The Judiciary and the Zimbabwean Constitution

Edited by

James Tsabora

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James Tsabora (PhD)

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Professor Julie Stewart and Dr Innocent Maja

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Critical to the production of a book of this nature are the reviews by unnamed experts and consultants of the various chapters which ensured that high level scholarship was achieved and sustained throughout the book. The members of staff of the University of Zimbabwe Press, led by Ndaizienyi Nyamakura, are acknowledged for their work in finalizing the production of this volume.

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PREFACE

This work examines the operations of the Zimbabwean judiciary against the background of the Constitution of Zimbabwe adopted in 2013. Essentially it is about the implementation of the Constitution by the courts of law and proper alignment of statute law with the Constitution. Having been one of those who put pen to paper, alongside eminent legislative drafters, Mr Brian Crozier and Mrs Priscilla Madzonga, it is fascinating to see, through the interpretation of constitutional provisions by the courts and academic analysis by renowned Zimbabwean scholars, how some of the provisions of the Constitution as we understood them when drafting the text, are understood by the courts of law, the ordinary reader and academic analysts or amplified in legislation. As drafters, we had a certain understanding of some of the provisions which, to the extent that that understanding now differs from that of the courts of law, is irrelevant. To mention one example: it was not our contemplation that Independent Commissions Supporting Democracy established by the Constitution, including the Judicial Service Commission, would become the mammoth organisations that they are today, employing commissioners on a full-time basis, with perks of office including motor vehicles provided by the State to individual members thereof.

One significant departure of the 2013 Constitution from the Lancaster House Constitution is that the interpretation of the Constitution and the declaration of invalidity of a law as inconsistent with it, is now open to all courts, including customary law courts, subject only to confirmation of the invalidity of the law by the Constitutional Court, in particular statute law, where it has been struck down by a lower court. We have not seen much of that happening. It may well be that the decisions of lower courts - the magistrate's court and the customary law courts – are not reported

The sixteen chapters of this work cover a wide spectrum of issues from the function and role of the judicial arm of the State in promoting and achieving the objectives of the Constitution to independence of the judiciary both institutional and at the level of the individual judicial officer. This is examined not only from the perspective of the Zimbabwean Constitution but also in light of constitutional principles, norms and standards for an effective judiciary under international law. The examination encompasses international best practices on appointments to the judiciary, security of tenure, promotion and the ever-pernicious issue of disciplinary measures and removal of judicial officers. The work enlightens the reader, student, politician and legal practitioner on the relationship between the judiciary and other branches of the State, especially the executive branch. This is done in full realisation, arising from the Westminster governance model, that ours is not a pure separation of the branches of the State, as for example that of the United States of America.

Several chapters of the work provide perceptive insights into the performance of the judiciary when interpreting the new Constitution and the jurisprudence emanating from adjudication of cases. Similarly covered are the issues of electoral justice, the right to fair labour practices, the right to administrative justice, rights of children, the right to sexual and reproductive health, environmental rights and the justiciability of socio-economic rights regarding health and water under the new constitutional dispensation. One is entitled, I think, to characterise, this work as concerned with the "due process of law" spoken to by Lord Denning in *The Due Process of Law* by which he meant "the measures authorised by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted; that arrests and searches are properly made; that lawful remedies are readily available; and that unnecessary delays are eliminated." In this way the work leaves the

reader in no doubt about the centrality of the judiciary in the promotion and safe-guarding of individual rights and freedom entrenched by the Constitution.

This work will be of much use to legal practitioners, political scientists, students, politicians and litigants who seek to understand the practical working of the Constitution. Each contributor has added immensely to the experience and knowledge of the Constitution arising from the changes brought to our society by the post 2013 constitutional dispensation. As I said in the Foreword to JA Mavedzenge and D Coltart's *A Constitutional Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic Rights*: "[o]n its own the adoption of a new Constitution does not guarantee this departure [from the old constitution] as envisaged under the new Constitution. Successful transformation of governance in line with the spirit, object and purport of the new Constitution largely depends on the political will to implement the new Constitution as well as the readiness by the citizens to engage with their new Constitution. Such engagement can only be possible if there is sufficient research and analysis which interrogates the various constitutional principles enshrined in the Constitution." The contributors to this work have answered to this call for engagement and came up with a "must read" for all of us concerned with the implementation of the new Constitution and its proper and progressive interpretation.

Justice Moses Hungwe Chinhengo
Judge of the High Court of Zimbabwe 1996-2004
Judge of the High Court of Botswana 2004-2012
Commissioner, International Commission of Jurists (since 2009)
Part-time Lecturer, Procedural Law, University of Zimbabwe (2013-2016) and Great Zimbabwe University, Herbert Chitepo Law School (2016 – 2020)
Co-founder of Africa Institute of Mediation and Arbitration (AIMA) and Practising Arbitrator since 2012
Co-founder and Chairman of the Board of Directors of the Africa Judges and Jurists Forum (AJJF)
Acting Justice of the Court of Appeal of the Kingdom of Lesotho (since 2015)
Acting Justice of the Supreme court of the Republic of Namibia (February -December 2021

Chapter 1

The Judiciary in Zimbabwe's Constitutional System: An Introduction

James Tsabora[1]

1.1 Introduction

The judicial function is a fundamental feature of the contemporary constitutional state. The Constitution of Zimbabwe, which was adopted as Constitutional Amendment (No.20) Act, 2013, asserts that judicial authority derives from the people and is vested in the courts.[2] As a key state institution, the judiciary plays important roles that define and shape the social, economic, political and cultural systems of a state. The judicial function is not limited to the mere adjudication and interpretation of the law *per se*; it extends to conflict management and dispute resolution, both clothed under delivering justice.

As a key state institution, the judiciary is cast as a vital state institution for the other two organs of state, being the Executive and the Legislature. By so doing, the Constitution creates a framework for the operationalisation of inter-relationships between the judiciary and these other organs of state. Further, in creating these spaces for interaction and engagement, the Constitution communicates not only the individual role played by the judiciary in the achievement of a 'democratic society based on openness, justice, human dignity, equality and freedom',[3] but also the specific contribution the judiciary has to make as part of the tri-partite system of state and government. An open society where justice, equality, human dignity and liberty flourishes is difficult to achieve without a judiciary working in this collective context to pursue the noble agendas in the2013 Constitution.

While the social function of the judiciary in a society is generally understood, the 2013 Constitution makes provision for several institutional and normative positions that have impacts and implications on that social function in Zimbabwe. In this regard, several areas of interest have emerged relating to the nature and scope of the judicial function and judicial roles in Zimbabwe. Arguably, the 2013 Constitution provides a very progressive platform for the judiciary to flourish and play its vital role in a constitutional democracy.

To define the efforts of the judiciary in the quest for human rights, the Constitution identifies several fundamental human rights and freedoms that are anchored in international

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[1]Senior Lecturer in Law, University of Zimbabwe. Bachelor of Laws (University of Zimbabwe), LLM (University of KwaZulu-Natal, South Africa); PhD Law (Rhodes University, South Africa).

[2]Section 162 of the Constitution.

[3]*Ibid*., s86 (2).

human rights law, comparative law and Zimbabwe's own political and historical experiences. The supreme law further establishes critical institutions and organs of government, which must discharge their roles and mandates in a constitutionally prescribed manner. Both the substantive and procedural frameworks, for the enjoyment of rights, are comprehensive and generate interesting discourses for scholars of constitutional law. A cursory glance at these provisions leaves little doubt that the judiciary must be seen as actually playing the most critical role in promoting constitutional objectives, safeguarding and enforcement of human rights, checking executive and legislative power, thereby shaping social, political, cultural and economic attitudes and behaviour in Zimbabwe.

One critical concern that characterises the judicial function in general, and that has defined Zimbabwe's judicial history is the concept of judicial independence. The independence of the judiciary is pivotal to the protection of human rights and instrumental in the pursuit of constitutional values, the rule of law and constitutionalism, in general. Indeed, the 2013 Constitution goes further in addressing this issue, leaving no doubt that this concept must be given theoretical and practical value.

Jurisprudentially, judicial independence has been linked to the principle of separation of powers. The exact application of this principle in the Zimbabwe's constitutional context is not clear and needs to be interrogated. The features of this principle are attributed to the French jurist, Montesquieu, who cautioned against the concentration of power in one state institution or organ and supported the distribution of state power among the executive, the legislature and the judiciary. Accordingly, the judiciary plays its function as part of the triumvirate but must remain independent to discharge its mandate effectively and freely. Critically, unlike the other two organs of state, the judiciary is in the most tenuous position of the three. The words of Judge 'O' Linn in the Namibian case of *S* v. *Heita*[4] are most apposite.

> "[…] the judiciary has no defence force or police force. They are not politicians. They cannot descend to the arena to defend themselves … precisely because they cannot protect themselves, unscrupulous persons may exploit this weakness by scandalizing the court."

The judiciary, in performing its interpretative and adjudicative roles is able to take on a variety of interpretative approaches. An interesting subject is the approaches to constitutional interpretation that the judiciary has embraced in relation to the fundamental human rights and freedoms in the entrenched Declaration of Rights and Freedoms. The Constitution has embraceda transformed Declaration of Rights which makes provision forpowerfully packaged civil-political rights and social and economic rights. Socio-economic rights are those human rights relating to the workplace, social security, family life, access to housing, water, health care and education, to mention but a few, that mostly require application of government resources before they can be fulfilled. The social and economic rights enshrined in the Constitution reflect the journeys travelled by the nation as a constitutional state, and the contests and tensions characterising its socio-political history.

A thematic issue related to enjoyment of these rights and freedoms is the specific recognition and protection granted to vulnerable groups and persons in the Constitution. These groups are identifiable as women and children, persons with disabilities, the elderly,

[4] (CA-1996/17) [1996] NAHC 55 (12 August 1996) available at <https://namiblii.org/na/judgment/high-court/1996/55>, accessed on 10 October 2021.

among others. Clearly, the principles encapsulated in both the civil-political and socio-economic rights will underpin law and policy in Zimbabwe. These rights and freedoms are also important weapons for civil society and the citizenry in demanding compliance and implementation from the government, and other public and private duty bearers. They are also important tools for the government to address social injustice and inequality and unfair discrimination, poverty, marginalisation and exclusion as well as other political and cultural ills that impact on human dignity, justice and liberty. This means that the judicial role includes determining the correct approach to interpreting the Declaration of Rights, for purposes of ensuring that the rights therein are implemented and enforced in the interests of society, and do not remain only aspirations on paper.

1.2 Structure of the Book

This book explores the judicial function from several perspectives with the aim of illustrating the nature, role, mandate and structure of the judicial function in Zimbabwe. It interrogates the interpretive approaches variously embraced and abandoned by the judiciary in Zimbabwe in relation to key constitutional issues such as human rights, the interactions between the judiciary and the other arms of the state and interrelated constitutional and jurisprudential issues.

This introductory chapter lays out the thematic concerns explored in the book. It further outlines the major themes explored in each chapter and the major contentions and debates that are presented.

In Chapter 2, Manyatera interrogates the key concept of judicial independence that must characterise an effective judicial system. He asserts that an independent judiciary is pivotal in enhancing the prospects for good governance and democratic consolidation, despite the lack of a universal consensus on how much independence is required. Indeed, he argues, the 2013 Zimbabwean Constitution reflectsseveral legal transplants which formed the bedrock of the reforms relating to the judiciary as an institution. His chapter introduces the concept of judicial independence broadly focusing on its theoretical foundations, the Zimbabwean constitutional framework on judicial independence and the key elements constitutive of an independent judiciary in general.

In Chapter 3, Penduka outlines the principles, standards, and norms for judicial independence and integrity as they have been developed under international law. This chapter provides answers to questions around the international benchmarks for the judicial appointment processes, security of tenure, judicial promotion, judicial disciplinary measures, and eventually the removal of judicial officers. Penduka's argument is that international benchmarks must inform domestic legal standards underpinning the judicial function.

In Chapter 4, Tsabora illustrates the judicial administrative system, represented by the Judicial Service Commission, and its role in enhancing the effectiveness of the justice administration system. His contention rests on the assumption that institutional frameworks for judicial administration are vital in democratic states that are built on the ideals of judicial independence, constitutionalism and the rule of law. Tsabora concedes that there are several models of judicial administrative systems globally, with each model seeking to achieve a particular set of goals etched in law. He however asserts that in contemporary constitutional democracies, the integrity of any preferred model derives not only from the nature of its mandate but from the manner the whole administrative system establishes a

support system for the delivery of justice, constitutionalism and the rule of law. Chapter 4 thus explores the constitutional mandate of Zimbabwe's Judicial Service Commission, and the role and purpose of this agency in the promotion of judicial independence, in safeguarding democracy, and in entrenching constitutionalism under the Zimbabwe's constitutional framework.

The relations between the judiciary and the Executive always invite interesting perspectives, particularly in a constitutional system that is supposedly built on judicial independence, the rule of law and the principle of separation of powers. This relationship is interrogated in Chapter 5. Maphosa and Chigumba outline the nature of judicial relations with the executive in Zimbabwe as reflected in the constitutional system. They contend thatthe theoretical justifications for the *trias politica* doctrine must be considered, since it is one of the key principles underpinning the constitutional order. The chapter proceeds to examine constitutional history, and the core elements of constitutionalism such as the rule of law, judicial independence and judicial review albeit in the context of the relationship between the executive and the judiciary.

The relationship between the judiciary and the executive becomes important especially in view of the role of the executive in judicial appointment processes. In Chapter 6, Manyatera explores this nexus between judicial independence and judicial selection mechanisms, and the implications of such a nexusto an independent judiciary in Zimbabwe. The Chapter unpacks the judicial selection mechanisms for superior courts focusing on the constitutional and legislative text as well as the criteria for eligibility for appointment to the various superior courts.

Another manifestation of the uneasy relationship between the judiciary and the executive is in the judicial disciplinary system.Mutatu canvasses this subject in Chapter 7, arguing that a judicial disciplinary system superintended by the Executive can erode the security of tenure for judges, and consequently the independence of the judiciary. The author illustrates the legal framework for the disciplinary system, and carefully presents the nuances inherent in the legal process.

The performance of the superior courts post the 2013 Constitution is the subject of Chapter 8. In this Chapter, Kika explores the highs and lows of the Constitutional Court, which is the apex court in Zimbabwe, but limited to constitutional matters only. Kika admits to the possibility of contestation as to the role the Court has thus far played in helping shape a new constitutional dispensation and jurisprudence for Zimbabwe. He however questions the extent to which the Constitutional Court has played its constitutionally mandated role of operationalising the Constitution, enforcing constitutional rights and providing judicial leadership to the lower courts.

In Chapter 9, Mutangi casts the spotlight on electoral justice, a contentious and divisive aspect in Zimbabwe's constitutional and political history. The Chapter explores the history of electoral adjudication in Zimbabwe and the debates emerging from Zimbabwe's laws on electoral adjudication. The author further explores the development of the electoral jurisdiction of courts andassesses the performance of the judiciary *vis-à-vis* electoral dispute resolution as seen through its jurisprudence.

Kasuso assesses the performance of the judiciary in the interpretation of the right to fair labour practices in Zimbabwe in Chapter 10 of this book. The author examines the current judicial attitude towards the scope and content of the right to fair labour practices in Zimbabwe. He queries whether the interpretative approaches of the Zimbabwean

courts resonate with the explicit purposes of labour legislation, the constitutional labour rights clause in the Constitution, and the tenets of constitutionalism underpinning the Declaration of Rights. The author demonstrates how the judiciary can create new trajectories in labour rights jurisprudence through their interpretative mandate and ensure the full enjoyment of workers' rights.

Administrative justice is key for any government as it defines and shapes operations of government, and the exercise of other rights and freedoms by citizens. In Chapter 11, Chikwana explores the import of section 68 of the Constitution,[5]which makes provision for the broad right to administrative justice. Unlike the Lancaster House Constitution given to Zimbabwe by its erstwhile colonisers, the 2013 Constitution entrenches the right to administrative justice as a new phenomenon in Zimbabwe's administrative law which is now grounded on a rights-based model of constitutionalism. Chikwana's argument is that such constitutionalisation has the potential of preventing the injudicious exercise of administrative discretion; the right can deter administrative authorities from acting arbitrarily. The question is how the judiciary has approached the interpretation of the right. Chapter 11 reviews the current statutory framework on the right to administrative justice and investigates whether such framework fully gives effect to the constitutional right in section 68 of the Constitution. The author expertly tackles the scope and nature of the right to administrative justice, ascertaining whether the limitations on the right to administrative justice imposed by administrative justice legislation are consistent with the Constitution.

