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A perspective of the contemporary role of judges in the Zimbabwe

By

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DECLARATION

I, PISIRAI KWENDA, do hereby declare that this dissertation represents my own work representing my honest and true effort. I further affirm that this work has not been previously submitted for a degree at University of Zimbabwe or another University.

Signed **…….**

PISIRAI KWENDA

Date **01 August 2022**

SUBMISSION APPROVAL FORM

A perspective of the contemporary role of judges in the Zimbabwe

I, **Professor L Madhuku**, do hereby approve the submission of this dissertation by **Pisirai Kwenda** to the **Postgraduate Department of the University of Zimbabwe** for assessment in part fulfilment of the requirements of the Master of Laws (LLM) Commercial Law.

SIGNITURE **……**

DATE **01 August 2022**

DEDICATION

I dedicate this dissertation to my wife, Joyce, my children Shepherd ‘Kazhumu’, Farai ‘The prince’, Tendai ‘Cool Ruler’ and Valerie ‘Mbumbie’ who all supported me enthusiastically despite that I deprived them of fatherly attention during my long episodes of absence from family interaction.

ACKNOWLEDGMENTS

I thank all my lecturers Professor Lovemore Madhuku, Dr Tarisai Mutangi, Mr Teerai Mafukidze, Mr N Machingauta, Miss S V Mugota and Mrs Mutandwa, Mr Patrick Jonhera and Ms Mutangadura who were very supportive throughout the programme.

Professor Madhuku's thought provoking approach to the module 'Advanced Legal Theory' was very enticing and helped me realise the importance of legal philosophy and its importance to a judicial officer and practising lawyer thereby contributing to my choice of my area of research.

Theresa Muchinguri (I privately nicknamed her the' Iron lady' and never told anyone), the coordinator of the Commercial Law Master's programme, discharged her role dutifully and with astounding dedication. She attended every study blocks and took part in class discussions as if she was part of the class.

I also received great encouragement from my colleagues in the judiciary Justice Joseph Mafusire, Justice (Dr)Amy Tsanga, Justice Esther Muremba and Mrs Slyvia Chirawu-Mugomba. On many occasions I entangled them in my school business without any consideration for time and space they needed for their own endeavours. I thank them for their tolerance.

ABSTRACT

Law is a system constituted by legal institutions such as the courts and the legislature and a systematic arrangement of rules. Legal systems exist because of the law's claim to authority over how people should act. Legal systems have the following distinguishing characteristics: (i) the underpinning philosophy of the legal system towards the resolution of disputes, (ii) the sources of law whether judicial precedent, statute, authoritative customary norms and, (iii) the role of the judge/adjudicating authority. In a civil law system, the legislature is primary and all law is made by the legislature and mostly codified. The role of the judge is to interpret it and the system in its purest sense, allows no room for judges to make law. Judicial interpretations of codes are not binding on future courts. On the other hand, in a common system, judges make law through judicial precedent. Zimbabwe has historically adhered to the common law tradition. Its superior courts have ruthlessly demanded adherence to the twin principles of judicial precedence and *stare decisis*. In this research the writer set out to investigate nuances of the legal system in contemporary Zimbabwe in light of the constitutional dispensation ushered in by the 2013 constitution of Zimbabwe. The writer detected growing jurisprudence in Zimbabwe which gives prominence to the supremacy of the constitution. Increasingly, more and more judges are churning out judgments which underpin the supremacy of the constitution and the rule of law. There are however some decisions which betray hesitation to assert constitutional supremacy. The researcher concludes by recommending the strengthening of the constitutional safeguards for the individual and collective independence of judges to enable them to function without fear and favour.

Contents

CHAPTER ONE

A General of the Study

1.0 Introduction

The issue of the role of judges in common law jurisdictions has been covered by many writers. It is however a topic which never gets tired in view of the nature of law as a living and dynamic system which adapts constantly to meet new challenges. The 2013 Constitution of Zimbabwe entrenches the rule of law and supremacy of the constitution. This research is a relook at the contemporary role of judges in light of the new constitutional dispensation.

In defining law, Willies[1] state that the core character of law is its distinctiveness as a mode of social organisation. The law serves diverse functions in society, but its hallmark is the stipulation of rights and duties, which, if uncertain or not complied with, are determined in court and, if necessary enforced on the authority of court orders. Legal systems exist because of the law's claim to authority over how people should act as explained above. Law is therefore a system constituted by legal institutions such as the courts and the legislature and a systematic arrangement of rules.[2]

There are various legal systems in the world. According to Hostein, Edwards, Nathan and Bossman[3] there are six families of legal systems. There is what the authors describe as the Romano-Germanic family which obtains in countries which assimilated either directly or indirectly the Roman law.[4] Their laws are codified. These are countries like France, Italy, German, Poland, some countries in Latin America and African countries previously colonised by France.[5] Another category is the Common law family consisting of Britain, its former colonies, current and former members of the commonwealth. These include United States of America, Canada,

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[1] Wille`s Principles of South African Law (9th edition)

[2] Wille`s Principles of South African Law (9th edition) at page 3

[3] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

[4] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

[5] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

Zimbabwe and Kenya. A distinguishing feature of the common law system is that it consists of law founded on unwritten law developed through centuries by the court systems.[6] Another family is the socialist system of law deriving inspiration from Marxist –Leninist ideology which was dominant in the countries comprising the Soviet Union. The block has since disintegrated and not much need to be said about this family.[7] The other family is the Religio-Philosophical laws based on Muslim and Hindu religions. Then there is the African customary law which is more defined in Africa and its chief characteristic is that it is tribal law and rejection of legal theorising. It places emphasis on resolution of disputes on the facts and reconciliation of differences in order to restore harmony in the community through acceptable and lasting solutions as opposed to enforced decisions. However due to previous domination most African countries combine customary law with Western systems of law. The last category is the mixed legal systems which combines two or more of the families of law. This to be found in countries like South Africa, Kenya, Britain and Zimbabwe

Another characterising of legal systems can be gleaned from a publication by the University of California[8] which classifies legal systems into five groups namely: - civil law, common law, customary law, religious law, and mixed legal systems.[9] According to the publication while civil law systems may have slight variations from country to country their procedural and substantive laws all have their origin in the Roman legal tradition. Their "trademark"[10] is that they have comprehensive legal codes which are frequently updated.[11] In the civil legal system case law is a

[6] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

[7]Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

[8] Guide to International and Foreign Law Research https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[9] Guide to International and Foreign Law Research https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[10] Guide to International and Foreign Law Research https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[11] See note 8 above

secondary source[12]. France, Poland and Germany[13] are two examples of countries with a civil law system.[14] Common law systems, while they often have statutes, rely more on judicial precedent.[15] Common law systems are adversarial, rather than investigatory, with the judge moderating between two opposing parties. The legal system in the United States is a common law system (with the exception of Louisiana, which has a mix of civil and common law).[16] Customary law systems are based on patterns of behaviour (or customs) that have come to be accepted as legal requirements or rules of conduct within a particular country. The laws of customary legal systems are usually unwritten and are often dispensed by elders, passed down through generations.[17] As such, customary law research depends greatly on the use of secondary sources[18]. Oftentimes, customary law practices can be found in mixed legal system jurisdictions, where they've combined with civil or common law.[19]Religious legal systems are systems where the law emanates from texts or traditions within a given religious tradition. The sources of religious law are the deity and legislation by prophets as distinguished from secular law which is made by

[12] See note 8 above

[13] https://www.lkoslaw.fi/legal-system-of-the-republic-of-poland/ accessed on 29 July 2022
"Legal system of the Republic of Poland has developed in close connection with the system of German and French law. The continental law system is in force in Poland. Furthermore, EU law is directly applicable.
Moreover, the Polish legal system is based on the rule of law. In addition, general European legal traditions such as the fundamental rights of citizens and the sanctity of law are respected.
Sources of Polish legislation | Legal system
The main source of Polish legislation is written law. The most important source of national regulations is the Constitution of the Republic of Poland, laws, regulations issued by the Council of Ministers and individual ministries"

[14] Guide to International and Foreign Law Research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[15] Loosely judicial precedent means abiding by judicial decisions that have already been made but the concept is discussed in more detail later in this research.

[16] Guide to International and Foreign Law Research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[17] See note 8 above

[18] See note 8 above

[19] guide to international and foreign law research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

human beings.[20] Distinguished from codes in secular laws which are changed by their makers, religious laws are considered to be eternal and non-changing.[21] The main sources of religious law are therefore religious texts and legislation by prophets and this system of law has no application in Zimbabwe and will therefore not be discussed further in this paper. It is not relevant to this research.[22] The last group is the mixed or hybrid legal systems where two or more of the above legal systems work together[23]

Legal systems have therefore the following distinguishing characteristics which are: -(a) the underpinning philosophy of the legal system towards the resolution of disputes; (b) the sources of law whether judicial precedent, statute, authoritative customary norms and; (c) the role of the judge/adjudicating authority.

This research is concerned with the legal system obtaining in Zimbabwe. The Zimbabwean legal system is a hybrid of the traditional common law, codified law and customary.[24] Classically in a common law system judges play the role of identifying the law, making the law and developing the law to deal with new challenges and what is normally referred to as 'judicial activism' when dealing with codified law[25].

Judges are the public officers appointed to decide cases in the courts of law. Judges all over the world over the world preside over and enforce the authority of the law disputes either arising from what the law is or non-compliance with the law. Their role in the common law legal system is the direct opposite of what happens in the civil system where they play a passive role as explained above. Globally, courts are divided into superior courts and other courts often referred to as inferior courts and tribunals. The same hierarchy is found in Zimbabwe where courts are divided into superior courts and other courts.[26] This research focuses on the contemporary

[20] See note 8 above

[21] https://study.com/academy/lesson/religious-law-definition-purpose.html accessed 11 July 2022

[22] See note 8 above

[23] guide to international and foreign law research

https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[24] s 332 of the Constitution of Zimbabwe (Amendment No 20) Act 2013

[25] See definition

[26] See Chapter 8, Part I of the Constitution of Zimbabwe (Amendment No 20) Act 2013

role of judges of the superior courts [27] only which have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.[28]

1.1 Background of study

The researcher is a judge of the High Court of Zimbabwe, a court of superior and inherent jurisdiction. It enjoys the power to identify, state and develop the common law and customary law. While by and large there appears to be general comity, mutual respect and cooperation among the three arms of government (the executive, legislature and the judiciary) there are instances when legislation promulgated by the executive and the legislature appeared to have been motivated by disagreement by those arms of government with interpretation and pronouncement of statute law by the courts. Interestingly the 2013 constitution gives prominence to the judiciaries power of review over legislation within the context of the supremacy of the constitution and rule of law. The researcher therefore undertook this research to assess what the role of judges in Zimbabwe is and what it should be. Related to that the researcher set out to investigate whether the precedent system should apply to codified law and whether that is not a usurpation of the legislative prerogative of the Legislature.

1.2 Statement of the problem

The role of judges in a common law or customary law system is clear. The law is not codified so judges identify and state the law. In addition to that they develop the law in response to the dynamics of society to the extent that the law can offer solutions. Judges therefore make law. The constitution has now codified the classical position in s 176.

