UNIVERSITY OF ZIMBABWE

FACULTY OF LAW

RECALL OF PARLIAMENTARIANS BY POLITICAL PARTIES: AN ARBITRARY PROCESS IN A CONSTITUTIONAL DEMOCRACY?

BY

ANESU CHIRENJE

August 2022

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF MASTERS IN CONSTITUTIONAL AND ELECTORAL LAW (LMCE)

SUPERVISOR: PROFESSOR LOVEMORE MADHUKU

DECLARATION

I declare that" ***Recall of Parliamentarians By Political Parties: An Arbitrary Process In A Constitutional Democracy?***"is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. ....

DEDICATION

I dedicate this piece of work to my late Grandmother Mbuya Enice Chirenje May your soul rest in peace and my Grandfather Sekuru Elias Chirenje

ACKNOWLEDGEMENTS

I want to extend my gratitude to the National Prosecuting Authority for kindly granting me leave to pursue this very educative professional course and to University of Zimbabwe for accepting me into this program

I want to acknowledge my family ,my three sisters Faith, Charmaine and Wadzanayi my two brothers Reginald and Blessing may this second piece of work be a source of inspiration to you

I also acknowledge my mother and my father Mr and Mrs Chirenje thank you for the support and prayers

Lastly i acknowledge my supervisor Prof L Madhuku, my classmates for the support, cooperation, encouragement and togetherness which made my studies interesting and bearable

ABSTRACT

Concern has been raised greatly by the arbitrary recall of lawmakers over the past few years. This is true because Section 67 of the Constitution's protection of the right ideally means that members of Parliament ought to account to the people as opposed to political parties. The legislative authority of Zimbabwe is derived from the people, and it is vested in and exercised in accordance with this Constitution by the Legislature, as stated in Section 117 of the Constitution. In the context of Zimbabwe, recall of legislators takes place in accordance with Section 129 (1) (k) of the Constitution, which states that a seat in the legislature becomes vacant if "the member has ceased to belong to the political party which he or or she was was a member of when he or she was elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the member has ceased to belong to the political party concerned. Because of the implications of this clause, over thirty opposition members of parliament have recently been recalled. The recalls were obviously outrageous, unprecedented, and politically motivated.

This thus raised the question of who, between the electorate and the political party concerned, has the responsibility of recalling the elected representatives. As a result, it is possible to infer that Section 129 (1) (k) conflicts with other Constitutional provisions. Furthermore, as demonstrated by the ***Mutasa, Khupe***, and***Madzimure*** cases, all of which were decided and dismissed by the Constitutional Court, the interpretation that has been given to it is one that is there to support the political interests of political parties, as opposed to the rights of the affected individuals. However, it is obvious that a citizen-driven recall mechanism is the most ideal. Additionally, it would seem that the conditions of a recall mechanism must not be overly onerous in order to allow for citizen participation in order for it to adhere to the fundamental principles of democracy. In addition, it is evident from the case studies of the United Kingdom and Indonesia that the Speaker must be assured that the conditions for recall have been met before a recall can be carried out . The Zimbabwean approach, which relies on the Speaker of Parliament to exercise arbitrary recall powers before being satisfied that the requirements for recall have been met, is in conflict with this. As such, to guard against these vices, there may be need to amend the Constitution so much so that recall of parliamentarians in initiated by citizens, that way the mechanism will not be subject to abuse by the political elites at the expense of the electorate.

Contents

DECLARATION ... i
DEDICATION ... ii
ACKNOWLEDGEMENTS ... iii
ABSTRACT ... iv
CHAPTER 1 ... 1
1.1 INTRODUCTION AND BACKGROUND ... 1
1.2 PROBLEM STATEMENT ... 3
1.3 JUSTIFICATION ... 4
1.4 METHODOLOGY ... 4
1.5 LITERATURE REVIEW ... 5
1.5 LIMITATIONS OF RESEARCH ... 7
1.6 OBJECTIVES ... 7
1.7 RESEARCH QUESTIONS ... 7
1.8 CAPTER SYNOPSIS AND CONCLUSION ... 8
Chapter 2 ... 10
The back ground and history of recall in Zimbabwe ... 10
Introduction ... 10
2.1 The historical development of the recall mechanism in Zimbabwe ... 10
2.1.2 The Lancaster House Constitution ... 10
2.1.3 The 2013 Constitution ... 12
2.2 The incidence of recall under Section 129 (1) (k) of the Constitution of Zimbabwe 2013. ... 13
2.3 PARLIAMENTARY RECALL IN ZIMBABWE VIS-À-VIS THE RIGHT TO VOTE AND THE SOCIAL CONTRACT THEORY. ... 14
2.3.1 The right to vote in perspective. ... 14
2.4 Direct Political participation ... 15
2.5 Parliamentary recall vis-à-vis the social contract theory ... 18
2.6 The Social contract and legitimacy ... 19
CHAPTER 3 ... 21
THE LEGAL FRAMEWORK OF RECALL IN ZIMBABWE. ... 21
Introduction ... 21
3.1 The 2013 Constitution ... 21
3.2 The Constitutional Context ... 22
3.3Interpretation of Section 129 (1) (k) by the Constitutional Court ... 23

3.3.1 The case of *Didymus Mutasa and Temba Mliswa v. The Speaker Of The National Assembly, The President Of Zimbabwe and Chairperson Zimbabwe Electoral Commission*in perspective. 23
3.3.2 The case of WilliasMadzimureand 16 others v. The Speaker of Parliament and 4 others. 25
3.3.3 Thokozani Khupe and Another v. The Speaker of Parliament and others 26
3.4 What is the role of the Speaker and the President of the Senate? 28
3.5 Constitutional interpretation 35
3.6 The Interpretation of Section 129 (1)(k) and the incidence of hard cases 38
Conclusion 40
CHAPTER 4 41
The Zimbabwean recall mechanism as compared to that of the United Kingdom, Indonesia, and Kenya 41
Introduction 41
4.1 Recall of Parliamentarians in the United Kingdom 41
4.1.1 The role of the Speaker in the United Kingdom's recall process 42
4.1.2 Participation of electors in the recall process in the United Kingdom 43
4.1.3 A comparison of the Zimbabwean mechanism to the British mechanism 44
4.2 Recall of Parliamentarians in Indonesia 46
4.2.1 The role of the citizens in the recall mechanism 47
4.2.2 A comparison of Zimbabwe's recall mechanism and that of Indonesia. 48
4.3 The Kenyan approach to recall of Parliamentarians 48
4.3.1 Citizen participation in the recall process and the role of the Speaker of Parliament 50
4.3.2 Analysis of the Kenyan approach as compared to the Zimbabwean recall mechanism 51
Conclusion 52
Chapter 5 53
Recommendations and conclusion 53
Introduction 53
5.2 Summary of Conclusions 54
Conclusion 56

CHAPTER 1

1.1 INTRODUCTION AND BACKGROUND

The existence of the State and Government emanates from the social contract. Social Contract is the basis of democracy and recall, just like voting is a form of democracy. Therefore, the social contract theory can be used to explain the genesis of recall. In the body polity of nations, it goes without saying that it is the social contract which gives legitimacy to political systems and structures as they exist today. This ought to be gleaned from the standpoint of such classic social-contract theorists like John Locke , and Jean-Jacques Rousseau who posit that the state and Government are an expression of the will of the people.

In essence, parliamentary recall is the removal of an elected person during his term of office[1]. Globally, in many Constitutional democracies, people are afforded the chance to express their will through electing representatives into Government. This will is thus protected and brought into effect through the right to vote.However in most democracies, the right to vote is often accompanied with the right to recall the elected officials once they affront the will of the people. Within the Zimbabwean context, recall of Parliamentarians occurs in terms of Section 129 (1) (k) of the Constitution which provides that the seat of a Member of Parliament becomes vacant;

> *"If the member has ceased to belong to the political party which he or she was a member when elected to Parliament and the political party concerned , by written notice to the Speaker or the President of Senate, as the case may be, has declared that the member has ceased to belong to it;"*

The ramifications of this clause has been such that in recent times, this has seen the unprecedented and controvesial recall of close to thirty opposition Members of Parliament[2]. The recalls were obviously outrageous, unprecedented and politically motivated, thereby bringing to the fore the issue of who has the onus of recalling the elected representatives between the electorate and the *political party concerned.*

[1]Ipsita Mishra, Right to Recall- Can this clean up the Indian political system? The Hindu, Sept 30, 2017
[2] ZESN, Report on March 26 by-elections

The recalls ought to be viewed under the purview of the right to vote. Section 67 of the Constitution of Zimbabwe guarantees the right to vote, as it provides that every person who is above the age of eighteen years has the right to vote. It further provides that every person has the right to free and fair elections. Further to that, ***Section 155*** of the Constitution provides that the state must ensure that the elections are conducted in a manner that is free and fair, in a manner that gives effect to the will of the people.

In this material respect, it follows that the only reasonable consequence of the right to vote is also the right to recall the elected officials once their conduct abrogate the will of the people. Unfortunately, this is not the obtaining situation in Zimbabweans it is the will of the *political party concerned* that takes precedence over that of the electorate. It is clear that ***Section 129 (1) (k)*** of the Constitution arrogates wielding powers to political parties in a manner that usurps and undermines the will of the people, especially if the right to vote is to be sincerely considered. It sacrifices the will of the people on the altar of political expedience.

Further to that, recalls have the effect of weakening Parliament because they change the composition of Parliament and inadvertently, disrupt business thereby rendering the function and operations of Parliament nugatory.

The Zimbabwean position ought to be juxtaposed with that of other states in the body polity of nations. In the United Kingdom, recall is where the electorate in an area can trigger a special election to remove an elected representative before the end of their term. This is done in terms of the ***Recall of Mps Act, 2015*** which sets conditions under which the electorate can recall members of Parliament. In this regard, it is worthwhile to note that in the United Kingdom, the power to recall Members of Parliament vests in the electorate as opposed to the *political party concerned.*

Further to that, in Indonesia, they have a complicated process of recalling elected officials and just like in Zimbabwe, the process is instigated by the *political party concerned*. However owing to the fact that the process is complicated, since its enactment, the recall proceedings have never been used with any success.

Closer home, in Kenya, the right to recall elected officials vests in the electorate. ***Article 104*** of the Kenyan Constitution provides that citizens have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.

From the foregoing, it is apparent that the Zimbabwean approach is in a class of its own, as it is am outlier.

1.2 PROBLEM STATEMENT

The indiscriminate recall of Parliamentarians over the past couple of years has been a great cause for concern. This is so because the recall of elected officials by political parties is inimical to the right to vote as contemplated by Section 67 of the Constitution. ***Section 117***of the Constitution is clear as it provides that legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature.

The point of no denial, is that legislative authority is derived from the people, as such those that enter Parliament, do so on behalf of no other entity other than the people who voted for them. In short Parliamentarians act as agents of the people, which people are the principals at all material times. In terms of ***Section 117(1)***of the Constitution, the people are not given a political character. That is to say, legislative authority is derived from the people, and not from the people of this and or that other political party. A member of Parliament thus serves at the mercy of the people without politically characterizing these people.

In terms of ***section 129(1) (k),*** political parties and not the people have an unguided discretion to recall a Member of Parliament mandated by the people, without even the slightest consideration to the people's views, which people are the principal and source of legislative authority. The difficulty that comes with this provision is that it arrogates unto political parties, to do as they want with elected officials to the complete exclusion of elected officials.

The recalling clause negates the supremacy of the people in legislative authority. By so doing, it conflicts with the essential features of the Constitution as per the essential features doctrine.

It ought to be appreciated that legislative authority is the foundation of our Parliament and its processes. ***Section 117 (1)*** is clear that whatever Parliamentary process, office and mechanisms, all such are to further the will of the people. The people confer legislative authority on Parliamentarians through a voting process, in exercise of their right in terms of ***section 67*** of the Constitution. ***Section 129(1) (k)*** gives power to a political party the complete exclusion of the people, to recall a Parliamentarian who was voted for under their party.

While ***section 67*** provides for a right to join a political party, and contest under it, such a right is not mandatory. People join parties if they want to, and they contest under political parties merely by choice. The right to join a political party is an individual right, same goes for contesting under it. The exercise of the right to vote in terms of ***section 67 (3) (a)*** is an individual affair, but the outcome of that process is collective. The outcome of an electoral process is collective. The collective nature of this outcome, is what gives rise to "we the people" concept of

Constitutional law. This collective character of an electoral outcome is what is referred to as the people in ***section 117(1)***.

In short, the people collectively are the legislative authority. A Member of Parliament does not hold office as a result of his individual relationship with a political party, but as a result of a collective view of the people in his Constituency. The voting contract is thus between the people and the Member of Parliament. Whatever party he belongs to is another personal issue between him and that party.

