionable. Electoral fraud also on polling day also precludes one from voting.[99]

---

[96] CCZ 3/18

[97] **Frank vs Canada Attorney General** 2015 ONCA 536

[98] See Electoral Act in Zimbabwe and the Elections Act in Kenya.

[99] Ibid.

3.4 **Key Institutions Involved in Elections**

3.4.1 **Introduction**

As has been observed above, the right to free and fair elections gives concrete effect to the right to vote and other political rights. In **New National Party of South Africa vs. Government of the Republic of South Africa** [100] the South African Constitutional Court observed that; "**the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for democracy, it is both empty and useless"**[101]

3.4.2 **Zimbabwe Electoral Commissions (ZEC)**

Section 238 of the Constitution of Zimbabwe establishes ZEC and mandates it to handle all electoral processes in Zimbabwe. Free and fair elections necessarily require an independent and competent ZEC. Section 238 provides that the Chairperson of ZEC will be appointed by the President in consultation with the Judicial Service Commission and Parliamentary Committee on Standing Orders. The President does not directly appoints the commissioners to ZEC, giving ZEC an ambience of independence.

Section 156 of the Constitution of Zimbabwe enjoins ZEC to ensure that:

(a) Whatever voting method is used, it is simple, accurate, verifiable, secure and transparent.

(b) The results of the elections or referendums are announced as soon as possible after the close of the polls.

Section 239 of the Constitution further obliges ZEC to ensure that elections are conducted "efficiently, freely, fairly, transparently and in accordance with the law".

3.4.3 **Independent Electoral and Boundaries Commission (IEBC)**

The IEBC is established in accordance with article 88 of the Kenyan Constitution and the **Independent Electoral and Boundaries Commission Act, 2011.** The members of

[100] 1999(3) SA 191 (cc)
[101] Ibid.

the IEBC are appointed by the President and confirmed by the Parliament. Commissioners of the IEBC are not supposed to be members of any political party and they are strictly vetted.

> Article 86 of the Kenyans Constitution provides as follows**:**
> ***At every election, the Independent Electoral and Boundaries Commission shall ensure that—***
> ***(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;***
> ***(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***
> ***(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***
> ***(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.***

It is not surprising that the provision is similar, almost word for word with the one contained in the Zimbabwean Constitution. This is similarity can be explained by the recent political developments in the two countries and also the global trends on constitutionalism.

Article 138 (3) (c) also reiterates, just like the Zimbabwean Constitution, principles of integrity, transparency, accuracy, accountability, importance, simplicity, verifiability. And similarly with the Zimbabwean Constitution, the Kenyan Constitution is augmented by the Elections Act.

The IEBC is tasked with handling of elections in Kenya. It is the central institution responsible for the conduct of elections and is charged to with the provisions duty of protecting the right to vote ensure the credibility of the process. Its none compliance with the electoral resulted in the 2017 Presidential election being nullified. See the 2017 Odinga judgement.

3.5 **Constitutional Supremacy**

The most important constitutional benchmark in presidential elections is the recognition of the doctrine of supremacy of the constitution. Section 2 of the Constitution of Zimbabwe which provides as follows:

> **Supremacy of Constitution (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.**
> **(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.**

The overall effect of the supremacy of constitution is that all conduct of state organs must be tested against the constitution and any conduct that is not consistent with the constitution in void to the extent of the inconsistency. In **Marbury vs Madison**[102]the Supreme Court of America emphatically asserted the right of the court to review conduct of the other arms of state. Further by implication the existence of the separate arms of state in Zimbabwe, that is, the executive, the legislature and the judiciary are telling of the fundamental place which is occupied by the doctrine of constitutional supremacy. It follows that elections must be held consistently with the Constitution.

3.6 **Political Questions Doctrine**

Political questions doctrine is one of the means by which the judiciary's power is restrained from encroaching into the other branches of the government. While in both Zimbabwe and Kenya the question of determination falls squarely for determination by virtue of the two constitutions, the approach taken by the courts has strong implication on the doctrine of political questions and court have shown a tendency of refraining

---

[102] 1803 5 US 137

from delving much into the issues of elections which on their own are largely political disputes.

Zhou H[103] observed that; "**there may be issues which are of a purely political nature which are better left to the electorate to determine through elections. Where those arise, the courts would be justified in declining to exercise power of review**.'' It is submitted that to a certain degree, the political questions have influenced the judiciary in the two countries under review. The **Nelson Chamisa case** has strong connotations of the court's unwillingness to set aside an election and the court appears to avoid the whole electoral matrix on one point: 'There is no evidence placed before us". In the **Raila Omolo Odinga vs Uhuru Kenyatta and Ors** [104]O.B Ojwang's dissenting judgement had the following remarks:

> **'Such is the jurisprudential context in which I have considered the petition herein. The majority decision, in effect, holds that the Court may, quite directly, engage the course of national history – through a precipitate assumption of recurrent policy-making or political inclinations and mandates. In my considered opinion, judges, where the making of history devolves to them, should focus their attention in the first place, upon the intellectual and jurisprudential domain – rather than upon the workaday motions of general policy and politics which devolve to the citizens themselves, and to the political agencies of state. Clearly indicates that the courts were not supposed to go deeper on matter otherwise settled politically.[105]**
>
> **The above clearly demonstrates the unwillingness of the courts to settle political matters which are otherwise best settled in the political spheres. [106]**

[103] See 2018 LLM Thesis, University of Zimbabwe, Unpublished.
[104] Election Petition (2012)
[105] Ibid.
[106] See also **Bush v Al Gore** wherein the court stated that: 'The court stands in admiration of the Constitution's design to leave the selection of the President to the people …and to the political sphere". The court went on to remark of its unwillingness to delve into the matter when it said '….when contenting parties invoke the process of the courts. It becomes our unsought responsibility to resolve the constitutional issues that the judiciary has been forced to confront'.

Other doctrines of constitutional law such as ripeness, prematurity and abstractedness do not appear to apply and the only pronounced applicable doctrine is that of political questions and to a degree avoidance.

3.7 Conclusion

In summary, thus chapter analysed the theoretical aspects of the elections, in both Zimbabwe and Kenya. The chapter further looked in to the key considerations in the electoral processes in both countries, including the various aspects of the right to vote, the central institutions involved in the elections.

CHAPTER FOUR

PRESIDENTIAL PETITIONS: APPROACH OF THE COURTS

4.0 Introduction

In terms of section 158 [107] of the Constitution of Zimbabwe, Zimbabwe now conducts its Presidential election concurrently with Parliamentary general elections and local authorities. This essentially means that a voter is issued with three ballot papers, one for the President, one for the local councillor and one for the Member of Parliament/House of Assembly representative. The Presidential Petition is governed by section 93 of the Constitution of Zimbabwe as read with the Constitutional Court Rules (S.I 161 of 2016) and the Electoral Act. In Kenya, a petition challenging the validity of the election of the President is informed by Article 140 [108] as read with the Elections Act and the Regulations made thereunder. This chapter seeks to give a comparative analysis the approaches of the various jurisdictions to electoral petitions.

4.1 General Approach of Courts

The leading authority which informs the general approach of the courts in deciding electoral petitions is the case English case of **Morgan vs Simpson.** Lord Denning and Lord Stephenson formulated the test for setting aside elections. The two learned judges articulated the test as follows:

1. **If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.**

---

[107] 158(2)

[108] *Section 140 provides as follows : A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.*

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President elect to be invalid, a fresh election shall be held within sixty days after the determination.)

2. **If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.**

The Uganda Supreme Court in **Col Dr. Kizza Besigye vs Attorney General** said the following:

> '**Annulling of Presidential election results is a case by case analysis of the evidence adduced before the Court. Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The Courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election.**[109]

It is clear that the generally followed trend is that enunciated by Lord Denning and Lord Stephenson above and it can be summarised as follows;

The first limp – If there is lack of compliance with substantial electoral provisions, the corresponding effect is irrelevant as the election should be annulled. The second limp being that if the mistake or breach is trivial, the election can only be set aside if the triviality affects the results of the election.

What has obtained in the determination of the electoral petitions is the juggling of the two tests and the issue of judicial discretion has been very central in the determination of the election petitions.

4.2 The Zimbabwean Approach

The courts have always been called upon to decide election petitions. The first case to be reported in post independent Zimbabwe is the case of **Pio vs Smith**[110] which was a

[109] Constitutional Petition No 13 of 2009 [2016] UGCC 1

[110] 1986 (3) SA 145 (ZH)

challenge to the 1985 parliamentary elections. What is intriguing about the case is the fact that the courts have been called upon the interpret the same contentious issues of electoral malpractices in parliamentary elections, even in presidential petitions. The increase in political parties at the turn of the millennium resulted in more petitions being filed as the political environment became polarised. In 2001, the High Court of Zimbabwe handed down judgments in parliamentary elections and set aside the elections of several House of Assembly members [111]the Members of Parliament appealed and suspended the High Court judgements the MPs were only left with a few months before the next elections when the appeals were decided. The 2002 Presidential Petition is still pending. Generally, it is a daunting task to set aside an election in Zimbabwe. The 2008 all parliamentary petitions were all dismissed on technicalities and 2013 Presidential Petition [112] was determined and dismissed notwithstanding that the Petitioner, Morgan Tsvangirai withdrew the challenge citing inability to obtain an order from the electoral court which would have enabled him to obtain access to official voter information in the sealed ballot papers. It is the broad and sweeping pronouncement by the Constitutional Court of Zimbabwe that the 'harmonised elections of 2013 was free, fair and credible'[113]when it was conducted concurrently with the parliamentary and local authorities election that is most fascinating. It is further amplified by the decision of the court to determine issues not before the court[114] and the inclination to apply technical aspects that appears to have carried the day. This clearly betrays a case of constitutional avoidance as the court was not prepared to deal with the merits of the case and get to the bottom of the matter.

4.3. Political considerations

In **Tsvangirai vs Mugabe & Ors**[115] the court made the following subtle remarks:

[111] **Hurungwe East Election Petition 2001 (1) ZLR 285, Buhera North Election Petition 2001 (1) ZLR 295, Mutoko South Election Petition 2001 (1) ZLR 311**
[112] Tsvangirai v Mugabe and Ors CCZ 20/ 17
[113] See Constitutional Court Order
[114] See findings of the Chief Justice on the ZEC server when dismissing the subpoena duces tacum
[115] CCZ 20/17

"An **election of a President is bound to generate profound public interest, not necessarily measured by the number of votes cast in the election. Stakes are very high and political tensions may rise to levels that threaten public order and national security. The election of the President is not about finding an answer to the question who of the candidates should be the leader of the government. It is about choosing a leader who will have the interests of all Zimbabweans at heart and has the intellectual ability to exercise the powers of the office in accordance with the fundamental principles and values on which a democratic society is based to change the lives of the people for the better.**

By the very nature of the circumstances in which it arises, a petition or application challenging the validity of an election of a President alleging that the President elect stole the election requires effective and urgent determination of the matter on the merits. It is indicative of simmering political tension and potential disturbance of public peace and tranquillity…."[116]

The above clearly betrays that the substance of politics prevailing in Zimbabwe during elections has an influence on the judges in their determination of a Presidential Petition. It is respectfully submitted that an election is just that: the expression of the preferred candidate by the electorate via a democratic process that is free and fair, the court has no business in analysing the qualities of a candidate who has made it on the ballot paper for selection via election. The courts, or rather the Zimbabwean court has a political barometer wherein it gauges the "simmering political tensions" and then steps in at once. The position resonates well with Professor Dworkin's words; "**Judges, like all political officials are subject to the doctrine of political responsibility"[117]** The theory of Ronald Dworkin which he says judges will discover the law becomes salutary, how the judges view the society, their political considerations which are influenced by the need for peace and a candidate who will embrace the aspirations of all Zimbabweans

[116] Ibid

[117] R. Dworkin,

becomes determinative. It suffices to note that there has never been a consistent approach to Zimbabwean electoral petitions by the Zimbabwean courts.

In **Moyo and Ors vs Zvoma N.O and Anor**[118] the Zimbabwean Supreme Court nullified the election of the Speaker of the House of Assembly on the basis that there were seven irregular votes. The irregular votes, even impugned, had no effect on the election as the winner would still be the winner.

4.4. The test for setting aside the election

The Zimbabwean Constitutional Court has embraced the test enunciated by Lord Denning in the Morgan v Simpson case. The Denning Test resonates well with the general approach adopted by the English courts. In the old case of **Woodword vs Sarson**[119] Coleridge CJ said the following:

> **"As to the first point, we are of opinion that the true statement is that an election is to be declared void by the Common Law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to void it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation or to be prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not open or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of**

[118] 2011(1) ZLR 345
[119] 1875 LR 10 CP 733

votes or false declaration of numbers by a Returning Officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void …".[120]

In **Chamisa vs Mnangagwa and 23 Ors**[121] the court per Malaba CJ also embraced his own dissenting opinion in **Moyo N.O vs Zvoma** (supra) as follows **"An election ought not to be held void by reason of transgression of law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is the success of the one candidate over the other, could not have affected by those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it was open to reasonable doubt whether these transgressions may not have affected the result and it [was] uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election**

[120] Ibid.
[121] CCZ21/19

> **void. It appears to us that this is the view of the law which has generally been recognised and acted upon by the tribunals which have dealt with election matters. (the underlining is for emphasis).**

It is submitted that the test applied in the leading authority, **Morgan vs Simpson**[122] has been followed in Zimbabwe. This test, while it has been universally applied, has nonetheless differed in its application from jurisdiction to jurisdiction as various courts have given their own peculiar interpretation to it. The test focuses on the effect of the irregularities complained of and its effect on the result, on one hand and whether or not the electoral process was materially flawed, and the extent of the flaws in the electoral process on the other hand. The researcher is inclined to agree with the recent Malawian Supreme Court decision wherein it gave effect to the election process rather than the result, which result could well be misleading if the process of the election was materially flawed. Respectfully, the Denning Test needs to be restricted to compliance of the electoral process with the Constitution and once an election fails that test, it must be set aside since the figures are a reflective of the process and it may be difficult to annul an election on the test of figures alone.[123]

4.5. Statutory Test for annulling a Presidential election

The principal operative legislation in elections in Zimbabwe is the Electoral Act (Chapter 2.03). Section 177 of the Act informs the test for and is inspired by the Constitutional test discussed above. Section 177 reads:

> ***An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that— (a) the election was not conducted in accordance with the principles laid down in this Act; and (b) such mistake or non-compliance did affect the result of the election.***

This provision creates a problem in interpretation on the face of it. Subsection (a) of section 177 address irregularities that result in non-compliance with the principles laid

[122] Ibid.

[123] **Prof Peter Mutharika and Anor vs Dr Saulos Klaus Chilima and Anor MSCA Appeal 1of 2020**

out in the Act which ordinarily includes the principle of free, fair and credible elections. Sub paragraph (b) address irregularities that may affect the result of the election, even if the election is otherwise in accordance with the principles of free and fair elections under section 3 of the same Act.

The challenge with the provision (section 177) is the use of the word 'and' in the conjunctive sense and not the use of the word "or" which would create a disjunctive sense. It appears the courts in Zimbabwe have not given the position on this aspect. However, a similar provision has been pronounced in a strong case law and held the similar provision to be disjunctive. See the decision by Gubbay J, in **State vs Ncube** [124]

It would also appear that a conjunctive reading of section 177 of the Act would result in abnormal decisions as virtually no presidential election can be overturned. There exists the real danger as well of violating section 165 of Constitution of Zimbabwe which provides the principles governing the judiciary.

4.5.1 **The Primary Evidence Rule**

The Zimbabwean courts appears to have adopted a very narrow approach in terms of evidence required to annul an election. In the Chamisa Petition, the court made a ruling that the Petitioner ought to have produced primary evidence in terms of the Section 67A and 70(4) of the Electoral Act and the court pointedly ruled that the failure to produce primary evidence was detrimental to Petitioner's case.

Malaba CJ went on the state that primary evidence rule disallows the use of evidence other than the primary evidence where that evidence is in existence. [125]The Zimbabwean Constitutional court per Malaba CJ strangely relied on a rare and old authority for its proposition on the "primary evidence rule" , the case of **Doe D. Gilbert v Ross (1840) 7M & W 102 at 106** (as referred to in Duhaime's Law Dictionary,) which provides as follows:

[124] 1987 (2) ZLR 246
[125] Chamisa case CCZ1/19,pp 96.

> **"The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach, which he does not produce."[126]**

With utmost respect, the departure from the ordinary and current jurisprudential norms being adopted by other countries on evidence signalled the reluctance of the apex court in Zimbabwe to set aside the election of Emmerson D Mnangagwa. In Kenya [127] and Malawi, [128] wherein the court directed the opening of the voter residue in order to appropriately ventilate the malpractices complained of in the elections.[129]

Thus the court ruled in the Chamisa Petition that the Petitioner ought to have exploited section 67 AD & 70 (4) the **Electoral Act** in order to obtain primary evidence and that settled his case. In 2013, **Tsvangirai vs. Mugabe and Ors,** Tsvangirai withdrew his petition citing the fact that ZEC had refused to furnish him with the primary evidence which he wanted to use for the purposes of prosecuting his case. This inconsistent position creates a problematic scene where the courts are clearly reluctant to protect an aggrieved candidate who wants to access information to prosecute his case. Where a Petitioner approaches the courts without same, the petition is dead from the outset.