The protection of children rights is increasingly being advanced through law, policy and other practical actions by contemporary societies. In Chapter 12, Moyo argues that child law' and 'children's rights' are relatively new phrases in Zimbabwe, as they are likely to be in most African states where traditional cultural contexts view children as objects of parental care and state protection. For Zimbabwe, the now defunct Lancaster House Constitution did not help at all in efforts made towards dismantling the idea that children are merely objects of social and parental control. This is because it shielded oppressive customary laws from constitutional provisions and therefore ensured the ongoing observance of traditional norms that violate children's rights. The 2013 Constitution marked a paradigm shift – it calls for a change of perspective as it portrays children as ends entitled to protection, provision (socio-economic) and participation rights.

The central pillar of Chapter 13 is constitutional referrals. Maja explores this constitutional procedural aspect. In the authors' opinion, procedure is important in that it provides practical rules to use to enforce substantive rules rights, duties and remedies. Further, the authors argue that procedural rules provide a fair and just means of resolving disputes while also creating an efficient method of processing cases in a systematic, formal and effective manner. In Chapter 13, the author unpack the framework for and procedure of referring constitutional matters from lower courts to the Constitutional Court in Zimbabwe. Conceptually, referrals ensure constitutional supremacy in that whenever laws are passed, interpreted or applied, and decisions are made, or actions are taken.

In Chapter 14, Sithole undertakes an exploratory diagnosis of the judicial treatment and interpretation of sexual and reproductive health and rights. This discussion is important

since Zimbabwe is a State Party to international law and policy frameworks that recognise sexual and reproductive health and rights issues. Sithole observes that Zimbabwe promulgated a progressive Constitution which is hailed for its potential to regard the reproductive rights of women as inalienable, interdependent, universal and indivisible. She however critiques the judicial treatment of these rights. This is because despite the evident importance of sexual and reproductive health and rights (SRHR) and their entrenchment in the Constitution as well as their protection in international human rights treaties, there have been a limited number of cases in which the right of access to reproductive health care services has been invoked. She castigates the lack of judicial interest in developing a comprehensive jurisprudence on these rights and calls for more aggressive approaches by the judiciary in this regard.

In Chapter 15, Mukumbiri analyses the interpretation of the socio-economic rights by the judiciary under the 2013 Constitution by evaluating judgements delivered on socio economic rights with reference to the right to water and the right to health.

Rutsate expands further the arguments on socio-economic rights implementation through judicial interpretation. She compares the judicial implementation of socio-economic rights to food and water to the comments and interpretations adopted by treaty frameworks under international human rights law. She questions whether the interpretations by Zimbabwean courts are consistent with the 'deconstructions' of these socio-economic rights under international law. Rutsate concedes that on the back of a new constitution, the jurisprudence on socio-economic rights is steadily progressing, albeit slowly. She illustrates that the 2013 Constitution provides for socio-economic rights as well as civil-political rights, with socio economic rights being subject to progressive realisation by their nature since their implementation requires resources more than civil and political rights. Taking the cue from Mukumbiri, Rutsate's main argument is that the judiciary has the responsibility to interrogate the measures that must be taken by the state towards the fulfilment of social and economic rights.

In Chapter 17, Nkomo and Maziwisa tackles the problematic subject of access to justice for refugees. In Zimbabwe, refugee studies have focused mostly on the mental, physical and social consequences of war on refugees. There appears to be no published academic literature that speaks to refugees' access to justice in Zimbabwe. Most attention seems to be directed towards providing refugees with humanitarian services such as food, health services, accommodation, income-generating projects, agricultural inputs, primary and secondary education, refugee status, and nutritional supplements provided by non-governmental organisations (NGOs). Moreover, very few cases involving refugees have come before the courts, such that the judiciary has not adequately or comprehensively dealt with refugee access to justice in Zimbabwe. Consequently, there is no adequate jurisprudence from the courts about access to justice for refugees, and there is thus no legal normative framework for the courts to follow, or adopt in the interpretation of access to justice for refugees. The Chapter therefore discusses the legal normative framework that must guide the judiciary when these issues come before them.

The prominent issue of environmental courts and tribunals as critical in the implementation of the constitutional environmental rights clause and the environmental legal framework is addressed in Chapter 18. The Chapter expertly interrogates the question of relevance of these judicial platforms in Zimbabwe's constitutional order. The author, C.G Moyo, argues that where environmental governance is concerned, the

judiciary's function is not to rewrite the law but to interpret and apply it according to enabling legislation. To that extent, the judiciary is a guarantor of the protective benefits of environmental law, and one of these benefits is the attainment of human rights for present and future generations. This is a crucial role in that it guarantees good environmental governance, which entails balancing environmental and development considerations in decision-making, thereby providing an impetus for the promotion of the implementation of global and regional environmental conventions consolidating the hand of the executive in enforcing environmental regulations.

From the thematic concerns explored in the book, it is clear that the judiciary plays a fundamental role in supporting a society's democratic aspirations. A conclusion is given at the end, highlighting this inescapable reality. In addition, the fluid nature of the legal system, exemplified by constitutional and legislative changes, institutional reforms in the judiciary and ever-changing court procedures, necessitate the need to regularly review the state of judicial process and the role of the judiciary. Despite this, there is no doubt that the topics explored in this book are critical for Zimbabwe's democracy, the compliance with the tenets of the rule of law, constitutionalism, and judicial independence.

Chapter 2

Conceptualising Judicial Independence under Zimbabwe's Constitutional Framework

Gift Manyatera[1]

2.1 Introduction

The 2013 Zimbabwean Constitution marked a paradigm shift from the Lancaster House Constitution's conceptualization of judicial independence. A cursory overview of the key provisions relating to the judiciary in the 2013 Constitution clearly shows the intention of the constitutional drafters to conform the judicial function to emerging global trends in so far as adherence to judicial independence principles is concerned. It is therefore critical that this contribution assesses the conceptual foundations of judicial independence as a general background to the discussions in other chapters to follow.

The chapter is organized as follows. It begins with an analysis of the various attempts at defining what an independent judiciary is. An examination of the concept of judicial independence generally is undertaken, focusing on its theoretical underpinnings and how it can be assessed. This is followed by an analysis of the different elements of judicial independence which are generally regarded as constitutive of an independent judiciary leading to the conclusion of the chapter.

2.2 Defining an independent judiciary

An independent judiciary is a *sine qua non* of a democratic state.[2] Indeed, the independence of the judiciary has grown to be seen as a fundamental element of constitutionalism[3] in modern day liberal democracies.[4] Constitutional law theories often highlight the

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[1]Executive Dean, Faculty of Law, Midlands State University, Zimbabwe.

[2]*See* Justice W. F. B. Kelly, 'An Independent Judiciary: The Core Of The Rule Of Law'(year?) ,<www.icclr.law.ubc.ca/Publications/Reports/An_Independant_Judiciary.pdf>,visited on 14 November 2020, where it was stated that "[t]he English philosopher, John Locke, and the French philosopher, Montesquieu, are generally considered to have the most influence on the evolution of the modern concept of judicial independence. At the end of the Eighteenth Century, Locke, who strongly influenced the English Revolution of 1688 and the American Revolution of 1776, stated that established laws with the right to appeal to independent judges are essential to a civilised society and that societies without them are still 'in a state of nature." *See also*, C. Okpaluba, 'Institutional Independence and the Constitutionality of Legislation Establishing Lower Courts and Tribunals', 28:2 *Journal for Juridical Science* (2003) p.110.

[3]For the core elements of constitutionalism, *see generally*, C. M. Fombad, 'The Constitution as a Source of Accountability: The Role of Constitutionalism', 2 *Speculum Juris* (2010) p.41. Fombad identifies the recognition and protection of fundamental rights and freedoms, the separation of powers, an independent judiciary, the review of the constitutionality of laws, the control of constitutional amendments and institutions that support democracy as core elements of constitutionalism.

[4]*See generally,* C. M.Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa', 55*The American Journal ofComperative Law* (2007) p. 5.

importance of an independent judiciary as a key element of the separation of powers and the rule of law paradigms. However, there is 'little agreement on just what this condition of judicial independence is or what kind or how much judicial independence is required'.[5] The exact meaning of the concept of judicial independence[6] has evoked a lot of debate in constitutional law discourse.[7] While acknowledging the divergent views on the meaning of judicial independence, an independent judiciary can be defined as one that ensures that judges adjudicate matters in a fair and impartial manner uninfluenced by external factors. It necessarily follows that judges must be insulated from all external factors not relevant to the case, and must perform their adjudicative functions free from 'considerations relating to their own self-interest or the interest of the body that appointed them.'[8]

It is hardly surprising that judicial independence as a concept has taken centre stage in public policy discussions around the world.[9] This is due partly to the powers of the courts to strike down legislation on the grounds of unconstitutionality which has led to what is commonly referred to as the 'countermajoritarian dilemma.'[10] An independent judiciary entails two things.[11] Firstly, there must be in existence the institutional independence of the judiciary from the other branches of government. Secondly, the decisional independence of the members of the judiciary. The decisional independence of the judges has two basic elements,[12] that is, substantive independence and personal independence.[13]

An independent judiciary remains one of the three pillars of limited government which complements the principles of separation of powers and the rule of law.[14] The rule

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[5]*See* P.H. Russell in, 'Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World', in P.H. Russell and D. M O'Brien (eds.), *Judicial Independence In The Age of Democracy: Critical Perspectives from Around the World (*University Press of Virginia, Charlottesville, 2001) p. 1.

[6]*Ibid.,* p. 6.

[7]*See also* S. B. Burbank, 'The Architecture of Judicial Independence', 72 *S. California Law Review* (1999) p. 315; P. S. Karlan, 'Two Concepts of Judicial Independence', 72 *S. California Law Review* (1999) p. 535; J.Ferejohn, 'The Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary', 72 *S.California Law Review* (1999) p. 353; D. R.Hensler, 'Do We Need An Empirical Research Agenda On Judicial Independence?' 72 *S. California. Law Review* (1998-1999) p.707.

[8]*See* R. A. Mcdonald and H.Kong, 'Judicial Independence as a Constitutional Virtue' in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) p. 832.

[9]*See* S. Levinson, 'Identifying Independence', 86 *Boston University Law Review* (2006) p. 1297.

[10]For a discussion of the countermajoritarian dilemma, *see* J. Waldron, 'Core of the Case Against Judicial Review', 115:6 *Yale Law Journal* (2006) p. 1346.

[11]*See generally, Van Rooyen and Others* v. *The State and Others* 2002 5 SA 246 wherein the basic requirements for judicial independence were discussed.

[12] *See* S. Shetreet, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff Publishers, Boston, 2011) p.44. According to Shetreet, "[s]ubstantive or decisional independence means that in making judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law. Independence of the judiciary implies that the judge should be removed from financial or business entanglements likely to affect or rather to seem to affect him in the exercise of his judicial functions."

[13]*Ibid.*According to Shetreet, "[p]ersonal independence means that the judicial terms of office and tenure are adequately secured. It is secured by judicial appointment during good behaviour terminated at retirement age, and by safeguarding judicial remuneration. Thus, Executive control over judges' terms of service, such as extension of term of office, remuneration, pensions or travel allowance is inconsistent with the concept of judicial independence. Still much less acceptable is any Executive control over case assignment, court scheduling or moving judges from one court to another or from one locality to another."

[14]*See* the South African Constitutional Court case of *South African Association of Personal Injury Lawyers* v. *Hendrik Willem Heath and Others* 2001 1 SA 883 CC paras.24-26 where Chaskalson P held that, "[t]he separation of the judiciary from the other branches of government is an important aspect of separation of powers required by the Constitution. Parliament and the Provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws made, but have no law-making power other than that vested in them by the legislatures. Although Parliament has a wide power to delegate legislative authority to the executive, there are

of law as a constitutional concept can only have meaning in a polity which has a judiciary whose members are insulated from internal and external influences or pressures. Due to the importance of an independent judiciary in modern day governance systems, several regional and international instruments trumpet the basic standards expected of an independent judiciary. However, none of these instruments define an independent judiciary but merely outline the elements constitutive of it.[15]

The same indeterminacy is reflected on the African constitutional law terrain. Article 26[16] of the African Charter provides for an independent judiciary but falls short in giving a definition.[17] It is hardly surprising that a definition was omitted considering the daunting task of prescribing a universal definition at the regional level taking into account the divergent approaches to judicial independence in Africa.[18] Similarly, the constitutions of most African countries including those of Mozambique, South Africa and Zimbabwe proclaim the independent role of the judiciary.[19] It is however apparent that judicial independence is conceived differently and these differences emanate from a variety of sources including the underpinning historical contexts and political cultures in each jurisdiction.[20]

limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent…the separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution will be undermined. The Constitution recognizes this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness."

[15]*See also,* Article 10 of the United Nations Universal Declaration of Human Rights(adopted 10 December 148 UNGA Res 217 A(III) (UDHR) art 5, 1948; Article 7 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986 (19882) 2I ILM 58 (African Charter) (1981); the UN Basic Principles on the Independence of the Judiciary(1985), the Beijing Principles on the Independence of the Judiciary(1995), the Latimer House Guidelines on the Independence of the Judiciary(1998), the Universal Principles of Judicial Independence for the SADC Region(2004); the Universal Charter of the Judge(1999), the Bangalore Principles on Judicial Conduct(2002); the International Bar Association Minimum Standards of Judicial Independence(1982); the Syracuse Draft Principle on Independence of the Judiciary(1981); Montreal Universal Declaration on the Independence of Justice(1983); the International Covenant on Civil and Political Rights.

[16] Article 26 of the African Charter provides that, "[s]tate Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

[17]*See also,* the case of *Civil Liberties Organization* v.*Nigeria*, Communication No. 129/94.

[18]*See* Russell and O'Brien *supra* note 4, p. 3.

[19]*See*Fombad, *supra* note 2, p.47. According to Fombad, "[f]rom a formal perspective, all African countries have provisions which in varying degrees of effectiveness, provide for judicial independence. Determinants of such formal constitutional independence include vesting judicial functions exclusively on the judiciary, qualifications for prospective judges, the independence of the appointment process, the independence of the Judicial Service Commissions, security of tenure, judicial remuneration, promotion processes, disciplinary processes and immunity from criminal and civil suits."

[20]*See*Shetreet, *supra* note 11, p. 45. According to Shetreet, "[w]hether and to what extent the judiciary in any country can be viewed as independent will not only depend on the law and constitution of that country, but also on the nature and character of the people who hold office of judge, on the political structure and social climate, on the traditions prevailing in that country and on the institutional and constitutional infrastructure of judicial independence."

2.3 Theoretical justifications for an independent judiciary

The concept of judicial independence has been the subject of intense scholarly scrutiny.[21] Various schools of thought have explored the theoretical justifications for the existence of an independent judiciary in a liberal democratic state. The moot point is determining the rationale for judicial independence. The various theories can broadly be categorized under the separation of powers, rule of law and 'delegative' theories which explain the rationale for politicians in promoting judicial independence.[22] Attempts have been made to provide the rationale for judicial independence at both the regional and international level. The 2003 Vienna Declaration on the Role of Judges attempts to capture the justification for an independent judiciary in the following terms;

> "An independent judiciary can best articulate and activate the normative framework for the protection of human rights. In doing so judges also act as catalysts for law reform and social change, defending the constitution, establishing norms and contributing to the progress towards the full enjoyment of human rights and sustainable human development. Judges also have a crucial role in balancing the requirements of defending society against invidious types of crime […]"[23]

Apparently, the rationale for the existence of an independent judiciary is deeply rooted in the separation of powers and the rule of law paradigms. The importance of not vesting governmental functions in any one body was recognized in the 1789 French Declaration of the Rights of Man and of the Citizen.[24] The political ramifications of the separation of powers concept were underscored by James Madison. Madison observed that, 'the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'[25]

Most of the written constitutions of many countries in different parts of the world make an attempt to clearly delineate the functions of the three organs of government.[26] Such constitutional prescription of the doctrine reinforces the importance and necessity of the principle as a bulwark of democracy. In a modern day liberal democracy, checks and balances are inherent in the governance structures.[27] These checks and balances entail that none of the three organs of state becomes a law unto itself thereby endangering the rights and welfare of citizens. Thus, the separation of powers principle has two important functions. First, it guards against the 'abuse of public power through the concentration of

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[21] *See generally,* J. Ferejohn *et al*, 'Comparative Judicial Politics' (October 2004), <www.yale.edu/polisci/rosenbluth/Papers/comparative%20judicial%20politics.pdf>, visited on 7 January 2020.