> 176 Inherent powers of Constitutional Court, Supreme Court and High Court
>
> The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the

[27] See s 167,169 & 171 of the Constitution of Zimbabwe (Amendment No 20) Act 2013

[28] S 176 of the Constitution of Zimbabwe (Amendment No 20) Act 2013

common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.[29]

Judicial activism and discovery of the law are key functions of the judiciary in a common law system and customary law respectively. Judgments of the superior courts are therefore authoritative in the area and the precedent system. However, in a civil law system, the classical position is that legislation is primary. All law is made by the legislature. Most of it is codified. The role of the judge is to interpret it. There is no room for law made by the judges. To an extent that is part of the essence of separation of powers between the judiciary and the Legislature. Judicial interpretations are not binding on future courts. Under this system, law must be written and must be clear. In a civil law system, the concept of precedent does not occupy the same position given to it in some common law systems. This is because the philosophy of a civil law system is that once law has been codified, the codification must remain the authoritative source of law. Section 176 above does not permit the judiciary to develop codified law. In a common law system, the laws derived from principles extracted from previous decisions of the courts. This is not where the courts are interpreting legislation but where the principles are emanating from the judges' sense of justice and fairness. The true basis of the common law therefore is community's sense of justice as read by the judges.

The Zimbabwean legal system is a mixture of the codified, the common and customary laws. The responses by the Legislature and the executive arms of government to certain judicial pronouncements on the law suggest that those arms of the State would prefer a situation whereby they expect the judiciary to keep to what the arms of government perceive as the judiciary's correct lane. It is the classical position that it is the prerogative of the legislature to make law as elected representatives of society and there should be no room for judge made law especially through authoritative interpretation of statutes. The problem is whether that view conforms with the traditional role of judges in what has become the common law in Zimbabwe and whether the 2013 constitution countenances judicial passivism by judges The judiciary in Zimbabwe seems to insist on the application of

[29] See note 28 above

the twin doctrines of precedent and *stare decisis* doctrine even when dealing with legislation.

1.4 Justification

This research aims to make a contribution to the debate in light of the growing appetite by the executive to rule by decree or codes.

1.5 Literature Review

To set the tone for the research it is necessary to state the competing views as articulated by renowned scholars. Eminent scholar, academic and jurist Ben Hlatshwayo[30] put the issue of "judicial activism[31] and development" in perspective in his article published in the Zimbabwe Law Review, Vol 19-10[32]

> In January, 1991 the Zimbabwe government was on the brink of enacting into law a fundamental amendment to the country's constitution: the Eleventh Amendment1. This amendment would have the effect of denying the courts the power to declarers unconstitutional, on the basis that the compensation provided by that law is not fair, an enabling Act fixing the amount of compensation payable and the period within which it had to be paid, for land compulsorily acquired by the state from individuals2. There was disquiet in some quarters and quiet; expectation in others,
>
> Then, suddenly, all hell broke loose. The Zimbabwe Chief Justice, Mr Justice Gubbay, in a speech marking the opening of the 1991 Legal Year, declared that the Supreme Court would hold the proposed amendment invalid since according to him there was an implied limitation in the amending section of the constitution (s 52(1)) which precluded parliament from abrogating or changing the identity of the constitution or its basic features. The Attorney- General fumed, attacking the Chief Justice's

[30] Ben Hlatswayo was a lecture if the faculty of Law when he wrote the article. He was later to be appointed judge of the High Court before being elevated to the Supreme court of Zimbabwe and now he is a judge of the Constitutional court of Zimbabwe

[31] **Definitions**

Legal Definition of judicial activism: the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent

[32] Zimbabwe Law Review, Vol 19-10 p5

statement as “unwarranted, unprecedented and disappointing”3 The President “replied with a public invitation to the Chief Justice to resign”4

The above episode clearly dramatises the conflicting perspectives about the role of the judiciary in development. On the one hand, there is the view that the judiciary has or should have unrestricted: law-making and law-reviewing powers in the exercise of its functions, especially in developing countries. On the other hand, there is the positivist belief in the formal precedence of the law and judicial subordination to the law which is characterised by the aphorism: “Judges do not make law; they merely apply it.”

Since the notion that judges do make law is no longer seriously contested,5 the question of judicial passivism falls away. Therefore, the focus of this paper is going to be on the merits and limits of judicial activism. The phenomenon of judicial activism will be examined in a historical perspective and in the light of urgent efforts necessary to uplift the standard of living of the vast majority of working people in the developing countries, in general, and in Zimbabwe, in particular.

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……..

The idea of unrestricted judicial law-making is traceable to the age of primitive law when the personal character of the king or magistrate played a decisive role in the actual workings of legal justice. But even at this primitive stage such excessively discretionary powers were viewed with disquiet. For example, Aristotle’s solution was to separate the administrative and the judicial roles and allow discretion in the one and not in the other. But perhaps again the picture of judges as “living oracles” and “depositories” of the law at this, stage was a bit exaggerated since they could not ignore the economic and social patterns which gave rise to the law they were “making.” However, the point still remains that this period represents the unqualified and highest expression of judicial law-making.

The ushering in of the 2013 constitution of Zimbabwe which entrenches supremacy of the constitution and the rule of law has now put in doubt the applicability of legal positivism in modern Zimbabwe. The “...basic concepts of legal positivism are:

1. A view of law as the product of the sovereign state authority;
2. Separation of law from social evaluative criteria — humanity, morality and democracy;
3. Formalistic conception of rule of law; —
4. Judicial subordination to law."[33]

To quote Willies Principles of South African Law[34] "…the law….claims authority, that is, it demands that people act *on the basis of* legal rights and duties, and that they do so simply because these are legal"[35] At page 4 of the same textbook the authors observe that". At page 4 the authors argue that

> …legal rights and duties have this status regardless of their content, and simply by virtue of their formal status as legal rights and duties-the legal force of a legal prescription is independent of one may think of it…..
>
> This…. is reflected in pronouncements by judges, who (at a maximum) assert that law has authority over their professional lives. A classic example is provided by this statement regarding the death penalty in the case which inaugurated the new legal era established by South Africa's Bill of rights:
>
> > I am …prepared to assume that …the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before u, however, is not what the majority of South Africans believe a proper sentence for murder should be it is whether the constitution allows the sentence.[36]

1.6 Methodology

The researcher adopted the doctrinal and analytical research methodology. The type of research did not require empirical evidence. The purpose of this research was achievable through desk research. The researcher therefore conducted desk research and main sources of data were books by authoritative authors, internet articles, journal articles and case law.

1.5 Significance of study

Zimbabwe was historically viewed as a common law jurisdiction because the applicable law was predominantly as identified and developed by the courts flowing

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[33] B Hlatswayo, Judicial Activism and Development- warning signals from Zimbabwe, Zimbabwe Law Review Volume 9-10 1991-1992 p 6

[34] Wille`s Principles of South African Law (9th edition) at page 4.

[35] See note 53 above

[36] Wille`s Principles of South African Law (9th edition) at page 4.

from the Roman Dutch tradition as modified. There common law was complemented by piecemeal legislation which according to the common-law tradition was also subject to authoritative interpretation by the courts. There are instances, like in human rights issues, political questions and land issues, only to mention some, where the reaction by the Executive and the Legislature have appeared to legislate to counter judicial pronouncements on the statute law. In some instances, the legislature has amended or introduced a law to re-enact a previous legal position struck down by the judiciary. Recent years have witnessed greater appetite by the Executive and Legislature to legislate in areas previously regulated by common law. Examples are the law on bail[37], company law[38] and the criminal law[39]. This research is aimed at making a contribution to contemporary thoughts on what the role of the judiciary should be in modern Zimbabwe.

1.6 Limitation of study

If it was up to the writer, he would have discussed certain concepts in greater detail but there are limitations on the length of the paper and date of submission imposed by the Department of postgraduate degrees in the Faculty of law which the researcher had to obey. It is therefore inevitable that certain areas that may lack sufficient depth. Effort was made, however, to ensure as much as possible no discussion was left hanging. The main focus of the research was how the common law tradition and the 2013 constitution of Zimbabwe delineates the role of judges In contemporary Zimbabwe.

Below are the research questions which guided the research

1.3 Research Questions

1.3.1 Main research question

What is the ideal role of judges in the contemporary hybrid legal system in Zimbabwe?

1.3.1 Sub-questions

[37] S 117 of the Companies and Other Business Entities [Chapter 24:31]

[38] Companies and Other Business Entities [Chapter 24:31]

[39] Criminal Law (Codification and Reform) Act *[Chapter 9.23]*

1.3.1.1 Sub research question 1

What are the classical key features distinguishing the various legal systems in the world and the respective roles of the judges?

1.3.1.2 Sub research question 2

What role has been played by judges in contemporary Zimbabwe?

1.3.1.3 Sub research question 3

How does the philosophy of the legal system in South Africa on the role of the judiciary compare with the Zimbabwean approach?

1.3.1.4 Sub research question 4

What are the key findings of the research and recommendations to be made based on the findings.?

1.7 Chapter synopsis

1.7.1 Chapter 1

This chapter introduces the area of research by providing background information on the researcher and what motivated his choice of the area of research. It contains the background to the study, a statement of the problem which motivated the research, imitation of study delineating the area of study and its parameters. It sets out the main and sub questions to serve as beacons keeping the research and researcher focused and also assist the reader the thrust. The researcher identified the civil and common law systems as the most relevant to this study and these are the focus of this paper subject to the limitations imposed by time and maximum length requirements of the faculty.

1.7.2 Chapter 2

This chapter contains a brief expose of the various legal systems obtaining in the world and their main characteristics. The researcher focused on the principles of judicial precedent which is the cornerstone of the common law tradition and judicial philosophy of the contemporary legal system in Zimbabwe.

1.7.3 Chapter 3

Since the research focuses on the role of judges this chapter exposes the judicial philosophy in Zimbabwe as discerned from case law and the constitutional

framework ushered in by the 2013 constitution of Zimbabwe. The chapter interrogates the validity of the claim that in contemporary jurisprudence the common law refers to a system of law which is based on and distinguishable not by the source of the law but by its philosophy based on judicial precedent irrespective of whether the applicable law is judge made law, statute or the common law. activism in the area of codified law.

1.7.4 Chapter 4

The fourth Chapter consists of a comparative study with South Africa which the researcher chose as a comparator because its legal history and constitutional framework resembles ha of Zimbabwe.

1.7.5 Chapter 5

The fifth chapter contains the findings of the research and recommendations.

1.8 Conclusion

The purpose of this chapter was to give the reader an over view of the research from conception of the research area up to its conclusion and recommendations by the researcher.

2.0 CHAPTER TWO

Conceptual and Theoretical framework of the study

2.1 Introduction

This chapter is an expose of the conceptual and theoretical framework of the research. It contains a discussion of the philosophical underpinnings of the various legal systems in the world and the characteristics that distinguish them. Emphasis will be on the role of judges in the respective legal systems.

2.1. Types of legal systems and their characteristics

2.1.1 A perspective by Hostein,Edwards,Nathan and Bossman

2.1.1.1. Civil law

It is necessary to recap on the discussion on the various legal systems There are various legal systems in the world. One such system is the civil law. These may have slight variations but what they have in common are the following features. There are legal systems which have maintained the influence of the Roman law.[40] These rely on written codes. Countries such as France, Italy, German, Poland, some countries in Latin America and African countries previously colonised by France have civil legal systems. In these countries judges are expected to apply the law irrespective of their personal views on what the law should be. To quote Willies Principles of South African Law[41] "…the law….claims authority, that is, it demands that people act *on the basis of* legal rights and duties, and that they do so simply because these are legal"[42] At page 4 of the same textbook the authors observe that". At page 4 the authors argue that "…legal rights and duties have this status regardless of their content, and simply by virtue of their formal status as legal rights and duties-the legal force of a legal prescription is independent of one may think of it…..".