In the Chamisa Petition, the Petitioner at some stage before the main hearing of the Petition itself, approached to the court seeking a *subpoena duces tecum*. A *subpoena duces tecum* is a subpoena issued under a court order compelling a person to produce documents which the courts is satisfied are relevant evidence of a matter under determination. The decision to be made by the court is whether or not the information needed is necessary under the force of a *subpoena duces tecum*.[130]

The Constitutional Court declined to issue the *subpoena duces tecum*, and when the Application was placed before the court in chambers, the Chief Justice commented as

---

[126] Ibid.
[127] Raila Odinga 2017 decision
[128] *See* Chilima &Chakwera v Mutharika CR 1/2019
[129] See J. Hachard "*Election Petitions and the Standard of Proof*" 2015, vol 17 The Denning Law Journal.
[130] See **Poli v Minister of Finances and Economic Development & Anor 1987 (2) ZLR 302 (s), Netone Cellular (Pvt) Ltd and Anor vs Econet Wireless (Pvt) Ltd and Anor, SC47/18**

follows; **"The decision whether or not the subpoena is to be issued is for the full court to make after weighing the issue of relevance of the evidence to be produced".**[131]

This approach by the Chief Justice, with respect is very controversial. Firstly, he clearly declined to entertain a matter where a party sought the availing of certain evidence for the purposes of prosecuting his case. Deferment of such an issue to the full court is clearly an injustice as the Petitioner would not have access to the information which he wanted, on the other hand, the court was ready to apply the primary evidence rule to his detriment. Against such reasoning, even if the Petitioner had approached the court in terms of Section 67 A and 70 (4) of the Act, no different position would obtain. Mirriam Azu tackles the various underlying factors which influence judges in deciding petitions.[132]

In **Hove vs Gumbo (Mberengwa West Election Petition Appeal)**[133] the Supreme Court made the following salutary remarks:

> **"For a court to set aside an election the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence …. The duty of the court is to determine whether the petitioner has by evidence adduced established the cause of his complaint against the election result. The effect of s 132 of the Act is that a petitioner complaining of an undue election must state the nature of the cause of his or her complaint. The cause of complaint must be clearly and concisely stated at the time of presentation of the petition …."**[134]

It is clear from the foregoing that the refusal by the Chief Justice to allow and ventilate the subpoena as requested by the Petitioner was fatal to be the Petitioner's case. The court clearly stood in the way of the best evidence. The comments by the Chief Justice on why he refused the Petitioner a subpoena are thus irrelevant since he technically

---

[131] Ibid
[132] M. Azu "*Lessons from Ghana and Kenya on why Presidential Petitions usually fail*" 2015, Vol 15 African Human Rights Law Journal.
[133] 2005 (2) ZLR 5 (S),
[134] Ibid

washed his hands off the subpoena. The court bizarrely relied on evidence not before it when dealing with the issue of the subpoena, particularly when it found that ZEC had no electric server. This finding of fact remains incorrect particularly when no evidence was considered by the Chief Justice, more so it is inconceivable that ZEC has no database when the voter registration process was conducted via biometric registration process and there is a soft copy of the voters roll.

4.5.2 **Standard of Proof**

The Zimbabwean Constitutional Court is generally follows the trend in any jurisdiction that any electoral fraud must be proved beyond a reasonable doubt. This question arose in the Chamisa case and the Zimbabwean Constitutional Court followed Nigerian Supreme Court in **Buhari vs Obasanjo**[135] wherein the Nigerian Supreme Court settled the position as follows:

> **"He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party."**

Firstly it would appear that the same position is followed in Kenya.[136] The Constitutional court in Zimbabwe has held that it is the Petitioner who must prove his case to the satisfaction of the court" Malaba CJ had the following to say in the Chamisa Petition: [137]

> '**It was incorrect for the applicant to suggest that since the Commission came up with the figures that were announced as the Presidential election result, the Commission bore the onus of proving that the figures were indeed**

[135] 2005 CLR 7 (K) (SC)
[136] **Raila Odinga & 5 Ors vs EBC supra, and Amama Mbabazi vs Museveni & Ors Presidential Petition 1/2016.**
[137] Chamisa case on pp 84

correct. That position is unsustainable, most fundamentally in the light of the presumption in favour of the validity of the Presidential election.'[138]

The same reasoning was applied in **Moyo & Ors vs Zvoma N.O and Anor**[139] The net effect of this principle is that an election can only be set aside when the irregularity complained of is so great in the magnitude ' that it goes to the heart and magnitude of the entire process.' This comparative jurisprudence appears to be followed in **Woodward vs Sarsons**[140] Ghana, Kenya, Uganda Nigeria, England and Canada.

This approach while comparatively followed the world over in many jurisdictions, appears to base on the attitude of the bench and the political dynamics of the various countries it has been applied. The recent Malawian Petition which set aside the election of President Mutharika is one case where the bench appears to have been liberal. [141]In that case, the court observed that;

".....**considering the activities involved in an electoral process, it is almost impossible to have an election that is completely free of any irregularities or anomalies. However in the present matter, it has been our finding that the irregularities and anomalies complained of have been so widespread, systematic and grave such that the integrity of the results has been compromised"**

Crucially and fundamentally, the Malawian Court adopted a liberal approach and it proudly declared as follows;

"**Court have adopted a standard of proof that is whorl and generous when it comes to the vindication of constitutional rights……This court has taken a view that this is the right approach to adopt where human rights**

[138] Ibid.
[139] 2011 (1) ZLR 345
[140] (1875) L.R 10 C.P 733.
[141] See Chilima & Chakwera vs Mutharika & Anor CRQ/2019)

guaranteed under the Constitution and implicated and sought to be vindicated" [142]

It is submitted that the Zimbabwean Approach, whilst it has strong similarities with other jurisdictions, its rigid and decisively undefined procedural rules makes the approach a difficult one to set aside a Presidential election. The rigidity with which a petition must be concluded militant against gathering of enough on the petition. The rigidity with which the court approaches the matter compounds a Petitioner's case see **Chiyangwa vs Matamisa**[143]

4.6 The Kenyan Approach

4.6.1 Introduction

Much of Kenya's electoral law developed post the 2010 Constitution conceived during the inclusive government of Mwai Kibaki, Raila Omolo Odinga and other smaller parties following the violent 2007 election. Of much significance are the two judgments in Kenya, the Odinga case of 2013 in which Raila Odinga unsuccessfully sought to invalidate the Kenyan 2013 Presidential election and the 2017 Raila Odinga case in which Raila Odinga successfully invalidated the Presidential elections. The Kenyan court reached two different positions on the test to apply where a Presidential election is being challenged, the 2013 judgement applying the first limp of the Denning test and the 2017 applying both limps.

4.7 The Constitutional Test for Setting Aside a Presidential Election in Kenya

A petition challenging the validity of a presidential election is made in terms of Article 163 (3) (a) and 140 of the Constitution as read together with the provisions of the **Supreme Court Act 2011**[144] and the **Supreme Court (Presidential Elections) Rules.** The judicial powers to hear and determine such a petition is provided for in Article 166 of the Kenyan Constitution. If follows that the Supreme Court's jurisdiction to preside

[142] Malawian Election Petition, para 393-394 of the judgement.
[143] 2001(1) ZLR 334.
[144] Act No. 7 of 2011

over such a matter is limited to the presidential election and 'will grant orders specific to the presidential election'[145]

The Raila Odinga case of 2013 relies largely on the **Morgan vs Simpson** case and it embraces the two limps enunciated by Lord Denning. The court in dealing with a provision of the Elections Act, Section 83 of the Elections Act[146] provides as follows:

> "**No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election process was concluded in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election".**

The Kenyan Court was evidently influenced by the constitutionally entrenched right to free and fair elections and the principles of democracy and openness that are hallmarks of the Kenyan Constitution. It held that a disjunctive reading would better promote those rights and principles. The Kenyan Supreme Court concluded that the provision had to be interpreted as follows:

> **"[T]he two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election'**

[145] Ibid.

[146] Act No. 24/2011

The Kenya Supreme Court has further taken a robust approach when it comes to figures and collating of votes. In the 2017 Raila Odinga case the court ordered the Forms 34 and 36 used in the collating of votes to be reopened to allow the Petitioners a chance to further scrutinize them. It thus summed it in one statement "numbers must simply add up*".*[147].

The 2013 Raila Odinga case appears to follow the Zimbabwean approach where the two limps are observed but the petition falls on evidence. In this instance, the court exercised its discretion and made a finding that the technicalities complained of would not affect the outcome of the election. The question of the material flaws in the electoral process becomes merely academic as the decision is up to the court to make on whether the evidence placed before it lays a case for setting aside an election.

Thus, in the headnote to the 2013 Raila Odinga case the Supreme Court opined as follows:

> **"The conduct of the presidential election was not perfect, even though the election had been of the greatest interest to the Kenyan people who had voluntarily voted. Although there were many irregularities in the data and information captured during the registration process, they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the first respondent, for the purpose of causing prejudice to any particular candidate." [148]**

The 2017 Raila Odinga case further took a robust approach the Presidential electoral process in Kenya, stating authoritatively that an '*election is not an event but a process'*. The court relied on the Indian cases of **Kanhiyalal Omar v R. K Trivedi & Ors**[149] and **Union of India vs. Association of Democratic Reforms and Another**[150] where the word 'election' was used in a wide sense to include the entire process of an election

[147] *See the majority judgement , Raila Odinga 2017 decision.*
[148] See the ratio in the 2013 Odinga judgement.
[149] 1986 AIR 111
[150] 2002 (3) SCR 292.

which consists of several stages and embraces many steps, some of which have a bearing on this electoral results. These stages, according to the Kenyan Supreme Court, include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results. The Kenyan Supreme Court relied on Lady Justice Georgina Wood, when she captured the same point as follows:

> '**The Electoral process is not confined to the casting of votes on an election day and the subsequent declaration of election results thereafter. There are series of other processes, such as the demarcation of the country into constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results and so on'**[151]

Thus the conundrum surrounding the electronic transmission of results and non-compliance with forms 34A of the Elections Act was decisively dealt with by Maraga CJ in the 2017 Raila Odinga decision and the election was annulled. The court took the view that electoral processes are sacrosanct and ought to be observed. While this approach appears questionable, the Malawian High Court has also weighed in recently, arguing that it is impossible to have a completely perfect election, but nonetheless, the overall electoral process must comply with the laws of the land.

4.7.1 **Evidence and standard of proof**

The evidence that is required in a presidential election petition in Kenya is another unsettled feature of the country's electoral laws. In 2013 Raila Odinga Case, the Supreme Court held that the test was neither criminal proof beyond a reasonable doubt nor civil proof on a balance of probabilities. The court thus concluded that an "***alleged breach of electoral law, which leads to a perceived loss by a candidate…takes different considerations***"[152]. Thus the court evaded a clear opportunity to lay down the

---

[151] Lady Justice Georgina Wood, —International Standards in Electoral Dispute Resolution‖ in the Book —Guidelines for understanding Adjudicating and Resolving Disputes in Elections‖, Guarde, Edited by Chad Vickery (2011) at page 8.

[152] *See para 297 & 298 of the judgement*.

law on the standard of proof required in petitions and it would appear that the court wanted the basis judicial flexibility and that is consistent with Dworkin approach where he says, '*judges do what they like'.*

The Raila Odinga 2017 decision adopted a different approach on evidence required in Presidential petitions ,Maraga CJ commented as follows: '**We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt'**[153] The same principle is also articulated in the case of **M. Naraya Rao vs. G. Ventaka Peddy of Another** [154].

In essence, the Kenyan 2017 petition resonates with the unanimous decision in the Zimbabwe Constitutional Court in the Chamisa Petition on the question of onus, citing the same authorities[155]. Interestingly, the two judgements reach a different conclusion on what constitutes a discharge of the onus and the cogent evidence led during the hearing of the matter.

The inquiry of the Court in the 2017 Odinga case with regards to allowing access to Petitions to the servers, allowed Petitions to have access to the Technical Partnership Agreements between IEBC Election Technology System would not have carried the day here in Zimbabwe. The refusal by bench in the Chamisa Petition to have ZEC open its servers is one such difference in approach. The 2017 Kenya decision took serious issue with IEBC for failing to avail two of the servers to the Petitioners and failing to complete the Forms 34A on time, resulting in unverified results being announced [156] and a violation of Article 292 of the Constitution, a position was the court could not condone and took as gross. The Kenyan Supreme Court was very much ready to give IEBC a chance to debunk the allegations made by the Petitioners, thus allowing itself the chance to assess the magnitude of the violations so alleged.

---

[153] See para 152 of the judgement.
[154] 1977 (AIR) SC 208
[155] Buhari vs Obasango (2005) CLR 7
[156] See the 2017 majority decision.

4.7.2 **Political Considerations**

The judges of both the Raila Omolo Odinga cases were very much alive to the political dynamics of the society. The 2013 Raila Odinga decision was accepted by all parties and it allowed for progress in a country fraught with political disturbances. The 2017 Raila Odinga decision presents much of these political considerations in concise form. The learned Maraga CJ quotes the Kriegler Report of 2007 as follows:

> **'The acceptability of an election depends very considerably on the extent to which the public feel the officially announced election results accurately reflect the votes cast for candidates and the parties. It depends, too, on factors such as the character of the electoral campaign and the quality of the voter register, but reliable counting and tallying is a sine qua non if an election is to be considered legitimate by its key assessors-the voters[110]….The system of tallying, recording, transcribing, transmitting and announcing results was so conceptually defective and executed (sic)…[111]Counting and tallying during the 27-30 December 2007 (and even hereafter) and the announcement of individual results were so confused- and so confusing- that many Kenyans lost whatever confidence they might have had in the results as announced. While integrity is necessary at all stages in the electoral process, nowhere is it more important than in counting and tallying'**[157].

The above sentiments illustrates a bench sensitive to the past political horrors that claimed over a 1000 people in 2007 and the need by the court to respect and safeguard the sanctify of the electoral process to the satisfaction of all political participants.

4.8 **General Comments**

The electoral aspects as approached from various jurisdictions to Presidential petitions have been discussed herein to give a comprehensive insight into the approaches of Zimbabwe and Kenya. It will be observed that while the same comparative

[157] See page 49 the majority judgement

jurisprudence which cuts across the majority of countries where a president is directly elected by the electorate; there remains fundamental features which differs from country to country. The following key features obtain:

A liberal bench is likely to urge all the parties to lay bare that facts so as to decide the matter. A rigid bench will hold fast on the need for a petition to produce evidence, even in situation which the evidence, even in situations where evidence is in the dormain of another party. It was similarly shocking for the Constitutional Court in Zimbabwe to rule that ZEC has no electronic server when the voter registration was conducted via BVR method and when the same ZEC provided consolidates prior of the election with soft copies of the voter register.

A liberal bench will likely be careful in its approach to the Presidential Petition Kenyan bench did in 2017 in ensuring that its findings do not affect the other electoral challenges in the lower courts. This needs to be compared with the 2012 order of the Constitutional Court where the apex court in Zimbabwe declared that the 2013 general election was "free, fair and credible and had been conducted in terms of the laws of Zimbabwe, thus indirectly compromising petitions pending in the lower courts.

A liberal bench will not pay an outlandish approach to its own Rules, rather , all tests as to the validity of election is a function of the Constitution and all that matters is for the court to interpret the rules in the context of what the Constitution seeks to achieve itself. It is trite law that delegated legislation cannot attenuate a Constitutional provision. This question came to light in the Chamisa petition wherein the court took a view that the rules of the Constitutional court were well applicable and interpreted same in peremptory terms, thus expunging certain documents from the record leaving the Petitioner's case exposed. See **Zimbabwe Township Development vs Lou's shoes** wherein the court made the following subtle remarks that:

> "**Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of**

legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution."[158]

A much more progressive bench will regard rules as they are. Rules must not be regarded as an end in themselves. Rules are procedural tools, fashioned by the court to enable it to dispense justice. [159]

In contrast, the Kenyans are very clear that even section 83 of their Elections Act must be interpreted so as to achieve the intention of the legislature. Thus Article 20(3) of the Kenyan Constitution stipulates:

"In applying a provision of the Bill of Rights, a court shall:….

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom"

[158] The same legal premise has been applied consistently in Zimbabwe, vide **Minister of Home Affairs v Bickle & Ors 1983 (2) ZLR 431 (S)** at 441E–H, 1984 (2) SA 39 (ZS) at 448F–G; **S v A Juvenile 1989 (2) ZLR 61 (S) at 89C,** 1990 (4) SA 151 (ZS) at 167G–H.).

[159] **Profert Zimbabwe (Pvt) Ltd v Macdom Investments (Private) Ltd HB-83-16)**

> The Supreme Court is under obligation under Article 20 (4) (a) to promote "*the values that underlie an open and democratic society based on human dignity, equality, equity and freedom?"*[160]

Of significance in Kenya, something totally missing in Zimbabwe is Article 159 (2) (d) of the Kenyan Constitution which provides that "*justice shall be administered without undue regard to procedural technicalities*". This provision is in light with asserting the Supremacy of the Constitution and it is with tremendous respect, a far cry from the Zimbabwean approach which covertly relies on the rules, especially when one factors in that rules are not constitutionally provided for, but created by the judges. Rule 23 of the Constitutional Court Rules sets a new provision altogether and the Malaba approach suggests that the rules are an extension of the Constitution.

4.9 **Conclusion**

This chapter illuminated the position of the law in Zimbabwe, Kenya and a host of other countries on certain determinant features in Presidential Petitions. Issues of evidence, issues of the relevant evidence and its threshold have been canvased, though admittedly this is very wide area which this research cannot look at each and every feature and its corresponding effect and treatment in another jurisdiction but had to confine itself with the major ones. Nonetheless, there is sufficient discussion on how the two countries comparatively treat Presidential Petitions.

[160] See also Article 20(4) (a) of the Kenyan Constitution.

CHAPTER FIVE

CONCLUSIVE REMARKS

5.1 Introduction

This thesis has unpacked electoral law in general and approaches of various jurisdictions on Presidential elections in particular. While the primary focus was on Zimbabwe and Kenya, several countries which also do direct presidential elections were also discussed with a view to illuminate the Zimbabwean and Kenyan presidential petitions. The nullification of the Presidential election in Kenya by the Kenyan Supreme Court in 2017, the fever pitch hearing of the Chamisa Petition in 2018 and most recently, the setting aside of an election in Malawi has ignited a lot of debate on the petitions in Africa where political instabilities are rife and the general electoral processes is opaque and controversial.