[22] *See generally,* G.Helmke and F. Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective', 12 *Annual Review of Political Science* (2009) p. 349.

[23] *See* Vienna Declaration on the Role of Judges in the Promotion of Human Rights and Fundamental Freedoms, 24 November 2003.

[24] Article 16 of the Declaration of the Rights of Man and of the Citizen states that, "[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."

[25] *See*J. Madison, 'The Particular Structure of the New Government and the Distribution of Power among Its Different Parts' 47 *Federalist* (New York Packet. 1 February, 1788).

[26] For a discussion of the importance of the separation of powers generally, *see* C. M. Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana', *Boston College Third World Law Journal* (2005) pp. 101-139.

[27] On the importance of checks and balances generally, see *Executive Council, Western Cape Legislature and Others* v. *President of the RSA and Others* 1995 10 BCLR 1289*; SAAPIL* v. *Heath and Others* CCT 27/00.

power.' Second, it promotes governmental efficiency by assigning specific functions to a government body which has the expertise and the time to attend to those specific functions.

Several African countries have made attempts to constitutionally prescribe the mandate of the executive, the legislature and the judiciary.[28] In a study on constitutionalism in Francophone and Anglophone Africa, one scholar observed that 'post-1990 constitutions in Africa generally provide for a separation of powers' thereby enhancing the prospects for constitutionalism and democratic governance.[29] Whilst the formulation of the separation of powers doctrine has evolved over time, it remains bedrock of an independent judiciary. The extent to which any country subscribes to the separation of powers principle is a matter of conjecture, to be gleaned from the prevailing political environment.

Closely intertwined with the separation of powers concept is the rule of law as opposed to rule by law.[30] The rule of law concept is a critical element of constitutionalism in modern day liberal democracies.[31] Several studies have propounded the rule of law theory. It basically provides that an independent judiciary is an essential element of the rule of law concept 'which secures property rights and guarantees the enforcement of contracts.'[32] According to Dicey's conception of the rule of law, the supremacy of the law is paramount in the same way as no man is above the law.[33] Governmental functions must be exercised in accordance with stipulated laws and such exercise of power within the confines of the law necessarily discourages tyranny and arbitrary use of power by those in authority.[34] This is pertinent considering that authoritarian regimes give a semblance of ruling 'within' the law. The rule of law thus assures 'standards of accountability' in any democratic dispensation.[35]

A government which respects and upholds the rule of law will necessarily assure a better human rights record for its citizens.[36] A genuinely independent judiciary promotes a culture of legality that necessitates respect for the rule of law.[37] It has been suggested that 'judicial independence does not automatically lead to respect for the rule of law or to economic progress.'[38] Instead, the rule of law thrives on a number of factors such as the nature of the political regime.[39] Without an independent judiciary which upholds the rule of

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[28]*See* for example the Constitutions of South Africa, 1996 and the Cpnsttitution of Zimbabwe Amendment (No. 20 (Act), 2013.

[29]*See* Fombad, *supra* note 2, p. 47.

[30] The rule of law was popularized in the nineteenth century by A. V. Dicey, a British jurist.

[31]*See generally*, A. V Dicey, *Lectures Introductory to the study of the law of the Constitution*, 1st edition (Macmillan, London, 1185) p. 215.

[32]*See* Mcdonald and Kong, *supra* note 7, p. 845.

[33]Dicey's conception of the rule of law has three elements namely, that individuals are subject to the application of general law and not to the exercise of wide discretionary powers, both individuals and government officials are subject to the ordinary law and the constitution is the result of decisions of the ordinary courts in relation to the rights of individuals.

[34]*See* P. Shivute, 'The Rule of Law in Sub-Saharan Africa- An Overview', in N. Horn and A. Bosl (eds.), *Human rights and the rule of law in Namibia* (Macmillan Namibia, Windhoek, 2009) p.225. *See also* B. Ajibola and D. Van Zyl (eds.), *The judiciary in Africa* (Juta, Cape Town 1998).

[35]*See* J. E. Finn, 'The Rule of Law and Judicial Independence in Newly Democratic Regimes', 13:3 *The Good Society* (2004) p.12.

[36]*See also* E.M Salzberger, 'A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?', 13 *International Review of Law and Economics* (1993) pp. 340-379.

[37]*See* C. M. Fombad, 'Some Perspectives on the Prospects for Judicial Independence in Post-1990 African Constitutions' 16:17 *Denning Law Journal* (2001-2003) p.41.

[38]*See* G. Helmke and F. Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective', 12 *Annual Review of Political Science* (2009) pp. 347-8.

[39]*Ibid*.

law, individual rights are consequently put at risk.[40] Significantly, 'most of the new democracies have relied heavily on the judiciary to realize the rule of law.'[41]

Delegative theorists have also put forward their own justifications for the existence of an independent judiciary. Lands and Posner have suggested an economic theory of an independent judiciary.[42] They propose an 'interest group theory of government' in which different groups compete for favourable legislation.[43] The price is determined by the value of legislative protection to the group.[44] The judiciary is an essential component because of its powers of judicial review and its ability to interpret legislation in conformity with the views of the dominant group.[45] Thus, the dominant group would be willing to pay the highest price for an independent judiciary which would protect its interests. Accordingly, an independent judiciary is of value to political actors and 'judges themselves are incentivized by self-interest to enforce legislative bargains and not to interpret legislation in ways that reflect the preferences of shifting legislative majorities.'[46] The main weakness of this theory is that it assumes that judges do not opt for their own preferences in interpreting legislation.

Closely linked to this theory is the political insurance justification for the existence of an independent judiciary.[47] According to this theory, 'constitutional designers are motivated by their own short term interests rather than by the long term interests of their societies.'[48] Accordingly, there are no incentives to create an independent judiciary where one party dominates.[49] Where there are several political parties with more or less the same political influence, 'the party in power will anticipate the possibility of political reversal and will introduce institutions that limit the powers of subsequent majorities.'[50] One such institution is an independent judiciary which acts as a buffer against the excesses of whichever party is in power.[51]

Furthermore, delegative theorists explain the existence of an independent judiciary as a consequence of blame shifting by politicians.[52] The main argument of the proposition is that politicians opt for an independent judiciary which shoulders the blame for unpopular decisions. In this respect, the executive initiates populist policies leaving the courts with the onerous task of reversals thereby shielding the executive, and the legislature from a public backlash. A variant of this theory suggests that an independent judiciary is useful to the legislature as it keeps the executive organs of the state in check by ensuring

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[40] *See* Finn, *supra* note 34, p. 12.

[41] *Ibid*.

[42] *See* W. M. Landes and R. A. Posner, 'The Independent Judiciary in an Interest-group Perspective', 18:3 *Journals of Law and Economics* (1975) p.875. *See also,* D. M.Klerman and P.G.Mahoney, 'The value of judicial Independence: Evidence from Eighteenth Century England', 7:1 *American Law and Economics Review* (2005) pp. 1-27.

[43] *Ibid*.

[44] *Ibid*.

[45] *See* Lands and Posner, *supra* note 41, p.879.

[46] *See* Mcdonald and Kong, *supra* note 7, p. 844.

[47] For a discussion of this theory, *see* T. Ginsburg, 'Constitutional Courts in New Democracies: Understanding Variation in East Asia', 2:1 *Glob. Jurist Adv*, (2002)<www.bepress.com/gj/advances/vol2/iss1/art4/>, visited on 15 May 2018.

[48] *Ibid*.

[49] *Ibid*.

[50] *Ibid*.

[51] *See* W.M Crain and R.D Tollison, 'The Executive Branch in the Interest-Group Theory of Government', 8:3 *The Journal of Legal Studies* (1979) p. 555.

[52] *See* E. Salzberger, 'A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?', 13 *International Review of Law and Economics* (1993) pp.349-379.

that executive organs do not deviate from the legislative intent.[53] Notwithstanding this, the main weakness of this theory is that it fails in parliamentary systems which have a more unified political leadership.[54]

It is apparent that the variation in theories highlights the lack of consensus on the rationale for the existence of an independent judiciary. It would appear that no theory of an independent judiciary has so far provided an exhaustive explanation for its existence. From its theoretical underpinnings, it is hardly surprising that judicial independence as a concept has never been fully established and is thus conceived differently in several jurisdictions.[55] While the differences in conception may persist, the important lesson for Africa is that the constitutional entrenchment of an independent judiciary 'signifies a clear pre-commitment to certain minimum standards' in promoting democratic consolidation.[56] Invariably, politicians bear the responsibility of 'formulating and creating a culture of judicial independence' which goes a long way in safeguarding the rule of law and the rights of citizens.[57]

In light of the above theoretical background for an independent judiciary, it is important at this juncture to analyse how judicial independence is assessed.

2.4 Assessing judicial independence

Whilst acknowledging the importance of judicial independence as a bulwark of democracy, it still remains unsettled as to the formula for determining or measuring the independence of the judiciary in a polity. This indeterminacy can be ascribed to the elusive nature of the concept of judicial independence itself. The difficulty attaching to measuring judicial independence was aptly underscored by Stephenson.[58] Stephenson observed that most attempts to measure judicial independence in different countries have been unsuccessful due to several factors. These factors include the difficulties of data collection and of "combining the different elements of judicial independence into a composite index."[59] Nevertheless, several toolkits have been crafted with the objective of aiding in the measurement of the extent to which a country upholds the independence of the judiciary.

A survey of recent literature on the topic shows that there are two broad categories of assessing judicial independence, that is, *de facto* and *de jure* measures.[60] *De facto* measures are based purely on subjective assessments whereas *de jure* measures focus on 'constitutional provisions that regulate institutional relationships.'[61] Further, it has been suggested that judicial independence can be measured through an analysis of court decisions overturning government decisions, nationalizations, and court decisions after an election.

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[53] *See generally* M. D. McCubbins and T Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms', 28:1 *American Journal of Political Science* (1984) pp. 165-79.

[54] *See* Helmke and Rosenbluth, *supra* note 38, p. 350.

[55] *See* Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on some Current Challenges and Future Prospects', *Buffalo Law Review* (2011) p. 1061.

[56] *See* Fombad, *supra* note 38, p. 41.

[57] *See* Shetreet, *supra* note 11, p. 20.

[58] *See* M. Stephenson, 'Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs', <www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/Judicial Independence.pdf>, visited on 20 November 2020.

[59] *Ibid*.

[60] *See generally*, 'Whats So Great About Independent Courts? Rethinking Cross National Studies of Judicial Independence' (2010), Preliminary Draft, Nov 8, at 7, < politics.as.nyu.edu/docs/IO/2787/HarveyJI.pdf>, visited on 3 Mrach 2015.

[61] *Ibid*.

These three factors put together serve as a useful tool in assessing the degree of independence of the courts.[62]

In spite of the above arguments, it must be noted that these propositions have their own weaknesses. These weaknesses emanate from the diverse political cultures across the world which makes an empirical study on judicial independence a mammoth task. Even if such a study was to be carried out, some scholars question whether such a study on judicial independence would serve any useful purpose at all.[63] Furthermore, formal and institutional guarantees of judicial independence are not an end in themselves. Breaches of the key elements of judicial independence have occurred in countries which have formally entrenched judicial independence in their respective constitutions.[64]

Notwithstanding the above criticism, studies on state adherence to judicial independence are important insofar as they determine the prospects for an independent and effective judiciary in a polity. In fact, countries with independent judiciaries capable of upholding the rule of law have better economic prospects as they are necessarily better poised to attract investment opportunities.[65]

2.5 Analysis of the different elements of judicial independence

This section explores the basic elements constitutive of an independent judiciary in a liberal democratic state. Various regional and international instruments have been crafted which provide the key elements constitutive of an independent judiciary. However, it must be pointed out that these instruments are merely guidelines and are therefore not binding on any state. Nevertheless, it appears that the basic elements of judicial independence enunciated in these instruments have come to be accepted as a form of 'soft' law. It is hardly surprising therefore that the 2013 Zimbabwean Constitution entrenches these basic elements constitutive of an independent judiciary.

The basic elements constitutive of an independent judiciary have been canvassed by several regional and international instruments such as the African Charter, the UN Basic Principles on the Independence of the Judiciary, the Latimer House Guidelines, the Bangalore Principles on Judicial Conduct and the Mt. Scopus Standards of Judicial Independence.[66] It must be noted that these guidelines are not prescriptive. They are an attempt to formulate minimum standards which can guide countries in their formulation of policies that serve to enhance the prospects for an independent judiciary. Emerging democracies undertaking judicial reform have in one way or another had their reform processes influenced by these basic elements. The above regional and international instruments point to the following as the basic elements of an independent judiciary;

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[62] *Ibid*. According to Ferejohn, Rosenbluth and Shipan, *supra* note 20, "[o]ne of the difficulties in grappling with the concept of judicial independence lies in measuring independence. We can identify various aspects of this concept […] but identifying these aspects does not directly provide a measure that we could use in tests of independence. What scholars can do, however, is to rely on surrogate measures. That is, rather than directly measuring independence by taking account of, and somehow adding up, its constitutive factors, we can look for a measure that reflects the behavior we would expect to find for different levels of independence".

[63] Ibid.

[64] See Shetreet, supra note 11.

65See generally, I. Matias et al., 'Judicial Independence in Unstable Environments: Argentina', 46:4 American Journal of Political Science (2002) p. 669.

[66]See also The Council of Europe's Recommendation on the Independence of Judges, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region and the Universal Charter of the Judge.

(i) institutional independence,
(ii) the judges must have security of tenure,
(iii) the process of appointing judges must be free from political patronage,
(iv) the judiciary must be financially autonomous, and
(v) the judges must have some degree of accountability.
A discussion of these basic elements follows.

2.5.1 Institutional independence

The institutional autonomy of the judiciary is a critical element of an independent judiciary. Institutional autonomy entails that the independence of the judiciary must specifically be entrenched in the constitution or some other laws.[67] Judicial autonomy encompasses principles such as the impartiality of the judiciary, and vesting adjudicative functions exclusively in the judiciary. The importance of the judiciary's institutional autonomy is underscored in Principle 1 of the UN Basic Principles on the Independence of the Judiciary. Principle 1 states that;

> "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary".'

Whilst constitutional prescriptions are not enough in themselves to guarantee the independence of the judiciary,[68] they are an important step in ensuring that the other organs of state respect the judiciary as a separate institution. The constitutional entrenchment of provisions on judicial independence has 'both legal and political value.'[69] This enables the defense of the judiciary's independence against internal and external threats such as pressure from politicians, the legal profession as well as pressure from members of the judiciary itself.[70] This necessarily entails that judges must be free to adjudicate matters according to the law and their conscience without any fear of reprisals.

The impartiality of the judiciary during the whole adjudication process is critical for the institutional autonomy of the judiciary. For example, Principle 2 of the UN Basic Principles statesthat;

> "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".

This entails that justice must not only be done but it must objectively be seen to be done. Thus, judges must free themselves from all external influences and even from internal influences within their own ranks. In this respect, the Bangalore Principles of Judicial Conduct give detailed guidelines in relation to judges maintaining impartiality in judicial proceedings.[71]

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[67] *See* Fombad, *supra* note 38, p.28.
[68] *See* L. Van De Vijver (ed.), *The Judicial Institution in Southern Africa: A Comparative Analysis of Common Law Jurisdictions* (SiberInk, Cape Town, 2006) p.4.
[69] *See* L. Madhuku, 'The Appointment Process of Judges in Zimbabwe and its implications for the Administration of Justice', 21 *SAPR/PL* (2006) p. 357.
[70] *See* Fombad, *supra* note 38, p.29.
[71] *See* Bangalore Principles 2 and 5.