This…. is reflected in pronouncements by judges, who (at a maximum) assert that law has authority over their professional lives. A classic example is provided by this statement

[40] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

[41] Wille`s Principles of South African Law (9th edition) at page 4.

[42] See note 53 above

regarding the death penalty in the case which inaugurated the new legal era established by South Africa's Bill of rights:

> I am …prepared to assume that …the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder. The question before u, however, is not what the majority of South Africans believe a proper sentence for murder should be it is whether the constitution allows the sentence.[43]

2.1.1.2 Common law

The other system is the common law which is found in Britain, its former colonies as well as current and former members of the commonwealth. A distinguishing feature of the common law system is that it consists, mainly, of law founded on uncodified law developed through centuries by the court systems.[44]

2.1.1.3 African Customary law

The African customary law is a tribal law which varies from community to community and its philosophy places emphasis on resolution of disputes on the facts, reparation and reconciliation. This system of law, too, is not codified and has to be discovered by the courts.

2.1.1.4 Mixed or Hybrid legal systems

The reality is that most African countries were at some stage in history under colonial domination and that resulted in customary law playing second fiddle to the imperialists' systems of law. The Roman law and the Dutch law influence were assimilated and one now finds in African countries a fusion of the common law, statutes and customary law as authoritative sources of law thereby constituting what can be termed as hybrid or mixed legal systems. These are the systems in Zimbabwe and South Africa.

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[43] Wille`s Principles of South African Law (9th edition) at page 4.

[44] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

2.1.2 A perspective of the California University

Another characterisation of legal systems can be gleaned from a publication by the University of California[45] which classifies legal systems into five groups namely: civil law, common law, customary law, religious law, and mixed legal systems.[46]

2.1.2.1. Civil law

According to that perspective civil law systems vary slightly from country to country but a common feature is that their procedural and substantive laws originated from the Roman legal tradition. Their "trademark"[47] is that they have comprehensive legal codes which are frequently updated.[48] Case law is secondary to legislation.[49]. Some civil law systems specifically oust it. France, Poland and Germany[50] are two examples of countries with a civil law system.[51]

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[45] Guide to International and Foreign Law Research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[46] Guide to International and Foreign Law Research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[47] Guide to International and Foreign Law Research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[48] See note 8 above

[49] See note 8 above

[50] https://www.lkoslaw.fi/legal-system-of-the-republic-of-poland/ accessed on 29 July 2022
"Legal system of the Republic of Poland has developed in close connection with the system of German and French law. The continental law system is in force in Poland. Furthermore, EU law is directly applicable.
Moreover, the Polish legal system is based on the rule of law. In addition, general European legal traditions such as the fundamental rights of citizens and the sanctity of law are respected.
Sources of Polish legislation | Legal system
The main source of Polish legislation is written law. The most important source of national regulations is the Constitution of the Republic of Poland, laws, regulations issued by the Council of Ministers and individual ministries"

[51] Guide to International and Foreign Law Research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

2.1.2.3 Common law

Common law systems depend more on judicial precedent although some areas of their law may be codified.[52] Common law systems are adversarial, rather than investigatory, with the judge moderating between two opposing parties.

2.1.2.4 African Customary law

Customary law systems are based on patterns of behaviour (or customs) that have come to be accepted as legal requirements or rules of conduct within a particular community. Customary law is usually unwritten and are often dispensed by elders, passed down through generations.[53] As such, customary law research depends greatly on the use of secondary sources[54]. Customary law practices are often found mixed legal system jurisdictions where they combine with the civil or common law.[55]

2.1.2.5 Religious systems

Religious legal systems are systems where the law emanates from texts or traditions within a given religious tradition. The sources of religious law are the deity and legislation by prophets as distinguished from secular law which is made by human beings.[56] Distinguished from codes in secular laws which are changed by their makers, religious laws are considered to be eternal and non-changing.[57] The main sources of religious law are therefore religious texts and legislation by prophets. This category of law no application in Zimbabwe and is not relevant to this research.[58]

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[52] Loosely judicial precedent means abiding by judicial decisions that have already been made but the concept is discussed in more detail later in this research.

[53] See note 8 above

[54] See note 8 above

[55] guide to international and foreign law research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[56] See note 8 above

[57] https://study.com/academy/lesson/religious-law-definition-purpose.html accessed 11 July 2022

[58] See note 8 above

***2**.1.2.6 Mixed or Hybrid legal systems*

The last group is the mixed or hybrid legal systems where two or more of the above legal systems work together[59]

2.1.3 Judges

Judges are the public officers appointed to decide cases in the courts of law. Internationally courts are Courts are normally divided into superior courts and other courts often referred to as inferior courts and tribunals. This research focuses on judges of the superior courts only. This research focuses on the It is the role of the judiciary in making or developing the law.

2.1.4 The common law in detail

The common law will now be discussed in more detail. The common law has its origins in British tradition in as much as civil law has its origins in Roman written codes. The common law system was started by the British Common law meaning the law that was not derived from legislation. This is the sense in which the common law is used today in England. In another sense common law was understood to mean a system of legal rules that were not derived from religious law. In this sense, the common law included legislation.[60] Sometimes "common law" was used to cover the law of the whole country as distinct to local law or customary law.[61] It is the law derived from principles extracted from previous decisions of the courts. This is not where the courts are interpretation legislation but where the principles are emanating from the judges' sense of justice and fairness. The true basis of the common law therefore is community's sense of justice as read by the judges. It remains to be seen at the end of this research what common law means in Zimbabwe.

The key distinguishing features of the common law legal system are the application of twin principles of precedent and *stare decisis*. The doctrine of

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[59] guide to international and foreign law research
https://guides.law.sc.edu/c.php?g=315476&p=2108388 accessed on 20 July 2022

[60] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p221

[61] [61] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p221

precedent is a state of affairs where authority is given to past judgments of the courts. It requires courts to follow the past decisions of superior courts of similar jurisdiction and higher courts in the judicial hierarchy. The maxim *stare decisis et non quieta movere* means "one stands by decisions and does not disturb settled points"[62].

The origins of precedent can be traced to the English legal system in its formative years. In a 1966 Practice Statement[63] Lord Gardiner, the Lord Chancellor stated the following on behalf of the House of Lords[64] **:**

> The Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property, and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this house.

The following quotation from a textbook by Professors Hahlo & Kahn[65] offers a useful guide on the benefits of the twin principles of precedent and *stare decisis*:

> In the legal process, as in all human affairs, there is a natural inclination to regard the decisions of the past as a guide to the actions of the future…In the legal system the calls for justice are paramount. The maintenance of the certainty of the law and

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[62] V G Hiemstra & H L Gonin, Trilingual Legal Dictionary p271

[63] **The equivalent in Zimbabwe is a Practice Direction issued by either the Chief Justice or the Judge President to make provision for a situation not covered in the Court rules**

[64] **[1966] 3 All ER 77**

[65] Hahlo & Kahn[65] The South African Legal System and its Background (1968) at 214

> of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rulings in previous decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.[66]

Slapper and Kelly[67] describe the doctrine of precedent as follows:

> The doctrine of binding precedent, or stare decisis, lies at the heart of the English legal system. The doctrine refers to the fact that, within the hierarchical structure of the English courts, a decision of a higher court will be binding on a court lower than it in that hierarchy. In general terms, this means that when judges try cases, they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow, but will certainly consider, it.[68]

Slapper and Kelly[69] argue further as follows:

> There are a numerous perceived advantages of the doctrine of stare decisis, among which are the following:
>
> - Consistency: This refers to the fact that like cases are decided on a like basis and are not apparently subject to the whim of the individual judge deciding the case in question. This aspect of formal justice is important in justifying the decisions taken in particular cases.
> - Certainty: This follows from, and indeed is presupposed by, the previous item. Lawyers and their clients are able to predict what the outcome of a particular legal question is likely to be in the light of previous judicial decisions. Also, once the legal rule has been established in one case, individuals can orientate their behaviour with regard to that rule, relatively secure in the knowledge that it will not be changed by some later court.

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[66] Hahlo & Kahn[66] The South African Legal System and its Background (1968) at 214

[67] Gary Slapper and David Kelly, English Legal System (18th edition) p 137

[68] N74 above

[69] Gary Slapper and David Kelly, **English Legal System (18th edition)** ***(p.168)***

- Efficiency: This refers to the fact that it saves the time of the judiciary, lawyers and their clients for the reason that cases do not have to be reargued. In respect of potential litigants, it saves them money in court expenses because they can apply to their solicitor/barrister for guidance as to how their particular case is likely to be decided in the light of previous cases on the same or similar points. (it should of course be recognized that the vast bulk of cases are argued and decided on their facts rather than on principles of law, but that does not detract from the relevance of this issue and is a point that will be taken up later in chapter 13).
- Flexibility: this refers to the fact that the various mechanisms by means of which the judges can manipulate the common law proved them with an opportunity to develop law in particular areas without waiting for Parliament to enact legislation. In practice, flexibility is achieved through the possibility of previous decisions being either overruled or distinguished, or the possibility of a later court extending or modifying the effective ambit of a precedent. (it should be re-emphasized that it is not the decision in any case which is binding, but the *ratio decidendi*. It is correspondingly and equally incorrect to refer to a decision being overruled)[70]

2.2 Conclusion

1. Based on the above it can be argued that historically there were three types of legal systems in the world that is the common-law, civil law and religious law. The legal systems were distinguished by the following: -
   a) The underpinning philosophy of the legal system towards the resolution of disputes,
   b) The sources of law, whether judicial precedent or statute and,
   c) The role of the judge or adjudicating authority.
   d) The roles of judges in the two systems are direct opposites
2. The doctrine of precedent as we know it today, has its origins in the English common law system.
3. The doctrine of precedent is the cornerstone of the common law system. The doctrine applies irrespective of whether or not the law is legislated.
4. There is sufficient justification for the precedent system as the bedrock of the rule of law even in instances where the law has been codified. The justification is consistence, certainty, openness, transparent, fairness and

[70] See note 80 above

equal protection of the law among other principles that underpin the concept of the rule of law.

5. Too stringent a body of rules of precedent, may result in numerous erroneous legal notions being retained and entrenched thereby perpetuating bad law and *previous injustices*. It also stifles law reform as the law may fail to develop and change to cater for changed circumstances and changing times/sentiments.
6. The advantages of the application of judicial precedent outweigh the disadvantages, with the result that the purposes served by the doctrine of precedent are at the core of the rule of law. More fundamentally, without adherence to the doctrine of precedent, the judiciary will not comply with the dictates of sections 164 and 165 of the Constitution.

This chapter discussed the philosophy behind different legal systems. The writer deliberately dedicated more space to judicial precedent because as will more fully appear hereunder it forms the bedrock of the Zimbabwean System of law. The next chapter will discuss the Zimbabwean situation.

CHAPTER THREE

The contemporary legal system in Zimbabwe

3.0 Introduction

The previous chapter discussed legal systems in general and their various characteristics. It explored in some detail the role of judges under the common law legal systems. The role of judges in civil systems was not discussed in much detail because the Zimbabwean law is largely uncodified. The Zimbabwean legal system is a mixture of codes, law constituted by judicial precedent and customary law.

At independence Zimbabwe was governed in terms of the 1980 Constitution adopted at Lancaster House in Britain. In terms of that constitution the law to be applied was the law in force at the Cape of Good Hope as at 10 June, 1891.[71] This was the Roman Dutch law which to begin with was based on codes and judges played a passive role. Between the years 1828 to 1910 the Roman Dutch law underwent transformation through the gradual reception English law between the years 1828 to 1910 hence the introduction of the doctrine of precedent.