The Rule of Law, the Bill of Rights and the statutes governing elections in the two countries, Kenya and Zimbabwe are substantially the same, with minor differences. What differs are the Constitutional institutions and frameworks for democracy in the countries. The historical narratives which resulted in the two respective countries having their 'new' Constitutions are more or less the same and these constitutions are revered in the two countries as they endeavour to create a peaceful society. Needless to state that the respective constitutions of the two countries have progressive provisions for dealing with presidential electoral disputes. The responsibility falls squarely with the judiciary in the event of a challenge and though the judiciary maintains that these are political matters, it nonetheless carries the obligation to conclude the electoral disputes. Elections are inherently political processes it is an unsought responsibility of a court to decide a winner.[161]

[161] Bush v Al Gore ibid.

5.2 **Capping the Philosophical Schools of Thought on Elections**

All the philosophical scholars discussed in this research finds resonance with the topic at hand and the researcher's quest to unravel and the various approaches to presidential petitions in light of the evolving notions of justice and fairness. Justice is a contentious issue on its own and law is equally contentious. What is the correct approach for a judge seized with a matter of immense magnitude such as a presidential election, considering its social, political and economic impact on a country? Should the judge decide the winner and consequently the losers in such an election, or order any other appropriate relief? What will be the purpose of the majority then, and ultimately the whole process if judges can decide the outcome? What is the extent of judicial review to be exercised by judges in presidential petitions? What should judges do, should they make a finding that there was violation of the electoral law in the electoral processes? To what extent, if any, should judges condone irregularities in an election? These questions are all explained in the philosophical realms discussed herein.

The doctrine of avoidance appears to push and influence many judges in different jurisdictions. Where a matter can be settled politically, the judges have been quick to leave it to the politicians, outside the court rooms.[162] Where the court had a firm idealist indication, it has not hesitated to annual an election. In so doing, it release the rules even of evidence and approaches are issue for a mutual law perspective.[163] In instances where the law has a palpable dearth on certain issues, the judges have stepped in to create their own rules, which rules goes to the constitution itself and modifies it. The Constitutional Court of Zimbabwe Rules of 2017 clearly elaborates a situation a situation wherein the judges have filled in gaps in the law and created their own 'laws', thus modifying the extant law. The Dworkin's approach is thus more pronounced in the massive law-fully in the 2019 Chamisa the Kenya 2017 judgment. Judges will discover the law, where the law is not clear, so that justice prevails.

---

[162] Bush vs Al Gore , supra

[163] Malawian Petition, supra and the Raila Odinga, 2017 decision

Elements of the Kelsenian approach, particularly the doctrine of effective control have been witnessed in 2013 Tsvangirai Petition where the court went on to decide the matter notwithstanding that the Petitioner had withdrawn the electoral challenge. The order of the Constitutional Court declared the entire general elections as free, fair and credible in an expression of how the bench so much wanted to decide electoral matters even when a petition has been withdrawn. Determination even of an uncontested petition cements the interests of the bench as a key political player, charged with political responsibility.

5.3 **Closing Remarks**

5.3.1 This research has looked at the various approaches in several jurisdictions as to the approach to electoral petitions. The research has also broadly looked at the various issues to do with democracy and the centrality of an election in a democracy and the centrality of an election in a democracy. Needless to state that an election challenge is central to the protection of the right to vote and to participate in political affairs guaranteed by most constitutions, including the Zimbabwean Constitution and the Kenyan Constitution.

5.3.2 While observing the dynamic nature of the presidential petitions discussed herein, it is recommended that the Zimbabwean Constitutional court should take a robust approach when deciding petitions. A Presidential Petition presents a chance for the courts to test the conduct of various parties against compliance with the constitution. It is submitted that the playing field petition should never be tilted in one favour or else a crisis of legitimacy, will ensue. A robust approach will entail an approach that recognises all the rights enshrined in the Constitution, including the principles guiding the judiciary. Cherry picking rights in the constitution and choosing which to disregard remains undesirable. In State **of South Dokota v. State of North Carolina** [164] where he stated:

‘**I take it to be an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from all the others and**

[164] 192 U.S 286 (1904).

considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.'[165]

In the Chamisa Petition, the court in the exercise of its discretion disallowed a *subpoena duces tecum* which had been filed by the Petitioner separately but with a bearing on the same matter. The court went further to disallow the bundle of documents filed by the Petitioners ahead of the hearing on some technicalities. While the court could have acted to protect its own processes and the dismissals could have been within its rights as they constituted non-compliance with the Rules, the whole reasoning is lost where the same court condoned other seemingly material non-compliance with the Constitution by the same Petitioner. A robust approach where there is uniformity of practice and consistency will vastly improve the Zimbabwean Constitutional Court jurisprudence.

5.4 The Zimbabwean court has of late developed a technical approach to matters of Constitutional nature. The Chamisa Petition was dismissed on the basis of "lack of evidence". Throughout the hearing and in pleadings before the court, ZEC consistently admitted to some errors[166]. That on its own ought to have persuaded the court to call upon ZEC to shed undue light on its collating and tabulation of votes countrywide to dispel any suspicion of electoral malpractices. The approach adopted in **Kalil NO v Mangaung Metropolitan Municipality 2014 (5) SA 123 (SCA)** para 30[167] was most appropriate. In that case, the court said the following:

"The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and

[165] Ibid.
[166] Twice the votes of ED were reduced
[167] 2004 (5) SA 123

loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance."[168]

The above approach resonates with the Kenyan Approach in 2017 wherein parties were given access to the electoral residue. The Malawian Courts have also taken a liberal approach wherein the court examined the residue itself to satisfy itself as to the issues of electoral malpractices before it.

To this end, the general rule that the petitioner must prove his case ought to be tempered with realistic appreciation of centrality of the institution responsible for managing elections. This was the case in Kenya and Malawi. Anything short of that makes annulling an election an impossible task, notwithstanding the irregularities. Anything short of that goes further to compromise the rights of all the people protected by the Constitution.

5.5 A central compound of electoral law which is lacking in Zimbabwe and Kenya is certainty. The precedents available in the two petitions in Zimbabwe and Kenya are at crossroads. One cannot with certainty approach the courts to nullify an election. The courts are so fluid and what complicates this aspect is the case to case basis upon which matters of this nature are decided.

END

[168] Ibid.

BIBLIOGRAPHY

Allan, TRS, 'Legislative supremacy and the rule of law: democracy and constitutionalism' [1985] CLJ 111(1985a)

Aristole, *The Politics*, 1962, Sinclair,TA (trans), Harmondsworth: Penguin

Austin, J, *The Province of Jurisprudence Determined* (1832), 1954, London: Weidenfeld & Nicolson

Boule, H. & Hoexter (1989), *Constitutional and Administrative Law* 14th Edition, Essex, Pearson Education Limited.

Goldman, S. (1987) *Constitutional Law: Cases and Essays*, New York, Harper & Row Publishers

Hatchard, J. *et al* (2004), *Comparative Constitutional and Good Governance in the Commonwealth: Eastern and Southern African Perspective,* Cambridge, Cambridge University Press.

Kelsen, H., *Pure Theory of Law,* Knight, M. (trans), (1967), Los Angeles, University of California Press.

Barnett, H (2006), *Constitutional and Administrative Law,* 6th Ed, London, Routledge Lavendish.

Carpenter, G, (1987), *Introduction to South African Constitutional Law*, Durban, Butterworth.

Quinot, G, (2008), *Administrative Law*: *Cases and material*, Stellenbush, Juta.

Hosten, WJ etal, (1983), *Introduction to South African Law and legal Theory*, Durban, Butterworth

Waal, J.D. Currie I & Erasmus G, (2001), *The Bill & Rights Handbook,* 6th Ed, Johannesburg, Juta & Co.

Friedmaan, W, (1967, *Legal Theory*, 5th Ed, London, Stevens and Sons.

Chinhengo, MH, et al, (2017) *Zimbabwe Rule of Law Journal, Harare*, ICJ.

Madhuku, L., (2015), *Labour Law in Zimbabwe*, Harare, Weaver Press.

Ougoya, Z.E & Ofeno, WE, (2012), A Handbook on Kenya's Electoral Laws and System, Nairobi, EISA

Murray, C, (2013), *Kenya's 2010 Constitution*, wwwresearchgate.net.

Ghai, Y.P and McAuslan (1970), *Public Law and Political Change in Kenya 1, A Study of the legal framework of Government from Colonial times to the present,* Nairobi, Oxford University Press.

Human Rights Watch*, "Kenya Old Habits Die Hard: Rights Abuses Follow Renewed Foreign Aid Commitments"* July 1995, www.org/legacy/reports/1995/Kenya.

CHAPTER ONE

INTRODUCTION

1.0 Background to the study

Electoral petitions in general and presidential petitions in particular remain hotly contested terrains the world over. It is accepted that of all constitutional law concepts, elections are one of the most subjective and value laden feature given their inevitable and almost immediate political, economic and legal consequences on any society. Thus, an election is an indispensable centrepiece of constitutionalism.

In the same vein, the study of electoral law takes due regard to the politics, economic and social and other extra-legal features obtaining in a particular state or country. It is also important to take into proper context the legal system that prevails from country to country as this is a key determinant in the approach a country will likely adopt.

In the study for electoral law, particularly electoral petitions, it is more important to recognise and appreciate the multiple varied approaches applied from jurisdiction to jurisdiction and the relevant legislation which. The manner in which a approaches in a presidential petition is therefore heavily underpinned by political theory and jurisprudential aspects prevailing in the given country. The courts in most cases have emphasised that challenges to national leadership elections are not ordinary matters but one which require utmost diligence and scrupulousness. Such thinking seems to resonate well with the narrow basis which obtains in setting aside elections in general. The courts have also made it clear that presidential elections ought to be settled by the people and not by the courts[169] wherein the court stated that

> : **"….[the court] stands in admiration of the Constitution's design to leave the selection of the President to the people…and the political sphere"**.

[169] Bush v Al Gore et al 531 U.S 98(2000)

On the other hand, the same courts have made it clear that where there is violation of the Constitution, they are ready to review any such decision.[170] It is not in dispute that Constitutional supremacy has been asserted in electoral matters[171].

In its own right, a court will determine whether an election withstands the tests of the challenge and if it fails, then it will be nullified. Therefore in its protective form, a petition tests whether the citizens' right to participate in the formation of a government of their choice is protected in its prescriptive mode. A presidential petitions tests the conduct of the election itself, whether any of the rules of the electoral system prevailing in a given country has been violated, and the extent thereof and the consequences. It is this latter point which this research seeks to elaborate with primary reference to Zimbabwe and Kenya.

1.1 **Statement of the Problem**

The emphasis on elections as a yardstick for measuring both the extent to which citizens participate in choosing their political leaders and the extent to which a country subscribes to democratic norms is almost indisputable. It will have to be assessed however whether any election protects the voter's fundamental right to decide on his or her leadership of choice and whether the electoral processes are consistent with democratic elections.

Free, fair and democratic elections have been embraced as a cornerstone for democracy and the Universal Declaration of Rights and several other regional charters such as Southern African Development Community and Africa Union have since come to underscore the need for free and fair elections and the importance of such elections as cornerstones of democracy. The right to vote is therefore a fundamental human right which various constitutional instruments of other countries embraces and endeavours to implement albeit in different styles and approaches.

[170] **Marbury v Madison 5 U.S 137 (1803**)
[171] See section 2 of the Zimbabwean Constitution and Article 3 of the Kenyan Constitution.

The right to free and fair elections embraced by the Zimbabwean Constitution in Section 67 and the Kenyan Constitution in Article 38 and many other constitutions the world over finds its ultimate fulfilment in the fair and satisfactory conduct of elections and determination of electoral disputes. Correlative to the right to vote is the fact that "**the right to vote is indispensable to, and empty without, the right to free and fair elections"**[172]

Key considerations that emerges from the foregoing problem is the test of a free and fair election. Invariably, it becomes the duty of the judiciary to decide whether an election is free and fair and whether it was conducted in a manner prescribed in the constitution and the enabling statutory instruments prescribing the processes of an election.

The general rule the world over where elections are held is that voters must determine the winner in an election and the courts must only come in to set aside an election where it is unavoidable[173]. To this end, there exists very narrow parameters for setting aside an election[174] and the test for annulling an election varies from legal system to legal system.

Courts have generally evolved a test of what are called substantive principles of electoral law and trivial principles of electoral. The instructive authority in **Morgan vs Simpson**[175] wherein Lord Denning articulated the test as follows:

> **"If the election was conducted so badly it was not substantially in accordance with the law as to the elections, the election is vitiated irrespective of whether the result was affected. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistaken at the polls, provided that the breach did not affect the result of the election."**[176]

---

[172] I Currie and J.D Waal, *The Bill of Rights Handbook* , Juta, 2013 pp354 .
[173] **Bush v Al Gore***, supra*, **Chilima and Chakwera v Prof Mutharika and Anor CR 1 OF 2019.**
[174] Professor L. Madhuku, Comparative Constitutional Law (lecture notes, 2019 , unpublished).
[175] **(1974) 2 ALL ER 722**
[176] Supra.

The Lord Denning approach, creates two limped approach to test to the validity of a petition: (a) if there is lack of compliance with substantial provisions the election must be set aside regardless of the result and (b) if the mistake or breach is trivial, the election cannot be impugned unless the triviality would affect the result.

The courts in Zimbabwe, Kenya, Ghana and Malawi and many other countries in which the presidency is decided directly by the electorate are therefore unremittingly grappling with an elusive constitutional dilemma when it comes to determination of electoral petitions. The tests clearly are never uniform and of key consideration is the fact that 'extra-legal' dynamics inherent in the process are never settled and continue to mutate and evolve, thus rendering the process of deciding a petition an uncertain process.

It is therefore cardinal for this research to locate the manner in which various jurisdictions approach presidential petitions, taking into context the various legal systems and the social economic issues prevailing in the various countries. It conceded that presidential petitions cannot be discussed outside other fundamental features of the constitution such a separation of powers, rule of law, judicial review and constitutional supremacy.

This research will discuss the critical questions:

1. What are the normative and philosophical underpinnings of electoral law in general and presidential petitions in particular?
2. What are the approaches of the courts in Zimbabwe and Kenya to presidential petitions?
3. How effective have been the approaches of the courts in Zimbabwe and Kenya in upholding the supremacy of their respective constitutions in Presidential petitions and protecting the right to vote?
4. What is the impact posed by the independence of the judiciary in deciding presidential petitions?
5. What are the factors taken into account by the courts in deciding a presidential election petition?

1.2 **Objectives**

1. To explore the approaches of various jurisdictions to presidential petitions, particularly Zimbabwe and Kenya.
2. To discuss the various philosophical schools of thought which influences elections in general and the attitude of the courts in presidential petitions.
3. To explore the relationship between the concept of free and fair elections, the constitutionally entrenched right to vote and the various approaches adopted by the courts in different jurisdictions.
4. To critically consider the factors underpinning the attitudes of the courts in deciding presidential petitions.
5. To discuss recommend effective approaches to electoral disputes which balances between the right to vote and fair and transparent determination by the courts.

1.3 **Delineation / Delimitation of the Study**

The forms of this study are our analysing on a comparative basis, the approach of the various jurisdictions to presidential election petitions. The case studies are Zimbabwe and Kenya. It is conceded that reference is made to jurisdictions such as South Africa, particularly because of the jurisprudential history shared by the two countries over and above a very similar historical narrative. Reference will also be made to other countries such as United States of America because of her arguably rich history in terms of constitutional supremacy and constitutionalism in the modern day. Also, the United States of America is arguably the leading country in terms of establishing a strong system of constitutional review, a plaint under which presidential petitions falls under in the realms of constitutional law.

The petitions and approaches of the court considered herein are limited to the period post the constitution of Zimbabwe, Amendment No. 20, which came into force in 2013 and under which all the presidential electoral petitions of 2013 and 2018 where considered. Previous decisions on presidential petitions in Zimbabwe will also be referenced, subject to their relevance to the discourse but it is fair to highlight now that the history of Zimbabwean presidential petitions prior to the 2013 Constitution is very

frugal. One notable presidential petition prior to 2013 Constitution is the **Tsvangirai vs. Mugabe & Anor** petition of 2002 which is still pending at the courts.[177]

The Kenyan comparative analysis is also based on the period post the Kenyan 2010 Constitutional dispensation which replaced the 1968 Constitution. Only two decisions have been handed down by the Kenyan Supreme Court post the 2013 Kenyan election and this is the famous[178]**,** popularly referred to as the **First Raila Odinga judgment of 2013** and the **Raila Odinga judgement of 2017** which for the first time in the history of Africa nullified a presidential election .The choice of the countries and the periods of time under consideration are by no means coincidental. Both countries share a lot of experiences which sharing begins with the sharing the same colonial master, during colonial times till the attainment of independence on the background of protracted armed conflicts, Kenya, attaining its independence 1968 and Zimbabwe attaining its independence in 1980. The constitution of Kenya from 1968 to 2010[179], barring sweeping amendments in between was similar to that of Zimbabwe in 1980.

Both countries also share relatively new and similar constitutional dispensations, Kenya successfully changed its Constitution in 2010 and Zimbabwe in 2013 and both constitutions were changed under the stewardship of unity governments and there is strong contention that the Constitutions were negotiated by the dominant political players in the two respective countries.[180] The choice of periods after the two new constitutions in both countries was persuaded by the fact that these two constitutions accords extensive regard to constitutional review and contains more articulate Bill of Rights than the previous ones. It is further compounded by the fact that both countries have had two presidential petitions apiece, something that few countries have attained

---

[177] The court is yet to handover a judgement in this matter and many academics render it academic as several elections have been conducted since then.