There is no logic in section 129(1) (k) completely ignoring the legislative authority, and bestowing the people's power to a political party.

1.3 JUSTIFICATION

It is without doubt that the power to recall as currently vested in *the political party concerned* is problematic. It negates from the will of the people on which the right to vote is premised and on which the elected representatives derive their authority. The mere fact that the right to recall vests in political parties is worrisome in that as in the Zimbabwean case, recalls are used to settle political differences at the expense of the electorate who will be in dire of representation in parliament. As such there is an attendant need for an expository analysis of the right to recall in Zimbabwe, vis-à-vis the right to vote and other cardinal provisions of the Constitution. This research will thus contribute to the limited literature that exists on recall in Zimbabwe, and address the political and legal dynamics of the recall process, answering whether the process is viable or not, at the same time making proposals for possible legal reform.

1.4 METHODOLOGY

The main import of this research is to interrogate into the right to recall Parliamentarians in Zimbabwe and the extent to which it conforms to the right to vote. This assignment is largely theoretical and explores the academic literature from primary and secondary sources through desk review. By and large, this is information gathered from statutes, case law, and authoritative texts. The research will also juxtapose through a comparative analysis of the current Zimbabwean approach vis a vis the practices in other countries.

1.5 LITERATURE REVIEW

In Zimbabwe, it is worthwhile to note that there exists limited literature on the right to recall. Noteworthy are the differences that arise in different jurisdictions.

An elected person may be removed from office prior to the end of their term of office through the recall process. It is frequently started with a petition demanding the removal of a specific elected politician. A poll asking voters whether the official should be recalled or not is started once the necessary amount of signatures from the official's constituency are gathered and confirmed. A replacement official may be elected if a majority of voters want to recall that official. This can be done by adding a second question to the recall ballot or by holding a new election. In its most basic form, the recall only pertains to specific individuals and may only be used by the voters who chose those individuals.[3].

A system of "direct democracy," commonly referred to as the "initiative, referendum, and recall," includes the recall as one of its components. The citizens' initiated referendum has dominated the practice of direct democracy in those jurisdictions that have adopted it.[4].

Further to that, ***Twomey***[5] posits that there seem to be two separate justifications for the recall. The first is based on the idea that elected officials are merely the electors' agents and that they must execute their mandate in a way that is compatible with the wishes of their constituents.[6]This view holds that an elected official shouldn't take the initiative, show leadership, or cast a vote in the legislature based on what they think is best for the country overall. Munro gave the followingdescription:

> *Officeholders approach the principal in the same manner that an agent would. They are merely instruments for doing public business, and if they act dishonestly in the discharge of their duties, the law ought to provide adequate procedures for removing them and substituting them by others*[7].

After World War I, during the Weimar Republic, many direct democracy initiatives were implemented in Germany. These included clauses allowing the populace to call for the dissolution of the Länder (unicameral legislature). The majority of these legislatures were chosen for terms of four years, and while some were incapable of being dissolved before their terms were up, others could do so with

[3]Anne Twomey, *The Recall of Members of Parliament and Citizens' Initiated Elections,UNSW Law Journal Volume 34(1)*

[4]Thomas Cronin, Direct Democracy – The Politics of Initiative, Referendum and Recall (Harvard University Press, 1999)

[6]Joseph Zimmerman, The Recall – Tribunal of the People (Praeger, 1997)

[7]William Munro, The Initiative, Referendum and Recall (Appleton, 1916) 314.

the support of a majority of the Landtag or a special majority. Through the use of citizen-initiated referenda, the populace would initiate the dissolution of the Landtag. Referendum petitions for the dissolution of the Landtag in the Länder were prevalent during the stormy 1920s and 1930s, at the height of the Nazi movement. The opposition parties, who wanted to gain political advantage through new elections, were the main proponents of the dissolution petitions.[8]

The improvement of the democratic participation of the populace in the political process and the ability to have an early election when necessary due to the shortcomings of the administration are, of course, the key benefits of allowing the people to initiate an early election.

A number of significant issues, nevertheless, would surface in respect to any such proposal. The means selected to carry out such a proposal must address and alleviate these worries. These are a few of them:

a. Needless expenditure;
b. Reducing the strength and efficiency of the executive branch; and
c. Using recalls as a political tool.

Steketee[9]believes that when an election is conceivable, it frequently results in a protracted period of rumor and conjecture. This can create ambiguity that is bad to the community as a whole, business, and governmental administration. Additionally, it diverts attention away from the correct performance of the Government's and the Parliament's respective duties.

Additionally, there is a large chance that such actions could be utilized as political pawns to stall the government's work or force election reruns. Even if there is no chance of success, petitions may be started in order to harm a government's reputation, divert attention from important policy decisions, discourage them from doing so, or exhaust the financial resources of the ruling party in order to leave them underfunded for the following general election.[10].

According to ***Makamure***, Parliament often represents the preferences and interests of the populace in democracies. Depending on the voting process used to choose MPs, it is effectively the voice of the people. The majoritarian system in Zimbabwe ensures that elected MPs represent certain constituencies whose interests they are required to advance and promote. The representatives of the public must be approachable in order to learn about these interests and concerns.

[8]Lee S Greene, 'Direct Legislation in the German Länder 1919–32' (1933) 27 American Political Science Review 445, 451.
[9]Mike Steketee, 'Shorter Terms a Worse Option in ihe Long Run', The Australian (Melbourne), 19 December 2009, 8.
[10]Joshua Spivak, 'California's Recall – Adoption of the "Grand Bounce" for Elected Officials', (2004) 82(2) California History 20, 28–37

Additionally, they must periodically update their people (to whom they account) on government or national development, as well as other policies and programs..[11]

The foregoing speaks to the close affinity that exists between the Members of Parliament and the electorate. It can thus be gleaned that on the basis of the atavism that comes with the relationship, it is the electorate that is best positioned to recall the members of Parliament.

1.5 LIMITATIONS OF RESEARCH

This study mainly focuses on recall of Members of Parliament. It will explore constitutional provisions on the same and the relevant legislation.In so doing, the study will look at the history of recall in Zimbabwe, challenges arising and the studywill focus the comparative analysis to the United Kingdom, Indonesiaand Kenya.

1.6 OBJECTIVES

- To examine the scope of the recall mechanism in Zimbabwe as provided for in Section 129 (1) (k) of the Constitution.
- To examine the role played by the citizens, if any in the recall mechanism.
- To assess how the courts have interpreted the recall provision in Zimbabwe.
- To examine how the current recall mechanism measures up against the social contract theory and notions of democracy.
- To examine how the Zimbabwean recall mechanism compares to that of other countries like the United Kingdom, Indonesia and Kenya.

1.7 RESEARCH QUESTIONS

1. Whether or not Section 129 (1) (k) of the Constitution is arbitrary in view of both procedural and substantive rights?
2. Whether or not the Zimbabwean recall mechanism is justified in view of both the social contract theory and democracy.

[11] John Makumbe, Strengthening parliamentary democracy in SADC countries, Zimbabwe country report, SAIIA, 2004

3. Whether the Courts have afforded Section 129 (1) (k) of the Constitution an interpretation that favours the enjoyment of other Constitutional rights.

4. Whether the Zimbabwean recall mechanism measures up against that of other jurisdictions like the United Kingdom, Indonesia and Kenya.

5. Whether or not the Zimbabwean recall mechanism can be remodelled in a manner that gives effect to other Constitutional rights.

1.8 CAPTER SYNOPSIS AND CONCLUSION

Chapter 1.

This will be an introductory chapter, committed to introducing the subject matter and the issues around it. It is made up of the introduction, problem statement and limitations to the research.

Chapter 2.

This Chapter will trace the history of recall and how it became part of our law. The chapter will trace the journey through time in an effort to lay a background for the study in question. The other section of this chapter will discuss the justification for recall based on the Social contract theory and democracy.

Chapter 3.

This chapter will focus on the legislative and policy framework regulating parliamentary recall in Zimbabwe.

Chapter 4.

This chapter will compare the current Zimbabwean position with that of the United Kingdom, Indonesia and Kenya.

Chapter 5.

This will be the final chapter of the research and it will capture the conclusion of the study, comments and recommendations.

Chapter 2.

The back ground and history of recall in Zimbabwe

Introduction

This Chapter will trace the history of recall and how it became part of our law. The chapter will trace the journey through time in an effort to lay a background for the study in question. The other section of this chapter will discuss the justification for recall based on the Social contract theory and democracy.

2.1 The historical development of the recall mechanism in Zimbabwe

2.1.2 The Lancaster House Constitution

It is important to emphasize right away that the Zimbabwean regime has not always included parliamentary recall. There was no recall clause in the pure Lancaster House Constitution. However, when ZANU PF itself was subject to internal rivalry, it enacted this statute to support its hegemony. Edgar Tekere, Robert Mugabe's Secretary General, was ousted from ZANU PF in 1988. Tekere, however, kept his parliamentary position, which prompted the creation of parliamentary recall through a constitutional change. As a result, former president Robert Mugabe was upset, which prompted Constitutional Amendment No. 9 of 1989, which amended the Constitution. As a result, Section 41 (1) (e) of the Lancaster House Constitution was created, which stated that a person ceased to be a member of parliament if;

> *“if, being a member referred to in section 34(1)(a) or 38(1) and having ceased to be a member of the political party of which he was a member at the date of his election to Parliament, the political party concerned, by written notice to the President of the Senate or the Speaker, as the case may be, declares that he has ceased to represent its interests in Parliament.”*

It is for this reasons Constitutional law experts like ***Professor Madhuku*** thus call it the ***“Tekere clause.”***

2.2.2.1 The recall of Munyaradzi Gwisai

"Unfortunately, or perhaps luckily, Tekere himself was not impacted by it, but Munyaradzi Gwisai was the first person to leave Parliament as a result of this clause. When Munyaradzi Gwisai stepped down from his seat in Parliament in 2002, the MDC became the first political party to take advantage of that provision, as Madhuku said. [12]

In this regard, Munyaradzi Gwisai, the MP for Highfield, Harare, was elected to the Zimbabwe parliament in June 2000, as a representative of the Movement for Democratic Change. At one of his innumerable socialist meetings, comrade Gwisai "called upon workers, peasants and war veterans to seize commercial farms on their own, and ignore Mugabe's cynical resettlement process". A furious Morgan Tsvangirai, the MDC leader, denounced comrade Gwisai as "wayward" and forced an immediate by-election in Highfieldon the basis of recall.

Gwisai capitulated and did not challenge his recall in the courts of law, but it became apparent that the recall mechanism as used by the political parties was prone to be used as a tool to whip politicians into line if ever they conducted themselves in a manner inimical to the political party's interests and political outlook.

2.2.2.2 Recall of Bhebhe and others

Further to that, this is also elaborated in the case of**Bhebhe and Ors v chairman of the Zimbabwe Electoral Commission N.O. and Ors**[13]

The applicants were elected members of the National Assembly in the 2008 general elections under MDC ticket. They fell out of favour with their MDC party resulting in their expulsion from the party in 2009. The MDC party proceeded to recall them from parliament. The Clerk of Parliament notified them that their membership to Parliament had been terminated with effect from 22 July 2009. The Speaker of the House of Assembly notified the President in terms of section 39(11) of the Electoral Act [Chapter 2:13] of the vacancies in the above-mentioned constituencies and the President took time to announce a date for the by-elections.

[12] https://www.zimeye.net/2021/04/09/mdc-is-the-first-party-to-use-the-undemocratic-recall-clause/

[13] (HC 1485 of 2010) [2011] ZWBHC 139 (12 October 2011)

In this particular regard, it is worthwhile to note that the gravamen of their application is such that they did not challenge their recall but rather sought to compel the President to issue a proclamation for the by election date to enable them to contest in same.

In dealing with this, the thenSpeaker of House of Assembly Mr Lovemore Moyoblasted the MDC leader Welshman Ncube over his party's decision to recall three Members of Parliament after a fall out between party leadership and the legislators. Mr Moyo said in his view, the Constitutional provision allowing party leadership to recall legislators was unfair and draconian. To further show his disdain for recall he even posited that he had delayed to make a pronouncement as so doing was against his strong convictions against recall[14].

The aforementioned demonstrates that the parliamentary recall was never an honest effort to protect voters; rather, it was devised to maintain elite control by requiring lawmakers to behave in a particular manner. This was done in order to ensure that voters would not be able to cast their ballots unreservedly. As a result, rather than functioning as a reflection of the preferences of voters, the provision has been put into place as a tool for enforcement that operates from the top down[15].