This transformation is historical and a detailed study of the early stages of the Roman Dutch law, now referred to as the common law, is beyond the scope of this research since the topic is concerned with contemporary Zimbabwe. Suffice it to say the clause was maintained successive nineteen amendments of the constitution of Zimbabwe until the promulgation of the 2013 Constitution of Zimbabwe wherein by virtue of section 192[72] the Roman Dutch with the influence of English law common law remains part of the law in Zimbabwe. The main branches of the law are cause the classical view is that their role is very narrow. It is simply to apply the law unquestionably. This chapter now zeros on the legal system in Zimbabwe and the role of judges in Zimbabwe.

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[71] S 89 of the Constitution of Zimbabwe 1980

[72] 192 Law to be administered

The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified.

It is for the above reasons that the conceptual and theoretical research placed emphasis on the role of the judiciary in a common law legal system, that is, to put a closer study of the modern Zimbabwean legal system into perspective.

3.1 The law being administered in Zimbabwe

The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified.[73] The law is identified in the constitution[74] as :-

> "(*a*) any provision of this Constitution or of an Act of Parliament;
>
> (*b*) any provision of a statutory instrument; or
>
> (*c*) any unwritten law in force in Zimbabwe, including customary law"[75]

The contemporary legal system in Zimbabwe therefore, consists of a combination of codes (civil system), uncodified law (common law) and customary law and it is the constitution, other legislation, common law and customary law in force on the date on which the constitution[76] took effect. Reference to unwritten law in the constitution is a misnomer because Superior courts are courts of record and thus case law is written. The term 'unwritten' should be understood to mean 'uncodified'. To the extent that the law in Zimbabwe combines three legal systems it can be said that it is a hybrid legal system. As stated in the introduction the assumption would be that the role of the judge would change depending on whether the law to be applied is common law or codified law. On one hand there would be no room for judicial activism, no room to make law, no room to develop the law and no room to disregard the law irrespective of whether the law is good or bad. The classical approach was that judges play a passive role when dealing with codified law. On the other hand, judges at common law could be judicially active (identify and discover and develop the law through their decisions).

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[73] S 192 of the Constitution of Zimbabwe (Amendment NO 20) Act 2013

[74] S 332 of the Constitution of Zimbabwe (Amendment NO 20) Act 2013

[75] See note 87 above

[76] Constitution of Zimbabwe (Amendment No 20) Act 2013

3.4 The contemporary legal system in Zimbabwe

3.4.1 Supremacy of the constitution

The 2013 constitution of Zimbabwe[77] is the supreme law of the land.

Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

3.4.2 Dominance of the common law over statute law

Most other branches of the law in Zimbabwe consist of uncodified. The key branches include property law, law of persons, contract law, delict and family law. To a certain extent there have been statutory inventions in the above areas of the common-law. Examples are the Contractual Penalties Act *[Chapter 8:04]* and the Consumer Protection Act *[Chapter 14:14]* in Contract Law; Deeds Registries Act *[Chapter 20:05],* Prescription Act *(Chapter 8:11)* and Titles Registration and Derelict Lands Act *[Chapter 20:20]* in Property law; and Marriages Act [*Chapter 5:15],* Maintenance Act *[Chapter 5.09]* and Matrimonial Cause Act *[Chapter 5.13]* in Family law.

There are areas of law which are now codified but the statutes do not expressly exclude the application of the common law. The company is now codified to a very large extent by the Companies and Other Business Entities *[Chapter 24:31]* and the Act did not seek to expressly repeal the common law. The law of succession is codified by at least three Acts of Parliament, namely Administration of Estates Act, Deceased Estates Family Maintenance Act [Chapter 6.02] and Deceased Estates Succession Act [Chapter 6.03]. The statutes do not expressly repeal the common law but modify it. The Criminal law is now codified in the (Codification and Reform) Act [*Chapter 9.23*] and an attempt was made an attempt was made to exclude the common law but in the next breath it was brought back.

Section 3 of the Criminal Law Codification and Reform [Chapter 9.23 reads as follows: _

> 3 Roman-Dutch criminal law no longer to apply
>
> (1) The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.
>
> (2) Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of–
>
> (*a*) the criminal law referred to in subsection (1); or
>
> (b) the criminal law that is or was in force in any country other than Zimbabwe.[78]

The writer has underlined the portions of the provision which reveal legislative concession not to exclude the common law completely.

In the preface of his Commentary[79] on the Criminal Law (Codification and Reform) Act[80] renowned professor of Criminal Law in Zimbabwe G Feltoe[81] explained the purpose and advantage of codification in the preface to the to the commentary

> The adoption of Criminal law by Parliament is a landmark development for the Criminal Law in Zimbabwe. This code will both improve the quality of the and its accessibility.
>
> Previously the criminal Law was widely dispersed. Much of the Criminal Law was not written in Statues but was contained in common law. The locating of the common law dealing with particular crime or a defence to criminal liability was often a laborious exercise as it involved tracing back to the original common law and then ascertain how over the years the Zimbabwean courts (and also the South African Courts) had interpreted and applied that common law. A considerable amount of the previous Criminal law was widely dispersed and was contained in a whole variety of different pieces of legislation.
>
> ……..
>
> ……..

[78] 3 of the Criminal Law Codification and Reform [Chapter 9.23 r

[79] Commentary on the Criminal Law (Codification and Reform) Act First Edition (2006) published by the Legal Resources Foundation in Zimbabwe

[81] G Feltoe is a lecturer of criminal law and Professor at the University of Zimbabwe

> Where the Criminal Law Code has simply codified the existing la w without alteration, reference can still be made to A Guide to the Criminal Law in Zimbabwe by G Feltoe (3rd Edi) published by the Legal Resources Foundation f Zimbabwe in 2004). Throughout the commentary reference will be provided to the relevant portions of this Guide[82]

The explanation by G Feltoe explains the dynamism and uniqueness of the Zimbabwean Legal System which has also witnessed aggressive legislation in the areas of bail law, company law and Finance. According to G Feltoe the common law remains relevant and extensive reference to case is made to case law in the commentary.

Another example is the codification of the common law principles of company through the repealing of the old Companies Act and promulgation of the Companies and Other Business Entities [Chapter 24:31]. In the definition section of the Act the word "company" is defined as "(a) a company incorporated under this Act or a repealed law; or (b) a foreign company, to the extent that the provisions of this Act apply to such companies." A "company limited by guarantee" is defined as "… a company described in section 76(b) ("Mode of forming a company" and "company limited by shares" means "a company described in section 76 (a)". The definitions are not useful at all. The definition and legal nature of companies still to be found in the common law. Sections 40[83] is the codification of the common law principles on the protection of minority shareholders. Section 60[84] codified the common law right of a member of a private business corporation or a company to bring an action in court in such persons in own name against any manager, officer or director or recover damages caused to him or her caused by violation of a duty by any such office bearer.[85] The underlying principles remain the same and cases decided at common law which include South African and English case law remain relevant as will be shown in the next chapter. The common law derivative actions by members on behalf of a corporate entity have been codified under s61[86] and 62 of the Companies and Other

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[82] See preface to the Commentary on the Criminal Law (Codification and Reform) Act First Edition (2006) published by the Legal Resources Foundation in Zimbabwe

[83] S 40 of the Companies and Other Business Entities Act [[Chapter 24:31]

[84] S 60 of the Companies and Other Business Entities Act [[Chapter 24:31]

[85] S 60 of the Companies and Other Business Entities Act [[Chapter 24:31].

[86] S 61 of the Companies and Other Business Entities Act [[Chapter 24:31]

Business Entities to recover damages by an entity as a result of a breach of fiduciary duty by an office bearer. The fusion and complementarity between the common law and codified law in company law is discernible in s61(1) of the Act which states that

> a member or shareholder of a company or private business corporation may bring an action in court in such person's name and on the company's behalf against any manager, officer or director referred to in sections 54 or 55 to enforce, or to recover from that manager, officer or director damages caused to the company by violation of, duties owed by that manager, officer or director to the company under this Act or any other law including laws against fraud or misappropriation.[87]

The underlining is by the writer to demonstrate the legislative intent to retain the common law to the extent that same is not inconsistent with statute. The clear intention was, as explained by G Feltoe in the context of criminal law, to make the law easily accessible and align company law with modern trends.

The bail law is another example. Section 117 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* codified the common law principles emanated from case law in order to streamline them and easier access. However, the Legislature in addition to giving detailed guidelines for guided exercise of discretion in bail matters infused discretion on any other grounds. S117(3) is reproduced hereunder by way of example:

> (3) In considering whether the ground referred to in—
>
> (*a*) subsection (2)(*a*)(i) has been established, the court shall, where applicable, take into account the following factors, namely—
>
> (i) the degree of violence towards others implicit in the charge against the accused;
>
> (ii) any threat of violence which the accused may have made to any person;
>
> (iii) the resentment the accused is alleged to harbour against any person;
>
> (iv) any disposition of the accused to commit offences referred to in the First Schedule, as evident from his or her past conduct;
>
> (v) any evidence that the accused previously committed an offence referred to in the First Schedule while released on bail; 59
>
> (vi) any other factor which in the opinion of the court should be taken into account;

Again the writer has highlighted the relevant portion of the bail law which shows the intention to retain the common law.

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[87] S 61 (1) of the Companies and Other Business Entities Act [[Chapter 24:31]

3.4.3 The customary law

The Customary law in defined in the Constitution as "customary law" means the customary law of any section or community of Zimbabwe's people;" The definition is further amplified is 2 of the Customary aw and Local Courts Act *[Chapter 7:05]* as ""customary law" means the customary law of the people of Zimbabwe, or of any section or community of such people, before the 10th June, 1891, as modified and developed since that date;" The Act provides for the application of customary law in section 3 as follows

> **3 Application of customary law**
> (1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires—
> (*a*) customary law shall apply in any civil case where—
> (i) the parties have expressly agreed that it should apply; or
> (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the
> parties have agreed it should apply; or
> (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and
> proper that it should apply;
> (*b*) the general law of Zimbabwe shall apply in all other cases.
> (2) For the purposes of paragraph (*a*) of subsection (1)—
> "surrounding circumstances", in relation to a case, shall, without limiting the expression, include—
> (*a*) the mode of life of the parties;
> (*b*) the subject matter of the case;
> (*c*) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe,
> as the case may be, which apply to the case;
> (*d*) the relative closeness of the case

It can therefore be safely concluded that the law in force in Zimbabwe is the Constitution, common law as modified by statute and judicial precedent and the customary law.

3.3 Developing the common law

In the introduction the writer alluded to the common law and its adoption at the attainment of independence in 1980. With the acceptance of the Roman Dutch law as modified by English law came the practice of judicial precedent as a constitutive source of law.

Section 176 of the 2013 Constitution of Zimbabwe[88] is a codification of that common law tradition in terms of which the Superior courts had the inherent power to regulate and protect their processes and to develop the common law. The constitution however introduced the standalone Constitutional court at the top of the courts' hierarchy and in order to cater for the new court which is a creation of Statute Section 176 therefore provides that the "…Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."[89] The new hierarchy of the Superior courts will be discussed later in this paper.