[178] **Raila Omolo Odinga vs Uhuru Kenyatta and Ors Petition 5 of 2013 and Raila Omolo & ORS v Uhuru Kenyatta & ORS, Petition No. 1 of 2017**

[179] Kenya became a one party state, de jure between 1982 and 2002. See also Widner, Jennifer A*, The Rise of a Party State in Kenya: From "Harambee!" to "Nyayo!* Berkeley: University of Califonia, 1992. http://ark.cdlib.org/ark:13030/ft9h4nb6fv

[180] See the general concerns raised by National Constitutional Assembly in *Newsday* issue of 23 September 2010 which quotes Prof Madhuku, then its Chairperson calling for the disbanding of COPAC.

in the past few years and a situation which sets the tone for an in depth comparative analysis of the two. It is indeed an exciting legal experience to put the two countries, Zimbabwe and Kenya under an academic study.

1.4 **Limitations**

Admittedly there is a dearth of written texts on constitutional law, particularly electoral law in Zimbabwe. Most of the materials had to be sourced from South Africa and United Kingdom, amid costs constraints. Electoral material from Kenya was also difficult to attain and most of the material, had to be sourced via the internet. It was also difficult to access first hand political experiences of Kenyans other than the written commentaries available online to that end, political dimensions in Kenya did not have sufficient analytical back up. It was also virtually impossible to travel to Kenya on the background of an unfunded research, more so given the time constraints and most of the material was sourced via the internet.

1.5 **Definition of terms**

This research is qualitative in nature and is primarily focussed on concepts. Definitions will be dealt with in the course of the research. It is however conceded that there are no technical words beyond those ordinarily applied in legal parlance.

1.6 **Assumptions**

This study presupposes the following:

1. Presidential petitions are key features of democracy and are key safeguards of the concepts of universal suffrage, and consequential protection of the right of citizens to participate in the governance of their countries.
2. That the Constitutions of Zimbabwe and Kenya allows for judicial review in the context of presidential petitions, with the highest courts in the two respective countries being clothed with the mandate to decide the presidential petitions.
3. That the determination of presidential petitions in intricately linked to judicial review and this inevitably puts issues of the independence of the judiciary, separation of powers and rule of law under consideration.

1.7 **Significance of the Study**

A presidential election is a constitutional function. The right to vote and freedom of choice which a petition seeks to protect is entrenched in the Constitution. It is regulated in terms of the constitution, the timing, the key components of the processes are, according to the Zimbabwean and Kenyan constitutions peremptory.[181] It follows that the determination of any dispute emanating from the constitution is primarily resolved in terms of the constitution peremptory. It follows that the determination of any dispute emanating from the constitution is primarily resolved in terms of the constitution.[182]

A comparative analysis of the approaches of Zimbabwe and Kenya offers a comprehensive and decisive insight into the underpinning jurisprudential, political and socio-economic considerations taken into account by the courts in arriving at their decisions.

The independence of the judiciary will inevitably come under scrutiny in this research, and that will inevitably touch the separation of powers concept in the two countries *vis* the rule of law and respect of the independent institutions constitutionally mandated to administer elections, Zimbabwe Electoral Commission (ZEC) in Zimbabwe and the Independent Electoral and Boundaries Commission (IEBC) in Kenya.

The research will answer critical questions on the role of the courts in shaping the electoral landscape and protecting the right to vote. The electoral field period prior to the elections and after the elections will be illuminated, with a view to unravel the role of the courts and political actors *vis* their constitutional rights. Various stakeholders in the legal profession, electoral supervisory commissions, political actors and the general public will find the research of extreme importance and informative on presidential petitions. The legislature and executive will also find the research useful since it offers insights in presidential petitions and identifies areas of reform, over and above clarifying the approaches of the courts, from a conceptual perspective.

[181] See sections 155, 156, 157,158 and 159 of the Constitution of Zimbabwe and Articles 136,137 and 138 of the Kenyan Constitution.

[182] **Tsvangirai vs Mugabe CCZ 20/17** pages 10-11.

1.8 **Theoretical Framework**

While the acceptance of free and fair elections as a cardinal feature of democracy is almost universal and agreed upon, various theories of law are equally applicable, albeit offering different explanations and rationales on the phenomenon of elections.

In order to bring out approaches of the courts in presidential elections more clearly and elaborately, various theoretical perspectives have been applied. Admittedly the writer is an ardent admirer of the Marxist approach to law, nonetheless, other relevant philosophical perspectives have been employed to give the research balance and an exhaustive thrust on analysis of the subject at hand. It is also the researcher's considered view that the philosophical theories complement each other rather than compete against each other as no single philosophical perspective can account for the development in law on its own.

In the final analysis, Marxist perspective on law will be evaluated alongside natural law theorists such as Dicey and von Hayck whose philosophy presents a formidable target for attack from Marxists. Views of Professor Joseph Raz, Professor Ron Fuller among others will also the invoked to illuminate the approach of courts in election petitions along with Professor's Rauls approach.

CHAPTER TWO

THEORETICAL AND PHILOSOPHICAL FOUNDATIONS OF ELECTIONS

2.0 Introduction

This chapter seeks to analyse the theoretical and philosophical dynamics underpinning the concept of free, fair and credible elections. Democracy entails that the mandate to govern is obtained from the people through a free, fair and credible suffrage system. The electoral laws of Zimbabwe and Kenya finds themselves entrenched in the two countries respective constitutions, and are amplified by statutory laws[183]. Disputes emanating from the presidential plebiscite automatically become a function of the constitution which constitution gives the elections its parameters in the first instance.

2.1 Definition of Key Concepts

It is important that this research proffers a definition of a constitution, it being clear and not in dispute that a presidential petition is a function of the constitution, and it's form and procedures are laid out in the Constitution. [184]

According to Professor Hilaire Barnet[185], a *constitution* is

> **"something which is prior to government,…. 'antecedent' to government, giving legitimacy to the government and defining the powers under which a government may act".[186]**

From the foregoing, it is clear that a constitution defines the legality of power and this notion is most pronounced in countries with a written constitution and a superior court imbued with the jurisdiction to rule on the legality of government action or any institution created by the constitution. This is the obtaining phenomenon between Zimbabwe and Kenya.

---

[183] Electoral Act *[Cap 2:13*], Zimbabwe and the Elections Act , Act 24 of 2011, Kenya
[184] H. Barnet, *Constitutional and Administrative Law*, 6th Ed , Routledge, 2006 p 6.
[185] Barnet (n 16 above).
[186] Ibid.

A complex definition of a constitution is given by Thomas Paine[187] **"A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right. A constitution is a thing antecedent to a government, and a government is only a creature of the constitution"**

The above definitions offers an insight into the approach of this research on a constitution. It is agreed that a constitution is the founding and enabling document of any country, particularly when it is written and when there is a court to provide an oversight role on the observance of the constitution. [188] Wherein the court asserted its duty to the Constitution ahead of popular public opinion as follows:

'Public opinion may have some reverence to the inquiry but by itself, is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were decisive, there would be no need for constitutional adjudication through which it can be vindicated.'[189] The origins of the written constitutions which Zimbabwe and Kenya have can be traced to the American War of Independence (1775 – 1783) and the French Revolution (1789). The initial constitutions of Zimbabwe and Kenya post-independence were derived from the former colonial power,[190] though subsequently repealed and replaced via each country's own process.

'*Constitutionalism'* is the doctrine which governs the legitimacy of government action[191]. By constutionalism is meant conformity with the broad constitutional and philosophical values within a State. A more insightful perspective has been rendered by Professor Barnet[192] who posits that the concept of constitutionalism implies something far more important than the idea of 'legality' which requires official conduct

[187] T. Paine , *Rights of Man (1792 Part II)*, 1984, Collins H (ed), Penguin,p 93
[188] **S v Makwenyane and Anor (1995) 3 SA 391**
[189] Supra.
[190] Zimbabwe Act of 1979. Kenya Act of 1968
[191] See Barnett (n 16 above) p 5
[192] Ibid.

to be in accordance with pre-fixed legal rules. He strongly argues that a power may be exercised on legal authority, however that fact is not necessarily determinative of whether or not the action was 'constitutional'.

An *electoral system* is now given that in a democratic state, the electoral process determines who holds political office. Power to govern is conferred on the office bearers by the electorate. The Constitution of Zimbabwe ensures the right to the vote [193] and the Kenyan Constitution has a similar provision.[194]

It would appear bother the Zimbabwean Constitution embodies the following similar features albeit in different words;

(i) the right to vote is guaranteed, subject to limited restrictions

(ii) Equality of the valid notes cast is respected.

(iii) The entire process of the elections from campaign to petitions is constitutionally and legislatively regulated in an effort to protect the fundamental right to vote and fairness. See in that regard **Baker vs Carr[195]**

(iv) The electoral system is modelled in such a way as to get a legislative representative of electorate and a government with absolute majority.

In the final analysis an electoral system is a combination of many aspects of electoral law and they do not exist in the isolation. Many countries now combine features of majority electoral system and proportional representation which are called mixed

---

[193] section 67 which accords citizens very broad political rights and section 67 (3) (a) which specifically grants the right to vote.

[194] *Article 38 which provides 38. (1) Every citizen is free to make political choices, which includes the right—*
(a) to form, or participate in forming, a political party;
(b) to participate in the activities of, or recruit members for, a political party; or
(c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
(a) any elective public body or office established under this Constitution; or
(b) any office of any political party of which the citizen is a member. (3) Every adult citizen has the right, without unreasonable restrictions—
(a) to be registered as a voter;
(b) to vote by secret ballot in any election or referendum; ……)

[195] ***369 US 186 (1962*).**

electoral systems. This is however different in the presidential election challenges which the research is focusing on.

Presidential petition refers to a court challenge by a losing presidential candidate or candidates, challenging the outcome of an election. This court process tests the validity of the election results based on non-compliance with the substantive electoral laws, irregularities during the election process and fraud on the part of winning candidate among other concerns which taints the election process. In most cases, the petition alleges corrupt practices in the run up or during the election process. In Zimbabwe, section 93 elaborately lays out the petition the process of instituting a presidential petition, the jurisdiction of the court among other key aspects.

In the end, an election may be set aside if a petition is successful among other consequential relief as the constitutional court my grant.

2.2 Theoretical and Philosophical Aspects of Free and Fair Elections

2.2.1 Communist Theories of Law

The Communist theories on law are headlined by Marxism, Leninism and others. They insists that law represents the interests of the powerful classes within society. This philosophical school of thought further posits that law is an ideological device employed by the powerful class within a society and the correlative powerlessness of the ordinary citizens. Law is thus a subterfuge designed to mask injustice and protect the interests of the powerful with society.

Marxism which itself is largely influenced by dialectical materialism also strongly posits that law in any given society is a reflection of economic power, a power which is consequently used to exploit this powerless within society[196]. Thus, the notions of rule of law, under which this concepts of the free and fair elections falls are just grand sloganeering, designed to create a society where the poor are kept complainant within notions of democracy which in essence do not exist[197]

[196]K Marx, *Introduction to the Critique of Political Economy*, 1979 , (ed M.Dobb), Progress Publishers.
[197] Barnett (n 16 above),

Communists theories of law further attacks western liberalism of freedom and equality, with the major target being Dicey and von Hayek[198] by advancing that ideas of freedom and equality before the law, parliamentary democracy and impartial judiciary are mere frauds which serve as instruments of class rule" [199] Effectively for Communists /Marxists, law is a rational instrument of oppression and the State is in reality a dictatorship. This particular perspective illuminates a significant component of the issues to do with the presidential plebiscites in Zimbabwe and Kenya.[200] It must also be appreciated that the communist theories of law are a radical departure from the classical bourgeois theories of law which views law and State as a means of protection of private property, achieved by obtaining consent of the subjects. The consent of the subjects in only obtained via electoral processes and judicial process which acts as a check of the electoral process. In its own right, communist theories of law argue that the State emerged as a means to curb class antagonism with conflicting interests and it is a power above the society that would alternate the conflicts and maintain order.[201] The process of an election becomes a necessary ingredient and formation to power to the ruling class.

Elections in any context, according to the communist theory of law, becoming a rule. It becomes a means of protecting the interests of a particular class ahead of others. Consequently issues of dispute resolution post an election or wherein the dispute is related to the election are all part of the misrepresentation posited by those who wish to control the means of production and mention the hold of private property.

2.2.2 **Classical Bourgeoisie Theory of Law**

[198] Ibid

[199] Marx (n 28 above).

[200] Business moguls such as Meikles Family, Econet and some indigenous Zimbabweans have reportedly funded election campaigns for both ruling party and opposition in Zimbabwe before, see an article by Jonathan Moyo on www.techzim.co.zw dated 8th June 2019 and Zimbabwe Independent article on ZMDC and Meikles dated 11 January 2013.

[201] F Engels ,*Origins of the Family, Private Property and State*, Marx& Engels Selected Works, vol III 1970 page 327

These theoretical narratives generally follows from Natural Law Philosophy and were much more pronounced by the medieval scholars such as Plato[202] wherein he articulated the idea of a social contract. The principle is captures as follows; [203]

Later medieval writers such as John of Salisbury, John of Paris and Thomas Aquinas followed the same contention, arguing that legal authority comes from the people not from the arbitrary will of their ruler.[204]

Professor W. Friedman[205] summaries the essentials of the Social Contract more eruditely, he sums it up as follows;

> **"The essential features of the doctrine of social contract are these; from a state of nature, in which they have no law, no order no government, this state of affairs appears to some writers as a paradise, to others as chaos-men have at same time passed to a state of society, by means of contract in which they undertake to respect each other and live in peace (pactum unionis). To this contract is added simultaneously or subsequently a second pact by which the people thus united undertake to obey a government which they themselves have chosen (pactum subjectionis)"[206]**

These words to dovetails quite accurately with the electoral systems of the two countries under study and perhaps, with every other legal order where elections are held as a means of ensuring that the consent of the subject is sought and obtained by the ruling class. Accordingly, the State is a creation of the legal will of the governed. Thus, the whole concept of the social contract is the forerunner to the concept of democracy.

Other important natural law philosophers include Hobbes (1588-1679), John Locke (1632 -1704) and Rousseau (1712 – 1788). Whilst all these philosophers did not agree on their perception of Natural Law, they nonetheless influenced the modern set up of

---

[202] *Republic Book 2 358* (Lindsay Trans)
[203] W Friedman , *Legal Theory*, 5th Ed, Stevens & Sons, 1967

[204] This research focuses more on the medieval scholars and their successors, nonetheless natural law theory can be traced as a way back to Ancient Greek philosophers such as Heraclitus.
[205] W. Friedmann , (n 35 above)
[206] Ibid.

governments particularly on the concept of separation of powers, issues to do with equality and modern concept of constitutionalism. Of particular note is that Rousseau continues to justify the peoples sovereignty "*volonte generale"* on the one hand and the original and inalienable rights of all men on the other. Locke, on the other hand assesses the social contract in its double function, first as *puctum unionis*, "the original contract by which men agree to unite into one political society, which is all the compact that is, as needs to be between the individuals that enter into or make a commonwealth"[207]

Secondly, Locke (1632-1704) asserts that[208], a majority agreement is identical with an act of the whole Society, as the consent by which each person agrees to join a body politic obliges him to submit to the majority agreement is identical with an act of the whole society, as the consent by which each person agrees to join a body politic obliges him to submit to the majority.

According to Locke, majority represents the only means by which other rights can be taken away. There may be palpable flaws in Locke's theory, especially on the contention of the compatibility of individual rights with majority rule and the inability of a person to recall a government, notwithstanding that a government, according to him is only a trustee.

However, his theory finds more relevance with the modern day electoral law and is fortified by other philosophers such as Hobbes who believed in a powerful government for the protection of individual rights[209] and also discouraged civil disobedience.

Later philosophers of natural law includes Professor Lon Fuller (1964) who strongly argued on the "morality of law". Professor Fuller is largely viewed as the extension of the natural law philosophers. Professor Fuller lays down the requirements which needs to be met not only for a system to prescribe to the 'rule of law" but for it to be "legal".[210]

---

[207] Of Civil Government, Book 2 s 99
[208] Cited in W. Friedman (n 35 above) p 122-123
[209] See De Civic 1644
[210] Barnett (n 15 above), 77

These prerequisites form the "morality of duty" or the inner morality of law" and are the very basis of a legal system.

Professor Fuller further argues that it is a duty of every government to create a free environment for its citizens so that they can have a platform to plan the life they want to live and all the government's plans must be directed to the good of its citizens and a government that fails in a material degree to meet these standards may fail to deserve the little "legal system". In essence, that which is "good' is central to Fuller. Legitimacy is key to every government hence it has to do the right thing otherwise, the government will be illegitimate. [211] While Professor Hart (1958) disagrees with Professor Fuller on the "morality of law" arguing that a dictatorial regime with no regard for fundamental rights can still meet the minimum prerequisites of legality prescribed by Fuller. Notwithstanding the criticism, however Fuller provides an interesting advancement of the earlier philosophers as well as an adjusted perspective of natural law and its influence on modern democratic elections. Legitimacy becomes a key factor and the role of the court becomes so important. Whether legitimacy is derived from the courts or not is debatable, what is clear is the law now provides for recourse to the courts to evaluate where the validity of an election has been questioned, a position which is consistent with the normative natural law theories.

2.2.3 **Positive theories of law**

The most influential pioneers of this theory is John Austin (1750-1859) and his work remains the most comprehensive and important attempt to formulate a system of analytical legal positivism in the context of a modern state. According to Austin, law exist separately from justice and is not based on the ideas of what is good, morality and acceptability but law is based on the power of the superior. This analysis of law appears to find resonance with the Zimbabwean and Kenyan situations when it comes to the

[211] Some political commentators have ascribed the political and economic crisis in Zimbabwe to the legitimacy issues which arises after elections, with massive allegations of rigging being reported. See M. Hove and G. Harris " *Free and Fair Elections in Zimbabwe : Mugabe and the challenges facing elections in Zimbabwe*, 2015, International Journal of Human Rights and Constitutional Studies.

interpretations of electoral legislation. Who is a winning candidate in the event of a dispute is a question decided by the apex courts in both countries[212].