As a corollary to judges' impartiality, Principle 3 of the UN Basic Principles states that the judiciary shall have jurisdiction over all cases of a judicial nature. The independence of the judiciary can only have real meaning if judicial functions are vested exclusively in the judiciary. Failure to do so can have the adverse effect of allowing politicians to create *quasi*-judicial bodies thereby circumventing the courts.[72] In Zimbabwe for example, courts were stripped of the jurisdiction to determine the constitutionality of land acquisitions by the government.[73] The Zimbabwean experience clearly shows that vesting judicial power in politicians is problematic and prone to abuse.[74]

At the regional level, several countries in Africa have in one form or another constitutionally entrenched the independent role of the judiciary in their governance systems. The constitutional entrenchment of judicial independence is evident in Anglophone, Francophone and in Lusophone African countries.[75] For example, the Constitution of South Africa goes much further than most Anglophone African countries in giving a detailed account of the judiciary's institutional autonomy.[76] By way of contrast, the Constitutions of Francophone African countries subordinate the judiciary to the executive. This is due to the fact that most of these countries have constitutions which are basically clones of the French Gaullist model. This model is rooted in the general distrust of the judiciary and does not recognize the judiciary as a separate and equal organ of state. For example, Article 127 of the Benin Constitution proclaims the President as the guarantor of the independence of the judiciary. It is clear that such provisions are meant to send a strong message that the judiciary is subordinate to the executive arm of government.[77]

2.5.2 Security of tenure

The security of tenure for members of the judiciary is generally 'regarded as a *sine qua non* of judicial independence.'[78] The importance of security of tenure for the judicial office has been underscored in several regional and international instruments on judicial independence.[79] Most of these instruments on judicial independence seem to point to three

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[72]*See* Russell, *supra* note 4, p.14.. In a discussion on structural threats to judicial independence, Russell opines that, "[c]ourt packing is by no means the only way in which political authorities may abuse the power they possess over judicial structure. Governments may strip courts of their jurisdiction to adjudicate matters in which the government of the day has a vital interest, or they may transfer jurisdiction over such matters from the regular courts to tribunals whose decision makers lack the security of tenure enjoyed by the judiciary."

[73]*See* the following cases, *Commercial Farmers Union* v. *Minister of Lands* 2000 2 ZLR 469(S); *Commissioner of Police* v. *CFU* 2000 1 ZLR 503 (H)*; Davies and Ors*v. *Minister of Lands* 1996 1 ZLR 681(S)*; Commercial Farmers Union and Others* v. *The Minister of Lands and Rural Resettlement* SC 31/10*; Mike Campbell (Pvt) Ltd and Others* v. *The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another* SC 49/07. These cases dealt with the contentious compulsory acquisitions of land. They also reflect the shift in the court's jurisprudence in relation to the right to property occasioned by the reshuffled Supreme Court bench.

[74] *See* also the judgment by Froneman. J in *Special Investigating Unit* v.*Ngcinwana and Another* 2001 4 SA 774 ECD which re-affirms the separation of powers doctrine in a constitutional democracy by 'attacking legislative erosion of judicial independence by purporting to vest judicial authority in a body which by its composition, competence and procedures does not fit into the judicial hierarchy'.

[75]*See generally,* Fombad, *supra* note 38,p. 29.

[76]*Ibid*.

[77]*Ibid.,* p. 30.

[78]*Ibid*., p.32.

[79]*See also*, Article 10 of the Universal Declaration of Human Rights(1948); Article 7 of the African Charter on Human and Peoples' Rights(1981); the UN Basic Principles on the Independence of the Judiciary(1985), the Beijing Principles on the Independence of the Judiciary(1995), the Latimer House Guidelines on the Independence of the Judiciary(1998), the Universal Principles of Judicial Independence for the SADC Region(2004); the Universal Charter of the Judge(1999), the Bangalore

features which guarantee security of tenure. These are the tenure of judicial office, constitutionally entrenched grounds of removal, and the due process of removal and discipline. These features are intended to insulate judges from undue external and internal pressure. Due to the importance of the judiciary in the adjudication process, and taking into account that judges sometimes rule against the central government, the failure to provide safeguards for the judicial office can have detrimental consequences. If judges can be removed from office on flimsy grounds, the whole administration of justice is consequently jeopardized.

2.5.2.1 Security of judicial office

The security of judicial office is guaranteed in two ways. For example, Principle 12 of the UN Basic Principles states that "[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".

It is submitted that judicial tenure is at best guaranteed when judges are appointed for life or appointed for a fixed term. It remains unsettled as to which of the two mechanisms best guarantees judicial tenure with pros and cons attaching to each method. However, a recent study in transitional countries established that 'judges without life tenure comply more with government preference than life tenured judges.'[80]

It is apparent that countries utilize a variety of tenure systems and within these systems, variations occur depending on the level of court concerned. The diversity of tenure systems is therefore indicative of the different conceptions of judicial independence. The diversity of tenure systems is also evident on the African terrain. For example, Francophone countries typically follow a career judiciary which guarantees life tenure while Anglophone countries have a non-career system with wide variations depending on each particular system.[81]

2.5.2.2 Removal from office

The removal of judges from office is a critical component of security of tenure. Regardless of the merits that may attach to a system of judicial appointment, its value is diminished if the political authorities can easily remove judges from office.[82] Russell opines that "judicial independence is less at risk at the front end of the personnel process- the appointing end- if there is a strong system of judicial tenure at the back end- the removal end."[83] Once appointed into office, judges must perform their duties fully conscious that whatever decisions they render will not impact on their judicial tenure. In any event, judges can perform better when they are not worried about the security of their tenure. It is hardly surprising therefore that much scholarly attention has been given to the mechanisms of

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Principles on Judicial Conduct(2002); the International Bar Association Minimum Standards of Judicial Independence(1982); the Syracuse Draft Principle on Independence of the Judiciary(1981); Montreal Universal Declaration on the Independence of Justice(1983); the International Covenant on Civil and Political Rights.

[80] *See* M. T. Dung, 'Judicial Independence in Transitional Countries', *UNDP* (2003) p. 18, <www.albacharia.ma/xmlui/bitstream/handle/123456789/30543/0291Judicial%20Independence%20in%20Transitional%20Countries.pdf?sequence=1>, visited on 16 November 2020.

[81] *See generally* Fombad, *supra* note 38, p. 32.

[82] *See* Madhuku, *supra* note 70, p. 351.

[83] *See* Russell, *supra* note 73, p. 16.

removing judges from office.[84] Similarly, several regional and international instruments also specifically address the grounds for removal of judges from office.[85]

The constitutional entrenchment of the grounds of removal is critical as it promotes transparency since judges can only be removed from office on clearly laid down grounds. Delegating removal grounds to ordinary legislation can be risky as ordinary legislation can easily be overridden by simple legislative majorities. The trend in Francophone and Lusophone African countries is to defer the details on the grounds of removal to ordinary legislation whereas most of the constitutions in Anglophone Africa constitutionally entrench these grounds.[86] However, an emerging trend in most countries is to complement these traditional techniques with the creation of judicial codes of conduct. These judicial codes expand the removal grounds in the constitution by providing for specific acts or conduct which are tantamount to judicial misbehaviour. A case in point is Zimbabwe which recently enacted a judicial code of conduct into law.[87]

2.5.2.3 Due process of removal and discipline

Closely intertwined with the removal of judges is the manner in which disciplinary proceedings are conducted against judges.[88] It is critical that disciplinary proceedings be clearly articulated in the constitution as a safeguard against abuse of the process for political ends. Where the judicial office is prone to the capricious depredations of the executive or the legislature, the exercise of judicial office becomes a daunting one. Safeguards against undue processes of removal are best guaranteed when the disciplinary procedures and processes are constitutionally entrenched.[89] In addition to a transparent laid down disciplinary procedure, the deliberations of such proceedings should be subject to judicial review.[90] The fairness of the disciplinary proceedings is also determined by the composition of the disciplinary tribunal. If the tribunal is dominated by executive appointees, this may cast serious doubt on the procedural fairness of the proceedings especially in cases where the complaint is emanating from the executive.

The critical nature of the removal provisions in African constitutional systems was aptly underscored by one scholar in the following terms:

> "The issue of disciplining and removing judges is particularly important at this critical stage of the democratic transition in Africa where judges play an important role in election disputes".[91]

We need not go very far into history to identify instances which highlight the importance of the judiciary in adjudicating election disputes.[92] Where politicians fear that judges will not rule in their favour, the possibility of arbitrary removals from office cannot be discounted. Furthermore, as African countries attempt to address colonial economic imbalances, issues

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[84] *See* generally J. E. Frankel, 'Judicial Discipline and Removal', 44 *Texas Law Review* (1965-1966) p. 1117.

[85] *See* for example Principle 17 of the UN Basic Principles on the Independence of the Judiciary; the Latimer House Guidelines VI.1.

[86] *See*Fombad, *supra* note 38, p.34.

[87] *See* Judicial Service (Code of Ethics) Regulations, 2012.

[88] *See* the Zimbabwean case of *Benjamin Paradza* v. *The Minister of Justice, Legal and Parliamentary Affairs* SC46/03.

[89] *See* Principle 19 of the UN Basic Principles on the Independence of the Judiciary.

[90] *Ibid,* principle 20.

[91] *See* Fombad, *supra* note 38, p.34.

[92] For example, since 2000, both presidential and parliamentary elections in Zimbabwe have been subject to court battles. The same applies to the 2007 Kenyan presidential election.

of land reform and nationalization necessarily come to the fore. In most cases, these issues spill into the courts and the judiciary as an independent institution, is expected to play its role without any fear of reprisals. An important lesson on constitutionalism in Africa is to guard not only against real threats to the independence of the judiciary but also against likely possibilities.

The necessity for more clarity in respect of the removal mechanisms of judges from office in Africa generally is evident. The importance of removal mechanisms was underscored by the African Commission on Human and Peoples' Rights in 2002. The Commission determined that arbitrary dismissals of judges from office constituted state breaches of obligations towards upholding judicial independence.[93] A survey of the situations prevailing in African countries reveals a plethora of removal mechanisms. For example, the Malawian Constitution delegates the power of removal of judges to the National Assembly.[94] The Malawian process basically puts judges in a precarious position as they are not sufficiently insulated from political shenanigans. Interestingly, several scholars identify the South African system as 'the best example of a fairly transparent system.'[95]

A critical aspect pertaining to the due process of removal and discipline is the liability of judges to criminal and civil suits. Clearly, it is undesirable to leave judges at the mercy of lawsuits which emanate from decisions rendered whilst fulfilling their mandate. Allowing such a scenario would be tantamount to destroying the very basis of fairness and impartiality in the adjudicative process. The issue of insulating judges from civil and criminal suits has generated its fair share of controversy. There are strong arguments in favour of dealing with wayward judges through the normal judicial disciplinary procedures. At the other end of the spectrum are those who argue for equality of all before the law which means judges must not be immune from civil and criminal suits. The Zimbabwean Supreme Court had the occasion to deal with the legality of an arrest effected on a judge arising from a criminal charge.[96] The Supreme Court ruled that such an arrest did not violate the independence of the judiciary as envisaged in the Constitution as judges are not immune from liability for acts done outside the scope of exercising judicial authority.

2.5.3 Judicial selection

The manner of selecting judges has a strong bearing on the independence of the judiciary as highlighted in several regional and international instruments.[97] For instance, a judiciary whose members have been appointed on the basis of political patronage cannot be expected to fulfil its adjudicative functions in a fair and impartial manner. Governments of the day usually pose the most serious threat to the independence of the judiciary. If politicians are permitted unfettered discretion in judicial selection, the whole administration

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[93] *Se eLawyers for Human Rights* v. *Swaziland*, Communication No. 251/2002.

[94] *See* section 119 of the Malawian Constitution.

[95] *See* Fombad, *supra* note 38, p.35.

[96] *See* the *Paradza* case, supra *note 89.*

[97] *See also* Article 10 of the Universal Declaration of Human Rights(1948); Article 7 of the African Charter on Human and Peoples' Rights(1981); the UN Basic Principles on the Independence of the Judiciary(1985), the Beijing Principles on the Independence of the Judiciary(1995), the Latimer House Guidelines on the Independence of the Judiciary(1998), the Universal Principles of Judicial Independence for the SADC Region (2004); the Universal Charter of the Judge(1999), the Bangalore Principles on Judicial Conduct (2002); the International Bar Association Minimum Standards of Judicial Independence (1982); the Syracuse Draft Principle on Independence of the Judiciary (1981); Montreal Universal Declaration on the Independence of Justice (1983); the International Covenant on Civil and Political Rights.

of justice is more likely to be put into disrepute. Whilst it is unavoidable that the executive will have a role to play in the judicial selection process, there is a clear need for a process which champions meritocracy as a virtue. A credible system of judicial selection must also instil public confidence in the calibre of persons appointed to the bench.

Principle 10 of the UN Principles on the Independence of the Judiciary provides guidance on the essentials of a credible system of judicial selection.[98] An assessment of whether a judicial selection process promotes an independent and effective judiciary hinges on two paramount considerations. The first consideration relates to the criteria for judicial selection. Constitutionally entrenched criteria for judicial selection are an important safeguard against appointments motivated by other considerations outside merit. In this respect, criteria such as qualifications and legal experience must be clearly spelt out. The second consideration relates to the procedure for nominating and appointing judges.[99] Procedurally, the prospects for an independent judiciary are enhanced when the judicial selection mechanisms are transparent. Openness and transparency in the manner of selecting judges allows principled public debate on the merits or demerits of prospective judicial candidates. Transparency in judicial appointments entails several processes which include publicly advertising judicial vacancies, conducting public interviews, and using a body representative of key stakeholders such as a judicial appointment commission.

Generally, judicial selection systems come in five basic configurations across the civil and common law divide namely, appointment by political institutions, judicial self-appointment, appointment by a commission or council, civil career judiciary and appointment through the electoral system.[100] Appointment by political institutions usually involves appointments by the executive with or without the involvement of the legislature. Judicial self-appointment involves members of the judiciary playing a pivotal role in the selection process.[101] Appointment by a commission is gaining popularity in emerging democracies. The commission is usually constituted by members from diverse backgrounds the paramount objective being to avoid its domination by political actors. The commission's role differs across countries with some having greater input in the selection process through recommendations which bind the appointing authorities.

On the other hand, a civil career system entails prospective judicial candidates go through specialized training before being appointed as judicial officers. This system of appointment is found predominantly in civil law countries. The electoral system of judicial selection entails appointment to judicial office through popular vote. The election can either be partisan or non-partisan. This system is utilized by several states in the United States of America. It is also utilized in the selection of lay judges in Lusophone countries such as Mozambique. Countries also utilize a variety of selection systems depending on the level of

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[98]Principle 10 reads that "[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory." See also Article 9 of the Universal Charter of the Judge; Principle 11-12 of the Beijing Statements of the Independence of the Judiciary; Principle IV (a) of the Latimer House Guidelines on the Independence of the Judiciary.

[99]*See* Russell, *supra* note 73, p. 23.

[100]*See* www.constitutionmaking.org/files/jud> visited on 15 June 2020.

[101]For example, this scenario is evident in India.

the court. The higher courts tend to have significantly higher levels of political influence in the appointment process compared to the lower courts.

The diversity of judicial selection systems is evident in Africa.[102] In fact, there are various variants of judicial selection systems in Africa such that it is not feasible to clearly demarcate the selection systems.[103] As observed earlier, countries typically utilize a wide range of judicial selection mechanisms which reflect their different conceptions of judicial independence.[104] This therefore suggests strongly that there is no consensus on the best manner to appoint judicial officers. Rather, legal systems are grappling with balancing judicial independence, and accountability in the judicial selection process.[105] As such, it remains difficult to come up with a blueprint on how a legal system ought to select its superior court judges.

2.5.4 Financial independence

The financial autonomy of the judiciary is an important element in establishing the independence of the judiciary. Ideally, judges must be guaranteed their salaries to avoid improper pressures of a financial nature being exerted on them. A judiciary without adequate financial resources is prone to corruption and underhand dealings. Due to the importance of the judicial role in modern day governance systems, the risk posed to the rule of law by an underfunded judiciary is high.[106] Moreover, limited budgets result in poor working conditions that undermine respect for the judiciary.[107] Entrusting budgetary responsibilities within the judiciary itself creates a framework that fosters judicial independence[108] as the courts do not have to rely on political pressure or compromise to get a fair allocation.