The description of the legal system in contemporary Zimbabwe would be incomplete without discussing the implications of the 2013 Zimbabwe Constitution since the constitutional framework has a huge bearing on the role of the judiciary or the judges. In this regard the following observations are made:

3.4 Protecting the Supremacy of the Constitution

Section 2 of the 2013 Constitution entrenches the supremacy of the constitution. The role of judges should be understood in the context of the constitution as read with the founding values and principles state in s 3 of the constitution[90] which include supremacy of the Constitution, rule of law,

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[88] Constitution of Zimbabwe (Amendment No 20) Act 2013

[89] S176 of the Constitution of Zimbabwe (Amendment No 20) Act 2013

[90] **3 Founding values and principles**

(1) Zimbabwe is founded on respect for the following values and principles—

(*a*) supremacy of the Constitution;

(*b*) the rule of law;

(*c*) fundamental human rights and freedoms;

(*d*) the nation's diverse cultural, religious and traditional values;

(*e*) recognition of the inherent dignity and worth of each human being;

fundamental human rights and freedoms, cultural, religious and traditional values, recognition of the inherent dignity and worth of each human being, recognition of the equality of all human beings, gender equality, observance of the principle of separation of powers, transparency, justice, accountability and responsiveness and due respect for vested rights.

The judiciary has a key role in protecting the supremacy of the constitution and principles and values enshrined in ss 2 and 3 of the Constitution. The Bill of Rights in Chapter 4 of the constitution speaks to the duty of the State and every person, including juristic persons, and every institution and agency of the government at

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(*f*) recognition of the equality of all human beings;

(*g*) gender equality;

(*h*) good governance; and

(*i*) recognition of and respect for the liberation struggle.

(2) The principles of good governance, which bind the State and all institutions and agencies of government at every level, include—

(*a*) a multi-party democratic political system;

(*b*) an electoral system based on—

(i) universal adult suffrage and equality of votes;

(ii) free, fair and regular elections; and

(iii) adequate representation of the electorate;

(*c*) the orderly transfer of power following elections;

(*d*) respect for the rights of all political parties;

(*e*) observance of the principle of separation of powers;

(*f*) respect for the people of Zimbabwe, from whom the authority to govern is derived;

(*g*) transparency, justice, accountability and responsiveness;

(*h*) the fostering of national unity, peace and stability, with due regard to diversity of languages, customary practices and traditions;

(*i*) recognition of the rights of—

(i) ethnic, racial, cultural, linguistic and religious groups;

(ii) persons with disabilities;

(iii) women, the elderly, youths and children;

(iv) veterans of the liberation struggle;

(*j*) the equitable sharing of national resources, including land;

(*k*) due respect for vested rights; and

(*l*) the devolution and decentralisation of governmental power and functions.

every level to respect, protect, promote and fulfil the rights and freedoms set out in Chapter 4 of the constitution.

Section 85 provides the constitutional mechanism for the enforce of fundamental rights and freedoms in the courts and the remedies.

> **85 Enforcement of fundamental human rights and freedoms**
>
> (1) Any of the following persons, namely—
>
> (*a*) any person acting in their own interests;
>
> (*b*) any person acting on behalf of another person who cannot act for themselves;
>
> (*c*) any person acting as a member, or in the interests, of a group or class of persons;
>
> (*d*) any person acting in the public interest;
>
> (*e*) any association acting in the interests of its members;
>
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.
>
> (2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).

Section 85 empowers a court to grant any appropriate remedy among the reliefs stated therein. One such relief which has revolutionalise the role of judges in Zimbabwe is contained in s 175 of the constitution. It is couched as follows: -

> **175 Powers of courts in constitutional matters**
>
> …….
>
> (6) When deciding a constitutional matter within its jurisdiction a court may—
>
> (*a*) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency
>
> (*b*) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.[91]

This is a remedy which is intended and does protect the supremacy of the constitution and has dominated the courts in contemporary law. A few examples from case law will be

[91] S 175(7) of the Constitution of Zimbabwe (Amendment No 20) Act 2013

used to demonstrate how the remedy has applied by judges in discharging their key role to protect the constitution.

In the case of Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors[92] ZLR (2)2018 603 (CC) the Constitutional court of Zimbabwe was seized with the following constitutional matter as summarised in the introduction per Makarau JCC

> On 4 July 2017, the Supreme Court acting in terms of s 175(4) of the Constitution referred a constitutional matter to this Court. The essence of its order is to seek from this Court an answer to the question whether or not s 27 of the Public Order and Security Act [*Chapter 7.11*], (POSA) is constitutional.
>
> *THE FACTUAL BACKGROUND*
>
> The facts giving rise to the constitutional matter are common cause. I set them out hereunder
>
> On 1 September 2016, the first respondent published a statutory instrument in terms of which he, acting in his capacity as the regulating authority for the Harare Central Police District, banned for a period of two weeks, the holding of any public processions or demonstrations within the Harare Central Police District. In acting as he did, the first respondent relied on the provisions of s 27 of POSA which in subs (1) provides:
>
> > "27 (1) If a regulating authority for any area believes on reasonable grounds that the powers conferred by section 26 will not be sufficient to prevent public disorder being occasioned by the holding of processions or public demonstrations or any class thereof in the area or any part thereof, he may issue an order prohibiting, for a specified period not exceeding one month, the holding of all public demonstrations or any class of public demonstrations in the area or part thereof concerned."
>
> On 2 September 2016, a day after the publication of the Statutory Instrument, the applicants approached the High Court at Harare on a certificate of urgency, seeking the suspension of the statutory instrument pending the determination of, among other issues, the constitutional validity of s 27 of POSA. The other challenges mounted by the applicants against the ban are not germane to the question before this Court.

[92] Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors[92] ZLR (2)2018 603 (CC)

The learned judge proceeded to consider the nature and content of the fundamental rights whose enjoyment had been limited by the impugned law namely the freedom to demonstrate and to petition[93] before coming to the conclusion that the rights enshrined in s 59 of the Constitution then, in simple terms, become the right to demonstrate peacefully and the right to present petitions peacefully.[94] The rights are subject to the general limitation provided for in s 86(2) of the Constitution because could not countenance the holding of violent demonstrations and the violent presentation of petitions as protected rights. Violence by its very nature has the effect of violating other persons' rights to liberty, bodily integrity or property.[95] The enjoyment of fundamental rights and freedoms is subject, worldwide, to the rule that the fundamental rights and freedoms granted to every person ought to be always exercised in consideration of the rights and freedoms of other persons.[96] After considering the facts of the case the Court[97] concluded as follows:

> It is beyond dispute that s 27 of POSA has the effect of infringing the rights granted by s 59 of the Constitution. The High Court correctly found so. One would venture to suggest that s 27 provides a classic example of a law whose effect infringes the fundamental rights in issue in this matter.
>
> The test to determine whether a law infringes a fundamental right was laid out by GUBBAY CJ in *In re Mhunhumeso (supra)* at page 62F as follows:
>
> > "The test in determining whether an enactment infringes a fundamental freedom is to examine its effect and not its object or subject matter. If the effect of the impugned law is to abridge a fundamental freedom; its object or subject matter will be irrelevant."

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[93] These rights are enshrined in s 59 of the Constitution of Zimbabwe (Amendment No 20) Act 2013

"59 **Freedom to demonstrate and petition**

Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully."

[94] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

[95] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

[96] In Zimbabwe the limitation of rights is found in s 86 (1) of our Constitution.

[97] [97] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

> Clearly, the effect of s 27 is to give wide discretion to a regulating authority to abridge the two rights. He or she can impose a blanket ban for up to one month if he or she believes on reasonable grounds that he will not be able to prevent violence from breaking out. During the currency of the ban, the two rights are completely negated.[98]

The court then disposed of the matter on the basis that s 27 of the Public Order and Security Act [*Chapter 11:17*] is unconstitutional and acting in terms of s 175 (6) (b) of the constitution suspended the declaration of invalidity to allow the competent authority (Legislature)to correct the defects in s 27 of the Public Order and Security Act if they are so inclined.[99]

The following two principles emerge from this case[100] when dealing with a law whose constitutional validity is under consideration: -

- The first principle is a presumption in favour of constitutionality. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other outside the provisions of the Constitution, the court must uphold the one that falls within.[101]
- The correct approach of presuming constitutionality is to avoid interpreting the Constitution in a restricted manner in order to accommodate the challenged legislation. Instead, after properly interpreting the Constitution, the court then examines the challenged legislation to establish whether it fits into the framework of the Constitution.[102]
- This approach gives the Constitution its rightful place, one of primacy over the challenged legislation. The Constitution is properly interpreted first to get its true meaning. Only thereafter is the challenged legislation held against the properly constructed provision of the Constitution to test its validity. In other words, one does not stretch the Constitution to cover the challenged

[98] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

[99] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

[100] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

[101] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

[102] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

legislation but instead, one assesses the challenged law, and tries to fit it like a jigsaw puzzle piece into the big picture which is the Constitution. If it does not fit, it must be thrown away. (See *Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S).

- The second principle entails the adoption of a broad approach where any derogation from guaranteed rights and freedoms is given a very narrow and strict construction to avoid the diminishing or the dilution of the rights or freedoms. In this regard, the court venerates the fundamental right or freedom as primary while regarding the limitation as secondary.[103]

In the case of Diana Eunice Kawenda v Minister of Justice, legal and Parliamentary Affairs[104] the Constitutional Court was seized with an appeal from the judgement of the High Court dismissing a constitutional challenge of the constitutional validity of the criminal law which sets the law at which a young person can consent to sexual intercourse at 16 years. The appellant had contested the constitutional validity of the definition of a young person in Part III of Chapter V of the Criminal law [Codification and Reform Act [Chapter 9.23][105]. In prohibiting extra marital sexual intercourse and perfuming of indecent acts with a young person the e impugned provisions of the Criminal law [Codification and Reform]Act defined [106]a young person as a boy or girl under the age of sixteen.[107] The application had been filed in the High court in terms of s 85 of the Constitution of Zimbabwe by the appellants who the Constitutional Court described as champions of omen's a and child causes and rights.

In deciding the matter, the court set out the principles that must guide a court when interpreting a constitution. It underscored the status of the constitution as a statute. In interpreting the constitution, the usual rules of interpretation of statues applied. However in interpreting constitutional provisions the preferred construction is one which serves the interests of the constitution and best carries out its purpose.[108]

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[103] Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N. O. & Ors CCZ 9/18

[104] CCZ3/22

[105] Part III of Chapter V of the Criminal law [Codification and Reform Act [Chapter 9.23]

[106] S 61 of the Criminal law [Codification and Reform] Act Chapter 9.23

[107] See introduction at Diana Eunice Kawenda v Minister of Justice, legal and Parliamentary Affairs CCZ3/22 of the cyclostyled judgment page 3-6

[108]

Further in interpreting provisions that guarantee fundamental rights the widest possible interpretation which gives the right its fullest measure or scope is to be preferred. The court took into account the presumption of validity and the onus on the person challenging the constitutional validity of a statute to prove the inconsistency. Where the statute I capable of more than one interpretation the interpretation falling within the provisions of the constitution is to be preferred. The court must also interrogate the effect of the contested law on the fundamental right or freedom. In disposing of the matter the court found that the impugned provisions were inconsistent with s 81(1) of the constitution which entrenched every boy and girl under the age of eighteen years, has the right to "…(*e*) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;"

The court thus declared the definition of a child as a boy or girl below 16 years of age constitutionally invalid and postponed the effective date of the declarator for 12 months to give the Legislature the opportunity to enact a law which protects all children.

In Mudzuru v Minister of Justice, Legal and Parliamentary Affairs[109] the constitutional court outlaw d marriage of person s under the age of eighteen years despite the fact that the Marriage Act [Chapter 5.11] legalised it. The court therefore struck own the offending provisions of the Marriage Act[110].