According to Austin laws are made by political superiors, either supreme or subordinate. Political subordinates also makes laws as delegated legislation. All the laws, Austin argue, have four critical elements, which are; command, sanction, duty and sovereignty. Thus, Austin's analytical positivism is aptly captured as follows in one of his works.[213]

> **'Laws properly so called are a species of commands. But, being a command , every law properly so called flows from a determinate source…whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear, and the latter is obnoxious to an evil which the former intends to inflict in case the wish be disregarded….every sanction properly so called is an eventual evil annexed to a command … Every duty properly so called supposes a command by which it is created …and duty properly so called is obnoxious to evils of the kind…''[214]**

In essence, all positivists agree that science of jurisprudence is concerned with positive laws or with laws strictly called, independent of their goodness or badness.[215]

Professor H.L.A. Hart further amplifies Austin's philosophical findings[216]. Hart argues that laws are commands of human beings and there is no necessary connection between laws and morals. Just like Austin, Hart further argues that a legal system 'is a closed logical system'[217] in which correct legal decisions can be deducted by logical means from predetermined legal rules without reference to social aims, policies, moral standards among other considerations.

---

[212] See section 93 in Constitution of Zimbabwe and Article 140 of the Kenyan Constitution.
[213] W. Friedmann (n 35 above)
[214] Ibid
[215] Lectures on Jurisprudence, op cit at 176
Lectures on Jurisprudence, op cit at 176
eq (1963)
[217] W. Friedman, *p 257*

Hart has been criticised as equally to relativistic and non-cognitivist, particularly on his argument that moral judgment cannot be established nor defended and are not factual. However, his philosophical expositions, offers a lot of insight in light of the laws which governs elections in Zimbabwe and Kenya and this is arguably shared among other jurisdictions such as the United Kingdom and United States of America. Electoral law remains decisively uncertain, particularly in Zimbabwe where it is the most amended legislation since 1980[218]

Kelsen also sought to restate positivism as given by Austin though Kelsen's theory differs with Austin's utilitarianism. Kelsen was more radical in approach arguing that a pure theory of law must not be contaminated by politics, ethics, sociology and history. According to Kelsen, **"the science of law is a hierarchy of normative relations not a sequence of causes and effects like natural science"[219]**

Just like Austin, Kelsen preoccupied himself with the law, not what the law ought to be. This is very critical when it comes to the determination of presidential petitions, especially in situations where the law has already provided, at the very supreme level, the procedure and the substance in the challenge against the validity of a presidential election. This, applying Kelsen ought to be followed because that is the law.

Kelsen further argues that, the aim of a theory of law, as of any science, is to reduce chaos and multiplicity to unity. In this sense, Kelsen argues that legal theory is a science and not volition and what matters is what the law is and not what it ought to be. Thus, the law is a normative not a natural science and a theory of law is formal, a theory of ordering changing contents in a specific way. It is quite easy to follow the cardinal points of Kelsen, based on the *grundnorm*. The legal norm derives its validity from an external source and the threat of sanction cannot be separated from the 'authority' which is the external force. It is also comparatively easy to follow the Kelsenian approach to

[218]L. Madhuku , *Electoral Law in Zimbabwe*, Zimbabwe Law Review, 1999,vol 16, University of Zimbawe.
[219] W. Friedmann ibid.

effective control, or authority in post-election period and even in the pre-election period.[220]

2.2.4 **Dworkin's Philosophy**

Perhaps it would be inconclusive to expose various philosophical schools of thought and omit Professor Ronald Dworkin.

Professor Dworkin is most famous for his criticism of the Hart's positivism views and he joins other groups of America scholars such as Oliver Wendell Holmes. Dworkin's theory is more 'interpretive' arguing that law is whatever follows from a constructive interpretation of the institutional history of the legal system. Law does not exist in isolation but is given an interpretation in its own context.

Of Dworkin's relevance to this present study is his perhaps most controversial articulation that "*the law properly interpreted will give an answer"*. To this end Dworkin creates a metaphorical judge called 'Hercules' who has an answer to every legal question and who acts on a premise that the law is a seamless web. Hercules J, according to Dworkin is able to apply his mind and construct a theory that is best applicable to the facts and is justifiable in deciding any particular case. According to Dworkin, Hercules J always comes to the right answer, not that it is agreeable to everyone, but nonetheless would be justifiable in the same manner. For Dworkin, judges like any other people, chooses between options and values that were supposed to be incommensurable.

Dworkin's approach on the role of values and options on judges is an indictment on positivism. This theory is striking like a pikestaff when taken in his context of Zimbabwean and Kenyan presidential petitions. It would appear that in the midst of the constitutional provisions and statutory provisions on elections, the judges would have the final say on whether the elections stands or falls, situation that prompted Dworkin

[220] The Montlante Commission on the killing of 8 protesters in Harare on 1 August 2018 following the announcement of 2018 Presidential Election Results in Zimbabwe and the acceptance speech of Raila Omolo Odinga in Kenya following the decision of the Supreme Court in the 2013 Presidential elections.

to argue that the judges will always discover the law and ultimately do what they like.[221] Whether the judges are compromised or influenced is a question to be decided on by another philosophical approach.

Dworkin has been fairly criticised. His theory clearly neglects porous political systems where the appointment and removal of judges compromises them. Dworkin concedes the values of any society may reflect the views of the most dominant class, a factor which can still compromise justice.[222]

2.3 **Conclusion**

What comes out of the various philosophical schools of thought discussed in this chapter is their contributory relevance to this research. Clearly, no legal system can be identified with one school of thought and it would appear that what ultimately is revealed is a 'counterpoint' of various schools of thought. Natural law theories of law answers certain aspects of the research. Communist theories of law answers some critical components of the research and positivism fills in the gaps, as does others. While it was not necessary to discuss all the philosophers in each category, those discussed herein still represents the major stance of each particular category. In the end, the various schools of thought are more contributory and they complement each other in unravelling the various questions of law and philosophy posed by this research.

[221] R. Dworkin *,Taking Rights Seriously*, Havard University Press, 1977
[222] Ibid.

CHAPTER THREE

CONTEXT AND SCOPE OF PRESIDENTIAL ELECTIONS AND PETITIONS

3.0 **Introduction**

The Zimbabwean and Kenyan president is directly elected by the electorate via a two-round system.[223] A direct election means that a voter chooses directly a candidate which he or she prefers. In both countries, the process of voter registration is governed by the constitution and related statutes and as a consequence voting is restricted to registered voters, who meet the registration criteria. It is also critical to note that the majority of countries which have experienced presidential electoral petitions are those in which a president is directly elected by the electorate as opposed to where the president is elected indirectly via an electoral college or delegates. Examples of countries that elects the president via the absolute majority are Zimbabwe, Botswana, Namibia, Malawi, Kenya, Zambia in Southern Africa all countries elects the president directly except South Africa and Swaziland. In the United States of America, the president is elected via the Electoral College process. Nonetheless there has been a contest of the legitimacy of the winner in the 2000 elections[224]. A petition may still be lodged in a country which does not elect its president directly if there is an infraction on the electoral laws and processes.

The right to vote is enshrined in the Constitution of Zimbabwe in terms of section 67 (3) (a)[225]A similar provision appears in the Kenyan Constitution in terms of the article 38[226]. As Constitutional democracies, elections are held regularly and in the people elects their leaders, and once elected, a leader will assume office for a prescribed period.

---

[223] The **two-round system** (also known as the **second ballot**, **runoff voting** or **ballotage**) is a voting method used to elect a single winner, where the voter casts a single vote for their chosen candidate. Despite its name, the two-round system may resolve an election in a single round if one candidate receives enough of the vote, usually a simple majority.[1] If no candidate receives enough of the vote in the first round, then a second round of voting is held with either just the top two candidates.

[224] See **Bush vs Al Gore** (n 1 above)

[225] This provision provides that every Zimbabwean citizen has a right to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret;

[226] See article 38 of the Kenyan Constitution.

It has been said of the right to vote that it lies at the very heart of any democratic electoral system. In **Haig vs Canada** [227] it was stated that:

> "**All forms of democratic systems are founded upon the right to vote. Without the right democracy cannot exist. The marking of a ballot is the mark of destination of citizens of a democracy. It is a proud badge of freedom."**[228]

This chapter will discuss the scope and context of elections in the two countries, Zimbabwe and Kenya. The manner in which elections are conducted will also be discussed alongside the political context of elections in the two countries.

3.1 Historical Context

It is critical to give the historical context which underpinned the constitutional development in the two countries so as to properly place the research. Both countries share a similar political past, both were colonised by the British in the 19th century. Protracted armed struggles resulted in the liberation of the two countries from colonial domination. However the two countries' legal development differs in many material respects. Zimbabwe has the Roman Dutch Law as its common law and the Roman and Dutch common law was imposed on colonisation and Kenya has the English Law as its common law which common also came along with the colonisation. Other fundamental differences are demonstrated below.

3.1.1 Zimbabwe

Much of the legal and political history of Zimbabwe begins with the colonial annexation of the territory. Prior to the colonisation, various chiefdoms occupied the land and had no other laws save for the African customary law which varied from Chiefdom to Chiefdom.

The legal basis for British penetration in Zimbabwe is heralded by the 1888 Moffat Treaty, a treaty concluded between Lobengula and Moffat wherein Lobengula agreed

---

[227] 16 CRR 193
[228] Ibid.

to refrain from entering into any treaty with other foreigners without the knowledge of Her Majesty's High Commissioner in South Africa. The annexation of Zimbabwe was sealed by the Rudd Concession[229]. Acting upon the Rudd Concession, the British South Africa Company (BSAC) was granted a Royal Charter in 1899 and Zimbabwe was colonised in 1890. The Charter gave the BSAC the power, aiming other things, to establish government power and administer the territory[230]

The major significant event which was to shape Zimbabwean legal development was the proclamation of 06 June 1891 to the effect that the law applicable in the colony as at that date is the law applicable at the Cape of Good Hope as at that date. Effectively, Zimbabwe become largely a Roman Dutch common law jurisdiction. It is important to observe that while the common law at the Cape of Good Hope was largely, Roman Dutch, the commercial law was English Common Law.

Laws in Zimbabwe were thus formulated under the Royal Charter which provided two main law making process: the first being by the ordinances promulgated by the Secretary of State in Britain on the advice of the Board of directors of the BSAC. Secondly, by the proclamations issued by the High Commissioner at the Cape of Good Hope. The country was thus subjected to private company rule, which company would initiate ordinances and was subject to proclamations of Her Majesty's High Commissioner at the Cape of Good Hope.

A new order which was effectively racist was then set in motion. Major features of this new legal and political order were the systematic segregation, exploitation and deprivation of black people by the settler regime. Primitive accumulation legislations and machinery were set in motion, blacks being disposed of their land and other means of livelihood such as cattle and goats. A brutal tax regime which targeted blacks to compel them to provide cheap labour was also activated and a cocktail of racially discriminatory laws were passed.

[229] A treaty concluded between Charles Rudd and Lobengula on 30 October 1888
[230] L Madhuku, Labour Law in Zimbabwe, Weaver Press, 2015 page 12

The oppression suffered by the blacks gave rise to the early trade union movements and political parties such as the Rhodesian Bantu Voters Association, The Rhodesian Railway Workers Association, The African National Congress and the National Democratic Party. These early movements were born out of the need to create equal opportunities between the blacks and the whites in the minority.

A critical event during the colonial domination is the Unilateral Declaration of Independence by Ian Douglas Smith, the Prime Minister from 1965 -1979 which led to a protracted legal challenge by one Madzimbamuto who argued that the UDI was illegal. The matter was decided by the Rhodesian Appellate Division and was appealed all the way to the Privy Council in the United Kingdom. The Privy Council ruled against Madzimbamuto[231]applying the Kelsen's theory of effective control.

The 1960s saw rapid sprouting of African political parties such as ANC, ZAPU, ZANU of National Democratic Party (NDP). The minority rule met these new parties with a lot of repressive legislation, banning of the parties and imprisonment of the political leaders. A protracted armed struggled began in the late 1960s and various negotiation platforms of 1975 failed to deliver an amicable solution until the Lancaster House Conference of 1979 which culminated the independence of Zimbabwe in 1980.

At the independence, Zimbabwe was adopted a constitution, negotiated at the Lancaster House Conference by the dominant political forces, that is ZAPU, ZANU, Rhodesian Front and the British as the former colonial master. The constitution of Zimbabwe was thus posited on it.[232] Clearly the Constitution of Zimbabwe in the 1980 had some provisions which the dominant political class was not comfortable with, since it was a negotiated document.[233] There were also clear cases of ring-fencing of property rights such as land, [234] the white representatives in Parliament among others. Between 1980 - 2013, before the new and current constitution came into force, the Lancaster House Constitution was amended nineteen times. While these amendments may appear like power retention mechanisms, they serve to explain that law is reflection of the will of

[231] Madzimbamuto vs Lardner Barke & Anor 1968 (1) RLR 203 (A)
[232] *See* Zimbabwe Act, (*Cap 60)* passed by British Parliament in 1979
[233] See the provisions on land in the Lancaster House Constitution.
[234] section 16 of the now repealed Lancaster House Constitution.

the ruling class and is the Marxist approach on property rights is not far-fetched when one considers the centrality of land.

The most significant of the Mugabe amendments to the Constitution was the 1987 Amendment Number Seven which created an executive President wherein Mugabe enjoyed the benefits of the American type of presidency and retained the Westminister kind of the parliament. The second most popular amendment under President Mugabe was the Amendment under 17 of 2005 which gazetted all land as specified and it stated categorically that Government was not going to compensate for the improvements.

Following hotly disputed elections in 2008 in which Mugabe lost to Morgan Tsvangirai by 47.8% to 43%, an inclusive government was formed via what was called the Global Political Agreement. The three political parties with representation in parliament came together and created a government of national unity and one of the key mandates of this government was to draw up a new constitution. The demand for a new people driven constitution was not novel, having started in the late 1990s with the formation of the National Constitution Assembly which successfully mobilized the people to reject the Chidyausiku Constitutional Commission Draft in 2000. A new vehicle was thus set in motion to oversee the drafting of the people driven constitution, Constitution Parliamentary Select Committee (COPAC). It was led by three co-chairs, who represented three main political parties and it came up with the current constitution in 2013 which has since been the nipped once.[235]

Zimbabwe's political narrative has always been marred by violent elections. In 2000 Parliamentary elections, at least 30 people were reported to have died due to the political violence and over 5000 harassed.[236] In the 2002 presidential elections more than 50 opposition supporters were also killed via political violence[237]and up to date, the petition by Tsvangirai for challenging the result of 2002 is still pending. In 2008 following Mugabe's loss of the election, more than 300 people, mainly opposition supporters are reported to have died[238]and Morgan Tsvangirai subsequently withdrew

[235] See the Constitutional Amendment Number 1 of 2017, gazetted on 7th September 2017.
[236] T. Lodge *et al* *Zimbabwe*: *Compendium of Elections in Southern Africa* (2002), EISA, 445-447.
[237] See GlobalSecurity.com for detailed discussion on this subject.
[238] Report by Crisis Zimbabwe Coalition on Zimbabwe Election Violence

from the elections citing an unfair playing field as thousands of his supporters had been displaced. The above dynamics and historical facts played a critical role in influencing the letter and spirit of the new constitution. The new Constitution reflects an effort to correct some historical anomalies and a fusion of the demands of the dominant political players, particularly the opposition.

3.1.2 **Kenya**

The Kenyan historical and political narrative is different from the Zimbabwean, though similarities can be drawn between the two countries as indicated above.

Kenya was annexed by the British in1880, and what is modern day was not like what it is but it consisted of various territories of a number of communities and ethnicity was a major issue from the outset[239]. According to Charles Hornsby [240] pre-colonial Kenya was an artificial creation, delineated by the British for their own purposes lumping together neighbours, enemies and some communities that had previously no contact whatsoever. This annexation was to give rise to tribalism later on and much of Kenya's constitutional and political narrative has been dominated by ethnicity and calls for devolution[241].

Independence in Kenya was attained in 1962, following many years of British occupation and colonial legislation which deprived the Kenyans a number of political and human rights as well as segregated on the land distribution and usage[242]. The independence of Kenya came on the back of an armed struggle, mainly led by Kenyan Africa Democratic Union (KADU) and Kenyan Africa National Union (KANU). Jomo Kenyatta was the first president of independent Kenya and he ruled Kenya till 1975 when he died and was replaced by Daniel Arap Moi.

---

[239] See a detailed article by Yash Ghai and Jill Cottrell Ghai *Constitutional Transitions and Territorial Cleavages: The Kenyan Case.* Forum Federations, Vol 32, 2019.

[240] C. Hornsby , *Kenya A History Since Independence* , 2014, vol ,47 No 1.

[241] Supra.

[242] Ghai and Ghai (n 69 above) states that at independence Europeans numbered 55 759 but they occupied 16% of arable land

It has been argued that between them, Kenyatta and Moi, they managed to destroy democracy, used excessive violence against people opposed to their leadership.[243] This allegation has also been given on Zanu PF in the post-independent Zimbabwe wherein the ruling Zanu PF has been accused of emasculating state power and vicious attack on the voices of dissent.[244]

Upon the elevation of Daniel Arap Moi (he was Kenyatta's deputy) to the Presidency in 1978, the quest for devolution was suspended and new wave of repression ensued. The Constitution was amended and a new clause, Section 2A was inserted into the constitution [245] This signalled the lawful entrenchment of a one party State, parallels may be drawn between the Amendment number seven to the Lancaster House constitution in Zimbabwe wherein then President Mugabe assumed executive presidency and became a de facto dictator. This transposition in the two countries effectively resonates with Professor Hart's positivism approach. Clearly the correctness or morality of the law at some stage in both countries' history was non consequential.