The Latimer House Principles best capture the essence of judicial financial autonomy in the following terms:

> "Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary. Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary. As a matter of principle, judicial salaries and benefits should be set aside by an independent body and their value should be maintained."[109]

The judiciary's financial independence can be secured principally in two ways. The first safeguard is a constitutional provision barring the reduction of judges' salaries during their tenure in office and secondly, constitutionally prescribing that judicial salaries be charged on the Consolidated Revenue Fund. This means that the executive cannot tamper with the funds specifically set aside for the judiciary. Charging the budget to the Consolidated

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[102] *See* Fombad, *supra* note 38, p. 38.

[103] *Ibid*., p.37.

[104] *See* also S. A. Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence', 16:2 *Bond Law Review* (2004) p. 201.

[105] *See* T. S. Clark, 'Advice and Consent vs Silence and Dissent? The Contrasting Roles of the Legislature in US and UK Judicial Appointments', 71 *LALR* p.451.

[106] *See generally*, W. S. Ferguson, 'Judicial Financial Autonomy and Inherent Power', 57 *Cornell Law Review* (1971-1972) p.975.

[107] *See* Van De Vyver, *supra* note 69, p. 8.

[108] *Ibid*.

[109] *See* Latimer House Guidelines 2.

Revenue Fund insulates the judges from legislative bargains during the passage of the budget in Parliament.

On the African terrain, most of the constitutions of Anglophone countries address the remuneration of judges by charging the judiciary's budget to the Consolidated Revenue Fund.[110] The situation is quite different in Francophone and Lusophone African countries which do not constitutionally secure the judiciary's financial independence but relegate such matters to ordinary legislation.[111] The judiciary's financial autonomy is not only guaranteed by mechanisms barring reduction of salaries. The judiciary's financial autonomy is also threatened when the executive can arbitrarily increase salaries when it politically suits them especially when there are politically sensitive cases pending before the courts. A case in point is Zambia. In a study on the accountability of courts in Tanzania and Zambia, Gloppen notes that Presidents Chiluba and Mwanawasa increased judicial salaries at a time when election petitions against both were pending before the courts.[112] Clearly, the independence of the judiciary is threatened when politicians can use either granting or withholding funding as a means to coerce the judiciary to decide cases in a particular manner.

While the importance of funding the judiciary is acknowledged, certain practical constraints emerge, especially in the African context. Most of the African countries are burdened by external debt coupled with stringent budgetary constraints imposed by international financial institutions.[113] The situation is worsened when bad governance and a lack of accountability on the part of the government comes into play. In such an economic environment, the judiciary is more than likely to receive inadequate funding depending on the priorities of the executive in distributing the national 'cake'.

2.5.5 Judicial accountability

In as much as the other organs of state are accountable to society, judges must also be democratically accountable to the general society to avoid a tyranny of judges.[114] The virtues of judicial office necessarily dictate that judges cannot be a law unto themselves. The judiciary must be accountable to the public for both its decisions and operations in a liberal democratic system.[115] Consequently, the more independent the judiciary is, the more accountable it has to be.

In Africa, the accountability of the judiciary is an especially pressing concern. The 'third wave' of democratization in Africa has necessarily resulted in the emergence of judiciaries with more powers of judicial review.[116] The powers of the courts to strike down legislation as being *ultra vires* the constitution has led to renewed calls for greater judicial accountability.[117] Judicial corruption has also dominated judicial accountability debates

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[110] *See generally,* section 99(3) of the Botswana Constitution; section 176(3) of the South African Constitution.

[111] *See* the Constitutions of the Republic of Angola, 2010 and Constitution of the Republic of Mali, 1992.

[112] *See* S. Gloppen, 'The Accountability Function of the Courts in Tanzania and Zambia', 10:4 *Democratization* (2003) p. 126.

[113] *See generally*, J. Widner, 'Judicial Independence in Common Law Africa' in USAID *Guidance for Promoting Judicial Independence and Impartiality* (2002), <pdf.usaid.gov/pdf_docs/PNACM007.pdf>, visited on 14 November 2012.

[114] *See*Shetreet, *supra* note 11, p. 47.

[115] *See* Van de Vyver, *supra* note 69, p. 9.

[116] *See generally*, C. M. Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Perspectives from Southern Africa,' 55 *The American Journal of Comperative Law* (2007) p. 1.

[117] *See* Russell *supra* note 73, p. 19.

especially in Africa.[118] There is a general perception that high rates of judicial corruption are prevalent in developing countries,[119] and this makes judicial accountability an important tool in promoting the judiciary's responsibility to society.[120]

Legal systems across the world have been grappling with balancing the independence of the judiciary and judicial accountability. While respecting the independence of the judiciary, a right balance must be struck between judicial independence and accountability. Invariably, the two values are not diametric opposites.[121] In reality they complement each other. Whilst there is no specific formula to balance these two ideals, any mechanism meant to foster judicial accountability must nevertheless not endanger judicial independence.[122]

A distinction is sometimes made between the individual accountability of judges and the institutional accountability of the judiciary as a whole.[123] A survey of the literature on judicial accountability identifies four basic elements of it, which are transparency, political accountability, personal accountability and public accountability.[124] These elements of judicial accountability hinge on identifying whom judges are accountable to and the mechanism to ensure that accountability.[125]

Transparency appears to be the key to judicial accountability.[126] It necessarily follows that, transparency is the key to both judicial independence and accountability.[127] Transparency entails several factors. First, judicial accountability is strengthened when judges are appointed on merit using a transparent judicial appointment criterion. An open and participatory judicial selection system has better prospects of selecting more competent judges.[128] Invariably, judges appointed in such a manner are better placed to administer their judicial functions in a fair and impartial manner. Second, a transparent mechanism of registering complaints against judicial impropriety is an important aspect of judicial accountability.[129] It leads to greater public confidence in the judiciary. Where acts of misconduct by judges are subject to secretive disciplinary processes, public confidence and trust in the administration of justice is greatly diminished. Third, the open court system coupled with public access to court records increases transparency in the whole adjudicative process. In some jurisdictions, the judiciary publishes annual reports which are an important information tool which promotes public debate concerning the judiciary's activities. Another important aspect of external accountability relates to commentaries on court judgments. For example, external review of judgments by scholars tends to promote sound court decisions as the judges will be conscious of the fact that the decisions that they render will be scrutinized.

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[118] *See* generally Widner, *supra* note 114.

[119] *See* Dung, *supra* note 81, p. 28.

[120] See R. Handberg, 'Judicial Accountability and Independence: Balancing Incompatibles?' 49 *Miami Law Review* (1994-1995) p.129.

[121] *Ibid*.

[122] *See* Dung, *supra* note 81, p. 27.

[123] *See* D. Carpenter, 'Judiciaries in the spotlight' XXXIX *CILSA* (2006) p. 382.

[124] *Ibid.*, p. 381.

[125] *Ibid.*, p.382.

[126] *See* Fombad, *supra* note 38, p. 40.

[127] *See* Van der Vyver, *supra* note 69, p. 10.

[128] *See* Dung, *supra* note 81, p. 28.

[129] *See* Van der Vyver, *supra* note 69, p.10.

It is important to note that many countries are increasingly fostering judicial accountability through judicial codes of conduct which go a long way in promoting internal accountability. Judicial codes of conduct are primarily meant to arrest any rot within the judiciary by stipulating standards of ethics expected of judges. These standards also serve as grounds for disciplinary action.[130] As earlier alluded to, a case in point is Zimbabwe which following widespread complaints from the legal fraternity against the judiciary's ineptitude, enacted a judicial code of conduct into law.[131]

Other mechanisms of enhancing judicial accountability have been formulated such as performance evaluations and judicial training for judges. Performance evaluations for judges are now a common feature in many states in the United States.[132] By their nature, performance evaluations can encourage high standards of professionalism on the part of judges. The caveat however, is that such evaluations must not be a mechanism for witch-hunting especially if judges render politically unpopular decisions. Other mechanisms of fostering internal accountability include appeal processes which ensure that the court decisions are reviewed by a higher court. This tends to promote sound judicial decisions as judges know in advance that their judgments can be taken on appeal.

2.6 Conclusion

The preceding discussions have demonstrated the critical nature of an independent judiciary in modern day governance systems as entrenched in the 2013 Zimbabwean Constitution. The chapter set out to explore the theoretical foundations of judicial independence as an important element of constitutionalism. Even though the concept itself is essentially a 'contested' one, the virtues of an independent judiciary cannot be underestimated especially in emerging democracies in Africa. Admittedly, the protection of the fundamental rights of citizens and the rule of law fare much better in a polity which respects and entrenches an independent judiciary. Recent studies have also shown that countries which entrench an independent judiciary correspondingly have better economic prospects. These economic prospects are a direct consequence of investor confidence in the fair and impartial dispute resolution mechanisms necessitated by the existence of an independent judiciary. It is apparent from the preceding discussions that judicial independence has been justified on several normative grounds. Judicial independence is not a one size fits all concept. It is a fluid concept which can only be meaningfully assessed by analysing each country's peculiar circumstances. It is hardly surprising that there is no universally accepted way of measuring judicial independence. What is currently available are models which give critical indicators as to a legal system's compliance with the generally accepted basic elements of an independent judiciary. Significantly, these judicial independence toolkits recognize the five elements generally accepted as constitutive of an independent judiciary.

[130] *See generally,* the Bangalore Principles of Judicial Conduct.
[131] *See* Judicial Service (Code of Ethics) Regulations, 2012.
[132] *See* Russell, *supra* note 73, p. 19.

Chapter 3

International Standards and the Judicial Function in Zimbabwe

Brian Penduka*

3.1 Introduction

The courts sit at the apex of any functional justice delivery system, helping to moderate the use of power by the executive, maintaining the rule of law, protecting rights holders, and providing redress for victims of violations. The courts' role is indispensable to the proper functioning of society and the furthering of its democracy. Given the importance of the Judicial Officers' contribution to the ordering of the state, a number of measures designed to protect and advance the independence of the courts have evolved and been adopted globally. The purpose of this chapter is to outline these principles, standards, and norms as they have been developed under international law. The chapter answers in the most basic way, the questions around the benchmarks for the appointment process/procedures, the security of tenure, promotion, disciplinary measures, and eventually the removal of judicial officers. The chapter content is divided into three thematic areas. The first part explores the various standards and principles on the appointment of judicial officers. It considers eligibility criteria, shortlisting, and appointment procedures and concludes with a discussion on the nature/character of the appointing authority. The second section is concerned with the standards relating to the incumbency of judges. It looks at the judge's remuneration, promotion, and guarantees that are meant to secure their tenure. The chapter concludes by setting out the benchmarks for disciplinary action that may be taken against judicial officers, including processes for their removal from office.

In order for the proper functioning of society, the courts must play the role of the impartial arbiter in disputes between citizens themselves and with the state. The ability of the judiciary in playing this role is directly related to its impartiality in the resolution of disputes. The courts must not be seen as holding an interest in any

* LLBs (Hons), LLM, PGDip in Business. Rule of Law Practitioner and a Commissioner with the Zimbabwe Human Rights Commission. Email: brianpenduka@gmail.com. The author is grateful to the Raoul Wallenberg Institute for a research grant (financed by Swedish Development Cooperation) that made this research possible.

matter it is called upon to resolve. They must be impartial, competent and independent referees in matters before them. Given that the courts do not wield the political power that resides in the executive and the legislature, principles and standards have evolved overtime to ensure that the independence of the courts is not unduly interfered with by outside forces.

This chapter seeks to explore the various standards that have been developed internationally to regulate the conduct of the Judiciary and more importantly the courts interaction with the other two branches of the state. The chapter, while acknowledging that numerous standards have been developed at a regional and international level, will look to highlight trends. It does not consider the efficacy of the various standards nor does it evaluate them in any way. It simply outlines for the reader their policy objectives. The purpose of the chapter is to provide some general guidance on how international law norms have sought to deal with contemporary issues that affect judges on a daily basis. It will look at standards that govern independence, the processes of appointment, issues to do with judicial tenure, eventually how judges ought to be removed from office and the safeguards to ensure that they are removal from office is done in a manner that abides by or ensures that their office is not compromised.

3.2 International Standards and the Judicial Function

The judiciary plays a very critical role in the ordering of society. The courts have the responsibility to resolve disputes between the state and its citizens. Guaranteeing or safeguarding in the process that the state, as the primary duty bearer, meets its obligations to rights holders. They also ensure that the other two branches of government operate within the ambits or parameters set for them by the law. The courts also ensure social and economic cohesion through the resolution of disputes between private actors. But perhaps their most critical role is the maintenance of law and order through the administration of criminal justice. The courts' influence' on society lies in their ability to apply the law to a set of facts and adjudicate in a manner that is not only just but is perceived as so. For the courts to be able to effectively play their role, their legitimacy must be beyond reproach. Society as a whole must be confident that the men and women entrusted with the duty of upholding and ensuring the supremacy of our laws do so without fear or favour. That they discharge their duties independent of outside influence and guided by the strict tenets of the law. Judicial legitimacy strongly depends on judges being, and appearing to be, impartial and independent in their work.

Furthermore, in recent years the role of the courts has continued to evolve and has become more complex. The courts have been requested to respond to broader social, moral, political and economic questions. Matters that would previously not have been brought before the courts and in some cases, which shouldn't be the subject of judicial consideration are finding their way into the courts. For example, the increased judicialization of politics on the African continent; this is the resolution of political disputes in the courts. The diminishing faith in the integrity of the electoral systems has meant that more and more

electoral disputes are brought before the courts for resolution, forcing judges to confer legitimacy to otherwise flawed electoral processes. Changes in constitutional provisions have also seen the scope of the work of judges increasing. The inclusion in modern constitutions of justiciable economic, social and cultural rights will invariably mean that courts will have to decide on more issues of policy formulation and the subsequent allocation of resources. In addition, provisions similar to section 2 of the Zimbabwean Constitution[1] which require the expunging of laws, practices, customs or conduct that is inconsistent with the tenets of the Constitution, have the potential of increasing the courts' constitutional review of legislation. Judicial power properly exercised or applied in the context of these provisions is likely to see the judiciary come into conflict with the executive and legislative branches of government. Consequently, it is important that the judiciary be seen to be free of outside influence of any kind to ensure that the state and its citizens are satisfied with the objectiveness of the courts' decisions. But more importantly, the courts must be insulated from outside influence and pressure through the enactment of provisions that preserve their independence.

3.3 Judicial Independence

Judicial independence is a very complex, multifaceted concept, which is easier articulated than it is in practice. For those that are not burdened by the responsibility of the office and the weight that comes with judicial appointment, it is a term that is easily brandished and thrown around when judges are perceived to operate in a manner that is contrary to the views or interests of a particular group. Judicial independence can refer to the independence of an individual judge or the independence of the judiciary as an institute.[2] In both cases the extent to which the courts are perceived to be independent will depend on historical, political, social and legal context and/or how the bench has evolved in that country. For example, the Zimbabwean judiciary will have to make considered efforts to separate itself from the perception that it is executively minded. This view has grown or emanates from the widespread purging of judicial officers that occurred during the fast-track land reform program. As such, the courts have a reputational burden to overcome in order for them to be seen to operate outside of the influence of the government. Institutional independence refers to the independence of the judiciary from the other branches of government, that is the executive and the legislature, as well as from any other non-judicial actor. This is not to imply that the judiciary is meant to operate in a vacuum but rather that they are not unduly influenced by outside forces in the determination of cases. Individual independence refers to the moral character/fortitude of the individual judge. Their ability to resist external influence and/or internal pressure exerted by higher ranking judges (or in some cases their peers) on the substance of their judgment. A judge should be totally independent

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[1] *Constitution of Zimbabwe Amendment* (No. 20) Act, 2013 [Zimbabwe], 22 May 2013 (Hereinafter the Constitution).
[2] International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1* (International Commission of Jurists, Geneva, 2007) pp.21-23. <www.refworld.org/pdfid/4a7837af2.pdf>, visited on 26 July 2021.

of outside influence when they make decisions in any particular case. Their judicial pronouncements should solely be motivated on the facts presented to them and on the law. The international standards that have been developed over the past decades have sought to protect both the integrity of the judiciary and its independence. It should always be emphasized that judicial independence is not an end in itself, but rather a means to secure public confidence in the courts, guarantee the impartial exercise of judicial functions, and to protect the rights of the litigants (and the general public). Properly exercised the independence of the courts must benefit the public and must be seen as a basic right of the people and not as the personal privilege of the judge. It is an indispensable prerequisite for the efficient and effective protection of Human Rights. The Bangalore Principles of Judicial Conduct[3] highlight the importance of the judiciary in the human rights discourse in two important ways. These are as follows;

Firstly, it recognises the indispensable role of the courts in the attainment of the right to a fair trial. Its preamble notes that:

> "[t]he Universal Declaration of Human Rights (UDHR) recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge."[4]

The enjoyment of fair trial rights cannot be achieved in the absence of a functional, competent and independent judiciary.