3.4 Inconsistency in constitutional protection

There are cases when the court failed to offer constitutional protection. A few examples are given below. These are the cases of Standard Chartered Bank Zimbabwe Limited v China Shougang International[111] and CABS v Penelope Douglas Stone and & Others[112] In the two cases the court gave too much deference to the separation of powers and the common law. The courts were called upon had to deal with competing laws. On hand was the common law on the legal relationship between a bank and client based on the common law of contract and on the other hand, legislation which interfered with that contractual relationship and also

[109] 2016 (2) ZLR 45 (CC

[110] Marriage Act [Chapter 5'11]

[111] *Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2)ZLR 385

[112] SC 15/21

infringed upon property rights protected in the constitution. Both cases involved disputes between the two banks and their clients who held United States dollar denominated accounts. The common law imposes on a bank the contractual obligation of a bank to maintain the money accepted from client to his or her credit and pay the money on demand. The Reserve bank had interfered with that common law position by enacting a directive which directed the banks to hand over the deposit to it hence appropriating the money. In the case of *CABS v Penelope Douglas Stone and & Others*[113] the government had also passed a law in the form of a statutory instrument which declared certain United States dollar denominated bank balances redeemable in local currency law. The laws not only adversely impacted or interfered with the contractual relationship between bank and client but also reduced the value of the credit balance to be paid on demand since it had become redeemable in a dreaded Zimbabwean currency. It also amounted to outright appropriation of such funds by the State functionaries. The problems which how should a bank approach bad law, whether the bank is absolved of its contractual obligations because of interference by a State actor through bad law and whether the law in Zimbabwe offer protection to the bank or its customer in circumstances where the lawmaker interferes with the bank customer contractual relationship.

The High court had given relief in both cases which tended to protect vested rights giving rise to celebration of constitutional vindication. That such legislative interference is wrong is obvious and how so is captured in an article the International Bar Association:

> "How a subject must approach a bad law has been subject of jurisprudential debate for decades. In this case, the question is how a bank must approach a law that abridges its traditional obligations to its client to pay back to a customer the same value as was deposited with it. What happens when such law is then declared invalid in a competent court, and who bears the obligation to compensate?" [114]

[113] SC 15/21

[114] Zimbabwean High Court reaffirms sanctity of banker-client relationship- International Bar Association.

However, the celebrations were short-lived because the Supreme court overturned the High court and in the process abdicated from its constitutional duty to protect vested rights against legislative assault.

In the case of Standard Chartered Bank Zimbabwe Limited v China Shougang International[115] the Supreme court's decision was : -

- The general principles of contract apply to a bank client relationship[116]
- The general rule relating to deposits made in a bank account by a customer is that the money becomes the property of the Bank which can use such deposit as it pleases so long as it pays to the depositor, on demand, the equivalent of the amount deposited in the account.[117]
- The legal relationship between a bank and its customer whose account is in credit with it is that of debtor and creditor. Although the customer 'deposits' money to the credit of his account with the bank, the transaction is not one of *depositum,* but of loan.[118]
- What the bank paid to the RBZ in terms of the directive issued by the regulatory authority was its own money. That the bank parted with the deposits in the account was of no import to the account holder whose right to be paid the equivalent of the deposits, on demand, remained unaffected by the bank's dealings therewith. The transfer to the RBZ, in terms of its directive, did not, therefore, extinguish the bank's contractual obligation to make payment to the respondent.[119]

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[115] SC 49/13

[116] See *Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2)ZLR 385

[117] In *Standard Bank of South Africa v Echo Petroleum* CC, Case No. 192/11 (2012) ZASCA 18; see also *ABC Bank v Mackie Diamonds* SC 23/13; *Foley v Hill* (1848) 2 H.L

[118] See *Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd* 2004 (1) SA p 284 G; *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) at p 673 C-H. *Absa Bank Ltd v Intensive Air (Pty) Ltd & Ors* 2011 (2) SA 275.

[119] See *Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2)ZLR 385

- An legislative act of by the State may qualify as a supervening impossibility if it renders performance by a party to a contract impossible and discharge the bank from liability.[120]
- A bank is discharged from liability only if for some reason beyond its control it cannot, from its resources, repay the debt. The impossibility must be proved and it must be clear from the evidence that performance is impossible, not merely undesirable or uneconomical.[121]
- Legislation subsequent to the making of the contract, making performance illegal either absolutely or in part qualifies as an excuse to the bank, but not obedience to a ministerial directive given without statutory authority.[122] A bank must resist unlawful instructions which interfere with its contractual obligations to client.[123]

In *CABS v Penelope Douglas Stone and & Others*[124] the decision was also that [125]: -

- The bank's liability is based on contract or bank client relationship.[126]
- Where a law or lawful directive is given by a State actor the bank must comply. [127]
- A bank escapes liability where is fails to pay client the same value received from client due to circumstances beyond its control coming into existence because of the lawful actions of a State actor.
- In the event that the bank is not liable due to impossibility created by a State actor there is a sound legal basis for pursuing a claim against the Reserve bank and the Responsible Minister.[128]

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[120] See *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 and *Bob's Shoe Centre v Henneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A); seealso *The Law of Contract in South Africa* 3 *ed by* RH Christie *at* pp 524-525.

[121] *See Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2)ZLR 385 See also *The Law of Contract in South Africa* 3 *ed by* RH Christie at p 525.

[122] *The Law of Contract in South Africa* 3 *ed by* RH Christie at p 525

[123] See *Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2)ZLR 385

[124] SC 15/21

[125] CABS v Penelope Douglas Stone and & Others SC 15/21

[126] CABS v Penelope Douglas Stone and & Others SC 15/21 page 10

[127] CABS v Penelope Douglas Stone and & Others SC 15/21 page 10

[128] Page *CABS v Penelope Douglas Stone and & Others* SC 15/21 at page 10

In 2008 the State mooted the introduction into the basket of currencies of bond notes, denominated in and intended to be valued at par with United Stater Dollars (USD). In the year 2016 one Zimbabwean national, Joyce Teurai Ropa Mujuru's court challenge to the introduction of bond notes was unsuccessful[129] in the Constitutional Court which ruled that the challenge was premature and speculative.[130] She returned to the Constitutional Court to challenge the actual introduction of the bond notes through Statutory Instrument (SI) 133/16 but was again unsuccessful.[131] What motivated the challenges was the reality the bond note was clearly not USD and the effect of their introduction would be the diminution of the USD bank balances. The bond note was indeed introduced through SI 133/16 and indeed the USD balances in bank accounts were replaced by bond notes to the prejudice of bank account holders. Other laws are the Finance Acts (No.2) and (No. 3) both of 2009 which arbitrarily put the value of bond note at par with the USD.

3.5 Judicial precedent mandatory

The constitution makes application of judicial precedent mandatory in Zimbabwe and the argument is based on the 2013 Constitution of Zimbabwe. Here is why,

The doctrine, as applied in England, was imposed on 10 June, 1891. It started operating from that day and has been with us to today. It was adopted at independence in section 89 of the 1980 Lancaster House Constitution. It remained the law until the promulgation of the 2013 Constitution of Zimbabwe wherein by virtue of section 192[132] it remains part of the law in Zimbabwe.

The constitution of Zimbabwe creates a hierarchy in the Zimbabwean Judiciary. The respective jurisdiction of the courts is such that the intention that the decisions of higher courts should bind lower courts is clear. The courts are

[129] https://allafrica.com/view/group/main/main/id/00046239.html accessed on 15 December 2021

[130] The writer could not lay his hands on the actual judgment but its dismissal is confirmed in the case of Joyce Teurai Ropa Mujuru resident of Zimbabwe & Ors CCZ8/18 in para39

[131] Joyce Teurai Ropa Mujuru resident of Zimbabwe & Ors CCZ8/18

[132] 192 Law to be administered

The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified.

divided into superior and inferior courts. The superior courts of record are the Constitutional Court,[133] Supreme Court[134], High Court,[135] and the inferior courts are the Labour Court, Administrative Court, the magistrates courts, customary law court and other courts established by or under Acts of Parliament.

The constitutional intention to entrench the doctrine of precedent is evident from the following constitutional provisions setting out the jurisdiction of the superior courts. The writer has underlined the telling portions of the provisions.

> (1) The Constitutional Court—
>
> (*a*) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;
>
> (*b*) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131(8)(*b*) and paragraph 9(2) of the Fifth Schedule; and
>
> (*c*) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
>
> (2) Subject to this Constitution, only the Constitutional Court may—
>
> (*a*) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;
>
> (*b*) hear and determine disputes relating to election to the office of President;
>
> (*c*) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-Pres-ident; or
>
> (*d*) determine whether Parliament or the President has failed to fulfil a constitutional obligation.
>
> (3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force.[136]

[133] S 166 of the constitution of Zimbabwe (Amendment NO 20) Act 2013

[134] S169 of the constitution of Zimbabwe (Amendment NO 20) Act 2013

[135] S 171 of the constitution of Zimbabwe (Amendment NO 20) Act 2013

[136] S 167 of the constitution of Zimbabwe (Amendment NO 20) Act 2013

> "The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction."[137]
>
> (1) The High Court—
> (*a*) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
> (*b*) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions;
> (*c*) may decide constitutional matters except those that only the Constitutional Court may decide; and
> (*d*) has such appellate jurisdiction as may be conferred on it by an Act of Parliament.[138]

The appellate jurisdiction of the High Court is set out in the High Court Act *[Chapter 7:06]* in sections 26[139], 30[140] and 34[141].

Section 3 of the Constitution, Zimbabwe is founded, *inter alia*, on respect for the rule of law. The rule of law requires the doctrine of precedent because all the purposes sought to be achieved by the doctrine are the very essence of the rule of law. The doctrine of *precedent* is therefore protected by the Constitution and judges are bound by it irrespective the law to be applied, whether they are dealing with common law or Statute.[142]

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[137] S 171 of the constitution of Zimbabwe (Amendment NO 20) Act 2013

[138] S 171 of the constitution of Zimbabwe (Amendment NO 20) Act 2013

[139] **26 Power to review proceedings and decisions**
Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe

[140] **30 Jurisdiction in appeals in civil cases**
(1) The High Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which in terms of any other enactment an appeal lies to the High Court.

[141] **34 Jurisdiction in appeals in criminal cases**
(1) The High Court shall have jurisdiction to hear and determine an appeal in any criminal case from the
judgment of any court or tribunal from which, in terms of any enactment, an appeal lies to the High Court.

[142] S 3 of the Constitution of Zimbabwe (Amendment NO 20) Act 2013

The source of Statute law is the Legislature. Section 116 of the Constitution defines the Legislature as consisting of Parliament and the President[143] to the extent that the constitution accords to the President a legislative function[144] , that is the power to amend this Constitution in accordance with section 328 and to make laws for the peace, order and good governance of Zimbabwe[145] subject to section 134.

3.6 Developing the Customary law

Customary law is defined in the Constitution as "customary law" means the customary law of any section or community of Zimbabwe's people;" The definition is further amplified is section 2 of the Customary Law and Local Courts Act *[Chapter 7:05]* as "customary law" means "…the customary law of the people of Zimbabwe, or of any section or community of such people, before the 10th June, 1891, as modified and developed since that date;"[146] Clearly, therefore, in addition to the traditional common law role of judges to discover ascertain customary law and a judge's pronouncement of the customary law binds future courts through precedent. This is clear in s 176 of the constitution. In any event the constitution entrenches its supremacy "…and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.."[147].