2.1.3 The 2013 Constitution

Under the current Constitutional dispensation, parliamentary recalls have also found their way into the Constitution by virtue of ***Section 129 (1) (k)*** of the Constitution. In this respect, it provides that;

> *"129 Tenure of seat of Member of Parliament*
>
> *(1) The seat of a Member of Parliament becomes vacant …*
>
> *(k) if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it."*

[14] https://allafrica.com/stories/201303110875.html
[15] https://davidhofisi.blogspot.com/2020/05/parliamentary-recall-origins-perils-and.html

Resultantly, the present Constitutional dispensation has been inundated with a litany of endless recalls of parliamentarians, so much that ***Section 129 (1) (k)*** of the Constitution has been the subject of much scrutiny both by the judiciary and by the courtof public opinion.

2.2 The incidence of recall under Section 129 (1) (k) of the Constitution of Zimbabwe 2013.

The past few years have been riddled by needless and indiscriminate recalls, particularly within the formations of opposition parties, so much that to date, more than thirty (30) Members of Parliament have been recalled[16]. Resultantly, the recalls led to serious contestation in the Courts leading to a serious exposition of the current recall mechanism.

Following that, these recalls resulted in the holding of by-elections, the most noteworthy of which was the election that took place on the 26th of April 2022. These by elections were held to fill in vacancies in the National Assembly, the majority of which had been created as a result of recalls at the instance and invocation of Section 129 (1) (k) by the MDC-T let by DouglousMwonzora, who sought to deal with his political rivals through the means of recalling them from office. These by elections were held to fill in vacancies in the National Assembly. The results of the election demonstrated that the true competition was between the CCC and ZANU PF and not between MDC-T and ZANU-PF, which had recalled their Parliamentarians. The CCC was victorious in 19 of the seats, while ZANU-PF was successful in nine, which is an increase of two seats from 2018. No other political party was successful in gaining a member in the legislature, and none of the others even came close to doing so.

What was even apparent from the election results was that the MDCT-T led by DouglousMwonzora, had invoked Section 129 (1) (k) solely for the purposes of settling political scores. This is so because most if not all of the Parliamentarians that had been recalled managed to retain their sits. Clearly this is reflective of the fact that falling out of favour with the *political party concerned* is not falling out of favour with the electorate. As such the vesting of Parliamentary recalls in the *political party concerned* is needless and unnecessary.

Further to that it is also apparent the indiscriminate recalls have the effect of affecting the proper functioning of state and Government for the following reasons;

[16]http://country.eiu.com/article.aspx?articleid=1450844928&Country=Zimbabwe&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability

a. They have an impact on the oversight function performed by members of parliament.

b. They have an impact on how government business is conducted in parliament because, in the context of Zimbabwe, they keep political parties focused on elections rather than on important deliverables.

c. They represent a waste of tax dollars.[17].

2.3 PARLIAMENTARY RECALL IN ZIMBABWE VIS-À-VIS THE RIGHT TO VOTE AND THE SOCIAL CONTRACT THEORY.

All electoral processes, including recall elections, are founded on the right to vote. Voting and the election of lawmakers are considered an expression of the will of the people under the social contract theory because of the significance of the right to vote in that regard. However, in the Zimbabwean context, the recall process as described in Section 129 (1) (k) of the Constitution seriously distorts the relationship between the right to vote and the recall process, giving the impression that the right to vote is secondary to the recall process. This dynamic of the people's will versus the party's will is thus paradoxical.

2.3.1 The right to vote in perspective.

In dealing with the right to vote, ***Section 67 (3)*** of the Constitution provides that:

> *"Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right-*

[17] https://www.thezimbabwemail.com/parliament-parliament/recalls-from-parliament-costs-state-37-billion-in-by-elections/

a. to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and

b. to stand for election for public office and, if elected, to hold such office."

This demonstrates how recall is an addition and complementary to the right to vote. It should be a right that voters can exercise after a general election, not an option. In a sense, it serves as a reminder of the person they initially selected's genuine essence and character. In this regard, Section 129 (1) (k) of the Constitution, which deals with Parliamentary recall, has the potential to violate Section 67 (3) of the Constitution's guarantee of the right to vote because it invalidates the people's will. In a representational democracy like ours, lawmakers should typically answer to the people who elected them. It is therefore curious why this mechanism has been usurped from the electorate yet they are the ones who vote for the election of the members. For this to actually be the case, the latter require an instrument of deterrence, a mechanism of control over opportunistic representatives, for example, the right to recall them at any time.

The current arrangement is therefore problematic as itmakes the member of parliament responsible and accountable to the political party rather than the constituents that they are elected to serve.

This is so because in the ordinary scheme of things, voters do not have to wait until the next election to get rid of a public figure who is incompetent, dishonest, unresponsive, or reckless. Recall acts as a tool for ongoing accountability. The basic goal of recall mechanisms is to strengthen the "grip" of the public on their representatives. The recall is intended to make it simpler for voters to remove unsatisfactory representatives, increasing the incentives for those in office to be concerned with the will of the people. Electoral representation is predicated on the idea that voters should be able to do this.[18].

In this regard, it follows that, in accordance with the principles of representative democracy, as Members of Parliament are chosen at large by the electorate, they should have the power to be recalled. Zimbabweans, unlike South Africans, do not vote for political parties but rather for the individual candidates, which supports the necessity to provide the voters the power to recall officials. Thomas Jefferson stated that "Governments are instituted among Men, deriving their legitimate Powers from the Consent of the Governed" in the Declaration of Independence.

2.4 Direct Political participation

The right to participate in democratic processes is a foremost right which is an entitlement to all citizens. In the present circumstances, it entails participation in such democratic processes as elections.

This right stems from the fact that the State and Government derives its authority from the people as such, they have to be a part and parcel of every process that has a potential of affecting their rights and interests.

The Constitution is permeated with the need to foster citizen engagement and participation in matters of state and government. One particular provision which deals with this is ***Section 117 (1)*** of the Constitution which provides that Legislative authority is derived from the people. It follows therefore that, on the basis of this authority, citizens ought to participate both in the election and recall of Parliamentarians since the mandate to legislate is derived from them.

The right to participate in democratic processes is not unique to Zimbabwe, this is so because under international standards, men and women have an equal right to participate fully in all aspects of the electoral process.

In dealing with this, the ***Universal Declaration of Human Rights***[19]provides that:

> *"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

Further to that, ***Article 25 (b)*** of the ***Covenant on Civil and Political Rights*** provides that every person has the right;

> *"To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;"*

Even more specific language can be found in the ***African Charter on Human and People's Rights*** regarding this issue. It stipulates that the right to self determination should be granted to all peoples. They have the unchallengeable and inalienable right to decide for themselves.[20]. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

[19] Article 21
[20]Article 20

From the foregoing treaties, it is apparent that the right to vote and participation in electoral processes is an expression of the will of the people. Most importantly, the foregoing thus make it abundantly clear that representative authority is derived from the people, as such, it can thus be surmised that even the authority to recall parliamentarians ought to be vested in the electors.[21]The General Election is the method that is utilized in the process of state administration for the purpose of populating representative institutions. Election is both a means of articulating the aspirations and interests of the people as well as one of the instruments to realize the sovereignty of the people who intend to form a legitimate government. This is because election is one of the instruments to realize the sovereignty of the people.

Jimly asserts that the relationship between the people and the State's everyday power typically develops on the basis of two theories: the theory of direct democracy (direct democracy), in which the people's sovereignty can be exercised directly in the sense that they act in their own best interests, and the indirect theory of democracy (representative democracy).

Recall elections are occasionally viewed in this light as a type of direct democracy, making them incompatible with a representative democratic system. However, as its application in numerous democracies demonstrates, this is a constraint brought about by a particular conception of how a representative ought to act and not a legislative prohibition on the adoption of recall elections. Recall elections, on the other hand, might be seen as an additional corrective tool within a representative democracy, to be used in cases where normal elections or disqualification clauses are unavailable. As ***Thomas Cronin*** pointed out: “voters have generally preferred to reserve the recall for its original intended use (to weed out malfeasance and corruption) and to settle political questions at regular elections.”[22]

The delegate theory of representation serves as the foundation for the recall device. According to this view, a member of parliament and her constituents have a tight bond. Therefore, the purpose of representatives in Parliament is to carry out the will of the people. The recall is part of a model of representation that, in contrast to the rival trustee theory of representation, envisions a far closer interaction between the voters and representatives since, under the delegate theory, it is the people themselves, not their interests, that are represented. The delegate model is incompatible with an excessive amount of independence from the electorate. As a result, a delegate who ignores the preferences of the electorate runs the risk of losing their ability to serve in that capacity. Therefore, if representatives don't uphold the standards expected of them or speak

[21]W. Friedmann, Legal Theories Colombia University Press New York, 5th Edition

[22] T Cronin *Direct Democracy: The Politics of Initiative, Referendum and Recall* (Harvard University Press, Cambridge, MA, 1989) 143.

effectively on their behalf (without using too much of their own judgment), their people have the right to "recall" them and elect a new representative.[23]

2.5 Parliamentary recall vis-à-vis the social contract theory

One of the most significant theories in the body politic of nations has been the social contract hypothesis. Its discussion of the foundation of a sovereign's legitimacy, the idea of individual freedom and equality, and the question of self-determination are the grounds for its immense influence.[24].

According to the traditional social contract theory, people made an implicit agreement to give up some of their personal freedoms to a political authority, or State, in exchange for the State better protecting some of their more crucial needs and rights, in order to escape the state of nature, an unstable state of inevitable war. This is how thinkers like Thomas Hobbes, John Locke, Jean Jacques Rousseau, and others later justified the founding of a state and under the auspices of the social contract theory.

According to the traditional social contract beliefs, in the beginning individuals lived in a state of nature, where there were no laws to obey to and no government to control them. Because people did not cooperate with each-other and concerned only of their private interests, they were continuously fighting with each-other. To address this problem, they agreed to build a separate society, through a social contract which would make it possible to live in peace and harmony. In this sense, Hobbes's theory is that political legitimacy and moral obligations are approved by the free will of individuals. According to Hobbes, it is the duty of every person to utilize his own will when deciding to transfer the rights to others or to renounce their rights by a voluntary act[25].

In dealing with this, Locke further propounds that, political obligations can derive only by a contract which is voluntarily accepted and approved by individuals, by which they submit themselves to someone else's will[26].

A contract that states one party gives all of their rights to another party is not permissible in Rousseau's view because it makes the other party a slave upon completion of the deal. In the event that such a contract is established, individuals

[23] Note that in this paper, I have focused only on the type of recall election where the recall can be initiated and decided on by the people. In some states, the recall is made by branch of government, usually the legislature.

[24]Evers, Williamson M. (1977) "Social Contract: a Critique ." Journal of Libertarian Studies, Vol. 1, No. 3, 185 194. Pergamon Press, Great Britain.

[25]*Hobbes, Thomas. Leviathan. Yale University Press, 2010, 1651., pt. 1, chap. 21, p. 138-139.*

[26]*Locke, John. Two Treatises of Government. London, 1823. Pg., 402.*

will no longer be able to freely express their will or take independent actions.[27]It is quite evident that Rousseau's goal is to establish some form of relationship between people, through which all citizens will be safeguarded by the society while each of them will still have their own free will and liberty.

Thomas Hobbes notes that the people realized the need for government and eventually formed the government through a social contract, which entailed that each individual relinquishes his sovereignty to a central body, and one can withdraw that sovereignty when the government fails to perform what it was created to do[28]

From these protagonists of the social contract theory the following aspects are clear;

a. Legitimacy is derived from the people.
b. the people have the liberty to elect representatives

2.6 The Social contract and legitimacy

By providing a framework for the legitimacy of government and outlining the obligations of citizens, the social contract has consistently been a factor in determining the political form of states. Because it is impossible to gain the permission of all individuals, Locke argues that governments should be viewed as the embodiment of a social contract between those individuals who have come together to form a community in which the majority rules. This indicates that a government is only valid if it has the agreement of the majority of the people it governs. This is because the people are the primary source of sovereign power, and for a government to be legitimate, it must have the permission of the people it governs.[29]

Moreso, it is worthwhile to note that legitimacy includes political authority and political obligations[30].

Admittedly, this brings to the fore the question; where do parliamentarians take legitimacy from? Social contract could still answer this question. As it was explained before, legitimacy arises from the will of its citizens. Within the context of electoral processes it is clear that the will of the people is expressed through the right to vote and it follows therefore that having elected the parliamentarians

[27] *Rousseau, Jean Jacques. Social Contract. Simon and Schuster, 2010, 1762.*
[28] See leviathan
[29] *Encyclopaedia Britannica. http://www.britannica.com/EBchecked/topic/157129/democracy/233861/The-legitimacy-of-government (accessed June 2022).*
[30] *Paz-Fuch, Amir. The social contract revisited: The modern welfare state. Oxford: The Fundation for Law, Justice and Society. 2011.*

as per the social contract theory, the citizens must retain the right to recall them because legitimacy is derived from them and not from political parties.