Secondly, the courts give effect to the rights as set out in international law through the interpretation of various national instruments and offering redress to victims of human rights violations. Standards developed by the judiciary through the interpretation of laws give substance to legal precepts. The Bangalore Principles of Judicial Conduct articulately point out that, "[t]he importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice."[5]

More significantly in the context of Africa, judiciaries are usually the last line of protection for human rights defenders and opposition political actors who are suffering from persecution. The integrity, impartiality and the independence of the judiciary is paramount to the safeguarding of human rights.

A logical starting point for most international standards is therefore to emphasize the importance of protecting the independence of the courts. The Basic Principles on the Independence of the Judiciary[6] adopted by the UN Congress on

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[3] *The Bangalore Draft Code of Judicial Conduct* 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices.

[4] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

[5] *See* Preamble to the *Bangalore Principles Of Judicial Conduct*.

[6] United Nations, *Basic Principles on the Independence of the Judiciary* (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985).

the Prevention of Crime and the Treatment of Offenders in Milan in 1985 are a set of values which were primarily formulated with judges in mind but apply equally to magistrates[7] with the objective of assisting UN member states in their task of securing and promoting judicial independence.[8] Principle 1 states that the independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution or the law of the country. States are enjoined to put in place in their constitutions provisions that ensure judicial independence. The Universal Charter of the Judge adopted by the International Association of Judges is more elaborate. It provides that:

> "Judicial independence must be enshrined in the Constitution or at the highest possible legal level.
> Judicial status must be ensured by a law creating and protecting judicial office that is genuinely and effectively independent from other state powers. The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary."[9]

The Charter of the Judges adds to the need for guarantees (for judicial independence) set out in the other standards two additional considerations. The idea or principle that the provisions must be such that they lead to a judiciary that is genuinely independent and that the judge must be able to exercise judicial power free from outside pressure and independent of other judges. The Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (The Implementation Measures) elaborates on the setting up of the guarantees by outlining the issues which must be addressed by the legal provisions. The Implementation Measures provide that the principle of judicial independence requires the State to provide guarantees through constitutional or other means to ensure the following:

Firstly, that the judiciary be independent of the executive and the legislature in that no power be exercised as to interfere with the judicial process.[10] In other words, the guarantee set out in the constitution must ensure the separation of powers. The executive is encouraged to refrain from any acts or omissions that pre-empt the judicial resolution of a dispute or frustrate the proper execution of the court's decision[11] and that the legislature and the executive must not exercise or attempt to exercise any pressure on a judge whether in an overt or covet manner. Furthermore, that legislative or executive powers that may affect judges in their office[12], their remuneration, conditions of service or their resources, shall not

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[7] *See also*, United Nations, *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, (*Resolution 1989/60, 15th plenary meeting, 24 May 1989) procedure 3.
[8] *See* Preamble to *Basic Principles on the Independence of the Judiciary*, supra note 6.
[9] Article 2-1 the Charter is not full referenced/cited.
[10] *Ibid.*, art.10.1 (a).
[11] *Ibid.*, art.10.1 (f).
[12] *Ibid.*, art.10.1 (g).

be used with the object or consequence of threatening or bringing pressure upon a particular judge or judges.[13]

Secondly, the implementation measures also required that no special ad hoc tribunal be established to displace the normal jurisdiction that is vested in the courts.[14] Additionally that in the decision-making process judges are able to act without restriction, improper influence, inducement, pressure, threats, or interference, direct or indirect, from any quarter or for any reason and exercise unfettered freedom to decide cases.[15] In terms of the implementation measures, the jurisdiction of the courts must be absolute over all issues of a judicial nature.[16]

Most of the modern Constitutions that have been enacted have a provision that guarantees the independence of the courts. The South African Constitution[17]provides for judicial independence in section 165 titled "Judicial Authority". It guarantees in section 165 (2) that "the courts are independent" without specifying who from and they are "subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." Section 165 (3) prohibits the interference by any person or organ of state with the functioning of the courts. The state is enjoined by section 165 (4) to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The courts in South Africa have been celebrated for their independence based on this framework. Subsequent constitutions like the Zimbabwean Constitution and Kenyan Constitutions[18] are more intentional and set out in clearer terms the safeguards or guarantees for judicial independence. Outlined below are primary provisions in both constitutions which guarantee the independence of the courts.

Table 1: Judicial independence guarantees (Kenya and Zimbabwe)

Kenya Constitution	**Zimbabwe Constitution**
Independence of the Judiciary. 160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.	165. Principles guiding judiciary (1) In exercising judicial authority, members of the judiciary must be guided by the following principles-- (a) justice must be done to all, irrespective of status; (b) justice must not be delayed, and to that end members of the

[13]*Ibid*., art.10.1(h).
[14]*Ibid,*. art.10.1(c).
[15]*Ibid*., art. 10.1(d).
[16]*Ibid*., art.10.1(e).
[17]The Constitution of the Republic of South Africa, 1996.
[18] The Constitution of Kenya, 2010.

(2) The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office.
(3) The remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund.
(4) Subject to Article 168(6), the remuneration and benefits payable to, or in respect of, a judge shall not be varied to the disadvantage of that judge, and the retirement benefits of a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of that retired judge.
(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

judiciary must perform their judicial duties efficiently and with reasonable promptness;
(c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.

(2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.
(3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.
(4) Members of the judiciary must not--
(a) engage in any political activities;
(b) hold office in or be members of any political organisation;
(c) solicit funds for or contribute towards any political organisation; or
(d) attend political meetings.

(4) Members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.
(5) Members of the judiciary must give their judicial duties precedence over all other activities, and must not engage in any activities which interfere with or compromise their judicial duties.
(6) 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 domestic and international law.

However, as the Implementation Measures cynically point out, judicial independence is in part a state of the mind of the members of the judiciary. The individual judge must value their independence and must be seen by society to be beyond reproach. International law recognizes that the responsibility of the state must go beyond the enactment of provisions that guarantee independence. But should also extend to the establishment of a set of institutional arrangements that will enable the judge to enjoy that state of mind and assure society that the bench is truly free from undue influence. These safeguards or safety net provisions have also been subject of international consideration and a number of guiding principles and standards have been put in place to inform states in their formulation of the relevant legal provisions. The rest of the chapter is divided into three thematic areas and will begin a discussion on some of the main issues affecting judicial officers. The first part explores in brief the various standards and principles on the appointment of judicial officers. It considers eligibility criteria, shortlisting, and appointment procedures and conclude with a discussion on the nature/character of the appointing authority. The second section is concerned with the standards relating to the incumbency of judges. It looks at the judge's remuneration, promotion, and guarantees that are meant to secure their tenure. The chapter concludes by setting out the benchmarks for disciplinary action that may be taken against judicial officers, including processes for their removal from office.

3.4 Appointment of Judicial Officers

Several standards have been developed which seek to ensure that the appointment process for judicial officers strengthens the independence of the courts, furthers public confidence in the administration of justice and ensures adherence to the rule of law. The appointment process should be able to ensure the selection of appropriately qualified personnel with the requisite skills to perform the duties and responsibilities of a judge. But more importantly, it must foster a sense of confidence in the public that the persons appointed to judicial office will perform their functions independently of outside influence particularly influence from the appointing authority.

The Universal Charter of The Judge[19] requires that recruitment or selection of judges must be based only on objective criteria, which may ensure professional skills.[20] Article 9 of the Cape Town Principles on the Role of Independent

[19] International Association of Judges, *The Universal Charter of The Judge* (1999), *(*adopted by the IAJ Central Council in Taiwan on November 17th, 1999)

[20] *Ibid.,* art. 4.1.

Commissions in the Selection and Appointment of Judges[21] sets this requirement out as follows:

> "The criteria for judicial office and the process of selection should be set out in written form and published in a manner that makes them readily accessible to candidates for selection and the public at large. Such transparency provides a foundation for public confidence in the selection process."

In other words, the general public should have access to a predefined set of requirements or criteria upon which the selection and appointment of judicial officers will be undertaken. The public should be able to assess the appointment process against this pre-established set of requirements. The candidates should also be able to self-assess and see if they have the requisite qualifications to be appointed to the bench. Sections 166 of the Kenyan Constitution and 174 of the South African Constitution define and codify the selection criteria for judicial officers in the two countries. The Zimbabwean Constitution is more elaborate as it has an entire segment which is dedicated to defining the selection criteria for judges in each Court. Part 2 of Chapter 8 of the Zimbabwean Constitution which is made up of sections 177 to section 179 outlines the requirements for appointments to the Constitutional Court (section 177) to the Supreme Court (section 178) and appointments to the High Court, Labour Court and Administrative Court (section 179). A basic requirement for a candidate to qualify as a judge of the Constitutional Court for example, is that the individual must be a Zimbabwean citizen and at least be forty years old.[22] In addition to these basic requirements (citizenship and age), the candidate must have served as a judge of a court with unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English and English is an officially recognised language. Alternatively, the candidate for at least twelve years, whether continuously or not, should have qualified to practise as a legal practitioner.[23] Similar criteria is set for the other courts with differing levels of experience required for each court. Suffice to note that the Constitution of Zimbabwe has a clear set out eligibility standard for each court that is readily accessible to aspiring candidates and the public at large.

The criteria itself should be such that the most appropriate person will be selected for the post. The most comprehensive single expression of these requirements is set out in article 10 of the United Nations *Basic Principles on the Independence of the Judiciary*,[24]which reads as follows: -

> "Qualifications, selection and training

[21]University of Cape Town , Bingham Centre for the Rule of Law, *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (2016)(heereinafter referred to as the Cape Town Principles).

[22]S177 (1) of the Constitution

[23] *Ibid*., s177(1)(b).

[24]*Basic Principles on the Independence of the Judiciary*, supra note 7.

> 10. Persons selected for judicial office shall be *individuals of integrity and ability* with *appropriate training or qualifications in law*. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, *there shall be no discrimination* against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office *must be a national of the country concerned*, shall not be considered discriminatory."

The same criteria is set out in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa(hereinafter the Principles and Guidelines)[25] which provide that the sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.[26] It proceeds in article 4 (j) that any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. It qualifies however, that it shall not be considered discriminatory for states to (a) prescribe a minimum age or experience for candidates for judicial office (b) prescribe a retirement age or duration of service for judicial officers and that this may vary with different level of judges, magistrates or other officers in the judiciary and (c) require that only nationals of the state concerned shall be eligible for appointment to judicial office.

The appointment criterion as set out in the Kenyan, Zimbabwean and South African Constitutions seem to tick each of these boxes, setting out the minimum levels of experience, age and/or seniority. In Zimbabwe, for example, the appointment criterion set out in sections 177 to 179 requires that the candidate be a legally qualified person with the appropriate years of qualification and must be a fit and proper person to hold office as a judge. The Kenyan Constitution in section 166 has a similar requirement. However, instead of using the term fit and proper to describe the candidate's moral fortitude, the Kenyan Constitution requires that they "have a high moral character, integrity and impartiality." The appointing authority must also ensure that appointments onto the bench are reflective of the composition of society. This issue is addressed in sections 174 (2) and 184, of the South African and Zimbabwean Constitutions, respectively, which require that judicial appointments reflect society.[27]

There is very little provided by international standards on the appointment mechanism itself, save that the method of judicial selection shall safeguard against judicial appointments for improper motives.[28] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa require that the process for appointments to judicial bodies be done in a transparent and accountable manner

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[25]African Union, T*he Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* DOC/OS(XXX)247

[26]*Ibid.,* art. 4(i).

[27] Section 184 of the Constitution provides that judicial appointments must reflects the society by broadly reflecting the diversity and gender composition of Zimbabwean society.

[28]Article 10 of the *Basic Principles on the Independence of the Judiciary, supra* note 6.

and encourages the establishment of an independent body for this purpose. Furthermore, in keeping with the UN standards the Principles and Guidelines stipulate that any method of judicial selection shall safeguard the independence and impartiality of the judiciary.[29] As such, whatever the method of appointment that is used, it should be such that the candidates that are selected are the right ones for the job and are appointed for the right reasons. Whether it is by election or through interviews, the outcome is what is important. In most jurisdictions, the final appointing authority is usually from the executive branch of the government. The contemporary approach is to have appointment done following an interview process by an independent body or commission and then have the executive arm select the final candidate from a limited pool. This gives rise to another important discussion on the nature of the selection committee or body. The European Charter on the Statute for Judges provides that the body responsible for every decision affecting the selection recruitment appointment, career progress or termination of the office to be independent of the executive and legislative powers of the state and that at least half of the body composed of judges elected by their peers under a procedure that guarantees the widest possible representation of the judiciary.[30]

The Cape Town Principles are more instructive, they stipulate the following:

Firtsly, the appointing mechanism which it refers to as a Commission, should consist of members drawn both from the judiciary and from other professions and backgrounds. However, that the proportions should ensure that the commission is not unduly dominated by the executive or by members of parliament or representatives of political parties. It also recommends that they be diversity on the Commission to reflect society. [31]Secondly, members of the commission should be required to apply their individual judgement to all matters of judicial selection, to avoid conflicts of interest and to observe the highest standard of ethics. As a safeguard of their individual independence, members should enjoy security of tenure, subject to appropriate term limits, and should not be vulnerable to arbitrary termination of their membership. The ethical obligations of members may be reinforced by an oath or affirmation of office, a code of conduct, and provisions that temporarily disqualify members or former members from applying for judicial office.[32]

International standards therefore seek to ensure that individuals of integrity and competence are selected or appointed to the bench. The criteria by which these individuals are appointed should be clearly spelled out for both the general public and aspiring candidates to be able to look at and reflect upon. The principles and standards acknowledge that nationality and age are important considerations for judicial appointment and therefore that any criteria that define a minimum age or demands that the candidate be a citizen cannot be deemed to be

[29] Principle 4 (h) of *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *supra* note 25.
[30]European Charter on the Statute for Judges adopted by the Council of Europe Article 1.3.
[31]Principle 6, Cape Town Principles.
[32]Principle 7, Cape Town Principles.

discriminatory. But they should be safeguards to ensure that the appointments reflect society and that that they are not done in a discriminatory manner. Another important consideration is that the body responsible for the selection of judges should be one that is not unduly influenced by the other two branches of the state.

3.5 Tenure

Perhaps the most significant consideration when evaluating the guarantees provided by the state to ensure the independence of the judiciary is the security of their tenure. The Latimer House Principles recommend that judicial appointments in the normal course of things should be permanent. However, where it is inevitable to appoint judges or judicial officers on a temporary basis, such appointment should be subject to appropriate security of tenure. This, regrettably, is as instructive as the Latimer House Principles get on this issue, as they do not specify what appropriate security of tenure entails in such circumstances. The Latimer House Principles also stipulate that salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary and add that there be an independent body set up to determine the remuneration and benefits for judicial officers. In almost similar terms, the Principles and Guidelines for the right to a fair trial in Africa, provide that judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term.[33] However, the Principles and Guidelines go further to state that the conditions of service of the judicial officer, that is, "the tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service" should be guaranteed by law.[34] Articles 11, 12, 13 and 14 of the Basic Principles on the Independence of the Judiciary set out the conditions of service for judicial officers. These can be summarized as follows: (a)The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law, (b)Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists, (c)Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience (d)The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

What the various norms attempt to do is to ensure that there is no carrot or stick that may be put before the court to sway it in its decisions. If a judicial officer is guaranteed of their continued employment, they are less likely to succumb to threats of dismissal or promises of continued/extended employment. These standards are looking to guarantee that the individual judge is secure in their work. The standards and principles developed acknowledge that the executive and perhaps parliament have control over national resources, control which the judiciary may not have and as such, can influence the courts by providing or

[33]Principle 4(b), *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.*
[34]*Ibid*., principle 4 (c).

withholding these resources. However, what each of the standards failed to do is to address the salient issues when it comes to the actual remuneration of judges. It is not enough to simply provide that the conditions of service should be codified or that they should be adequate. Further safeguards need to be in place to ensure judges are sufficiently remunerated to ensure that they are not easily corrupted by litigants or the other two arms of the state.