3.7 Judicial review

The new constitutional dispensation therefore subordinates all law and law making institutions to the constitution and this includes decisions of the superior courts. Such is the rule of law as set in s 2 of the 2013 constitution as read with section 3. Indeed, any law or conduct inconsistent with the constitution is subject

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[143] S 116 of the Constitution of Zimbabwe (Amendment NO 20) Act 2013

[144] S 117(1) of the constitution of Zimbabwe (Amendment NO 20) Act 2013

[145] S 11(2) of the constitution of Zimbabwe (Amendment NO 20) Act 2013

[146] S 2 of the Customary aw and Local Courts Act *[Chapter 7:05]*

[147] S 2 (1) of the Constitution of Zimbabwe (Amendment NO 20) Act 2013

to contestation under section 85 as read with section 175 of the constitution. The Judges have power to review administrative action in terms of the Administrative Justice Act [Chapter 10.28].

Section 117 delineates the scope of legislative authority in the following manner: -

> "(1) The legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature."

The judiciary, therefore, has a role to play in ensuring that the law and institutions of the State are compliant with the constitution. The power is concomitant with the rule of law and the right to equal protection of the law protected by s 56 of the Constitution. Certain powers of review are reserved for the Constitutional Court.

> **167 Jurisdiction of Constitutional Court**
>
> (1) The Constitutional Court—
>
> …….
>
> (2) Subject to this Constitution, only the Constitutional Court may—
>
> (*a*) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;
>
> (*b*) hear and determine disputes relating to election to the office of President;
>
> (*c*) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-Pres-ident; or
>
> (*d*) determine whether Parliament or the President has failed to fulfil a constitutional obligation.
>
> (3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the Pres-dent or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force.[148]

Section 164 of the constitution is unambiguous in as much as it provides for the independence of judiciary in the following terms: -

> (1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.

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[148] Section167

> (2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore—
> (*a*) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;
> (*b*) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.
> (3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.[149]

Section 165 of the Constitution mandates the judiciary to do justice for all, irrespective of status and not to delay justice and thus perform their judicial duties efficiently and with reasonable promptness. It also fosters on the judiciary the paramount role of safeguarding human rights and freedoms and the rule of law.[150] Members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domes-tic and international law.[151] The intention of these provisions is achievable through the application of precedent.

3.7 Conclusion

1. This research identified the following key roles of judges in contemporary Zimbabwe. They are; protecting the supremacy of the constitution; developing the common law; developing customary law; judicial review; interpreting statute law
2. The law in force in Zimbabwe is largely the common law as modified by statute and judicial precedent.
3. The doctrine of precedent is mandatory in Zimbabwe.
4. It is no longer relevant to define the legal system obtaining in contemporary Zimbabwe in terms of the classical theories or philosophy of the common law, civil law, customary law. The classical distinction

[149] S 164 0f the Constitution of Zimbabwe (Amendment) No 20) Act 2013

[150] S 164 0f the Constitution of Zimbabwe (Amendment) No 20) Act 2013

[151] S 164 (7)0f the Constitution of Zimbabwe (Amendment) No 20) Act 2013

between civil law and common law based on the role of judges is no longer relevant because judicial precedent now applies to both statute and case law.

5. The modern definition of common law should be a system of law which is uncodified law of general application in the country constituted by judicial.
6. In statute law the binding effect of precedent set by superior courts on lower ranking courts is final whereas judicial precedent in common law can be circumvented.
7. Zimbabwe is a constitutional democracy which recognises the supremacy of the constitution, the rule of law and the principle of separation of roles, complementarity, and comity among the three arms of the State.
8. Judicial precedent is now constitutionally protected by the 2013 Constitution of Zimbabwe through the hierarchy of power in the courts.
9. Section 164(1) of the Constitution further entrenches judicial precedent in that it requires courts to be independent and be subject only to the law to be applied *impartially, expeditiously and without fear, favour or prejudice* Impartiality is a standard which entails independence of the judge and that the idiosyncrasies of individual judges are irrelevant in a justice delivery system.
10. The principles of promptness and efficiency set out in section 165 of the Constitution require adherence to the doctrine of judicial precedent.
11. The interpretation given to statute by superior courts and the application of cannons of interpretation bind future courts and courts with lower jurisdiction. The interpretation given to Statute by a judge is authoritative and is the law.
12. In the exercise of the constitutional power of judicial review judiciary have the power to declare any law, practice, custom or conduct inconsistent constitutionally invalid to the extent of the inconsistency.

The next chapter is a comparative study of the legal system in South Africa and the role of the judiciary in that country.

CHAPTER FOUR

A comparative perspective

4.0 Introduction

This Chapter contains a comparative study of the nature of the South African Legal System and the role of judges in that country. It is therefore necessary to recap on the common law position discussed in the preceding chapters.

4.1 The legal system in South Africa

The law in South Africa is described by Hostein,Edwards,Nathan and Bossman[152] as a mixed legal system.[153]

> "Mixed Legal systems. Not much need to be said here since most of this book is devoted to one classic example of a mixed legal system."

There are three formal sources of law in South Africa namely

> (I) Statute emanating from the sovereign Republican Parliament are acts of Parliament
>
> (ii)Judicial precedent as developed in Court judgments. We shall anticipate here and state categorically that judges do not only apply the law but that the also create it. In this way a rule of law formulated by the court may acquire validity as South African law through the constitutive medium of president. For the moment we shall take precedent to mean a previous decision which affords authority for a later decision…"
>
> (iii) Custom, as we shall see below, operates at a far slower tempo than does either statute or judicial precedent….

4.1 Judicial precedent in South Africa

South Africa also still adheres to the precedent system even in the interpretation of statute. The importance of judicial precedent and the justification or its retention even in Statute law is explained by Professors Hahlo and Kahn[154]:

> The advantages of a principle of stare decisis are many. It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional

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[152] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p220.

[153] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 871.

[154] Hahlo & Kahn, **The South African Legal System and its Background (1968)**

> activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike, and it conserves the time of the courts and reduces the cost of law suits – as Cardozo said, 'the labour of judges would be increased almost to the breaking point if every past decision could be reopened in every case'. Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis[155].

The South African Constitutional Court has held that the doctrine of precedent is a core component of the rule of law, a founding value of the South African Constitution. In the case of Camps Bay Ratepayers and Residents Association & Another v Gerda Yvonne Ada Harrison [2010] ZACC 19, the Constitutional Court per Brand AJ said:

> *[*28] Moreover, in seeking to meet the two threshold requirements for leave to appeal, the applicants further argued that this Court should now confirm that the interpretation of section 7(1) of the Building Act adopted in Walele constitutes binding authority from which the Supreme Court of Appeal; was not entitled to deviate as it did in True Motives and in this case. The argument raises issues concerning the principle that finds application in the Latin maxim of stare decisis (to stand by decisions previously taken) or the doctrine of precedent. Considerations underlying the doctrine were formulated extensively by Hahlo and Kahn. What it boils down to, according to the authors, is: "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to the gained by legal system from the principle of stare decisis". Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfies that the decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher

[155] Hahlo & Kahn, in their celebrated book, **The South African Legal System and its Background (1968)**

authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.[156]

In another South African case Turnbull- Jackson v Hibiscus Coast Municipality & Others [2014] ZACC 24, Madlanga J stated that "…. [54] The Walele-True Motives controversy brings to the fore the important doctrine of precedent, a core component of the rule of law, without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos. The doctrine is a means to an end. This Court has previously endorsed the important purpose it serves…"[157]

After discussing the various legal systems in the world Hostein, Edwards, Nathan and Bossman[158]state unequivocally as follows about the South African Legal System

- *"Mixed legal systems*. Not much need be said here since most of this book is devoted to one classic example of a mixed legal system, namely the South African Law."[159]
- The sources of law in South Africa are identified as follows.
- The superior courts identify the common law at any given time since the law is not static.[160]
- In that regard the court searches for formal authority. A formal source is that which has a binding effect.[161]
- No judicial officer is at liberty to ignore authority.[162]
- The formal sources are judicial precedent, statute and indigenous customary law.[163]

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[156] Residents Association & Another v Gerda Yvonne Ada Harrison [2010] ZACC 19

[157] Turnbull- Jackson v Hibiscus Coast Municipality & Others [2014] ZACC 24

[158] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 868-871.

[159] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 871.

[160] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p220.

[161] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 8220

[162] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 220.

[163] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 Chapter 4.

- The hierarchy of the courts is a key feature of the legal system and signifies the relationship between inferior and superior courts[164]

Of significance is the South African approach to "Judicial creativity and precedent."[165]

i. "… a judge may have considerable latitude when confronted by a rule existing in a previous case. Depending, naturally, on the position of the court in the hierarchy of the courts, the judge may approach the existing rule in a variety of ways.

ii. He may apply the existing rule since he may find complete identity between the case before him and the case from which the existing rule was deduced…….

iii. He may, where the material facts of the case before him differ from those upon which the legal proposition is based, play down those differences in order to fit the material facts of the case before him under the existing rule…

iv. He may, by reinstating the facts (upon which the existing rule or proposition of the law is based) raise the level of generality and thus widen the scope of the rule.

v. He may by reversing the process outlined in (iii) above, narrow the scope of the rule. That technique is called distinguishing.

vi. He may, in a more radical fashion, hold that the existing rule is not binding on him because it is based on *obiter dicta*. The literal meaning of *obiter dicta* is: a saying by the way, in other words it constitutes a casual pronouncement of law. *Such a pronouncement of law which is not part of the ratio decidendi* is held to be merely persuasive and not authoritative……[166]

With regards to statute Hostein, Edwards, Nathan and Bossman[167] explain the role of a judge with astounding lucidity under the heading "Interpretation of Statutes":-

> ……We have seen how legislative supremacy may be challenged, legally, under certain circumstances by the judiciary. By far the most important factor in tempering

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[164] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 226.

[165] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 234

[166] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 234-235

[167] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980

> with the supremacy of parliament, however is the nexus that has been forged between statute as a law-constitutive medium and precedent as a law –constitutive medium. This works as follows. By way of the *stare decisis* rule courts of a superior standing, once they have said what parliament means by a particular statute, superimpose their interpretation on that piece of legislation. Courts of lower standing, assuming they are bound by the previous decision of the higher court, are then bound by that court's interpretation of the statute until the appellate division intervenes; or alternatively, where the appellate division itself is concerned, until parliament amends the disputed statute. Thus statute law is what the judges say it is.
>
> It should be pointed out that there is a difference between expositions of law through the doctrine of precedent of precedent, on the one hand, and decisions involving construction of statues on the other. In the former case, as we have seen, the *ratio decidendi,* of the case may be manipulated by the "technique of distinguishing". In this instance the stare *decisis rule* dos not operate absolutely. However, in the latter case the question the question is one of determining what interpretation may be placed on a written statutory instrument. And as we have noted the lower courts have to follow the higher court's interpretation of an act. In other words, the *stare decisis* –rule operates absolutely and the construction of the words in an act given by the higher court and not the words of the act themselves become law.

The above explanation of law constitutive role of judges through statutory interpretation is the approach in Zimbabwe and destroys the argument that judge play a passive role when applying codified law.

The role of the judge discussed under "judicial creativity and precedent"[168] forms the cornerstone of the role of the judge which has been maintained in contemporary Zimbabwe and has been codified under the constitutions of Zimbabwe and South Africa. A comparison will therefore be made between the constitutions for the two countries.