In his discussion of the subject of political representation, ***James Madison*** proposes, from the vantage point of the social contract theory, that a political representative is a delegate who works to achieve the goals that have been expressed by her constituents. Because they only serve in a spokesperson capacity, they are unable to follow their own independent thoughts while making decisions. A contract of mandate is an agreement in which one party, the mandatary, takes on the obligation to perform a certain act for the other party, the mandator, who entrusts her by means of specific instructions. When defining the juridical nature of the relationship between representatives and their represented, some academics refer by analogy to the contract of mandate. This contract is an agreement in which one party, the *mandatary*, takes on the obligation to perform a certain act for the other party, the *mandator*. At any point, either side might choose to sever their ties with the other. The information presented up until this point makes it abundantly evident that in the system of representation, the voter serves as the principal, while the member of parliament acts as the agent. On the basis of this one argument alone, there is no justification for granting recall rights to the political party that is in question.[31]

From the foregoing, what is clear is that within the matrix of representation, the voter is the principal and the Member of Parliament is the agent. On this basis alone, there is no rationale for thus affording recall powers to the *political party concerned.*

Section 129 (1) (k) of the Constitution is thusnot in keeping with the social contract theory which lays the foundation for both state and Government.

Conclusion

The Social contract is the basis of the relationship between the citizens and the state. Most importantly on the basis of the Social contract, the citizens retain the right to vote for elected officials and it follows that the recall mechanism is a tool that ought to be at the disposal of the citizens for the purposes of holding Members of Parliament accountable. Section 129 (1) (k) of the Constitution is however inimical to the social contract theory as it vests the recall mechanism in the *political party concerned* as opposed to the people, as such it defeats the will of the people.

[31]Geoffrey Brennan, Alan Hamlin, *Democratic Devices and Desires, The Independent Review Vol. 6, No. 1 (Summer 2001), pp. 132-135*

CHAPTER 3

THE LEGAL FRAMEWORK OF RECALL IN ZIMBABWE.

Introduction

This chapter will focus on the legislative and policy framework regulating parliamentary recall in Zimbabwe. With a view to determine the nature of the recall mechanism and the processes involved therein. The chapter will also explore the approach that has been taken by the Courts in interpreting Section 129 (1) (k) of the Constitution.

3.1 The 2013 Constitution

As has already been alluded to, under the current Constitution[32], recall provision is found in section 129(1)(k)

of the Constitution. It specifically provides that;

> *"129 Tenure of seat of Member of Parliament*
>
> *(1) The seat of a Member of Parliament becomes vacant …*
>
> *(k) if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, hasdeclared that the Member has ceased to belong to it."*

Just like its forerunner, there are two critical elements in this provision:

1. After being elected to Parliament, the MP has renounced his membership in the political party he previously belonged to.

[32] Constitution of Zimbabwe, 2013

2. The political party must notify the Speaker or the Senate President in writing that the MP no longer belongs to it.

It is worthwhile to note that these seemingly innocent and plain provisions have proven to be very deceptive and elusive, this is so because a lot of the issues which the provisions attempt to deal with remain shrouded in mystery. The provisions are not clear with respect to the following[33];

a. What does it mean for a member to no longer belong to a political party?

b. How does the Speaker or the President of the Senate know that the written notice is from the authorized political party?

c. What, if any, part do the Speaker and President of the Senate play in this entire process?

d. Does that job have any actual substance, or is it purely procedural?

This lack of information, despite being troublesome, is not a flaw in the Constitution because it is not for the Constitution to unpack topics in detail and with greater particularity. In most cases, primary and secondary legislation are responsible for determining this. Regrettably, there is no legislation that can shed light on these issues and provide clarification. In addition, because there is no legislation that addresses parliamentary recalls, as such the interpretation and application of Section 129 (1) (k) have been the focus of a great lot of debate and controversy.

3.2 The Constitutional Context

The provisions of Section 129 (1) (k) of the Constitution have the potential of violating the fundamental human rights which are Constitutionally guaranteed, both in its substantive interpretation and application.

The right to the equal protection and benefit of the law which is protected by ***Section 56(1)*** of the Constitution of Zimbabwe, 2013 is one such right which has the potential of being violated. This is so because at the face of it, the application and invocation of Section 129 (1) (k) is there to give an upper hand to the *political party concerned* whilst disregarding the vested interests of the affected member of parliament.

[33]https://bigsr.africa/bsr-critical-analysis-of-the-law-of-parliamentary-recall-d38/

Further to that, the right to stand for election for public office and, if elected, to hold such office protected by ***Section 67(3)(b)*** of the Constitution of Zimbabwe, 2013 is also infringed by the recalls, for reasons that the act of recall has the effect of unduly denying one the chance to serve in a public office.

The recalls are also inimical to the right to administrative justice protected by ***Section 68*** as read with ***Section 69*** of the Constitution, 2013 for reasons that the affected party is not even afforded a chance to be heard, it would appear that the Speaker of Parliament or President of Senate is promoted to recall the Member of Parliament at the mere say so of the *"political party concerned"*.

It is thus clear that Section 129 (1) (k) of the Constitution is at variance with key tenets of the Constitution and given the existing contradiction, it would be worthwhile to assess how the Courts have interpreted this problematic provision.

3.3Interpretation of Section 129 (1) (k) by the Constitutional Court

In the absence of guiding legislation, the interpretation of the recall provision has been left to judges in the courts of law. In this material respect, as will be elaborated hereunder, the Constitutional Court has already pronounced itself with respect to Section 129 (1) (k) of the Constitution.

3.3.1 The case of *Didymus Mutasa and Temba Mliswa v. The Speaker Of The National Assembly, The President Of Zimbabwe and Chairperson Zimbabwe Electoral Commission*[34]in perspective.

This case is one of the very few instances where the ruling party Zanu PF had to recall some of its Parliamentarians. In this case, the Constitutional Court was called upon to interpret the recall provision. It had this to say:

> *"In interpreting s 129(1)(k) of the Constitution, the Court is under an obligation to give full effect to the founding values enshrined in s 3 of the Constitution, including the supremacy of the Constitution and the rule of law. The supremacy of the Constitution means that the provisions of the Constitution are supreme and any law repugnant to them is invalid. The rule of law also dictates that decisions must be based on and sanctioned by the law. Section 129(1)(k) of the Constitution regulates the tenure of office of Members of Parliament. In terms of the section, the seat of a Member of Parliament becomes vacant if the Member has ceased to belong to the*

[34] CCZ-18-19

political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it. The Court on a previous occasion has held that, in general, the principles governing the interpretation of a Constitution are basically the same as those governing the interpretation of statutes. One must look to the words actually used and deduce what they mean within the context in which they appear. If the words used are clear and unambiguous, then no more is necessary than to construe them in their natural and ordinary sense."

Further to that, in dealing with the role of the Speaker of Parliament in the recall process, the Court took the position that recall happens by operation of law, once the *political party concerned* writes to the Speaker of Parliament, and the Speaker of Parliament does not have to make any inquiry with respect to the cessation of Membership. The court went on to express the opinion that the status of having ceased to be a member of the political party in question is a matter of fact, and that the legality of this status is decided by reference to the rules of the constitution of the political party in question. It is possible that this fact is the end result of a process involving expulsion or a voluntary resignation. When it does happen, it continues to be a subject that affects the internal affairs of the political party that is being targeted, and an affected person has the option of opposing the recall through the party's internal remedies if it so chooses.

3.3.1.1 An analysis of the Mutasa case

From the foregoing, it is apparent that the Constitutional Court gave the provisions of Section 129 (1) (k) a simplistic interpretation that averts from the entirety of the Constitutional context. It is apparent that the Constitutional court, took a position that tilts in favour of political parties. Affected MPs are always on the losing end. This is probably not surprising given the rationale of the recall provision.

The fact that the Constitutional took the position that the recall mechanism did not offend other Constitutional provisions is on its problematic. This is so because, in so doing it failed to appreciate that the recognition, protection, and preservation of rights are not the result of state largesse because rights are not granted by the state, nor are they grantable by the state. This is the message that is made abundantly clear by the text of the constitution, which states that rights have an inherent value and utility. They are inherent to humans, each and every

person, by virtue of the fact that they are human, and the state and those in charge are not doing anyone a favor by respecting their rights.[35].

From the Mutasa case it is clear that the Constitutional Court made it clear that in the recall process, the role of the Speaker of Parliament is passive, as all he had to do was to announce a vacancy in the seat, which process was a consequence of the internal processes of the political party concerned. In so doing, the Constitutional Court effectively made a finding to the effect that the role of the Speaker of Parliament was not substantive but rather it was procedural. In so doing, the Constitutional Court fell into the error of isolating the provisions of Section 129 (1)(k) of the Constitution from other cardinal provisions of the Constitution.

3.3.2 The case of WilliasMadzimureand 16 others v. The Speaker of Parliament and 4 others[36].

Similar to the Mutasa case, the applicants in this case claimed that the Speaker and Senate President's actions in "expelling" them from Parliament violated their constitutionally guaranteed right to equal protection and benefit of the law as stated in Section 56(1). In addition, they claimed that Sections, 68, and 69(3) of the Constitution had been violated, which dealt with the right to administrative justice and the right to a fair trial, respectively. They also claimed that Section 67 which dealt with the right to stand for election to public office and, if elected, the right to hold such office had been violated. Their application was denied by the Constitutional Court's entire bench because it was determined that;

> *"A Member of Parliament loses his or her seat in the specific circumstances prescribed under s 129 of the Constitution. Section 129(1)(k) of the Constitution provides for one of the circumstances prescribed. One cannot read any other value into the section, because s 129(1)(k) of the Constitution is a complete provision that is not subject to the Bill of Rights. The wording of s 129(1)(k) of the Constitution is clear. Like any other provision of the Constitution, s 129(1)(k) is a fundamental law, partaking of the status of supremacy of the Constitution against which the validity of conduct can be measured. It is not permissible to import notions from other constitutional provisions to impose a duty that was not intended to be part of the requirements of a particular constitutional provision."*

[35]**Attorney General v Kituo Cha Sheria & 7 Others** [2017] eKLR
[36]Judgment No. CCZ 8/19

3.3.2.1 Analysis of the Madzimure case

It is worthwhile to note that the reasoning of the Constitutional court in this material respect was no different from the one it gave in the Mutasa case, as the Constitutional Court simply restated its pronouncements. Regarding the role of the Speaker of Parliament, again the court emphasised that his role was simply to communicate the existence of a vacancy, upon receipt of a written notice from the political party concerned, as such he did not have any substantive role to play, serve to give effect to the provisions of Section 129 (1) (k) of the Constitution.

From these two leading cases, it is a pity that the Constitutional Court in interpreting the provisions of Section 129 (1) (k), did not make an authoritative statement that borne out of Constitutionalism rather, it has used the literal rule of interpretation, pointing out that the ordinary meaning of the recall provision admitted to no other considerations other than the fulfilment of the two elements stated above – cessation of membership and communication to Parliament. On all fours, it is apparent that the approach taken by the Constitutional court negates from cardinal Constitutional provisions. The Bill of Rights in Zimbabwe's constitutional framework is not a minor, peripheral or alien thing removed from the definition, essence and character of the nation. It is integral to the country's democratic state and is the framework of all policies touching on the populace and the foundation on which the nation state is built.

3.3.3 Thokozani Khupe and Another v. The Speaker of Parliament and others[37]

In this case, Professor L. Madhuku who was representing the Applicant, took an entirely different approach altogether in challenging the recall of Thokozani khupe, of course, this had been informed in part by the apparent attitude and pronouncements of the Constitutional Court in the previous matters.

As a result, the applicant filed a complaint with the Constitutional Court, claiming that the Speaker of Parliament had broken a constitutional duty to preserve a Member of Parliament's right to hold office as provided for in Section 119 (1) of the Constitution. Therefore, it was the applicant's argument that Section 129 (1) (k) of the Constitution did not take effect automatically, but rather that the Speaker of Parliament has a constitutional duty to either initiate a procedure akin to interpleader proceedings and require a court of law to resolve the dispute or to refer the parties to a court once it has been informed by any of its Members about a potential dispute in a political party to which a Member belongs. Thus, it was necessary for the Court to provide a definitive interpretation of Section 129(1)(k) of the Constitution.

[37] CCZ-20-19

In dealing with this new line of argument, the Constitutional Court took the view that the matter had become moot.Khupe wanted a declaration that she was still an MP despite the fact that the Parliament of which she was a member had been dissolved after its term came to an end in July 2018. According to the Court:

> *"The dissolution of Parliament rendered it legally meaningless for the Court to grant the first applicant [Khupe] the specific relief she sought by way of the court application. It also became a futile exercise to embark on the consideration and determination of the question whether or not Parliament had a constitutional obligation under s 119(1), as read with s 129(1)(k), of the Constitution of the nature and scope contended for by the first applicant."*

In this regard, the Constitutional Court clearly and completely disregarded, arguments that had been raised on behalf of the Applicant to the effect that the Court should not avoid a moot case when it is clear that it concerns issues that are capable of repetition.