The tenure of office for a judge in Zimbabwe is provided for in section 186 of the Constitution[35].The section is one of two provisions dealing with the judiciary that was introduced into the Constitution through a 2021 constitutional amendment and amended through Constitution of Zimbabwe Amendment (No. 2) Act, 2021. The Amendment has brought about new positions with significant implications on judicial independence and integrity in Zimbabwe.

Currently, the courts are seized with several cases dealing with the implications of amendments to section 186.[36] Constitutional Amendment Act (No. 2) repealed, through section 13, the entire gamut of 'Tenure' guarantees and replaces them with new provisions allowing judges of the superior courts to extend their tenure of office beyond the mandatory age of retirement, which is currently 70 years, annually for up to five years. However, this is on condition that the individual judge in question is certified to be mentally and physically fit to continue in office. Before the Constitution was amended, the tenure limitations of judges of the Constitutional Court were set out in section 186 (1)(a). The provision required that judges of the court must retire upon the attainment of the age of 70 and/or after serving 15 years in the Court.[37] The Constitution only allowed extension of tenure to complete part-heard matters.[38]Furthermore, the Constitution, prior to being amended, did not set out a tenure regiment for the Chief Justice (CJ) or Deputy Chief Justice (DCJ) that was different from other judges of the Constitutional Court. This approach was consistent with the rest of Chapter 8, which did not distinguish the CJ (save by mention) from the rest of the Constitutional Court Judges.[39] The Chief Justice was effectively the first amongst equals. Conversely, the amendment has created multiple levels of privilege and distinguished the conditions of service for the CJ and the DCJ from the other judges of the Constitutional Court. In terms of the Amendment, Act the CJ and the DCJ shall "hold office from the date of their assumption of office until they reach the age of seventy years."[40]

The CJ and DCJ are no longer subject to the 15-year term limitation that is imposed on the other judges of the Constitutional Court. Ordinarily the Chief

[35]The Constitution of Zimbabwe Amendment (No 20) Act, 2013.

[36]*Kika* v. *Minister of Justice & Ors; YLAZ* v. *JSC &Ors* HH264-21.

[37] The tenure for judges for the remaining courts was guaranteed by section 186 (2) which set the retirement age at 70 years old. The Constitution prior to the amendment did not prescribe a retirement age for judges of the Labour Court and the Administrative Court. An anomaly that has been addressed by the Amendment Act.

[38]Section 186(4) of the Constitution before the 2021 amendment.

[39]It should be noted that the Constitution in section 162(3) sets out in clear terms that, "the Chief Justice is head of the judiciary and is in charge of the Constitutional Court and the Supreme Court."

[40]*See* sections 186 (1) and 186 (2) of the Constitution as amended.

Justice should not be seen as having a superior jurisprudential role within the Court. Every effort should be made to ensure that the Chief Justice and Deputy Chief Justice are able to debate legal issues as equals with other judges in that court. When the Court sits to deliberate on a jurisprudential issue, each judge must be allowed to contribute their views independent of the influence of other judges. The extended period of service of the CJ and DCJ which sees them serving beyond the 15 years afforded to all the other judges of the court is in this respect potentially problematic. It creates seniority and privilege for the Chief Justice and the Deputy Chief Justice, which is not extended to the other judges of the court. This potentially creates a judicial hierarchy that could conceivably stifle debate and impede on the individual independence of the other judges. The CJ and the DCJ will, by design, out serve other judges in the Superior Courts. They will undoubtedly engender a sense of professional seniority, above and beyond that which invariably follows the office. This may affect the way issues are debated in the court and thus weakening the quality of jurisprudence emerging from the Courts.

The amendment to the Constitution, it must be emphasised, does not affect the tenure of a judge. The judge's tenure, barring any disciplinary proceedings, continues to be guaranteed up to the age of 70 years for all the courts. This ensures that the law in this respect continues to be in line with international standards and norms. The term of office for the judge is guaranteed up to the mandatory retirement age of 70. What then becomes problematic are the optional periods of employment which are available to superior court judges upon attainment of the mandatory retirement. As was stated above, the tenures of the CJ and DCJ are not affected by the 15-year limit set for the other judges, and in addition, they can also potentially benefit from the provision which allows the Judges of the superior courts, that is, the Constitutional Court and Supreme Court, to extend their tenure annually for a further five years beyond the mandatory retirement age of 70.

This privilege is not afforded to judges in the other courts.[41] The preferential conditions afforded to the superior court judges must also be analysed together with the provisions dealing with promotion, discussed below. The amendment to the Constitution grants the President authority to promote judges without the need for interviews. This then creates a route for promotion, which is at the President's discretion, which is not available to the judges on equal terms. The Amendment Act has created mistrust and doubt in the public. The mischief however, without looking at the arguments raised in the two cases,[42] seems to be with the timing of the amendment and apartheid of rights it creates within the judiciary. The extension of office may be seen as a carrot dangled in front of the judges or ultimately as a reward presented to compliant judges. These fears maybe unfounded and without basis but will invariably affect public confidence in the judiciary.

[41]That is the High Court, Labour Court and Administrative Court.

[42]*Kika* v. *Minister of Justice & Ors; YLAZ* v. *JSC &Ors, supra* note 33.

Table 2: Amendment Act Number 2, 2021

Before amendment	Comments	Amendment
1. Judges of the Constitutional Court are appointed for a non-renewable term of not more than fifteen years, but-- (a) they must retire earlier if they reach the age of seventy years; and (b) after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment.	• The term for the CJ and DCJ are no longer limited to 15 years, they are now eligible to hold office until there are seventy years of age. However, they may extend their tenure annually for an addition 5 years provided they are in good physical health. • Retirement age for judges of the Constitutional Court is 70, However they may extend their tenure annually for an addition 5 years provided they are in good physical health. **Comment** These changes must not be understood with the incumbent judges in mind, but should be seen as also applying to future office bearers. Prior to the amendment the Constitution did not distinguish the Chief Justice (CJ) and Deputy Chief Justice (DCJ) from	(1) The Chief Justice and the Deputy Chief Justice hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject to the submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to their mental and physical fitness so to continue in office. (2) Judges of the Constitutional Court are appointed for a non-renewable term of not more than fifteen years, but— (a) they must retire earlier if they reach the age of seventy years unless, before they attain that age, they elect to continue in office for an additional five years:

	other judges of the Constitutional Court. The CJ and the DCJ were subject to the same condition as all other judges. The amendment might be seen as creates a hierarchy within the courts may be detrimental to the rule of law. The CJ and/or DCJ may be perceived as being superior adjudicators and not the first amongst equals. The amendment also provides, subject to the successful completion of a medical examination, all the judges of the Constitutional Court with option of extending their tenure beyond the age of 70. The decision to extend is at the discretion of the judge but is subject to approval by the president.	Provided that such election shall be subject to the submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office; (b) after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court, at their option, if they are eligible for such appointment.
2. Judges of the Supreme Court and the High Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire. 3. A person may be appointed as a	• The amendment also extends to judges of the Supreme Court the same prerogative and ability to extend their tenure beyond the age of 70 on production of a medical report.	(3) Judges of the Supreme Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire unless, before they attain that age, they elect to continue in office for an additional five years: Provided that such election shall be subject

judge of the Supreme Court or the High Court for a fixed term, but if a person is so appointed, other than in an acting capacity, he or she ceases to be a judge on reaching the age of seventy years even if the term of his or her appointment has not expired;		to the submission to, and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of the judge so to continue in office. (4) Notwithstanding subsection (7) of section 328, the provisions of subsections (1), (2) and (3) of this section shall apply to the continuation in office of the Chief Justice, Deputy Chief Justice, judges of the Constitutional Court and judges of the Supreme Court. (5) Judges of the High Court and any other judges hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire. (6) A person may be appointed as a judge of the Supreme Court, the High Court or any other court for a fixed term, but if a person is so appointed, other than in an acting capacity, he or she ceases to be a judge on reaching the age of seventy-five years (in the case of a judge of the Supreme Court) or
	• The law now provides for the mandatory retirement age of 70 for judges of the Labour Court, and Administrative Court.	

		seventy years (in the case of a judge of the High Court or any other court) even if the term of his or her appointment has not expired.
4. Even though a judge has resigned or reached the age of seventy years or, in the case of a judge of the Constitutional Court or a judge referred to in subsection (3), reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge.		(7) Even though a judge has resigned or reached the age of retirement or, in the case of a judge of the Constitutional Court, reached the end of his or her term of office, he or she may continue to sit as a judge for the purpose of dealing with any proceedings commenced before him or her while he or she was a judge.
5. A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission.	• Judges still retain the option to retire from office upon giving notice	(8) A judge may resign from his or her office at any time by written notice to the President given through the Judicial Service Commission.
6. The office of a judge must not be abolished during	• The Tenure of the judge continues to be guaranteed	(9) The office of a judge must not be abolished

his or her tenure of office.	during his or her tenure of office."

3.6 Remuneration and Promotion of judicial officers

The Basic Principles on the Independence of the Judiciary add a very important safeguard. They provide that the promotion of judges requires that judges be subject to an objective process of promotion which looks at factors such as ability, integrity and experience.[43] The provisions dealing with promotion should be similar to that of appointment in the manner that it is conducted otherwise, it will simply become a carrot that is in the hands of the appointing authority.

The Amendment No. 2 of 2021 has however fundamentally affected the promotion/appointment process through the insertion of section 180 (4a). The Constitution now allows the President acting on the recommendation of the JSC to appoint sitting judges to vacancies in the higher courts, without subjecting them to the public interview procedure. Effectively the President now has the authority to promote a judge. The powers conferred on the President have the potential to affect the independence of the judiciary in three fundamental ways. Firstly, it will affect how these judges are perceived by court users and the public. The amendment may create an impression in the minds of the public that such appointees are executively minded or loyal to the President. It also takes away the potential for scrutiny and the evaluation of candidates, for promotion, that was afforded to the public by the interview process. The public interviews were an important accountability mechanism that helped the public build trust in the appointed officials. The confidence and trust are potentially lost through the section 180 (4a) appointment processes. Secondly, the possibility of being promoted without going through the rigors of a public interview might cause some judges to make pronouncements that they feel would endear them to the President in a bid to gain favour and the potential for promotion. So even without the prompting of the executive some judges may feel compelled to further the interests of government. Finally, the motivation for including such an amendment to the law must be examined. It cannot be ruled out that this amendment might be used by the executive as a carrot to be dangled in front of judges.

3.7 Judicial Accountability

Judicial independence is an important and integral component for ensuring that there are effective checks and balances for the exercise of power by the other two branches of government. It is absolutely imperative the judges be immune or at the very least be protected against potentially frivolous and vexatious accusations about their work, character and conduct. Judges should be at liberty to exercise their discretion without fear of retribution from the state or disgruntled litigants. However, unmitigated independence will invariably lead to impunity. An individual

[43]Principle 13, the *Basic Principles on the Independence of Judges*.

judge cannot hide behind the concept of independence to conduct themselves in a manner that's deplorable. As such, international law standards have evolved which seek to deal with the extent to which judicial independence can be checked. Judges must conduct themselves in accordance with a highest moral standard. The Bangalore Principles of Judicial Conduct are a set of values that were developed to guide the judicial officers' deportment. The Bangalore principles are the most extensive set of guidelines on judicial conduct and have been adopted by a number of countries and incorporated into national legislation. However, there are a number of other standards that are worth noting before considering what is set out in the Bangalore Principles.

The Principles and Guidelines adopted by the African Commission provide that judicial officers should not be subjected to civil or criminal proceedings for improper acts or missions in the course of their work or rather in the exercise of their judicial function.[44] The Principles and Guidelines go on to make note that judicial officers shall not be removed from office or subject to other disciplinary or administrative procedure by reason that their decisions have been overturned on appeal or reviewed by a higher judicial office.[45] Judicial officers in terms of the Principles and Guidelines may only be removed or suspended from office for gross misconduct incompatible with the judicial office or physical or mental incapacity that prevents them from undertaking their judicial duties.[46] The Principles and Guidelines emphasized that the principles of a fair hearing should also apply to judicial officers facing disciplinary suspension or removal proceedings.[47] The procedure for handling complaints against, or conducting disciplinary processes of a judicial officer should also be prescribed by law and complaints against judicial officers should be processed promptly, expeditiously and fairly.[48]

The Latimer House Principles in turn provide that judges should be subject to suspension or removal only for reason of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. The principles on the independence of the judiciary in principles 17 to 20 outline very key considerations for the discipline, suspension and removal of judicial officers, as follows:

> "Discipline, suspension and removal
> 17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
> 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
> 19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

[44] *Basic Principles on the Independence of Judges*, art. 4 (n)(i).
[45] *Ibid.,*4 (n)(i).
[46] *Ibid,,* art. 4 (p).
[47] *Ibid.*, art.4 (q).
[48] *Ibid,,* art. 4 (r).

> 20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."

A common thread that is apparent from the standard set in the various international norms is that the procedure for handling complaints against judicial officers should abide by the ordinary tenets of a fair trial. In other words, the process for the discipline, suspension and/removal of a judicial officer should be subject to the usual procedural safeguards. A decision to remove or suspend a judge should not be taken lightly and should be based on their incapacity to discharge their job. Confidentiality and expedience are of paramount importance when dealing with complaints or disciplinary processes of judges. The office of the judge should not be impaired as a result of charges brought against them.

In terms of the South African Constitution, in section 177 titled "Removal," a judge may be removed from office if the judicial Service Commission finds that the judge suffered from incapacity, is grossly incompetent or is guilty of gross misconduct.[49] The National Assembly can then call for a judge to be removed by resolution supported by at least two thirds of its members. Section 177(2) of the South African Constitution enjoins the President to remove a judge from office upon adoption of such a resolution. The president in this case does not have any discretion as they *must* remove the judge. The President is however given discretion when it comes to suspension of a judicial officer. Section 177 (3) provides that the President on the advice of the JSC *may* suspend the judge who is subject of a disciplinary process. The substance of the procedure for the disciplining of judges is elaborated in the Judicial Service Commission Act 9 of 1994.

The Kenyan and Zimbabwean Constitutions are more elaborate in setting out the removal process for judicial officers. The removal of a judge in Kenya is done in accordance with section 168 of the Constitution. Section 168 (1) sets out the grounds upon which a judge of the Superior Court may be removed from office. The list includes bankruptcy, incompetence, gross misconduct or behavior, breach of the code of conduct and inability to perform the functions of the office from mental or physical incapacity. The Kenyan Constitution has a very important safeguard contained in section 168(2) which provides that the removal of a judge may only be initiated by the JSC acting on its own motion or the petition of any person. Neither president nor the legislature has a voice in this process. The President is enjoined within 14 days of receiving a petition to suspend the judge from office and act in accordance with the recommendations of the Judicial Service Commission suspend the judge and call for the establishment of a tribunal.[50] Once a decision has been taken by the Tribunal, a judge who is aggrieved may appeal against the decision to the Supreme Court, within ten days after the tribunal makes its recommendations.[51]The removal of a judge in Zimbabwe is set out in section 187 of the Constitution, in similar fashion to the Kenyan version that came before

[49]Section 177(1) a, Constitution of the Republic of South Africa.
[50]Section 168 (5), Constitution of Kenya.
[51]*Ibid*., section 168 (8).

it, the first paragraph deals with the grounds upon which a judge may be removed. The Zimbabwean list however is limited or shorter than the Kenyan one and provides for removal only if the judge is incapable of performing their function due to mental health or physical incapacitation, gross incompetence or misconduct. A separate procedure is set out for the removal of the Chief Justice and that of other judges of the courts in the way that the claim or complaint against them may be initiated. Removal of the Chief Justice can be at the instance of the President[52] and all other judges (including the Chief Justice) only upon recommendation from the JSC.[53]Put differently, the executive can only play a part in initiating the removal of the Chief Justice and no other judge. In both cases, the President is enjoined to appoint a tribunal to inquire into the matter. Once the matter has been referred to the tribunal for investigation, the judge is suspended from office until the President, on the recommendation of the tribunal, revokes the suspension or removes the judge from office.[54]

An important value that is enshrined in the Basic Principles on the Independence of the Judiciary is that all disciplinary proceedings against a judicial officer should be determined in accordance with an established standard of judicial conduct. The Bangalore principles add to this conversation, guiding principles which define the conduct of judicial officers. The principles themselves point out in the preamble that they were designed to provide guidance to judicial officers and to afford the judiciary a framework for regulating judicial conduct. To this end, the Bangalore Principles have been used to develop or as a basis for national codes for judicial conduct. For example, the Zimbabwean Code[55] is based exclusively on the Bangalore Principles. They were also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. The Bangalore Principles are made up of 6 values, independence, impartiality, integrity, propriety, equality, competence and diligence, numbered 1 to 6 respectively. Each of the values is initially outlined as a principle, for instances, value 6 "Competence and diligence are prerequisites to the due performance of judicial office".Thereafter, the Bangalore Principles make an attempt to set out practical guidance on how each value should be applied.