In 1992, the country reverted to multiparty democracy and in the elections of 1992, President Moi won the election. He was later to lose to Mwai Kibaki in 2002. Though multiparty democracy was retained in Kenya in the period extending from 1992 to date, the regime was still criticized for combining elements of democracy and autocracy and has been criticised for violating minimum standards of democracy.[246] Just like in Zimbabwe elections in Kenya have been characterised with violent clashes between supporters of various political formations and several allegations of electoral malpractices have been raised in both countries and the most similar political events are those of the election of 2007 in Kenya wherein violence erupted following a disputed election won by Mwai Kibaki against Raila Odinga. The post electoral death rate topped 1 500 people. There were delays in announcing the results and that undermined the credibility of the Electoral Council. Eventually a grand political coalition, culminating in the formation of a coalition government which created new executive

[243] Ibid.
[244] See the Gukurahundi conflicts and debates among the civic society organizations in Zimbabwe.
[245] This clause effectively banned multi-party democracy and Kenya became a one party State, **de jure**
[246] See Ghai and Ghai, supra

posts, including that of the Prime Minister. This narrative also obtained in Zimbabwe in 2008, an election in which Robert G. Mugabe lost to Morgan Tsvangirai. Results were delayed amidst widespread fears of manipulation of same by ZEC and in the run up to the run off Tsvangirai withdrew from the election citing violence against his supporters and over 200 people lost their lives. Just like with Kenya, a coalition government was created, with Tsvangirai getting the newly created executive post of Prime Minister.

Kenya finally managed to have the new constitution in 2010 following years of lobbying. The major highlight of the lobbying being the rejection of the draft constitution by the referendum in 2002. On the other hand Zimbabwe also had a new Constitution in 2013, following years of intense lobbying for the civil society, particularly NCA which also saw the rejection of the Chidyausiku Draft Constitution in 2000. All the presidential elections in Zimbabwe and Kenya from 2011 have been conducted under the countries' respective new constitutions. However the elections have been hotly disputed.

3.2 **Theoretical Features of Free and Fair Elections**

The Universal Declaration of Human Rights and International Covenant of Civil and Political Rights entrenched rights to political participation. According to this charter "**elections must be periodic, genuine, organised according to the universal suffrage and by secret ballot"** [247]

Overtime, the right to 'genuine' elections came to be interpreted as a 'right to free and fair election. The origins of the interpretation was explained by the South African Constitutional Court in **Kham & Others v Electoral Commission and Another**[248] wherein the court per Zondo CJ said:

> "**Free and fair election entered the general lexicon in 1978 when it featured in the United Nations Security Council Resolution 435 calling for the early**

[247] Article 21 of the Universal Declaration of Human Rights, 10 December 1948 Article 25 of the International Government on Civil and Political Rights, 16 December 1966.
[248] (2015) ZACC 37, 2016 (2) SA 338

independence of Namibia through free and fair elections under supervision and control of the United Nations"[249]

The right to free and fair elections is further entrenched in the African Charter in Elections, Democracy and Governance[250]. Article 11.4 of the African Union Principles on Election amplified this position by exhorting member states to conduct democratic elections 'freely and fairly', by impartial, all inclusive, competent and accountable national electoral bodies stuffed by qualified personnel".[251]The same principles have been embraced by SADC Principles and Guidelines Governing Democratic Elections. [252]

The Zimbabwean Constitution embraces international covenants on free and fair elections. The right to free and fair elections is the foundation of Zimbabwe's constitutional democracy. The Constitution of Zimbabwe begins by "*We the people of Zimbabwe…."* thus committing it to the will and wishes of the people of Zimbabwe.

Under section 3 (2) (b) of the Constitution of Zimbabwe, the right to free and fair elections is given as a founding value. The right to free and fair elections is given under section 67 (1) and under in terms of section 155 (1) of the constitution, it's a guiding principle of the electoral system.

In **Tsvangirai vs Mugabe and Ors[253]** the Constitutional Court of Zimbabwe held that

"a free, fair and credible election for any elective public office is an essence of democratic self-government"[254].

Similar sentiments have been echoed by the Kenyan Supreme Court when it also held that:

"**Elections are the surest way through which the people express their sovereignty. Our constitution is founded upon the immutable principle of**

[249] Ibid
[250] Article 17 commits State parties to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.
[251] Supra.
[252] Adopted on 20 July 2015, in Pretoria, South Africa.
[253] CCZ 20/17
[254] CCZ 20/17

the sovereign will of the people. The fact that it is the people and they alone in whom all power resides, be it moral, political or legal. And so they exercise such power, either directly, or through their representatives whom they democratically elect on free, fair, transparent and credible elections"[255]

Ultimately a free and fair elections appears to depend on the various aspects underpinning a legal system. In **Kham vs. Independent Electoral Commission**[256]. The South African Constitutional Court described the right to free and free election as follows:

*"***There is no internationally accepted definition of the term "free and fair elections". Whether any election can be so characterized must always be assessed in context. Ultimately it involves a value judgment…….it must be stressed that the judgment whether an election was free and fair has to be made in the specific context of the constitution. In certain instances it may be appropriate to be guided by identifiable international norms, where these exist. But the constitutional requirement is that the elections must have a free and fair. This is a single requirement not a conjunction of two separate and disparate elements. The expression highlights both the freedom to participate in the electoral process and the ability of political parties and candidates both aligned and non-aligned, to compete with one another on relatively equal terms…." [257]**

From the foregoing, it would appear that elections are founded on the concept of free and fair and what is "free and fair" is given effect to by the presiding court in light with the principle of separation of powers. Further, the concept of free and fair elections in Zimbabwe must be interpreted in the light of the international covenants in light of section 46 (1) of the Constitution it provides that:

"(1) ***When interpreting this Chapter, a court, tribunal, forum or body—***

[255] Odinga & ORS EPP1/2017
[256] 2016 (2) SA 338 (CC)
[257] ibid

(a) must give full effect to the rights and freedoms enshrined in this Chapter;

(b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;

(c) must take into account international law and all treaties and conventions to which

Zimbabwe is a party;

(d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and

(e) may consider relevant foreign law;

3.3 Constitutional Benchmarks to Free and Fair Elections

3.3.1 The right to vote

The right to vote is a very much contested terrain which has not been universally embraced notwithstanding the existence of the several international covenants committing State parties to observe same. The right to vote generally regarded as a product of western liberal notions.[258] According to L. Madhuku [259], the right is very much dependant on the nature of the electoral system. A direct election is one in which a voter directly elects a particular candidate in an election whereas an indirect election is one in which a voter chooses delegates/ electors to choose a candidate. While Professor Madhuku maintains that the right to vote is dependent on the nature of the electoral system, this research is more focused on whether the right to vote is exercised as per the letter and spirit of the constitution and whether it actually exists in practice and by who is the right taken or diminished.

In **Jelousy Mawarire vs Robert Mugabe and Ors** [260] the Constitutional Court of Zimbabwe generously extended the right to protection of the law under the previous constitution to the right to vote. The court also held in *obiter* that the Applicant's right

[258] Barnett, ibid
[259] L. Madhuku (n 6 above).
[260] CCZ1/13

to vote had been infringed by failure to proclaim election dates when they fell due and directed President Mugabe to proclaim elections.

The current Constitutional of Zimbabwe benchmarks the right to vote and participation in political affairs in section 67 (i) (a) and (b) .In Kenya, the right to vote is entrenched is the constitution under article 38(2) of the Kenyan Constitution.

It appears that much of the question of whether there exist the right to vote depends on the electoral modalities in place. These include the issues of voter registration, the issues of tabulation of votes and counting itself. Protection of the right to vote cuts across the whole electoral process, from voter registration right to the announcement of election results and consequently, a free and fair election in one that ultimately protects the right to vote at each and every stage of the electoral process.

In **Baker vs Carr**[261]it was held that the delimitation of constituencies must create substantially equal voting districts. The same principle was enunciated in the case of **Davis vs Bendemer**[262] where the issue of political gerrymandering came for the consideration in light with the equal protection of the law guaranteed by the fourth amendment to the American Constitution[263]

3.3.2 **Limitation to the right to vote**

The right to vote necessarily entails limitations on who can exercise it and it is not uncommon to have such limitation to the rights. The Constitution of Zimbabwe is however conspicuous about its silence on the limitations. A reading of section 67 reveals no derogation from the right. However the Zimbabwe Electoral law excludes certain categories of people from exercising this right to vote. Restrictions on the right to vote normally takes the following categories;

[261] 369US 186 (1962)
[262] 106 SC (1986)
[263] A Kirshner , *International Status on the Right to Vote*, Democracy Coalition Project, (Unpublished).

3.3.2.1 **Restrictions based on communities' membership**

These would include status of a citizen; aliens are not allowed to vote in Zimbabwe and Kenya.

Residence status of a person also affects his or her right to vote. In some countries, language is a sufficient basis to exclude the right to vote. Even Zimbabwean citizens who are resident outside the country do not have a right to vote. In **Gabriel Shumba & 2 Ors vs Minister of Justice and Legal and Parliamentary Affairs & 6 ORS** [264] the Constitutional Court rejected an application by Zimbabwean citizens resident in other countries to exercise the right to vote. Canada[265]among other countries imposes a residency restriction on voting.

3.3.2.2 **Restrictions based in competency / autonomy**

The Zimbabwean and Kenyan electoral systems places an age restriction on the right to vote. The minimum age requirement is eighteen years of age[266]. The age is not specified in the Constitutions but the respective Acts appears to do gap filling for the Constitution. Mental Health patients are also precluded from the voting though this doubtful given the absence of machinery to detect same during voting process in Zimbabwe, particularly on registration to vote and on polling days.

3.3.2.3 **Restriction as a form of punishment**

Prisoners are not allowed the right to vote. While the Constitution does not specify them as excluded, the Acts in the respective countries restricts this. The constitutionality of this restriction is very questionable. Electoral fraud also on polling day also precludes one from voting.[267]

---

[264] CCZ 3/18
[265] **Frank vs Canada Attorney General** 2015 ONCA 536
[266] See Electoral Act in Zimbabwe and the Elections Act in Kenya.
[267] Ibid.

3.4 **Key Institutions Involved in Elections**

3.4.1 **Introduction**

As has been observed above, the right to free and fair elections gives concrete effect to the right to vote and other political rights. In **New National Party of South Africa vs. Government of the Republic of South Africa** [268] the South African Constitutional Court observed that; "**the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for democracy, it is both empty and useless"**[269]

3.4.2 **Zimbabwe Electoral Commissions (ZEC)**

Section 238 of the Constitution of Zimbabwe establishes ZEC and mandates it to handle all electoral processes in Zimbabwe. Free and fair elections necessarily require an independent and competent ZEC. Section 238 provides that the Chairperson of ZEC will be appointed by the President in consultation with the Judicial Service Commission and Parliamentary Committee on Standing Orders. The President does not directly appoints the commissioners to ZEC, giving ZEC an ambience of independence.

Section 156 of the Constitution of Zimbabwe enjoins ZEC to ensure that:

(a) Whatever voting method is used, it is simple, accurate, verifiable, secure and transparent.

(b) The results of the elections or referendums are announced as soon as possible after the close of the polls.

Section 239 of the Constitution further obliges ZEC to ensure that elections are conducted "efficiently, freely, fairly, transparently and in accordance with the law".

3.4.3 **Independent Electoral and Boundaries Commission (IEBC)**

The IEBC is established in accordance with article 88 of the Kenyan Constitution and the **Independent Electoral and Boundaries Commission Act, 2011.** The members of

[268] 1999(3) SA 191 (cc)
[269] Ibid.

the IEBC are appointed by the President and confirmed by the Parliament. Commissioners of the IEBC are not supposed to be members of any political party and they are strictly vetted.

> Article 86 of the Kenyans Constitution provides as follows**:**
> ***At every election, the Independent Electoral and Boundaries Commission shall ensure that—***
> ***(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;***
> ***(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;***
> ***(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and***
> ***(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.***

It is not surprising that the provision is similar, almost word for word with the one contained in the Zimbabwean Constitution. This is similarity can be explained by the recent political developments in the two countries and also the global trends on constitutionalism.

Article 138 (3) (c) also reiterates, just like the Zimbabwean Constitution, principles of integrity, transparency, accuracy, accountability, importance, simplicity, verifiability. And similarly with the Zimbabwean Constitution, the Kenyan Constitution is augmented by the Elections Act.

The IEBC is tasked with handling of elections in Kenya. It is the central institution responsible for the conduct of elections and is charged to with the provisions duty of protecting the right to vote ensure the credibility of the process. Its none compliance with the electoral resulted in the 2017 Presidential election being nullified. See the 2017 Odinga judgement.

3.5 **Constitutional Supremacy**

The most important constitutional benchmark in presidential elections is the recognition of the doctrine of supremacy of the constitution. Section 2 of the Constitution of Zimbabwe which provides as follows:

> **Supremacy of Constitution (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.**
> **(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.**

The overall effect of the supremacy of constitution is that all conduct of state organs must be tested against the constitution and any conduct that is not consistent with the constitution in void to the extent of the inconsistency. In **Marbury vs Madison**[270]the Supreme Court of America emphatically asserted the right of the court to review conduct of the other arms of state. Further by implication the existence of the separate arms of state in Zimbabwe, that is, the executive, the legislature and the judiciary are telling of the fundamental place which is occupied by the doctrine of constitutional supremacy. It follows that elections must be held consistently with the Constitution.

3.6 **Political Questions Doctrine**

Political questions doctrine is one of the means by which the judiciary's power is restrained from encroaching into the other branches of the government. While in both Zimbabwe and Kenya the question of determination falls squarely for determination by virtue of the two constitutions, the approach taken by the courts has strong implication on the doctrine of political questions and court have shown a tendency of refraining

---

270 1803 5 US 137

from delving much into the issues of elections which on their own are largely political disputes.

Zhou H[271] observed that; "**there may be issues which are of a purely political nature which are better left to the electorate to determine through elections. Where those arise, the courts would be justified in declining to exercise power of review**.'' It is submitted that to a certain degree, the political questions have influenced the judiciary in the two countries under review. The **Nelson Chamisa case** has strong connotations of the court's unwillingness to set aside an election and the court appears to avoid the whole electoral matrix on one point: 'There is no evidence placed before us". In the **Raila Omolo Odinga vs Uhuru Kenyatta and Ors** [272]O.B Ojwang's dissenting judgement had the following remarks:

> **'Such is the jurisprudential context in which I have considered the petition herein. The majority decision, in effect, holds that the Court may, quite directly, engage the course of national history – through a precipitate assumption of recurrent policy-making or political inclinations and mandates. In my considered opinion, judges, where the making of history devolves to them, should focus their attention in the first place, upon the intellectual and jurisprudential domain – rather than upon the workaday motions of general policy and politics which devolve to the citizens themselves, and to the political agencies of state. Clearly indicates that the courts were not supposed to go deeper on matter otherwise settled politically.[273]**
>
> **The above clearly demonstrates the unwillingness of the courts to settle political matters which are otherwise best settled in the political spheres. [274]**

[271] See 2018 LLM Thesis, University of Zimbabwe, Unpublished.
[272] Election Petition (2012)
[273] Ibid.
[274] See also **Bush v Al Gore** wherein the court stated that: 'The court stands in admiration of the Constitution's design to leave the selection of the President to the people …and to the political sphere". The court went on to remark of its unwillingness to delve into the matter when it said '….when contenting parties invoke the process of the courts. It becomes our unsought responsibility to resolve the constitutional issues that the judiciary has been forced to confront'.

Other doctrines of constitutional law such as ripeness, prematurity and abstractedness do not appear to apply and the only pronounced applicable doctrine is that of political questions and to a degree avoidance.

3.7 Conclusion

In summary, thus chapter analysed the theoretical aspects of the elections, in both Zimbabwe and Kenya. The chapter further looked in to the key considerations in the electoral processes in both countries, including the various aspects of the right to vote, the central institutions involved in the elections.

CHAPTER FOUR

PRESIDENTIAL PETITIONS: APPROACH OF THE COURTS

4.0 Introduction

In terms of section 158 [275] of the Constitution of Zimbabwe, Zimbabwe now conducts its Presidential election concurrently with Parliamentary general elections and local authorities. This essentially means that a voter is issued with three ballot papers, one for the President, one for the local councillor and one for the Member of Parliament/House of Assembly representative. The Presidential Petition is governed by section 93 of the Constitution of Zimbabwe as read with the Constitutional Court Rules (S.I 161 of 2016) and the Electoral Act. In Kenya, a petition challenging the validity of the election of the President is informed by Article 140 [276] as read with the Elections Act and the Regulations made thereunder. This chapter seeks to give a comparative analysis the approaches of the various jurisdictions to electoral petitions.

4.1 General Approach of Courts

The leading authority which informs the general approach of the courts in deciding electoral petitions is the case English case of **Morgan vs Simpson.** Lord Denning and Lord Stephenson formulated the test for setting aside elections. The two learned judges articulated the test as follows:

1. **If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.**

---

[275] 158(2)

[276] *Section 140 provides as follows : A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.*

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President elect to be invalid, a fresh election shall be held within sixty days after the determination.)

2. **If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.**

The Uganda Supreme Court in **Col Dr. Kizza Besigye vs Attorney General** said the following:

> '**Annulling of Presidential election results is a case by case analysis of the evidence adduced before the Court. Although validity is not equivalent to perfection, if there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The Courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election.**[277]

It is clear that the generally followed trend is that enunciated by Lord Denning and Lord Stephenson above and it can be summarised as follows;

The first limp – If there is lack of compliance with substantial electoral provisions, the corresponding effect is irrelevant as the election should be annulled. The second limp being that if the mistake or breach is trivial, the election can only be set aside if the triviality affects the results of the election.

What has obtained in the determination of the electoral petitions is the juggling of the two tests and the issue of judicial discretion has been very central in the determination of the election petitions.