The Court thus refused to make any authoritative pronouncement as it took the view that it had already pronounced itself in this regard, it thus persisted with its pronouncements as per the ***Madzimure***case that;

> *"The role the Speaker or the President of the Senate has to play in the process is to satisfy himself or herself that the document he or she has received is from a political party and that it contains a written notice declaring that the Member of Parliament who was a member of that political party when elected to Parliament has ceased to belong to the political party concerned. The Speaker or the President of the Senate has no power to prevent the occurrence of the creation of the vacancy in the seat of a Member of Parliament commanded by s 129(1)(k) of the Constitution as the consequence of the communication and receipt of the written notice."*

3.3.3.1 Analysis of the Khupe case

Once again, the Constitutional Court squandered an opportunity to make an authoritative pronouncement with respect to the interpretation of Section 129 (1) (k) of the Constitution, especially in the wake of new arguments that had been raised. It is clear that the Speaker of Parliament has an obligation to protect the tenure of a seat of a Member of Parliament pursuant to Section 119 (1) of the Constitution. It thus remains curious why the Constitution refused to make an authoritative pronouncement in this material respect.

In this specific instance, the Constitutional Court simply chose to ignore the fact that the behavior of the Speaker of Parliament is outlined in the Constitution, which is the highest law that can be upheld in the country. It is up to the courts of law, not the least of which is the Constitutional Court, to assert the authority and supremacy of the Constitution. The

English tradition of parliamentary supremacy is not one that is particularly beneficial to young democracies like ours.

Just like in all the other cases before it, the Constitutional court relegated the Speaker of Parliament to a mere somebody who is simply there to rubberstamp the wishes of the political party concerned in the recall process.

3.4 What is the role of the Speaker and the President of the Senate?

In all cases before it, it is clear that the Constitutional Court rejected the view that the Speaker and the President of the Senate had such a substantive role in the process of recall. For instance, in the ***Madzimure case***, the Court stated:

> *"Thelaw requires the Speaker and the President of the Senate only to accept that a personhas ceased to be a member of a political party as communicated by the writtennotice. They have no power to enquire into the legality of the processes which lead tothe eventuality of the cessation by the Member of Parliament of membership of thepolitical party concerned."*

In the Mutasa case, the Court reiterated the same point in the following terms:

> *"The provisions of s 129(1)(k) of the Constitution do not clothe the Speaker or the President of the Senate with power to inquire into the legality or otherwise of the fact of cessation of membership of the political party concerned by the Member of Parliament …"*

The same argument was persisted with in the ***Khupe***case. From the foregoing cases, it is clear that in interpreting the provisions of Section 129 (1) (k) of the Constitution, on all occasions, the Constitutional Court took the position that the roles of the Speaker and the President of the Senateare merely procedural. Their role is to simply accept the written notice and to communicate the existence of a vacancy that would have occurred by operation of law.

However, it has to be borne in mind that in the exercise of his role, the Speaker is an administrative authority and as such, the functions and conduct of administrative authorities are prescribed both by the Constitution and by legislation.

In terms of ***Section 68 (1)*** of the Constitution, every person has the right to administrative conduct that is reasonable, and both substantively and procedurally fair.

Further to that, ***Section 3*** of the ***Administrative Justice Act***[38]provides that an administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person must act lawfully, reasonably and in a fair manner, at the same time affording the affected party a chance to be heard.

This therefore puts to doubt the propriety of the conduct of the Speaker of the Parliament as he is there to simply announce a vacancy without making any inquiry and without affording the affected party a chance to be heard. Surely the conduct of the Speaker of Parliament in the recall process should not be that mechanical, due regard ought to be given to all the Constitutional considerations and provisions that are at play. It is clear that in proceeding to effect recalls without affording the Parliamentarians a chance to be heard, the Speaker would have abrogated from his duty to act fairly and in a reasonable manner.

Further to that, there are two distinctrequirements under section 129(1)(k). A Member of Parliament cannot lose their seat unless two conditions are met according to Section 129(1)(k). Which are:

a. The Member of Parliament must no longer be a member of the political party that they were a part of when they were elected to the legislature.

b. The political party in question must have declared that the member of parliament no longer belongs to it by giving written notice to the Speaker of the National Assembly or the President of the Senate.

Further to that, the word *"and"* that was inserted between the two requirements was clearly intended to mean something. The two conditions are separate. For instance:

A political party cannot unilaterally remove a member from its ranks by notifying the Speaker in writing that the member no longer belongs to it, as long as the member is still a member at the time the written notice is received by the

[38]Administrative Justice Act [Chapter 10:28]

Speaker. This is so because a member of Parliament who left the political party of which he or she had been a member when elected to the House does not forfeit their seat until the political party in question notifies the Speaker or President of the Senate in writing that the member has left their ranks.

This is so because the seat of a Member of Parliament becomes vacantif the member was a member of a political party at the time of election and the political party concerned has declared that the member has ceased to be a member of it by written notice to the Speaker or the President of the Senate, as the case may be.

In relation to the first requirement, the question is: At what point does a party member "cease to belong" to that party? The nature of the connection between a political party and its supporters will determine the response to this query.It is cliché that a voluntary association, such as a political party, has a contractual relationship with its members.

According to the case of ***Matlholwa v. Mahuma& Others***[39];

> *"A political party is a voluntary association established on the basis of mutual agreement, as the court below correctly noted. Political parties and their members have a contractual relationship, similar to any other voluntary association; the constitution of the party contains the terms of the contract."*

The Zimbabwean Constitution thus governs the agreements made between political parties and their supporters. Any clause that conflicts with section 67 of the Constitution with a view to limit or diminish political participation is unenforceable.

In the case of ***Ramakatsa& Others v. Magashure& Others***[40], the South African Constitutional Court stressed the following:In pertinent part, section 19(1) declares that every citizen of our nation is free to make political decisions, including the right to take part in political party activities. This privilege is granted unconditionally. The section means what it says and says what it means, which is consistent with the liberal interpretation of provisions of this kind. It guarantees the right to freely choose your political affiliation, and once you've decided, the section protects your right to take part in that party's activities. In this instance, the appellants and other ANC members are entitled to take part in its activities thanks to a constitutional guarantee. It safeguards the right's exercise not only from outside interference but also from interference coming from within the party. Political parties may not adopt constitutions that are in conflict with section

[39]Matlholwa v Mahuma and Others (207 of 2008) [2009] ZASCA 29 (30

[40]CCT109/12

19, it bears repeating. If they do, a claim of constitutional invalidity may be made against their constitutions.

Therefore, it becomes clear and obvious that a member only "ceases" to belong to their political party within the meaning of section 129(1)(k) if they voluntarily withdraw from the party. A member does not "cease" to be a member in the sense of section 129(1) when their membership is unlawfully terminated at the request of the political party (k). It is impossible to read section 129(1)(k) in any other way. Given the unqualified nature of a citizen's right to make political decisions under section 67, including the right to take part in the activities of a political party of one's choice, it cannot accommodate unlawful termination of membership.

It is thus a matter of both law and fact as to whether or not a member has lost party affiliation. Section 129(1) only applies to members of parliament who have formally ceased to be members of their political party (k)

With regard to the second prerequisite, the written notification to the Speaker or President of the Senate must be sincere in the sense that it must be the action of the relevant political party. A written notice must come from a person or organ with the necessary authority under the relevant political party's constitution because a political party is a persona ficta (legal persona). The written notice is invalid for purposes of section 129(1) if it was not authorized by the political party in question (k).

However, the problem with Section 129(1)(k) is that it does not explicitly say how to assess whether or not a seat has become vacant by determining whether or not the two conditions have been met. The Constitution must be read as follows in accordance with the proper method of constitutional interpretation described above:

Before announcing or declaring the seat empty, the Speaker or President of the Senate must be confident that both conditions have been satisfied. The following Constitutional provisions both explicitly and implicitly create this obligation:

Supremacy of the Constitution as enshrined in Section 2 of the Constitution clearly enjoin the Speaker of Parliament to act in a manner that is consistent with Constitutional provisions.

Further to that, the founding values that are enshrined in Section 3 of the Constitution are of great bearing. This is so because; it is clear from Section 3(2) (k) and (f) that Zimbabwe is founded on respect for the people of Zimbabwe from who authority to govern is derived and also due respect for vested rights.

In this regard, the Speaker or President of the Senate must get the opinion of the concerned Member of Parliament regarding the two requirements before determining whether or not they have been met. As a result, the Speaker or President of the Senate must tell the Member of Parliament in question of the existence of the notice and explicitly acquire the member's opinions on the following:

a. Whether or not they are no longer a part of the political party, and
b. Whether the notice is legitimate.

In the event that a member and his or her political party disagree over one of the two requirements, the Speaker or President of the Senate is not authorized to mediate the matter. The rule of law and the concept of the separation of powers demand that any dispute be resolved in a court of law, regardless of how frivolous or vexatious it may seem to the Speaker or President of the Senate to be. This is also a result of Constitutional ***Section 69(3)***, which states:

Everyone has the legal right to access the courts or any other tribunal or forum that has been established by law to settle disputes.

As such, the position of Speaker of Parliament is one of a fair and completely impartial presiding officer under common law (law and custom of Parliament). This is implicitly codified in the Constitution by necessity. The Constitution's intent in requiring that the written notice be submitted to the Speaker and not the Clerk of Parliament is to guarantee complete impartiality in the handling of the matters covered by the section. In order to maintain impartiality, one must inform the relevant Member of Parliament and refrain from intervening in any ensuing disputes, allowing the courts to resolve them.

As has already been established, it is not just a matter of law and natural justice to involve the member in question before declaring his or her seat vacant under section 129(1)(k). Additionally, it is just common sense. Given that joining a

political party is a contract, it is illogical to permit only one party to announce the contract's termination. Any deviation from this common sense calls for explicit language to that effect.The people who created the Constitution were very familiar with how political parties behaved, especially their propensity to make decisions based on expediency rather than principle. To enable a member to contest the political party's bare authority, the two requirements are distinct.

Section 129(1)(k) only applies when neither of the two requirements is in question. For instance, section 129(1)(k) easily applies when a member voluntarily resigns. The section is not a simple route if that circumstance does not exist. Because we live in a democratic society with conflicting values and principles, this is the case. Before the section is put into effect, the courts must definitively settle any dispute.

An interpretation that undermines the values and principles upon which Zimbabwe is founded and is so absurd that it can never have been the intention of the Constitution's framers is one that permits the Speaker or President of the Senate to declare a seat vacant without giving the member in question the opportunity, if he or she so desires, to demonstrate the non-fulfillment of one or both of the two requirements in that section.

According to section 117(1) of the Constitution, legislative power derives from the people, which is why voters elect members of parliament. Any interpretation of section 129(1)(k) that grants political parties unrestricted power is at odds with the notion of "authority from the people."The Constitution does not explicitly grant the right to be recalled. It is forbidden to read Section 129(1)(k) as granting an express right of recall. There is no express clause granting political parties an unrestricted right to recall, as voters do not have such a right.

The composition of Parliament will be entirely at the whim and discretion of political leaders under an interpretation that permits the Speaker or President of the Senate to declare seats vacant simply on the basis of a political party's request. It is not unusual for one person to have complete control over a political party. If Members of Parliament were to be expelled arbitrarily from the legislature, the entire purpose of the constitutional provisions governing the legislature would be defeated. This is such an egregious absurdity that it was obviously never intended.

The absurdity of the role of the Speaker of Parliament is thus brought to the fore in the case of in the case of ***KucacaIvumilePhulu&Ors v Benjamin Rukanda&Ors***[41]

In this particular instance, all six members were affiliated with a political party known as the People's Democratic Party (PDP), which had previously been divided into two distinct groups prior to the general election in 2018. Both groups identified themselves as members of the PDP. The six individuals were members of one faction, which ran candidates under the banner of the MDC-Alliance in the election. The other faction joined a different coalition, which was known as the Rainbow Coalition. Each of the six individuals was successful in their bid to become a representative for the MDC-Alliance in the National Assembly. The other faction's candidates did not fare any better in this election than anyone else.

More than two years after the election, a member of the losing faction that had joined the Rainbow Coalition wrote to the Speaker, calling himself the Secretary-General of the PDP, and asked that the six MDC-Alliance members be recalled in accordance with section 129(1)(k) of the Constitution. This happened more than two years after the election.