On the Constitutional framework a comparison of the relevant constitutional provisions of the South African Constitution 1996 and the Constitution of Zimbabwe. The similarities between the constitutions are many. They do have differences though. The differences are mainly in the form of wording. The Independent

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[168] Hostein,Edwards,Nathan and Bossman Introduction to South African Law and Legal Theory first Edition Revised Reprint 1980 p 234

Commissions established by the respective constitutions coincide and differ. The most significant difference between the constitutions is that South Africa has a commission with the constitutional mandate and power to regulate religion.
The founding values are similar to those of Zimbabwe and they are human dignity, the achievement of equality and the advancement of human, Supremacy of the constitution and the rule of law[169],BILL OF RIGHTS[170] and the judiciary's power of review.

4.5 Conclusion

1. The doctrine of precedent is mandatory in South Africa.
2. It is no longer relevant to define the legal system obtaining in contemporary South Africa in terms of the classical theories or philosophy of the common law, civil law, customary law. The classical distinction between civil law and common law based on the role of judges is no longer relevant because judicial precedent now applies to both statute and case law.
3. The modern definition of common law should be a system of law which is uncodified law of general application in the country constituted by judicial.
4. In statute law the binding effect of precedent set by superior courts on lower ranking courts final whereas judicial precedent in common law can be circumvented
5. South Africa is a constitutional democracy which recognises the supremacy of the constitution, the rule of law and the principle of separation of roles, complementarity, and comity among the three arms of the State.
6. Judicial precedent is now constitutionally protected by the 1996 Constitution of South Africa through the hierarchy of power in the courts.
7. The 1996 Constitution of South Africa entrenches judicial precedent in that it requires courts to be independent and be subject only to the law to be applied impartially, expeditiously and without fear, favour or prejudice Impartiality is a standard which entails independence of the judge and that the idiosyncrasies of individual judges are irrelevant in a justice delivery system.

[169] See Chapter 1 of the South African Constitution, 1996

[170] See Chapter 2 of the South African Constitution, 1996

8. The principles of promptness and efficiency set out in section 165 of the Constitution require adherence to the doctrine of judicial precedent.
9. The interpretation given to statute by superior courts and the application of cannons of interpretation bind future courts and courts with lower jurisdiction. The interpretation given to Statute by a judge is authoritative and is the law.
10. In the exercise of the constitutional power of judicial review judiciary have the power to declare any law, practice, custom or conduct inconsistent constitutionally invalid to the extent of the inconsistency.

CHAPTER 5

Findings & Recommendations

5.0 Introduction

This chapter therefore contains the findings of the research and a discussion of the researcher's viewpoints on the merits and demerits of the approach of the judiciary in contemporary Zimbabwe.

5.1 Findings

The research was guided by the following research questions: -

5.1.1 Main research question

What is the ideal role of judges in the contemporary hybrid legal system in Zimbabwe?

5.1.2 Sub-questions

5.1.2.1 Sub research question 1

What are the classical key features distinguishing the various legal systems in the world and the respective roles of the judges?

5.1.2.2 Research sub question 2

What role have judges played in contemporary Zimbabwe?

5.1.2.3 Sub research question 3

How does the philosophy of the legal system in South Africa on the role of the judiciary compare with the Zimbabwean approach?

5.1.2.4 Research sub question 4

What are the key findings of the research and recommendations to be made based on the findings.?

The researcher made the following key findings in answer to the research questions.

5.1.1 The classical key features distinguishing the various legal systems in the world and the respective roles of the judges.

- Historically there were three types of legal systems in the world that is the common-law, civil law and religious law. The legal systems were distinguished by the following: -
    - The underpinning philosophy of the legal system towards the resolution
    - of disputes,
    - The sources of law, whether judicial precedent or statute and,
    - The role of the judge or adjudicating authority.
    - The roles of judges in the two systems are direct opposites
- The doctrine of precedent as we know it today, has its origins in the English common law system.
- The doctrine of precedent is the cornerstone of the common law system. The doctrine applies irrespective of whether or not the law is legislated.
- There is sufficient justification for the precedent system as the bedrock of the rule of law even in instances where the law has been codified. The justification is consistence, certainty, openness, transparent, fairness and equal protection of the law among other principles that underpin the concept of the rule of law.
- Too stringent a body of rules of precedent, may result in numerous erroneous legal notions being retained and entrenched thereby perpetuating bad law and *previous injustices*. It also stifles law reform as the law may fail to develop and change to cater for changed circumstances and changing times/sentiments.
- The advantages of the application of judicial precedent outweigh the disadvantages, with the result that the purposes served by the doctrine of precedent is at the core of the rule of law. More fundamentally, without adherence to the doctrine of precedent, the judiciary will not comply with the dictates of sections 164 and 165 of the Constitution.

5.1.2 What role has been played by judges in contemporary Zimbabwe?

1. This research identified the following key roles of judges in contemporary Zimbabwe. They are; protecting the supremacy of the constitution;

developing the common law; developing customary law; judicial review; interpreting statute law

2. The law in force in Zimbabwe is largely the common law as modified by statute and judicial precedent.
3. The doctrine of precedent is mandatory in Zimbabwe.
4. It is no longer relevant to define the legal system obtaining in contemporary Zimbabwe in terms of the classical theories or philosophy of the common law, civil law, customary law. The classical distinction between civil law and common law based on the role of judges is no longer relevant because judicial precedent now applies to both statute and case law.
5. The modern definition of common law should be a system of law which is uncodified law of general application in the country constituted by judicial.
6. In statute law the binding effect of precedent set by superior courts on lower ranking courts is final whereas judicial precedent in common law can be circumvented.
7. Zimbabwe is a constitutional democracy which recognises the supremacy of the constitution, the rule of law and the principle of separation of roles, complementarity, and comity among the three arms of the State.
8. Judicial precedent is now constitutionally protected by the 2013 Constitution of Zimbabwe through the hierarchy of power in the courts.
9. Section 164(1) of the Constitution further entrenches judicial precedent in that it requires courts to be independent and be subject only to the law to be applied *impartially, expeditiously and without fear, favour or prejudice* Impartiality is a standard which entails independence of the judge and that the idiosyncrasies of individual judges are irrelevant in a justice delivery system.
10. The principles of promptness and efficiency set out in section 165 of the Constitution require adherence to the doctrine of judicial precedent.
11. The interpretation given to statute by superior courts and the application of cannons of interpretation bind future courts and courts with lower

jurisdiction. The interpretation given to Statute by a judge is authoritative and is the law.

12. In the exercise of the constitutional power of judicial review judiciary have the power to declare any law, practice, custom or conduct inconsistent constitutionally invalid to the extent of the inconsistency.

5.1.3 How does the philosophy of the legal system in South Africa on the role of the judiciary compare with the Zimbabwean approach?

1. The doctrine of precedent is mandatory in South Africa.
2. It is no longer relevant to define the legal system obtaining in contemporary South Africa in terms of the classical theories or philosophy of the common law, civil law, customary law. The classical distinction between civil law and common law based on the role of judges is no longer relevant because judicial precedent now applies to both statute and case law.
3. The modern definition of common law should be a system of law which is uncodified law of general application in the country constituted by judicial.
4. In statute law the binding effect of precedent set by superior courts on lower ranking courts final whereas judicial precedent in common law can be circumvented.
5. South Africa is a constitutional democracy which recognises the supremacy of the constitution, the rule of law and the principle of separation of roles, complementarity, and comity among the three arms of the State.
6. Judicial precedent is now constitutionally protected by the 1996 Constitution of South Africa through the hierarchy of power in the courts.
7. The 1996 Constitution of South Africa entrenches judicial precedent in that it requires courts to be independent and be subject only to the law to be applied impartially, expeditiously and without fear, favour or prejudice Impartiality is a standard which entails independence of the judge and that the idiosyncrasies of individual judges are irrelevant in a justice delivery system.
8. The principles of promptness and efficiency set out in section 165 of the Constitution require adherence to the doctrine of judicial precedent.
9. The interpretation given to statute by superior courts and the application of cannons of interpretation bind future courts and courts with lower

jurisdiction. The interpretation given to Statute by a judge is authoritative and is the law.

10. In the exercise of the constitutional power of judicial review judiciary have the power to declare any law, practice, custom or conduct inconsistent constitutionally invalid to the extent of the inconsistency.

5.2 Recommendations

5.5.2 The Judiciary

5.5.2.1Protecting and promoting the independence of the judiciary

The elaborate provisions in section 180 of the 2013 Constitution of Zimbabwe on the appointment of judges are quite impressive on paper but offer no clear remedies in the event that they are not followed. It is correct the decision to appoint a judge is administrative action which is subject to the provisions of the Administrative Justice Act.[171] The system does not offer internal mechanisms of review before the Presidential exercises his prerogative. The Presidential prerogative is excluded from the application of the Administrative Justice Act. The outcome of the selection process is not disclosed to the candidates and the and thus the process lacks transparency. In practice there is no room to request reasons before recommendations reach the President. The process is thus non-compliant with sections 68 (right to administrative justice) and 62 (Access to information) of the constitution. Section 186 protects the tenure of judges. Section 187 protects judges from arbitrary removal from office. Similarly, in terms section 188 the conditions of service of judges may not be lowered or withheld.

All these constitutional guarantees are weakened by the lack of remedies. In other words, there are no in built mechanisms to strengthen the safeguards.

5.5.2.1Protecting and promoting the integrity of the judiciary

The constitution imposes on the judges, individually and collectively, the duty to respect and honour their judicial office as a public trust and to strive, at all times, to enhance their independence in order to maintain public confidence in the judicial system. Judges are also required to decide matters freely and without interference

[171] Administrative Justice Act [Chapter 10.28]

or undue influence. Judges are prohibited from soliciting or receiving gifts loans or favours that influence their judicial conduct or give the appearance of judicial impropriety. They are required to give their judicial duties precedence over all other activities and not engage in any activities which interfere with or compromise their judicial duties.

These principles guiding the judiciary set out in s165 of the constitution are only achievable if the constitutional safeguards which protect the independence of judges are religiously observed.

It is therefore recommended that the Minister of Justice could initiate amendment of the constitution to strengthen the constitutional safeguards.

5.5.3 More judicial training.

Section 165 (7) implores judges to seek knowledge to maintain and enhance their professional knowledge, skills and personal qualities as well as constantly of developments in domes-tic and international law. This is very important in view of the obligations which the constitution imposes on judges. Judges have the duty to develop the common law, develop the law and to apply codified law in a manner that promotes the bill of rights. A constant research and knowledge of international trends is necessary so that local jurisprudence is enriched.

5.5.4 Codification of the law

In terms of s 165 (1) (a) of the Constitution of Zimbabwe justice must not be delayed. The judiciary is therefore mandated to perform their judicial duties efficiently and with reasonable promptness. This is only achievable if the law is easily ascertainable and accessible. Time must not be wasted on research. The advantages of the codification of the criminal law, company law and bail law are abundantly clear. The law is now easily accessible. It is not desirable for legal principles to be scattered. The downsides of that situation are many. It is inevitable that there will be conflicting judgments due to the time it takes to find the law and the latest position at law in circumstances where the law is strewn in case law. In the spirit of bringing justice nearer to the people the Judiciary has opened court seats in the provincial cities. The number of judges has dramatically improved due to more awareness. This has not been matched by a corresponding increase in the resources to conduct research and the availability of research material. Codified law

is therefore easy to work with. It is therefore recommended that there is needs codify more areas of the law.

It is therefore recommended that the Minister of justice should initiate codification of other branches of the law.

5.5.7 Law development role of judges to be maintained

However, in terms of S 165 (c) courts play a key role in safeguarding human rights and freedoms and the rule of law. It is therefore necessary to retain the current role of judges to interpret the law and develop in manner informed by the constitution and respecting the separation of powers.

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