4.2 The Zimbabwean Approach

The courts have always been called upon to decide election petitions. The first case to be reported in post independent Zimbabwe is the case of **Pio vs Smith**[278] which was a

[277] Constitutional Petition No 13 of 2009 [2016] UGCC 1

[278] 1986 (3) SA 145 (ZH)

challenge to the 1985 parliamentary elections. What is intriguing about the case is the fact that the courts have been called upon the interpret the same contentious issues of electoral malpractices in parliamentary elections, even in presidential petitions. The increase in political parties at the turn of the millennium resulted in more petitions being filed as the political environment became polarised. In 2001, the High Court of Zimbabwe handed down judgments in parliamentary elections and set aside the elections of several House of Assembly members [279]the Members of Parliament appealed and suspended the High Court judgements the MPs were only left with a few months before the next elections when the appeals were decided. The 2002 Presidential Petition is still pending. Generally, it is a daunting task to set aside an election in Zimbabwe. The 2008 all parliamentary petitions were all dismissed on technicalities and 2013 Presidential Petition [280] was determined and dismissed notwithstanding that the Petitioner, Morgan Tsvangirai withdrew the challenge citing inability to obtain an order from the electoral court which would have enabled him to obtain access to official voter information in the sealed ballot papers. It is the broad and sweeping pronouncement by the Constitutional Court of Zimbabwe that the 'harmonised elections of 2013 was free, fair and credible'[281]when it was conducted concurrently with the parliamentary and local authorities election that is most fascinating. It is further amplified by the decision of the court to determine issues not before the court[282] and the inclination to apply technical aspects that appears to have carried the day. This clearly betrays a case of constitutional avoidance as the court was not prepared to deal with the merits of the case and get to the bottom of the matter.

4.3. Political considerations

In **Tsvangirai vs Mugabe & Ors**[283] the court made the following subtle remarks:

[279] **Hurungwe East Election Petition 2001 (1) ZLR 285, Buhera North Election Petition 2001 (1) ZLR 295, Mutoko South Election Petition 2001 (1) ZLR 311**
[280] Tsvangirai v Mugabe and Ors CCZ 20/ 17
[281] See Constitutional Court Order
[282] See findings of the Chief Justice on the ZEC server when dismissing the subpoena duces tacum
[283] CCZ 20/17

"An **election of a President is bound to generate profound public interest, not necessarily measured by the number of votes cast in the election. Stakes are very high and political tensions may rise to levels that threaten public order and national security. The election of the President is not about finding an answer to the question who of the candidates should be the leader of the government. It is about choosing a leader who will have the interests of all Zimbabweans at heart and has the intellectual ability to exercise the powers of the office in accordance with the fundamental principles and values on which a democratic society is based to change the lives of the people for the better.**

By the very nature of the circumstances in which it arises, a petition or application challenging the validity of an election of a President alleging that the President elect stole the election requires effective and urgent determination of the matter on the merits. It is indicative of simmering political tension and potential disturbance of public peace and tranquillity…."[284]

The above clearly betrays that the substance of politics prevailing in Zimbabwe during elections has an influence on the judges in their determination of a Presidential Petition. It is respectfully submitted that an election is just that: the expression of the preferred candidate by the electorate via a democratic process that is free and fair, the court has no business in analysing the qualities of a candidate who has made it on the ballot paper for selection via election. The courts, or rather the Zimbabwean court has a political barometer wherein it gauges the "simmering political tensions" and then steps in at once. The position resonates well with Professor Dworkin's words; "**Judges, like all political officials are subject to the doctrine of political responsibility"**[285] The theory of Ronald Dworkin which he says judges will discover the law becomes salutary, how the judges view the society, their political considerations which are influenced by the need for peace and a candidate who will embrace the aspirations of all Zimbabweans

[284] Ibid
[285] R. Dworkin,

becomes determinative. It suffices to note that there has never been a consistent approach to Zimbabwean electoral petitions by the Zimbabwean courts.

In **Moyo and Ors vs Zvoma N.O and Anor**[286] the Zimbabwean Supreme Court nullified the election of the Speaker of the House of Assembly on the basis that there were seven irregular votes. The irregular votes, even impugned, had no effect on the election as the winner would still be the winner.

4.4. The test for setting aside the election

The Zimbabwean Constitutional Court has embraced the test enunciated by Lord Denning in the Morgan v Simpson case. The Denning Test resonates well with the general approach adopted by the English courts. In the old case of **Woodword vs Sarson**[287] Coleridge CJ said the following:

> **"As to the first point, we are of opinion that the true statement is that an election is to be declared void by the Common Law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to void it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation or to be prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not open or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of**

[286] 2011(1) ZLR 345
[287] 1875 LR 10 CP 733

votes or false declaration of numbers by a Returning Officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void …".[288]

In **Chamisa vs Mnangagwa and 23 Ors**[289] the court per Malaba CJ also embraced his own dissenting opinion in **Moyo N.O vs Zvoma** (supra) as follows **"An election ought not to be held void by reason of transgression of law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is the success of the one candidate over the other, could not have affected by those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it was open to reasonable doubt whether these transgressions may not have affected the result and it [was] uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election**

[288] Ibid.
[289] CCZ21/19

> **void. It appears to us that this is the view of the law which has generally been recognised and acted upon by the tribunals which have dealt with election matters. (the underlining is for emphasis).**

It is submitted that the test applied in the leading authority, **Morgan vs Simpson**[290] has been followed in Zimbabwe. This test, while it has been universally applied, has nonetheless differed in its application from jurisdiction to jurisdiction as various courts have given their own peculiar interpretation to it. The test focuses on the effect of the irregularities complained of and its effect on the result, on one hand and whether or not the electoral process was materially flawed, and the extent of the flaws in the electoral process on the other hand. The researcher is inclined to agree with the recent Malawian Supreme Court decision wherein it gave effect to the election process rather than the result, which result could well be misleading if the process of the election was materially flawed. Respectfully, the Denning Test needs to be restricted to compliance of the electoral process with the Constitution and once an election fails that test, it must be set aside since the figures are a reflective of the process and it may be difficult to annul an election on the test of figures alone.[291]

4.5. Statutory Test for annulling a Presidential election

The principal operative legislation in elections in Zimbabwe is the Electoral Act (Chapter 2.03). Section 177 of the Act informs the test for and is inspired by the Constitutional test discussed above. Section 177 reads:

> ***An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that— (a) the election was not conducted in accordance with the principles laid down in this Act; and (b) such mistake or non-compliance did affect the result of the election.***

This provision creates a problem in interpretation on the face of it. Subsection (a) of section 177 address irregularities that result in non-compliance with the principles laid

[290] Ibid.

[291] **Prof Peter Mutharika and Anor vs Dr Saulos Klaus Chilima and Anor MSCA Appeal 1of 2020**

out in the Act which ordinarily includes the principle of free, fair and credible elections. Sub paragraph (b) address irregularities that may affect the result of the election, even if the election is otherwise in accordance with the principles of free and fair elections under section 3 of the same Act.

The challenge with the provision (section 177) is the use of the word 'and' in the conjunctive sense and not the use of the word "or" which would create a disjunctive sense. It appears the courts in Zimbabwe have not given the position on this aspect. However, a similar provision has been pronounced in a strong case law and held the similar provision to be disjunctive. See the decision by Gubbay J, in **State vs Ncube** [292]

It would also appear that a conjunctive reading of section 177 of the Act would result in abnormal decisions as virtually no presidential election can be overturned. There exists the real danger as well of violating section 165 of Constitution of Zimbabwe which provides the principles governing the judiciary.

4.5.1 **The Primary Evidence Rule**

The Zimbabwean courts appears to have adopted a very narrow approach in terms of evidence required to annul an election. In the Chamisa Petition, the court made a ruling that the Petitioner ought to have produced primary evidence in terms of the Section 67A and 70(4) of the Electoral Act and the court pointedly ruled that the failure to produce primary evidence was detrimental to Petitioner's case.

Malaba CJ went on the state that primary evidence rule disallows the use of evidence other than the primary evidence where that evidence is in existence. [293]The Zimbabwean Constitutional court per Malaba CJ strangely relied on a rare and old authority for its proposition on the "primary evidence rule" , the case of **Doe D. Gilbert v Ross (1840) 7M & W 102 at 106** (as referred to in Duhaime's Law Dictionary,) which provides as follows:

[292] 1987 (2) ZLR 246

[293] Chamisa case CCZ1/19,pp 96.

"The law does not permit a man to give evidence which from its very nature shows that there is better evidence within his reach, which he does not produce."[294]

With utmost respect, the departure from the ordinary and current jurisprudential norms being adopted by other countries on evidence signalled the reluctance of the apex court in Zimbabwe to set aside the election of Emmerson D Mnangagwa. In Kenya [295] and Malawi, [296] wherein the court directed the opening of the voter residue in order to appropriately ventilate the malpractices complained of in the elections.[297]

Thus the court ruled in the Chamisa Petition that the Petitioner ought to have exploited section 67 AD & 70 (4) the **Electoral Act** in order to obtain primary evidence and that settled his case. In 2013, **Tsvangirai vs. Mugabe and Ors,** Tsvangirai withdrew his petition citing the fact that ZEC had refused to furnish him with the primary evidence which he wanted to use for the purposes of prosecuting his case. This inconsistent position creates a problematic scene where the courts are clearly reluctant to protect an aggrieved candidate who wants to access information to prosecute his case. Where a Petitioner approaches the courts without same, the petition is dead from the outset.

In the Chamisa Petition, the Petitioner at some stage before the main hearing of the Petition itself, approached to the court seeking a *subpoena duces tecum*. A *subpoena duces tecum* is a subpoena issued under a court order compelling a person to produce documents which the courts is satisfied are relevant evidence of a matter under determination. The decision to be made by the court is whether or not the information needed is necessary under the force of a *subpoena duces tecum*.[298]

The Constitutional Court declined to issue the *subpoena duces tecum*, and when the Application was placed before the court in chambers, the Chief Justice commented as

---

[294] Ibid.
[295] Raila Odinga 2017 decision
[296] *See* Chilima &Chakwera v Mutharika CR 1/2019
[297] See J. Hachard "*Election Petitions and the Standard of Proof*" 2015, vol 17 The Denning Law Journal.
[298] See **Poli v Minister of Finances and Economic Development & Anor 1987 (2) ZLR 302 (s), Netone Cellular (Pvt) Ltd and Anor vs Econet Wireless (Pvt) Ltd and Anor, SC47/18**

follows; **"The decision whether or not the subpoena is to be issued is for the full court to make after weighing the issue of relevance of the evidence to be produced".**[299]

This approach by the Chief Justice, with respect is very controversial. Firstly, he clearly declined to entertain a matter where a party sought the availing of certain evidence for the purposes of prosecuting his case. Deferment of such an issue to the full court is clearly an injustice as the Petitioner would not have access to the information which he wanted, on the other hand, the court was ready to apply the primary evidence rule to his detriment. Against such reasoning, even if the Petitioner had approached the court in terms of Section 67 A and 70 (4) of the Act, no different position would obtain. Mirriam Azu tackles the various underlying factors which influence judges in deciding petitions.[300]

In **Hove vs Gumbo (Mberengwa West Election Petition Appeal)**[301] the Supreme Court made the following salutary remarks:

> **"For a court to set aside an election the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence …. The duty of the court is to determine whether the petitioner has by evidence adduced established the cause of his complaint against the election result. The effect of s 132 of the Act is that a petitioner complaining of an undue election must state the nature of the cause of his or her complaint. The cause of complaint must be clearly and concisely stated at the time of presentation of the petition …."**[302]

It is clear from the foregoing that the refusal by the Chief Justice to allow and ventilate the subpoena as requested by the Petitioner was fatal to be the Petitioner's case. The court clearly stood in the way of the best evidence. The comments by the Chief Justice on why he refused the Petitioner a subpoena are thus irrelevant since he technically

---

[299] Ibid

[300] M. Azu "*Lessons from Ghana and Kenya on why Presidential Petitions usually fail*" 2015, Vol 15 African Human Rights Law Journal.

[301] 2005 (2) ZLR 5 (S),

[302] Ibid

washed his hands off the subpoena. The court bizarrely relied on evidence not before it when dealing with the issue of the subpoena, particularly when it found that ZEC had no electric server. This finding of fact remains incorrect particularly when no evidence was considered by the Chief Justice, more so it is inconceivable that ZEC has no database when the voter registration process was conducted via biometric registration process and there is a soft copy of the voters roll.

4.5.2 **Standard of Proof**

The Zimbabwean Constitutional Court is generally follows the trend in any jurisdiction that any electoral fraud must be proved beyond a reasonable doubt. This question arose in the Chamisa case and the Zimbabwean Constitutional Court followed Nigerian Supreme Court in **Buhari vs Obasanjo**[303] wherein the Nigerian Supreme Court settled the position as follows:

> **"He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the Court giving judgment in favour of the party."**

Firstly it would appear that the same position is followed in Kenya.[304] The Constitutional court in Zimbabwe has held that it is the Petitioner who must prove his case to the satisfaction of the court" Malaba CJ had the following to say in the Chamisa Petition: [305]

> '**It was incorrect for the applicant to suggest that since the Commission came up with the figures that were announced as the Presidential election result, the Commission bore the onus of proving that the figures were indeed**

[303] 2005 CLR 7 (K) (SC)
[304] **Raila Odinga & 5 Ors vs EBC supra, and Amama Mbabazi vs Museveni & Ors Presidential Petition 1/2016.**
[305] Chamisa case on pp 84

correct. That position is unsustainable, most fundamentally in the light of the presumption in favour of the validity of the Presidential election.'[306]

The same reasoning was applied in **Moyo & Ors vs Zvoma N.O and Anor**[307] The net effect of this principle is that an election can only be set aside when the irregularity complained of is so great in the magnitude ' that it goes to the heart and magnitude of the entire process.' This comparative jurisprudence appears to be followed in **Woodward vs Sarsons**[308] Ghana, Kenya, Uganda Nigeria, England and Canada.

This approach while comparatively followed the world over in many jurisdictions, appears to base on the attitude of the bench and the political dynamics of the various countries it has been applied. The recent Malawian Petition which set aside the election of President Mutharika is one case where the bench appears to have been liberal. [309]In that case, the court observed that;

".....**considering the activities involved in an electoral process, it is almost impossible to have an election that is completely free of any irregularities or anomalies. However in the present matter, it has been our finding that the irregularities and anomalies complained of have been so widespread, systematic and grave such that the integrity of the results has been compromised"**

Crucially and fundamentally, the Malawian Court adopted a liberal approach and it proudly declared as follows;

"**Court have adopted a standard of proof that is whorl and generous when it comes to the vindication of constitutional rights……This court has taken a view that this is the right approach to adopt where human rights**

[306] Ibid.
[307] 2011 (1) ZLR 345
[308] (1875) L.R 10 C.P 733.
[309] See Chilima & Chakwera vs Mutharika & Anor CRQ/2019)

guaranteed under the Constitution and implicated and sought to be vindicated" [310]

It is submitted that the Zimbabwean Approach, whilst it has strong similarities with other jurisdictions, its rigid and decisively undefined procedural rules makes the approach a difficult one to set aside a Presidential election. The rigidity with which a petition must be concluded militant against gathering of enough on the petition. The rigidity with which the court approaches the matter compounds a Petitioner's case see **Chiyangwa vs Matamisa**[311]

4.6 The Kenyan Approach

4.6.1 Introduction

Much of Kenya's electoral law developed post the 2010 Constitution conceived during the inclusive government of Mwai Kibaki, Raila Omolo Odinga and other smaller parties following the violent 2007 election. Of much significance are the two judgments in Kenya, the Odinga case of 2013 in which Raila Odinga unsuccessfully sought to invalidate the Kenyan 2013 Presidential election and the 2017 Raila Odinga case in which Raila Odinga successfully invalidated the Presidential elections. The Kenyan court reached two different positions on the test to apply where a Presidential election is being challenged, the 2013 judgement applying the first limp of the Denning test and the 2017 applying both limps.

4.7 The Constitutional Test for Setting Aside a Presidential Election in Kenya

A petition challenging the validity of a presidential election is made in terms of Article 163 (3) (a) and 140 of the Constitution as read together with the provisions of the **Supreme Court Act 2011**[312] and the **Supreme Court (Presidential Elections) Rules.** The judicial powers to hear and determine such a petition is provided for in Article 166 of the Kenyan Constitution. If follows that the Supreme Court's jurisdiction to preside

[310] Malawian Election Petition, para 393-394 of the judgement.
[311] 2001(1) ZLR 334.
[312] Act No. 7 of 2011

over such a matter is limited to the presidential election and 'will grant orders specific to the presidential election'[313]

The Raila Odinga case of 2013 relies largely on the **Morgan vs Simpson** case and it embraces the two limps enunciated by Lord Denning. The court in dealing with a provision of the Elections Act, Section 83 of the Elections Act[314] provides as follows:

> "**No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election process was concluded in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election".**

The Kenyan Court was evidently influenced by the constitutionally entrenched right to free and fair elections and the principles of democracy and openness that are hallmarks of the Kenyan Constitution. It held that a disjunctive reading would better promote those rights and principles. The Kenyan Supreme Court concluded that the provision had to be interpreted as follows:

> **"[T]he two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election'**

[313] Ibid.

[314] Act No. 24/2011

The Kenya Supreme Court has further taken a robust approach when it comes to figures and collating of votes. In the 2017 Raila Odinga case the court ordered the Forms 34 and 36 used in the collating of votes to be reopened to allow the Petitioners a chance to further scrutinize them. It thus summed it in one statement "numbers must simply add up*".*[315].

The 2013 Raila Odinga case appears to follow the Zimbabwean approach where the two limps are observed but the petition falls on evidence. In this instance, the court exercised its discretion and made a finding that the technicalities complained of would not affect the outcome of the election. The question of the material flaws in the electoral process becomes merely academic as the decision is up to the court to make on whether the evidence placed before it lays a case for setting aside an election.