In the letter he sent, he stated, "We... hereby declare that the following Members of Parliament have ceased to belong to the People's Democratic Party. The parties to the agreement were able to maintain their separate identities as well as their autonomy, as stipulated in Clause 20 of the agreement.... At the time of the most recent election in 2018, these Members were affiliated with our political party, which at the time was known as.According to the provisions of Clause 6 (4) (a) of our party constitution, the members who are listed below have renounced their membership in the party and are being recalled as a result.

There were some odd features to the letter:

The writer purported to be speaking for the faction of the PDP which had joined the MDC-Alliance, even though he was a member of the faction that had joined the Rainbow Coalition and had himself stood as a parliamentary candidate for that Coalition (and had lost) (and had lost). The writer waited more than two years to write to the Speaker. The letter was copied to various political parties but not to the MDC-Alliance or to the six Members concerned.

Nonetheless, the Speaker read out the letter to the National Assembly on the 17th March, and as soon as he had done so the six Members were regarded as having ceased to be Members of Parliament.

Justice Mafusire granted the order sought by the former Members and dismissed the letter-writer’s contentions, for the following reasons:

[41]HH-516-21

The previous judgment obtained by the former Members remained extant and was binding on the parties to the case. According to that judgment the letter-writer was not the Secretary-General of the PDP and his letter was a nullity. The Speaker and the rest of Parliament had no choice but to ignore it. In any case, the letter-suggestion writer's that the PDP remained a single party despite having split into two factions whose candidates had competed against each other in the election of 2018 under the umbrella of different coalitions was offensive to common sense and went against the grain of what the letter-writer was trying to say. Although they both used the name of the PDP, in reality the factions were two totally different political formations.

According to clause (k) of subsection (129(1)) of the Constitution, the power to recall members of Parliament rests with the political party to which the members belonged at the time of their election. This provision gives political parties the authority to remove members from the House of Representatives. The letter-writer was not a member of the same political formation or faction to which the six Members belonged, either at the time of the election or thereafter. He was powerless to call the Members back to their seats.

This thus makes it clear that the role of the Speaker of Parliament ought not be mechanical, but rather he must be satisfied that requirements for recall have been satisfied so as not to offend the tenets of due process.

3.5 Constitutional interpretation

Textualism is a mode of interpretation that focuses on the plain meaning of the text of a legal document. It is evident that the Constitutional court resorted to textualism in its interpretation of Section 129 (1) (k) of the Constitution. Textualism is a mode of interpretation that focuses on the plain meaning of the text. Due to the fact that the Constitutional Court adopted a rather mechanical approach, it is also abundantly clear that the court did not investigate questions concerning the intent of the people who drafted the Constitution. Constitutions are considered to be legitimate, or "self-validating," as long as "they remain within the boundaries set by moral principles,"[42] as ***Raz*** pointed out.

In this regard, it is abundantly clear that the decisions handed down by the Constitutional Court do not represent what is worthy of moral attention. This is because the Constitutional Court does not place a primary emphasis on the most

[42] JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 348 (2009)

important interests of the members of society, in particular the human rights that are safeguarded by this Constitution.

Regard must be had to Section 46, which applies, with any necessary changes, to the interpretation of this Constitution apart from Chapter 4, as stated in Section 331 of the Constitution, which states that in the interpretation of the Constitution, regard must be had to Section 46, which states that in the interpretation of the Constitution, regard must be had to Section 46.

In this regard, the purpose of Section 331 is to extend the application of Section 46 of the Constitution to such a degree that it is present throughout the Constitution and has the ability to permeate other sections.

In dealing with interpretation of the Constitution, ***Section 331*** of the Constitution provides that in the interpretation of the Constitution, regard must be had to Section 46 which *applies, with any necessary changes, to the interpretation of this Constitution apart from Chapter 4.*

In particular, ***Section 46*** provides that;

"46 Interpretation of Chapter 4

(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;

(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; …

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter."

In ***S v. Makwanyane***[43]**,**The Court came to the conclusion that provisions of the Constitution should not be construed in isolation but rather in the context in which they are found. This context includes the history and background of the adoption of the Constitution along with the other provisions of the Constitution itself and, in particular, the provisions of the Bill of Rights. The Court came to this conclusion after reviewing the history of the adoption of the Constitution. In addition, the provisions need to be construed in a way that ensures "individuals the full measure" of the protection it offers.

[43]S v Makwanyane and Another (CCT3/94) [1995] ZACC 3

In addition to this, these interpretation principles that are incorporated in the Con stitution represent the approach that is generally taken toward constitutional inter pretation in all countries that are committed to justice and fairness. The words in one leading case are worth reproducing. In the leading Canadian case of ***R v Big M Drug Mart Ltd*** Dickson J said:

> *"… this court (has) expressed the view that the proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom was ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter".*

In ***Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another***[44], It was held:

> *"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but*

[44]Nairobi High Court Misc. Appl. No. 890 of 2004.

also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."

Additionally, ***Fuller*** supports this viewpoint in *"Positivism and Fidelity to Law,"* where he asserts that even the simplest cases are resolved by a subconscious examination of a rule's purposes and that more complex cases should—and typically are—resolved by a more conscious examination of purpose and intent. Fuller challenged the idea that words have fundamental meanings and that these fundamental meanings typically permit judges to make decisions in cases without reference to intent or policy by using straightforward examples and exceptionally accessible linguistic arguments.[45]

In dealing with Section 129 (1) (k) of the Constitution, it is clear that the Constitutional Court did not have regard to this approach to interpretation rather Constitutional rights of the affected members of Parliament were sacrificed on the alter of political expedience.

In the context of statutory interpretation, a court is said to be activist when it either disregards the wording of the statute that is being evaluated or the intent of the legislature that enacted the statute. An activist court, in the words of ***Judge Frank H. Easterbrook***, "construe[s] the statute to do something other than what it says something possibly more sympathetic to the judge's notion of sensible policy."[46]

3.6 The Interpretation of Section 129 (1)(k) and the incidence of hard cases

By its very nature, Parliamentary recall creates the incidence of a *hard-case* before the courts. According to Dworkin[47],A hard case is a scenario in the legal system that gives rise to actual disagreements regarding the validity of a legal proposition that cannot be resolved by resorting to a set of clear facts that are determinative of the problem. In other words, a hard case is not one that can be easily settled. According to Dworkin, there is no law on the subject if the applicable law cannot be established with reasonable certainty by referring to the particulars of the instance that is currently being considered by the court (this is what he refers to as the rule of recognition). In order to fulfil his responsibility of bringing the case to a conclusion that is just and fair, the judge is required to

[45]Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).
[46]Frank H. Easterbrook, Do Liberals and Conservatives Differ in Judicial Activism?, 73 U. COLO. L. REV. 1401, 1404 (2002)
[47]Guest Ronald Dworkin (1997) 136.

study resources that are not of a legal nature. To put it another way, the judge must make use of his or her discretion in order to reach a conclusion.

It is possible for a judge to consult his or her own subjective disposition in order to come to a conclusion that is just and fair when they are allowed to exercise their discretion. Given the current state of affairs, ***Dworkin's*** argument can be understood by making reference to the rights and principles that are ingrained in the Constitution. The Constitution's character and framework are both established by the rights and principles that are important to the document. These rights and principles are rarely well defined, and they are frequently nebulous and general. The values are nebulous and abstract due to the fact that they do not specify the influence that they are intended to have on any specific scenario, nor do they explain how these values are to be balanced against the rights of other people or other values. This has a dual impact on the situation. Because the constitutional values do not have a definitive definition or meaning attached to them, there is nothing to direct the judge in the interpretation of those values; on the other hand, there is also nothing that constrains the judge in his or her interpretation because there is no clear definition or meaning attached to the constitutional values. This idea is not as shocking as it may initially appear because it adheres to the transformative constitutionalism principle, which is a foundational pillar of the Constitution. According to this principle, "the primary purpose of which is to intervene in unjust and impermissible power and resource distributions, and liberates the judicial function from an austere legalism."[48]'

With respect, the Constitutional court thus squandered an opportunity to transform the jurisprudence as they chose to follow a path that is not reflective of the Constitutional context as a whole. The court simply chose legalism over transformative constitutionalism and the problem with such an approach is that it provides little assistance in resolving hard cases.

In actual fact, this brings to the fore, the contest between judicial passivism and judicial activism. In *Judicial Activism and Passivism in Election Law*[49], ***Professor Dan Tokaji*** contends that the default position of the judiciary ought to be passivism; however, he acknowledges that there are circumstances in which judicial activism is both warranted and necessary. These circumstances include situations in which those in power seek to entrench themselves.

Nation Media Group Limited vs. Attorney General[50]it was held:

[48]Moseneke 'Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' 2002 SAJHR 318.
[49]DP Tokaji, The future of election reform: From rules to institutions, Yale Law & Policy Review 28 (1), 125-154
[50] [2007] 1 EA 261

"The Judges are the mediators between the high generalities of the Constitutional text and the messy details of how their application to concrete problems can become messy." And when it comes to giving form and substance to fundamental rights, judges will, of course, be guided by what people in their own time believe to be the prerequisites for a just society. They are not exercising their legislative authority in this manner at all. By modernizing an outdated text, they are not performing maintenance work on it. They are, on the other hand, applying the language of these Constitutional provisions according to how they should be interpreted and not how they were originally written. The text is referred to as a "living instrument" when the terms in which it is expressed, when placed in the context of the Constitution, invite and require periodic re-examination of its application to contemporary life."

Conclusion

As a result, the conclusion that can be drawn is that Section 129 (1) (k) is in conflict with other provisions of the Constitution. In addition, the interpretation that has been given to it is not one that is there to protect the affected persons; rather, it is one that is there to bolster the political interests of political parties as reflected in the ***Mutasa, Khupe and the Madzimure cases*** all of which were determined and dismissed by the Constitutional Court.

CHAPTER 4

The Zimbabwean recall mechanism as compared to that of the United Kingdom, Indonesia, and Kenya

Introduction

The phenomena of recall is not only unique to Zimbabwe, it is there in other countries, however, the major difference in the application of this mechanism is the question of who initiates recall between the electorate and the political party concerned. As such this chapter will juxtapose the Zimbabwean position to that of other countries in the body polity of nations, with specific focus on the following aspects;

a. At whose instance is the recall mechanism invoked?
b. What are the grounds for recall?
c. What is the role of the Speaker of Parliament if any?

4.1 Recall of Parliamentarians in the United Kingdom

In the United Kingdom, recall of Parliamentarians has been recently legislated in terms of the **Recall of MPs Act, 2015.** In this regard, Section 1 of the Act lays down the recall conditions and these include;

i. After being convicted of an offence in the United Kingdom.

ii. In response to a report from the Committee on Standards on the MP, the House of Commons orders the MP's suspension from House service for an agreed-upon amount of time.

iii. The MP was found guilty of an offense under Section 10 of the Parliamentary Standards Act 2009 after becoming a member of parliament (offence of providing false or misleading information for allowances claims).

It is important to keep in mind, however, that in the event of a conviction, the recall petition will not be opened until either the allotted time for appealing the conviction, sentence, or order has passed without the conviction, sentence, or order being reversed, or until all appeals have been heard and rejected.

In dealing with the first and third recall conditions,***Section 4***of the Act provides that the Court must notify the speaker of the House of Commons of the conviction and the sentence against a sitting Member of Parliament.

4.1.1 The role of the Speaker in the United Kingdom's recall process

Section 5 (1) of the Act, provides that the Speaker is required to provide notice of the fact that the first, second, or third recall condition has been met in relation to an MP as soon as it is reasonably practicable after becoming aware that the condition has been met. The notice must be given to the petition officer for the MP's constituency.

Further to that, ***Section 5 (5)*** provides that the notice by the Speaker must clearly specify the following;

a. The day and or date on which it is given by the Speaker.
b. It must also specify which of the recall conditions has been met with respect to the recall of the Member of Parliament

c. in a case in which the first recall condition has been met, must specify the offence of which the MP has been convicted.

In this respect it is clear that the role of the Speaker of Parliament in the United Kingdom is both substantive and procedural in the recall process. This is so

because as per ***Section 5 (1)*** of the Act, the Speaker of Parliament has to satisfy himself that the recall conditions have been before issuing a notice with the Petition Officer. It is thus abundantly clear that this is in keeping with the principles of fair administrative justice, especially considering that the Member of Parliament is also afforded a chance to appeal.

4.1.2 Participation of electors in the recall process in the United Kingdom

Section 7 of the Act provides that upon receipt of a notice from the Speaker, the Petition Officer must designate a place and a date when the recall petition is going to be signed by the electors, the petition officer then proceeds to send the petition notice to all eligible electors in the constituency concerned.

In terms of ***Section 9 (4)*** of the Act, a member loses his seat in the House of Commons if 10% of the registered electors sign the petition. In this respect as per ***Section 14 (2) (b)*** of the Act, it is the duty of the Petition Officer to notify the Speaker if a petition was successful or not.

From the foregoing, it is clear that the United Kingdom has a liberalised recall mechanism that allows the petitioners to have a say in the recall process, this is not only democratic but it goes a long way in giving meaning the people's right to vote. It goes without saying that the people (electors) are at the heart of the recall mechanism, as such what obtains at the end of the day is an expression of their will as opposed to the will and whims of the political party concerned.

However, it would appear that the recall mechanism in the United Kingdom is not citizen initiated, the citizens do not have any say with respect to initiation and or instigation of the recall mechanism. This leaves so much to be desired and it thus reveals the insincerity of the current model given the fact that there are very limited and very specific conditions for recall on account of serious wrong doing, it thus gives a sense of guided democracy. In coming with the Recall of MPs Act, the proposal by ,***Goldsmith***[51] the foremost proponent of a citizen initiated recall was not considered, he posited that citizens must be allowed to initiate recall under the following conditions;

i. acted dishonestly and dishonestly in financial matters,
ii. purposefully misled the body to which they were elected,
iii. breached any pledges they made in an election address,
iv. acted in a way that may potentially damage the reputation of his or her office,
v. lost the support of his or her constituents.

[51] See Zac Goldsmith's Bill, 2011

These conditions are too wide and have the potential of being abused by the electors, but this is no justification for coming up with a model that has very limited conditions which make it virtually impossible to recall representatives.

Additionally, it has been argued that if the purpose of implementing a recall process is to give voters the ability to remove representatives if they object to the way their representative votes or performs his or her duties, then this is a more challenging issue due to the concept of Parliamentary supremacy in the United Kingdom. This strategy lowers the status of members and treats them like insignificant ciphers or agents of the electorate..[52] It would therefore seem contrary to the way the system of representative government is intended to operate in the United Kingdom. Such a system would have a number of significant consequences that would even affect the proper functioning of the state, for instance;

a. it would put pressure on lawmakers to exclusively support populist policies and reject those that are needed for the state's well-being but unpopular with their constituents;

b. If governments couldn't rely on their supporters when a matter was crucial but controversial, it may result in political instability; and

c. It would probably put local interests ahead of those of the entire state, with local representatives voting on issues like urban consolidation based mostly on what's "not in my backyard."

In this regard, it is clear that the manner in which the recall mechanism is applied in the United Kingdom is reflective of their Parliamentary sovereignty.

As such, under the United Kingdom model, it can be seen that in as much as there is a semblance of citizen participation in the recall of representatives, the citizens themselves are not the initiators of the process, they only come in at the tail of the process.

4.1.3 A comparison of the Zimbabwean mechanism to the British mechanism

4.1.3.1Grounds for recall

It is clear that in the United Kingdom, they have very limited grounds for recall, all of which are premised on *"wrong doing"*. It can thus be surmised that these grounds are aimed at ensuring the probity of Members of Parliament as it were. in Zimbabwe as per Section 129 of the Constitution, a Member of Parliament can also be removed on account of *"wrong doing"* as per Sections 129 (1) (j) of the Constitution. In this regard, the major point of departure with respect to the grounds of recall is that in Zimbabwe, unlike in the United Kingdom, a member of Parliament can be recalled on account of changing the political party under which they were elected into Parliament. The difficulty that comes with this provision is that the electoral process is such that the electorate vote directly for the Members of Parliament, as such the role of the political parties in the recall process is problematic. This is thus reflective of the fact that the Zimbabwean recall mechanism has been weaponised to satiate the political whims of the ruling elite whilst sacrificing the rights and interests of the electorate on the alter of political expedience.

4.1.3.2 Citizen participation in the recall process

It is abundantly clear that in the United Kingdom, the power to recall Members of Parliament vests in the electorate and this is also justified by the mere fact in electing members, the electorate vote directly for them as such they have a retain a right to recall them. In Zimbabwe, however, despite the fact the electorate vote directly for the Members of Parliament, section 129 (1) (k) of the Constitution make it impossible for the electorate to recall MPs. In as much as it can argued that the United Kingdom's mechanism has very limited conditions for recall, nothing turns against the fact that power to recall is vested in the electorate and their mechanism is actually reflective of their much acclaimed Parliamentary Sovereignty.

4.1.3.3The role of the Speaker

In the United Kingdom, the Speaker plays a substantive role in the process of recall. This is so because in giving the notice of recall to the petitioner, the Speaker must be satisfied that the requisite recall conditions have been met. This is completely different from what obtains here in Zimbabwe wherein the Speaker of Parliament is there to play a passive role of giving effect to the notice from the political party concerned without being satisfied of the propriety or otherwise of the recall.

4.2 Recall of Parliamentarians in Indonesia

Indonesia is one such country with a unique recall mechanism that is fluid and ever evolving. The right to recall is vested in the political parties as provided for by Law No. 17 of 2014 and Law No. 2 of 2008.

The People's Legislative Assembly, the Regional Representative Council, the President and Vice President, and the House of Representatives Area are all elected under the process outlined in ***Article 22E*** of the ***Constitution of 1945***.

Further to that,***Law Number 7 of 2017*** on General Elections provides that to be eligible for election, members must belong to a specific political party, so much so that there is no single member who is not affiliated to a political party. This position is also confirmed by***Article 22E (3)*** of the ***1945 Constitution*** which provides that political parties shall be the participants in the general election to elect the People's Legislative Assembly.

In this regard, members of the Legislative Assembly besides being selected, they can also be removed by the political party.Of course this was motivated by a desire to control factionalism and defections.

Thus, Indonesia provides the best illustration of a political party ousting an official from office. In Indonesia, a parliamentarian's party has the right to recall them at any moment if they violate party rules, morals, or regulations. The party merely makes arrangements in advance with the Speaker of the assembly and suggests a candidate to take the seat of the recalled member.

The Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union has expressed regret on numerous occasions that Indonesian law grants political parties the authority to recall people's representatives, disregarding the fundamental tenets of the Indonesian Constitution stated in the preamble: the sovereignty of the people, democracy, and consultation among representatives.[53]

In dealing with recall in Indonesia, ***Article 239 (1)*** and ***(2)*** of***Law Number 17 2014*** on the People's Consultative Assembly provides that a member shall be dismissed if;

[53]Report of the Committee on the Human Rights of Parliamentarians submitted to the "Inter-Parliamenlary Conference in Windhoek", Geneva, IPU, 1998, pp. 83-93.

a. They are unable to carry out their responsibilities consistently or remain as members of the People's Legislative Assembly for a period of 3 (three) consecutive months without providing any explanation;

b. breaking the People's Legislative Assembly's code of ethics as well as the oath or commitment of office;

c. be found guilty on the basis of a court decision that has achieved permanent legal force for the commission of a crime that carries a punishment of five (five) years or more;

d. fail to show up to the plenary and/or meeting meetings of the DPR parliament, which have become its duties and obligations, for a total of six (six) times in a row without a good explanation;

e. being submitted by the political party it belongs to in conformity with the provisions of the law;

f. no longer meet the requirements to run for a seat in the People's Legislative Assembly in accordance with the rules of the law governing elections;

g. to breach the prohibition provisions as regulated in this Law to be dismissed as a member of a political party in accordance with the provisions of laws and regulations; or

h. to violate the prohibition provisions as regulated in this Law.

i. Join a different political party as a member of that party.

From the foregoing it is also clear that as per the Indonesian mechanism, one can also be recalled on account of *"wrong doing"*. However what stands out the most is the fact that one can also be recalled at the mere say so of the political party under whose ticket they entered Parliament or if they become a member of another political party.

4.2.1 The role of the citizens in the recall mechanism

In Indonesia, there is no such thing as a recall that is initiated by the citizenry. Given the existence of a political party's recall rights order, political parties have a great deal of authority to overturn the result of the people's choice as the holder of sovereignty for the benefit of the political party. This is done for the benefit of the political party. After the

people had chosen their representatives through various electoral processes, the job of political parties to serve as a method of political recruitment in the process of filling political office, in this case as members of the legislature, should have been finished and the process should have moved on to the next step.

No wonder, the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians[54] has lampooned the Indonesian recall mechanism on account that it negates from the sovereignity of the people as is expected in a healthy democracy. The situation is made dire by the fact that the political party does not only recall the member of Parliament but is also replaces him without the need for an election. Further to that, regarding the role of the Speaker of Parliament, the party simply arranges matters beforehand with the Speaker of the assembly and proposes a candidate to replace the member who is being recalled.

4.2.2 A comparison of Zimbabwe's recall mechanism and that of Indonesia.

4.2.2.1 Grounds for recall

Indonesia, just like Zimbabwe has a wide range of grounds upon which a member may cease to be a member of parliament. Regarding recall, in Indonesia, one is recalled if he or she ceases to be a member of the political party concerned. This approach is similar to that of Zimbabwe in the sense that floor-crossing of a member of parliament is considered as something that is so sacrilegious so as to warrant recall from Parliament. These two grounds of recall are synonymous with a blatant disregard for citizen participation in the electoral processes, as they are meant to muzzle the electorate.

4.2.2.2.2 Citizen participation in the recall process

Zimbabwe like Indonesia does not allow for citizen participation in the process of recall, this is so because recall is left to the whims and whiles of the political party concerned and not the electorate themselves. In both jurisdictions it would appear that the Speaker has a formalistic role which confines him to rubberstamp the desired of the *political concerned* without satisfying himself that any ground for recall has been established.

4.3 The Kenyan approach to recall of Parliamentarians

[54]Supra

Article 104 of the Kenyan Constitution provides that the right to recall Members of Parliament shall vest in the electorate. In giving expression to this right, the Elections Act lays down the procedure for the recall of Members of Parliament. ***Section 45*** of the Elections Act provides that a Member of Parliament can be recalled under the following circumstances:

a. is determined to have broken the provisions of Chapter Six of the Constitution, which deals with leadership and integrity, following the due process of the law's investigation into the matter.

b. is found guilty, via a legal process in accordance with the rules, of mismanaging public resources

c. has been found guilty of an offense related to this Act.

Further to that, ***Section 45*** is there to stipulate other conditions that have to be met in order for a Member of Parliament to be recalled and these are that recall can only be initiated after the High Court has confirmed either one of the grounds contemplated in ***Section 45 (2)***. Further to that, the recall can only be initiated 24 months after a general election and not less than 12 months before a general election. Moreso, the mechanism cannot be initiated against a member more than once during the term of his Parliamentary seat.

Further to that, ***Section 46*** of the ***Elections Act*** thus lays down the procedure for the recall petition as it provides that it should be filed with the Electoral Commission and it further stipulates that the petition shall be in writing and it should be accompanied by a High Court Order issued in terms of ***Section 45 (3)***. The petition should be signed by 30 % of eligible voters and that it should reflect the population diversity of the constituency. On top of all these requirements, the petitioner should also pay the prescribed fee for an election petition.

If the Commission, is satisfied that the requirements of ***Section 45*** are met,it shall within fifteen days after the verification, issue a notice of the recall to the Speaker of the relevant House.

Section 48 thus provide that a recall election shall be valid if the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency.

4.3.1 Citizen participation in the recall process and the role of the Speaker of Parliament

From the foregoing it is clear that in as much the recall mechanism is citizen initiated, it is virtually impossible to recall a Member of Parliament in Kenya. This problem stems from the fact that Article 104 of The Constitution of Kenya 2010; gives parliament the constitutional duty of making law on how a member of the same house can be removed from the house, thus forgetting their entrenched interests and biases.

In critiquing the recall mechanism, Mutua[55] is there to posit that;

> *"It will take nothing short of a miracle to for Kenyans who want to recall their MP to succeed."*

It is thus clear that as currently legislated the right to recall is currently moribund and is actuated to satisfy the self serving interests of the ruling elite.

In its third quarterly report, the CIC[56]in its opposition to many recall clauses on the grounds that they "offend the Constitution." It was in opposition to the conditions that a court order be acquired, that recall only be possible after two years had passed, and that it could not take place in the final year of an MP's term.

The Commission stated that the provisions infringed the sovereign power of the people as outlined in Article 1 of the Constitution and limit the constitutional right of the electorate to recall officials as outlined in Article 104 of the Constitution.

The Constitution gives power to the electorate to be able to initiate a recall election any time after the election of a Member of Parliament. As such, a recall election cannot be limited to only two out of five years of the life of an MP in Parliament," the report said.

The Constitution already says that most of these situations lead to a member automatically losing his or her seat – so the Elections Act adds little. In fact, the Act seems to make it harder than the Constitution to remove them for these things," Cottrell wrote in a critique of the recall law.

From the foregoing it is thus clear that Section 45 of Kenya's Elections Act has a high likelihood of violating the Constitution, in particular Section 104 of the Constitution which guarantees the citizens' right of recall.