Thus, in the headnote to the 2013 Raila Odinga case the Supreme Court opined as follows:

> **"The conduct of the presidential election was not perfect, even though the election had been of the greatest interest to the Kenyan people who had voluntarily voted. Although there were many irregularities in the data and information captured during the registration process, they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the first respondent, for the purpose of causing prejudice to any particular candidate." [316]**

The 2017 Raila Odinga case further took a robust approach the Presidential electoral process in Kenya, stating authoritatively that an '*election is not an event but a process'*. The court relied on the Indian cases of **Kanhiyalal Omar v R. K Trivedi & Ors**[317] and **Union of India vs. Association of Democratic Reforms and Another**[318] where the word 'election' was used in a wide sense to include the entire process of an election

[315] *See the majority judgement , Raila Odinga 2017 decision.*
[316] See the ratio in the 2013 Odinga judgement.
[317] 1986 AIR 111
[318] 2002 (3) SCR 292.

which consists of several stages and embraces many steps, some of which have a bearing on this electoral results. These stages, according to the Kenyan Supreme Court, include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results. The Kenyan Supreme Court relied on Lady Justice Georgina Wood, when she captured the same point as follows:

> '**The Electoral process is not confined to the casting of votes on an election day and the subsequent declaration of election results thereafter. There are series of other processes, such as the demarcation of the country into constituencies, registration of qualified voters, registration of political parties, the organization of the whole polling system to manage and conduct the elections ending up with the declaration of results and so on'**[319]

Thus the conundrum surrounding the electronic transmission of results and non-compliance with forms 34A of the Elections Act was decisively dealt with by Maraga CJ in the 2017 Raila Odinga decision and the election was annulled. The court took the view that electoral processes are sacrosanct and ought to be observed. While this approach appears questionable, the Malawian High Court has also weighed in recently, arguing that it is impossible to have a completely perfect election, but nonetheless, the overall electoral process must comply with the laws of the land.

4.7.1 **Evidence and standard of proof**

The evidence that is required in a presidential election petition in Kenya is another unsettled feature of the country's electoral laws. In 2013 Raila Odinga Case, the Supreme Court held that the test was neither criminal proof beyond a reasonable doubt nor civil proof on a balance of probabilities. The court thus concluded that an "***alleged breach of electoral law, which leads to a perceived loss by a candidate…takes different considerations***"[320]. Thus the court evaded a clear opportunity to lay down the

[319] Lady Justice Georgina Wood, —International Standards in Electoral Dispute Resolution‖ in the Book —Guidelines for understanding Adjudicating and Resolving Disputes in Elections‖, Guarde, Edited by Chad Vickery (2011) at page 8.

[320] *See para 297 & 298 of the judgement*.

law on the standard of proof required in petitions and it would appear that the court wanted the basis judicial flexibility and that is consistent with Dworkin approach where he says, '*judges do what they like'.*

The Raila Odinga 2017 decision adopted a different approach on evidence required in Presidential petitions ,Maraga CJ commented as follows: '**We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt'**[321] The same principle is also articulated in the case of **M. Naraya Rao vs. G. Ventaka Peddy of Another** [322].

In essence, the Kenyan 2017 petition resonates with the unanimous decision in the Zimbabwe Constitutional Court in the Chamisa Petition on the question of onus, citing the same authorities[323]. Interestingly, the two judgements reach a different conclusion on what constitutes a discharge of the onus and the cogent evidence led during the hearing of the matter.

The inquiry of the Court in the 2017 Odinga case with regards to allowing access to Petitions to the servers, allowed Petitions to have access to the Technical Partnership Agreements between IEBC Election Technology System would not have carried the day here in Zimbabwe. The refusal by bench in the Chamisa Petition to have ZEC open its servers is one such difference in approach. The 2017 Kenya decision took serious issue with IEBC for failing to avail two of the servers to the Petitioners and failing to complete the Forms 34A on time, resulting in unverified results being announced [324] and a violation of Article 292 of the Constitution, a position was the court could not condone and took as gross. The Kenyan Supreme Court was very much ready to give IEBC a chance to debunk the allegations made by the Petitioners, thus allowing itself the chance to assess the magnitude of the violations so alleged.

---

[321] See para 152 of the judgement.
[322] 1977 (AIR) SC 208
[323] Buhari vs Obasango (2005) CLR 7
[324] See the 2017 majority decision.

4.7.2 **Political Considerations**

The judges of both the Raila Omolo Odinga cases were very much alive to the political dynamics of the society. The 2013 Raila Odinga decision was accepted by all parties and it allowed for progress in a country fraught with political disturbances. The 2017 Raila Odinga decision presents much of these political considerations in concise form. The learned Maraga CJ quotes the Kriegler Report of 2007 as follows:

> **'The acceptability of an election depends very considerably on the extent to which the public feel the officially announced election results accurately reflect the votes cast for candidates and the parties. It depends, too, on factors such as the character of the electoral campaign and the quality of the voter register, but reliable counting and tallying is a sine qua non if an election is to be considered legitimate by its key assessors-the voters[110]….The system of tallying, recording, transcribing, transmitting and announcing results was so conceptually defective and executed (sic)…[111]Counting and tallying during the 27-30 December 2007 (and even hereafter) and the announcement of individual results were so confused- and so confusing- that many Kenyans lost whatever confidence they might have had in the results as announced. While integrity is necessary at all stages in the electoral process, nowhere is it more important than in counting and tallying'**[325].

The above sentiments illustrates a bench sensitive to the past political horrors that claimed over a 1000 people in 2007 and the need by the court to respect and safeguard the sanctify of the electoral process to the satisfaction of all political participants.

4.8 **General Comments**

The electoral aspects as approached from various jurisdictions to Presidential petitions have been discussed herein to give a comprehensive insight into the approaches of Zimbabwe and Kenya. It will be observed that while the same comparative

[325] See page 49 the majority judgement

jurisprudence which cuts across the majority of countries where a president is directly elected by the electorate; there remains fundamental features which differs from country to country. The following key features obtain:

A liberal bench is likely to urge all the parties to lay bare that facts so as to decide the matter. A rigid bench will hold fast on the need for a petition to produce evidence, even in situation which the evidence, even in situations where evidence is in the dormain of another party. It was similarly shocking for the Constitutional Court in Zimbabwe to rule that ZEC has no electronic server when the voter registration was conducted via BVR method and when the same ZEC provided consolidates prior of the election with soft copies of the voter register.

A liberal bench will likely be careful in its approach to the Presidential Petition Kenyan bench did in 2017 in ensuring that its findings do not affect the other electoral challenges in the lower courts. This needs to be compared with the 2012 order of the Constitutional Court where the apex court in Zimbabwe declared that the 2013 general election was "free, fair and credible and had been conducted in terms of the laws of Zimbabwe, thus indirectly compromising petitions pending in the lower courts.

A liberal bench will not pay an outlandish approach to its own Rules, rather , all tests as to the validity of election is a function of the Constitution and all that matters is for the court to interpret the rules in the context of what the Constitution seeks to achieve itself. It is trite law that delegated legislation cannot attenuate a Constitutional provision. This question came to light in the Chamisa petition wherein the court took a view that the rules of the Constitutional court were well applicable and interpreted same in peremptory terms, thus expunging certain documents from the record leaving the Petitioner's case exposed. See **Zimbabwe Township Development vs Lou's shoes** wherein the court made the following subtle remarks that:

> "**Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of**

legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution."[326]

A much more progressive bench will regard rules as they are. Rules must not be regarded as an end in themselves. Rules are procedural tools, fashioned by the court to enable it to dispense justice. [327]

In contrast, the Kenyans are very clear that even section 83 of their Elections Act must be interpreted so as to achieve the intention of the legislature. Thus Article 20(3) of the Kenyan Constitution stipulates:

"In applying a provision of the Bill of Rights, a court shall:….

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom"

[326] The same legal premise has been applied consistently in Zimbabwe, vide **Minister of Home Affairs v Bickle & Ors 1983 (2) ZLR 431 (S)** at 441E–H, 1984 (2) SA 39 (ZS) at 448F–G; **S v A Juvenile 1989 (2) ZLR 61 (S) at 89C,** 1990 (4) SA 151 (ZS) at 167G–H.).

[327] **Profert Zimbabwe (Pvt) Ltd v Macdom Investments (Private) Ltd HB-83-16)**

> The Supreme Court is under obligation under Article 20 (4) (a) to promote "*the values that underlie an open and democratic society based on human dignity, equality, equity and freedom?"*[328]

Of significance in Kenya, something totally missing in Zimbabwe is Article 159 (2) (d) of the Kenyan Constitution which provides that "*justice shall be administered without undue regard to procedural technicalities*". This provision is in light with asserting the Supremacy of the Constitution and it is with tremendous respect, a far cry from the Zimbabwean approach which covertly relies on the rules, especially when one factors in that rules are not constitutionally provided for, but created by the judges. Rule 23 of the Constitutional Court Rules sets a new provision altogether and the Malaba approach suggests that the rules are an extension of the Constitution.

4.9 **Conclusion**

This chapter illuminated the position of the law in Zimbabwe, Kenya and a host of other countries on certain determinant features in Presidential Petitions. Issues of evidence, issues of the relevant evidence and its threshold have been canvased, though admittedly this is very wide area which this research cannot look at each and every feature and its corresponding effect and treatment in another jurisdiction but had to confine itself with the major ones. Nonetheless, there is sufficient discussion on how the two countries comparatively treat Presidential Petitions.

[328] See also Article 20(4) (a) of the Kenyan Constitution.

CHAPTER FIVE

CONCLUSIVE REMARKS

5.1 Introduction

This thesis has unpacked electoral law in general and approaches of various jurisdictions on Presidential elections in particular. While the primary focus was on Zimbabwe and Kenya, several countries which also do direct presidential elections were also discussed with a view to illuminate the Zimbabwean and Kenyan presidential petitions. The nullification of the Presidential election in Kenya by the Kenyan Supreme Court in 2017, the fever pitch hearing of the Chamisa Petition in 2018 and most recently, the setting aside of an election in Malawi has ignited a lot of debate on the petitions in Africa where political instabilities are rife and the general electoral processes is opaque and controversial.

The Rule of Law, the Bill of Rights and the statutes governing elections in the two countries, Kenya and Zimbabwe are substantially the same, with minor differences. What differs are the Constitutional institutions and frameworks for democracy in the countries. The historical narratives which resulted in the two respective countries having their 'new' Constitutions are more or less the same and these constitutions are revered in the two countries as they endeavour to create a peaceful society. Needless to state that the respective constitutions of the two countries have progressive provisions for dealing with presidential electoral disputes. The responsibility falls squarely with the judiciary in the event of a challenge and though the judiciary maintains that these are political matters, it nonetheless carries the obligation to conclude the electoral disputes. Elections are inherently political processes it is an unsought responsibility of a court to decide a winner.[329]

[329] Bush v Al Gore ibid.

5.2 **Capping the Philosophical Schools of Thought on Elections**

All the philosophical scholars discussed in this research finds resonance with the topic at hand and the researcher's quest to unravel and the various approaches to presidential petitions in light of the evolving notions of justice and fairness. Justice is a contentious issue on its own and law is equally contentious. What is the correct approach for a judge seized with a matter of immense magnitude such as a presidential election, considering its social, political and economic impact on a country? Should the judge decide the winner and consequently the losers in such an election, or order any other appropriate relief? What will be the purpose of the majority then, and ultimately the whole process if judges can decide the outcome? What is the extent of judicial review to be exercised by judges in presidential petitions? What should judges do, should they make a finding that there was violation of the electoral law in the electoral processes? To what extent, if any, should judges condone irregularities in an election? These questions are all explained in the philosophical realms discussed herein.

The doctrine of avoidance appears to push and influence many judges in different jurisdictions. Where a matter can be settled politically, the judges have been quick to leave it to the politicians, outside the court rooms.[330] Where the court had a firm idealist indication, it has not hesitated to annual an election. In so doing, it release the rules even of evidence and approaches are issue for a mutual law perspective.[331] In instances where the law has a palpable dearth on certain issues, the judges have stepped in to create their own rules, which rules goes to the constitution itself and modifies it. The Constitutional Court of Zimbabwe Rules of 2017 clearly elaborates a situation a situation wherein the judges have filled in gaps in the law and created their own 'laws', thus modifying the extant law. The Dworkin's approach is thus more pronounced in the massive law-fully in the 2019 Chamisa the Kenya 2017 judgment. Judges will discover the law, where the law is not clear, so that justice prevails.

---

[330] Bush vs Al Gore , supra

[331] Malawian Petition, supra and the Raila Odinga, 2017 decision

Elements of the Kelsenian approach, particularly the doctrine of effective control have been witnessed in 2013 Tsvangirai Petition where the court went on to decide the matter notwithstanding that the Petitioner had withdrawn the electoral challenge. The order of the Constitutional Court declared the entire general elections as free, fair and credible in an expression of how the bench so much wanted to decide electoral matters even when a petition has been withdrawn. Determination even of an uncontested petition cements the interests of the bench as a key political player, charged with political responsibility.

5.3 **Closing Remarks**

5.3.1 This research has looked at the various approaches in several jurisdictions as to the approach to electoral petitions. The research has also broadly looked at the various issues to do with democracy and the centrality of an election in a democracy and the centrality of an election in a democracy. Needless to state that an election challenge is central to the protection of the right to vote and to participate in political affairs guaranteed by most constitutions, including the Zimbabwean Constitution and the Kenyan Constitution.

5.3.2 While observing the dynamic nature of the presidential petitions discussed herein, it is recommended that the Zimbabwean Constitutional court should take a robust approach when deciding petitions. A Presidential Petition presents a chance for the courts to test the conduct of various parties against compliance with the constitution. It is submitted that the playing field petition should never be tilted in one favour or else a crisis of legitimacy, will ensue. A robust approach will entail an approach that recognises all the rights enshrined in the Constitution, including the principles guiding the judiciary. Cherry picking rights in the constitution and choosing which to disregard remains undesirable. In State **of South Dokota v. State of North Carolina** [332] where he stated:

‘**I take it to be an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from all the others and**

[332] 192 U.S 286 (1904).

considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.'[333]

In the Chamisa Petition, the court in the exercise of its discretion disallowed a *subpoena duces tecum* which had been filed by the Petitioner separately but with a bearing on the same matter. The court went further to disallow the bundle of documents filed by the Petitioners ahead of the hearing on some technicalities. While the court could have acted to protect its own processes and the dismissals could have been within its rights as they constituted non-compliance with the Rules, the whole reasoning is lost where the same court condoned other seemingly material non-compliance with the Constitution by the same Petitioner. A robust approach where there is uniformity of practice and consistency will vastly improve the Zimbabwean Constitutional Court jurisprudence.

5.4 The Zimbabwean court has of late developed a technical approach to matters of Constitutional nature. The Chamisa Petition was dismissed on the basis of "lack of evidence". Throughout the hearing and in pleadings before the court, ZEC consistently admitted to some errors[334]. That on its own ought to have persuaded the court to call upon ZEC to shed undue light on its collating and tabulation of votes countrywide to dispel any suspicion of electoral malpractices. The approach adopted in **Kalil NO v Mangaung Metropolitan Municipality 2014 (5) SA 123 (SCA)** para 30[335] was most appropriate. In that case, the court said the following:

"The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and

[333] Ibid.
[334] Twice the votes of ED were reduced
[335] 2004 (5) SA 123

loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance."[336]

The above approach resonates with the Kenyan Approach in 2017 wherein parties were given access to the electoral residue. The Malawian Courts have also taken a liberal approach wherein the court examined the residue itself to satisfy itself as to the issues of electoral malpractices before it.

To this end, the general rule that the petitioner must prove his case ought to be tempered with realistic appreciation of centrality of the institution responsible for managing elections. This was the case in Kenya and Malawi. Anything short of that makes annulling an election an impossible task, notwithstanding the irregularities. Anything short of that goes further to compromise the rights of all the people protected by the Constitution.

5.5 A central compound of electoral law which is lacking in Zimbabwe and Kenya is certainty. The precedents available in the two petitions in Zimbabwe and Kenya are at crossroads. One cannot with certainty approach the courts to nullify an election. The courts are so fluid and what complicates this aspect is the case to case basis upon which matters of this nature are decided.

END

[336] Ibid.

BIBLIOGRAPHY

Allan, TRS, 'Legislative supremacy and the rule of law: democracy and constitutionalism' [1985] CLJ 111(1985a)

Aristole, *The Politics*, 1962, Sinclair,TA (trans), Harmondsworth: Penguin

Austin, J, *The Province of Jurisprudence Determined* (1832), 1954, London: Weidenfeld & Nicolson

Boule, H. & Hoexter (1989), *Constitutional and Administrative Law* 14th Edition, Essex, Pearson Education Limited.

Goldman, S. (1987) *Constitutional Law: Cases and Essays*, New York, Harper & Row Publishers

Hatchard, J. *et al* (2004), *Comparative Constitutional and Good Governance in the Commonwealth: Eastern and Southern African Perspective,* Cambridge, Cambridge University Press.

Kelsen, H., *Pure Theory of Law,* Knight, M. (trans), (1967), Los Angeles, University of California Press.

Barnett, H (2006), *Constitutional and Administrative Law,* 6th Ed, London, Routledge Lavendish.

Carpenter, G, (1987), *Introduction to South African Constitutional Law*, Durban, Butterworth.

Quinot, G, (2008), *Administrative Law*: *Cases and material*, Stellenbush, Juta.

Hosten, WJ etal, (1983), *Introduction to South African Law and legal Theory*, Durban, Butterworth

Waal, J.D. Currie I & Erasmus G, (2001), *The Bill & Rights Handbook,* 6th Ed, Johannesburg, Juta & Co.

Friedmaan, W, (1967, *Legal Theory*, 5th Ed, London, Stevens and Sons.

Chinhengo, MH, et al, (2017) *Zimbabwe Rule of Law Journal, Harare*, ICJ.

Madhuku, L., (2015), *Labour Law in Zimbabwe*, Harare, Weaver Press.

Ougoya, Z.E & Ofeno, WE, (2012), A Handbook on Kenya's Electoral Laws and System, Nairobi, EISA

Murray, C, (2013), *Kenya's 2010 Constitution*, wwwresearchgate.net.

Ghai, Y.P and McAuslan (1970), *Public Law and Political Change in Kenya 1, A Study of the legal framework of Government from Colonial times to the present,* Nairobi, Oxford University Press.

Human Rights Watch*, "Kenya Old Habits Die Hard: Rights Abuses Follow Renewed Foreign Aid Commitments"* July 1995, www.org/legacy/reports/1995/Kenya.