[55]Eric Mutua, why recalling an MP is no easy task (www.capitalfm.co.ke/news/2013/04/why-recallingan MP-is-noeasy-task) last accessed 10.07.2016.9.am
[56]Commission for the implementation of the Constitution,2012

In the case of ***Katiba Institute and another v. The Attorney General and another***[57]wherein the system for recalling candidates that is outlined in Section 45 of Kenya's Elections Act was being challenged on the grounds that it is incompatible with both the letter and the spirit of the Constitution.

In this case, the petitioner submitted that the limitation on the number of recall motions was unconstitutional. Section 45 (5) of the ***Elections Act*** provide that a recall petition shall not be filed against a member of Parliament (or Member of County Assembly) more than once during the term. Counsel submitted that this is inimical to Section 104 of the Kenyan Constitution. In a synopsis, learned counsel submitted that the restrictions are too extensive and unjustifiable.

In addition, the petitioner criticized ***Section 48*** of the ***Elections Act***, which states that a recall election shall be lawful if at least 50% of the registered voters in the concerned county or district agree to hold the recall poll. In a free and democratic society, the petitioner argued, it undermines the right to recall and imposes a high and unjustified standard. Additionally, it was argued that because the recall process is citizen-driven, it is an example of "direct democracy." In that way, it is linked to ***Article 38*** on political rights, in particular the freedom to advocate for a political party or cause, the right to have regular, free elections with the participation of all eligible voters, and the right to freely express one's political views. He thus argued for the interpretation of Article 104 of the Constitution with a purpose in mind.

In dealing with these submissions, the Court had consider Article 259 of theConstitution which mandates that thw court must interpret the Constitution in a way that (a) advances the Constitution's purposes, values, and principles; (b) advances the rule of law, as well as the human rights and fundamental freedoms outlined in the Bill of Rights;

The Court concluded that the Constitution gives Parliament the authority to determine the criteria for recalling a member of Parliament as well as the process to be followed. The Constitution's Section 104 does not grant Parliament the authority to enact laws defining which groups of voters have the right to start the recall process, hence it is not permissible for it to pretend to do so. The Court concluded that the Elections Act's sections 45(2)(3)and (6), 46(1)(b)(ii) and (c), and 48 are nonsensical and unnecessary, or that they fall well short of the constitutional requirement in Article 104 of the Constitution and are therefore unconstitutional to the degree that they do.

4.3.2 Analysis of the Kenyan approach as compared to the Zimbabwean recall mechanism

[57]**CONSTITUTIONAL PETITION NO. 209 OF 2016**

4.3.2.1 Citizen participation and the grounds for recall

The Kenyan model for the recall of Parliament although it allows for a citizen initiated recall mechanism, the grounds upon which a member can be recalled are too restrictive so much that it is even difficult for the citizens to recall a member of Parliament. Kenya takes a position that is almost similar to that of the United Kingdom in that a Member can only be recalled on account of *"wrong doing"*. This is completely different from what obtains in Zimbabwe where a member can be recalled entirely for political reasons as can be deduced from Section 129 (1) (k) of the Constitution. The Speaker of Parliament in Kenya plays a very peripheral role because he is only consulted by the Electoral Commission.

In Kenya it is also worthwhile to note that the Court has already pronounced itself regarding the recall mechanism that has been provided for in terms of the ***Elections Act*** and it has ruled that certain provisions of the Elections Act in dealing with recall are unconstitutional. This is progressive and cannot be compared to the approach of the Zimbabwean courts who have refused to make any authoritative pronouncement with respect to Section 129 (1) (k) of the Constitution.

Conclusion

From the above exposition, it is clear that various jurisdictions have different recall mechanisms. However it is clear that the most ideal recall mechanism is one that is initiated by the citizens. Further to that, it would also appear that for a recall mechanism to be fall within the key tenets of democracy, the conditions of recall must not be too restrictive so as to give effect to citizen participation. Further to that, as per the case studies of the United Kingdom and Indonesia, it is also clear that for recall to effected and or initiated, the Speaker must be satisfied that grounds for recall have been met. The Zimbabwean approach is thus at variance with this as the Speaker of Parliament is there to assume arbitrary powers of effecting recall without being satisfied that the conditions for recall have been met.

Chapter 5

Recommendations and conclusion

Introduction

Right to recall as discussed in the five chapters of this paper, is a great tool for accountability. Section 129 (1) (k) of the Constitution is thus problematic in that it is inappropriate for an MP to be recalled *for "purely political reasons"*. However, in some other jurisdictions like Indonesia, recall is allowed for any reason, including "political" reasons, however this is problematic in that it has the effect of stifling citizen participation. This right would contribute to the growth of direct democracy in our nation, expanding access and enhancing inclusion in the process. As a result of this, the right to recall must be granted concurrently with the right to vote in order to further develop democracy. This increases public trust in government because it increases the likelihood that a large number of politicians will provide strong performances. Some people who support the recall initiative see it as a "option" to fix erroneous choices that can be made immediately rather than having to wait for the next five years.

5.2 Summary of Conclusions

a. Chapter two of the research concluded that he Social contract is the basis of the relationship between the citizens and the state. Most importantly on the basis of the Social contract, the citizens retain the right to vote for elected officials and it follows that the recall mechanism is a tool that ought to be at the disposal of the citizens for the purposes of holding Members of Parliament accountable. Section 129 (1) (k) of the Constitution is however inimical to the social contract theory as it vests the recall mechanism in the *political party concerned* as opposed to the people, as such it defeats the will of the people as it provides for a recall mechanism that utterly excludes them. The current recall mechanism is thus inimical to tenets of democracy in a representative democracy like ours. This is so because the social contract is viewed as a forerunner to democracy and Right to recall isviewed as direct democracy.

ii. Chapter Three examines the existing framework for recall and challenges thereof. The analysis inthis Chapter informs the answer to the main research question ; in answering the main research question whether the current recall mechanism is arbitrary or otherwise, the answer is in the affirmative. This is so because the recall mechanism contemplated by Section 129 (1) (k) of the Constitution is not initiated by citizens, rather recall is premised on political grounds. The manner of the recall itself is in complete disregard of the Constitutional rights of the affected members, in particular the right to vote as protected by Section 67 of the Constitution, the right to fair Administrative justice as per Section 68 of the Constitution. This is so because the Speaker of Parliament is made to play a very rigid and formalistic role which does not give effect to both substantive and procedural fairness. Moreso, the Courts have also allowed for the injustices instanced by Section 129 (1) (k) of the Constitution to continue unabated. This is so because on several occasions, the Constitutional Court has refused to make an authoritative pronouncement regarding the interpretation of Section 129 (1) (k) of the Constitution.

iii. Chapter four compares Zimbabwe's recall mechanism to that of the United Kingdom, Indonesia and Kenya. The Chapter acknowledges the differences in approach to the recall mechanisms especially with respect to who initiates the recall between the citizens and the political party concerned and also with respect to the grounds of recall and the proceedings that are attendant to this. However it is clear that the most ideal recall mechanism is one that is initiated by the citizens. Further to that, it would also appear that for a recall mechanism to fall within the key tenets of democracy, the conditions of recall must not be too

restrictive so as to give effect to citizen participation. Further to that, as per the case studies of the United Kingdom and Indonesia, it is also clear that for recall to effected and or initiated, the Speaker must be satisfied that grounds for recall have been met. The Zimbabwean approach is thus at variance with this as the Speaker of Parliament is there to assume arbitrary powers of effecting recall without being satisfied that the conditions for recall have been met.

5.2 Recommendations

From the foregoing discussion, it is clear that the current mechanism for the recall of Members of Parliament as contemplated by Section 129 (1) (k) of the Constitution is both arbitrary and problematic. This is so because the recall mechanism is not citizen initiated as such this has seen the weaponization of the recall mechanism by political parties in a manner that is both indiscriminate and arbitrary. The study submits the following recommendations:

a. **Citizen initiated recall**- In this respect, citizens should be at the mainstay of the recall process, as such, there is need to amend the Constitution in such a way that a citizen initiated recall is a matter of right. This would go a long way in giving effect to the right to vote and other Constitutional rights and emoluments that also accrue to the affected persons. In this regard therefore, Zimbabwe is urged to adopt a model whereby citizens can trigger recall through recall petitions as elaborated by the models in the United Kingdom and Kenya. However to reflect our unique Constitutional democracy, suitable amendments would have to be made so as to give full effect to citizen participation.

b. **Conditions of recall**-there is also a dire need for Zimbabwe to adopt recall grounds and or conditions that are not entirely based on the political considerations of the political party concerned, as this has the effect undermining our Parliamentary sovereignty by making members of Parliament beholden and accountable to their political parties as opposed to the electorate. In this respect, there is need to factor in the following conditions in the grounds of recall;

- Breaking any promises made by him or her to the electorate
- Behaved in a way that is likely to bring his or her office into disrepute or
- Lost the confidence of his or her electorate.

These conditions speak directly to the relationship and mandate between the electorate and their representatives so much that they will foster accountability on the part of the Representatives.

c. **Inquiry that the requirements for recall have been met-** The Constitution also ought to be amended in manner that obligates the Speaker of Parliament to make an inquiry into whether or not the conditions for recall have been met. This will thus clearly spell out the role of the Speaker of Parliament in the recall process. This will leave no room for any doubts or second guessing. This will also close the gap that has seen the Courts shy away from making an authoritative pronouncement in this material respect. Most importantly, this ensure that the recall process is only conducted after due process has been followed.

d. **Capacitation of voters-**there is also ned for capacitation of voters by Civic Society organisations so that the electorate can lobby for the adoption of a more inclusive recall mechanism which gives effect to their right to vote as is contemplated by the Constitution. Moreso, capacitation will thus see the active and unbridled participation of citizens in democratic processes, and holding their elected representatives to account.

e. **Formation of a Constitution Implementation Commission-**Given the newness and novelty of our Constitution, there is a dire need for the formation of a Constitution implementation Commission that oversees and monitors the implementation of the Constitution by various arms of the Government. This is so because both the , interpretation and application that is presently afforded to Section 129 (1) (k) of the Constitution is inimical to innumerable Constitutional Provisions yet the issue remains undressed. It would appear that in as much we have the Human Rights Commission, the implementation of the Constitution requires a separate Commission to deal with issues incidental thereto.

Conclusion

It can thus be concluded that the current recall mechanism as provided for by Section 129 (1) (k) of the Constitution is a great cause for concern. This is so because the recall mechanism excludes the electorate, notwithstanding the fact that they are the ones who elect the representatives. As such in its interpretation and application, Section 129 (1) (k) of the Constitution is there to offend the rights not only of the electorate but also of the recalled Members of Parliament. To redress this misnomer, there is thus a need for Constitutional reform.

BIBLIOGRAPHY

Books and Articles

- Anne Twomey, *The Recall of Members of Parliament and Citizens' Initiated Elections,UNSW Law Journal Volume 34(1)*

- John Makumbe, *Strengthening parliamentary democracy in SADC countries*, Zimbabwe country report, SAIIA, 2004.

- Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1404 (2002)

- Evers, Williamson M. (1977) *"Social Contract: a Critique ." Journal of Libertarian Studies*, Vol. 1, No. 3, 185 194. Pergamon Press, Great Britain.

- Hobbes, Thomas. *Leviathan*. Yale University Press, 2010, 1651., pt. 1, chap. 21, p. 138-139.

- Locke, John. *Two Treatises of Government*. London, 1823. Pg., 402.

- Lee S Greene, *'Direct Legislation in the German Länder 1919–32'* (1933) 27 American Political Science Review 445, 451.

- Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

- Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997)

- Joshua Spivak, 'California's Recall – Adoption of the "Grand Bounce" for Elected Officials', (2004) 82(2) California History 20, 28–37

- ManjariKatju, The 'None of the Above' Option, 48(42) ECONOMIC AND POLITICAL WEEKLY 10, 12 (2013).

- Moseneke 'Fourth Bram Fischer Memorial Lecture: *Transformative Adjudication'* 2002 SAJHR 318.

- Rousseau, Jean Jacques. *Social Contract*. Simon and Schuster, 2010, 1762.

- T Cronin ,Direct Democracy: *The Politics of Initiative, Referendum and Recall* (Harvard University Press, Cambridge, MA, 1989) 143.

- Thomas Cronin, Direct Democracy – The Politics of Initiative, Referendum and Recall (Harvard University Press, 1999)

- William Munro, *The Initiative, Referendum and Recall* (Appleton, 1916) 314.

- W. Friedmann, Legal Theories Colombia University Press New York, 5th Edition

STATUTES

- Constitution of Zimbabwe, 2013
- Constitution of India 1945
- Constitution of Kenya 2010
- Recall of MPs Act,2015