3.8 Conclusion

The role that the judiciary plays is indispensable to the functioning of any modern democracy. The courts should at all times be seen as independent and impartial, their decisions should only be questioned on their merits and not the underlying motive. As such, it is important that the courts at all times be seen to operate in a manner that is above reproach. Furthermore, it is important that the courts appear to be insulated from influence by the other branches of the state. As such, the

[52]Section 187 (2), Constitution of Zimbabwe.
[53]*Ibid*., section 187 (3).
[54]*Ibid*., section 187 (10). Section 187 (10).
[55]On 15 June 2012 through Statutory Instrument 107 of 2012, the Judicial Service Commission promulgated the Judicial Service (Code of Ethics) Regulations 2012.

principles and norms that develop at an international level are an important starting point for developments at a national level. The norms outlined in this chapter are an indispensable starting point and as such should become the minimum upon which national standards and principles are built.

The existence of regulations, legislature or principles that guaranteed the independence of the judiciary or safeguard the judiciary from influence on their own are not enough. What is then needed are men and women of courage and valour who will be boldened by these standards and principles to effectively discharge their duties.

Chapter 4

The Administrative Framework for the Judicial Function in Zimbabwe

James Tsabora[1]

4.1 Introduction

Administrative frameworks for the judiciary have increasingly become significant in constitutional and democratic states that are built on the ideals of judicial independence, constitutionalism and the rule of law. Most states characterize these judicial institutional systems as judicial service commissions, acknowledging them as integral features of a constitutional state. There are several models of these judicial administrative systems, with each model seeking to achieve a particular set of goals etched in law. In contemporary constitutional democracies, the integrity of any preferred model derives not only from the nature of its mandate but also from the manner the whole administrative system establishes a support system for the delivery of justice, constitutionalism and the rule of law. The question therefore is whether the preferred design or model adequately promotes the ideals, values and principles relating to the judicial arm of the state which are embedded in the Constitution.

It must be noted that the institutional designs of judicial administrative systems can define the nature of interactions and relationships between the Judiciary and the two other arms of State (the Executive and the Legislature), which have their own distinct administrative systems suited to their functions. Each of these arms has mechanisms that enable them to lawfully relate to the other arms without compromising their autonomy. However, despite clear delineation of the framework for interaction and clear 'rules of engagement' among the three arms in the Constitution, the judicial administrative system remains a very possible playground for politics. The Executive and the Legislature can exert subtle force on certain pressure points of the judiciary, consequently undermining it. This leads to the second question – whether and in what manner is the judicial administrative system protected from unlawful and undue influence of the Executive and the Legislature.

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[1]LLB (Hons), University of Zimbabwe; LLM (University of KwaZulu-Natal, Durban, SA) & PhD (Rhodes, SA). Senior Lecturer in Law, University of Zimbabwe.

For Zimbabwe, the Judicial Service Commission of Zimbabwe (JSC) represents this judicial administrative system. It is positioned at the centre of the justice administration system. Its mandate is both regulatory and administrative and is therefore expected to promote constitutionalism by being independent, impartial, accountable and efficient. As an institutional system critical for justice, it is obligated to instil public confidence despite curious interrelationships that exist between it and the Executive. There are also certain aspects of its institutional design that raise concern, if not anxiety in relation to its justice administration mandate.

This Chapter explores these central questions in four parts. The first layer of analysis is the applicable legal framework for judicial administration in Zimbabwe, which is generally represented by provisions in the 2013 Constitution, the Judicial Service Act, the Judicial Service (Magistrate's Code of Ethics) Regulations (2019) and the Judicial Service (Code of Ethics) Regulations, 2012. This legal framework establishes the JSC institutional system and illustrates its structure, mandate, powers and limitations.

Within the legal framework are different strands of inquiry that will be analysed such as composition of JSC, the JSC role in judicial appointment, tenure of office and resource mobilisation among others. The second level of inquiry is the contribution of the JSC to judicial independence. Measured against international instruments and national legislation, there is need to assess how far the JSC has advanced the principle of judicial independence, which is central to constitutionalism, the rule of law and judicial integrity. The third and final part is an assessment of whether the JSC role has expanded, shrunk or remained the same since the passage of the 2013 Constitution in 2013. This inquiry focuses on whether spaces of influence have constricted or dilated due to constitutional and other legal developments that have taken place since 2013.

4.2 Why a Judicial Service Commission is Necessary?

A judicial administrative system provides the tools, instruments and environment for judicial officers to perform their work efficiently and effectively. The administrative system is thus responsible for establishing the support system for all judicial officers, particularly judges and magistrates. The support framework includes aspects of financial administration, human capital development, discipline and servicing and developing judicial infrastructure. In practical terms, the administrative system deals with virtually everything related to administrative activities except actual adjudication itself.

Under the Zimbabwean context, the judiciary administrative functions are shouldered by the Judicial Service Commission.[2] It is thus, first and foremost, an administrative body with administrative functions. However, in practice, the JSC has an advisory, supervisory, consultative and regulatory mandate. This mandate enables the JSC to create and sustain a suitable environment for the judiciary to

[2]The Judicial Service Commission was first introduced into Zimbabwe's Lancaster House Constitution by Constitutional Amendment Act No.23 of 1987 (the 7th Constitutional Amendment).

function efficiently in order to deliver on its constitutional functions.[3] As will be shown later, this means that the JSC's administrative role extends beyond mere provision of stationery and desks; it now extends to judicial selection processes through conducting public interviews and even making regulations governing the judiciary.[4] Further, and more substantively, the JSC is now the appointing authority for magistrates in Magistrates' Courts[5].

It appears that, in other countries the functions of judicial service commissions similarly extend beyond administrative duties as well. According to Manyatera and Fombad, the emerging trend is that judicial service commissions are becoming increasingly popular and an important feature of most judicial appointment systems in both civil and common law jurisdictions.[6] This means selection of judges for appointment has ceased from being the preserve of the Executive,[7] as most post-independence African constitutions provided.[8] Reliance on judicial administrative bodies such as the JSC directly constricts spaces for political patronage whilst allowing for the use of open and transparent mechanisms divorced from the Executive, or the Legislature in the judicial appointment process. However, all this depends on the surrounding or enabling political or governmental system. As Manyatera and Fombad concede, the existence of judicial service commissions do not necessarily translate to effective and transparent justice delivery by the judiciary; much depends on the composition and competencies of the commission,[9] with these commissions faring much better in political contexts which respect and uphold the rule of law.[10] Hence, the surrounding political and economic context is always the key and cannot be downplayed as an important determinant for effectiveness of these institutions.

Apart from their constitutional establishment, judicial service commissions are encouraged at the international level. An example is the Latimer House Guidelines on the Independence of the Judiciary, which states that the judicial service commission should be established by the Constitution or by statute, with a majority of members drawn from the senior judiciary.[11] Similarly, the Beijing Statement of Principles of the Independence of the Judiciary recognise the consultative role of judicial service commissions in making appointments and,

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[3]This was confirmed in the case of *Judicial Service Commission* v. *Ndlovu and Others* HB 172/13.

[4]*See* section 190(3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

[5]*Ibid*., section 182(b).

[6]*See* G.Manyatera and C.M Fombad, 'An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution', XLVII *CILSA* (2014) pp. 6-7. The authors cited the example of United Kingdom, United State of America, South Africa and some countries in Anglophone Africa as well as Latin American countries such as Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama and Paraguay.

[7] Prior to the 2013 Constitution, the Judicial Service Commission had been established in terms of Section 84 of the Lancaster House Constitution whose role was to be consulted by the President and recommend appointment and removal of judges.[7]

[8]H.K. Prempeh, 'Africa's constitutionalism revival? False start or new dawn?', 5:3 *CON*(2007) p. 492.

[9]Manyatera and Fombad, *supra* note 6, p8.

[10]*Ibid.*, p. 9.

[11] The Latimer House Guidelines on the Independence of the Judiciary (2008).missing information?

further, the need for such commissions to ensure judicial competence, integrity and independence.[12]

4.3 The 2013 Constitution and the Judicial Service Commission

In line with comparative constitutional practices, and with a view at improving from the Lancaster House Constitution, Zimbabwe made specific provisions for the Judicial Service Commission in the 2013 Constitution. This is clearly in line with the Latimer House Guidelines which require or encourage the establishment of a judicial service commission established by the Constitution or statute.

The Constitution dedicates Part Three of Chapter Six to the Judicial Service Commission. This part of the Constitution provides for the major features of the JSC in Zimbabwe's judicial system. Under this Part Three section 189 of the Constitution establishes the JSC and identifies its membership.[13]Section 190 outlines the functions of the JSC as follows:

> **"190 Functions of Judicial Service Commission**
>
> (1) The Judicial Service Commission may tender advice to the Government on any matter relating to the judiciary or the administration of justice, and the Government must pay due regard to any such advice.
>
> (2) The Judicial Service Commission must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and has all the powers needed for this purpose.
>
> (3) The Judicial Service Commission, with the approval of the Minister responsible for justice, may make regulations for any purpose set out in this section.
>
> (4) An Act of Parliament may confer on the Judicial Service Commission functions in connection with the employment, discipline and

[12] Article 15 of the Beijing Statement of Principles of the Independence of the Judiciary in the *LAWASIA* Region 1995.

[13] (1) There is a Judicial Service Commission consisting of—

(a) the Chief Justice;
(b) the Deputy Chief Justice;
(c) the Judge President of the High Court;
(d) one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court;
(e) the Attorney-General;
(f) the chief magistrate;
(g) the chairperson of the Civil Service Commission;
(h) three practising legal practitioners of at least seven years' experience designated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe;
(i) one professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such an association, appointed by the President;
(j) one person who for at least seven years has practised in Zimbabwe as a public accountant or auditor, and who is designated by an association, constituted under an Act of Parliament, which represents such persons; and
(k) one person with at least seven years' experience in human resources management, appointed by the President.

> conditions of service of persons employed in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court and other courts."

It can be argued that section 190(2) of the 2013 Constitution establishes the primary responsibility of the JSC, which is to "to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, and all the powers needed for this purpose." Interestingly, the provision asserts that the JSC '...has all the powers needed for this purpose'. Scanning the whole Constitution, this phrase is also used in relation to powers of local authorities.[14] There is need to define the scope of the power envisaged in these provisions.

Pertinently, it is contended that the provision recognises that the JSC has certain specified powers. However, section 190(2) appears to state that, a power exercised by the JSC does not end with listed powers only; the powers go beyond listed powers. Accordingly, to the extent that the JSC claims that its actions or a particular measure is meant to "promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe,"then the Constitution grants them the necessary power. In fact, the JSC can create structures, introduce certain rules and practises, and adopt new administrative procedures without ever needing to point to other provisions of the law. Section 190(2) of the Constitution grants the JSC enormous power. The power is limited only by the same section; if it can be proved that any action or measure adopted by the JSC is not meant to achieve the objectives in the section, then, the power must be exercised in terms of other provisions or other laws.

The implication of this kind of power is huge. Firstly, this power grants the JSC greater authority, prestige and confidence. As Prempeh echoes this prestigious evolution of judicial power in African states, and asserts;

> "Africa's judiciaries, long considered marginal to the course of national events and politics, have also emerged from the current democratic and constitutional reforms with far greater prestige, authority, and confidence than they have ever enjoyed in the Africa's postcolonial history".[15]

Indeed, it means that the JSC does not have to wait for the Legislature to pass laws granting certain powers that are specific. Further, it means that the JSC does not have to look over its shoulder when it adopts a particular measure, or when it takes certain actions in fear of being sued, challenged or pilloried. Most importantly, the JSC does not have to look up to the Executive to determine how and when to act. It has all the necessary powers to act. All it needs to demonstrate is that its actions

[14] In terms of section 276 of the Constitution, "a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established and has all the powers necessary for it to do so".

[15] H.K. Prempeh, 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa', 80:1 *Tulane Law Review* (2006) p. 7.

are meant to promote and facilitate the independence of the judiciary.[16]A contrary approach is akin to abdication of responsibility.[17]

Another important feature, in section 190(3) of the Constitution, is the granting of law-making powers to the JSC. Under this provision, the Judicial Service Commission, *with the approval of the Minister responsible for justice* may make regulations. Two issues arise in this provision. That the JSC must prove that the issues covered in their regulations are not outside the ambit of section 190 of the Constitution.

Secondly, that section 190(3) of the Constitution grants the JSC delegated law-making power, exercisable in accordance with the parameters and limits of section 134 of the Constitution. Constitutional limitations to this power include the requirements that regulations by delegated agencies must not infringe fundamental rights and freedoms; must be consistent with the Acts of Parliament under which they are made; must be published in a government gazette; must be laid before the National Assembly and scrutinized by the Parliamentary Legal Committee for constitutional consistence. Currently, the Judicial Service Act outlines the exact nature of regulations that can be adopted by the JSC.18 It is stated that most of the areas covered under section 25 of the Judicial Service Act are envisaged under section 190(4) of the Constitution. The JS Act is envisaged by section 190(4) of the Constitution as the legislation that "confers on the Judicial Service Commission functions in connection with the employment, discipline and conditions of service of persons employed in the higher courts."

What is the nature of provisions on the Judicial Service Commission? The location of the JSC in the Constitution is important; thus, the nature of the provisions that establishes this institution must be defined. For the first time in Zimbabwe's constitutional history, the Constitution recognises that some of its provisions require a harder method of amendment than others, under a doctrine commonly known as 'entrenchment'. The concept of constitutional entrenchment connotes inclusion of provisions in the Constitution that are deliberately and exceedingly difficult to amend. These provisions are thus different from other provisions that require the ordinary processes of amendment. Unlike the 'entrenched' provisions, the provisions on the JSC are not entrenched in the

[16]Arguably, the powers granted to the JSC in terms of section 190(2) of the Constitution are comparable to the powers granted to the President and Cabinet under section 110 of the Constitution, and also those granted to Parliament under section 119 of the Constitution. Section 110 provides that "[t]he President has the powers conferred by this Constitution and by any Act of Parliament or other law, including those necessary to exercise the functions of Head of State", whilst section 119(2) provides that "Parliament has power to ensure that the provisions of this Constitution are upheld and that the State and all institutions and agencies of government at every level act constitutionally and in the national interest."

[17]*See* C.A. Odinkalu, 'The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the Failure of Post-Independence Bills of Rights', 8 *African Society of International and Comparative Law* (1996) pp. 136-37. Odinkalu argues that "[t]he first generation of the Constitutions and Bills of Rights in Common Law Africa was destroyed not so much by the intolerance of the executive as by the enthusiastic abdication of judicial responsibilities by the persons and institutions mandated under those Constitutions to perform them, coupled with a readiness".

[18]*See* section 25 of the Judicial Service Act *[Chapter 7:18].*

Constitution of Zimbabwe. This means that the JSC provisions are subject to the ordinary constitutional amendment process. Amending the provisions of section 190 of the Constitution only require 90 days-notice, public input and a two-thirds majority vote in parliament to be changed, an easy task if a ruling political party commands more than two-thirds majority in Parliament.

It is also important to state that the functions and responsibilities of the JSC should be understood in the context of the whole Constitution. This is because, unlike other commissions in the Constitution, the JSC is an institution that directly safeguards democracy, constitutionalism and the rule of law. In this regard, the fact that JSC is responsible for facilitating and promoting judicial independence, impartiality, integrity as well as effective and efficient delivery of justice means that its work must be informed by the founding values and principles stated in section three of the Constitution. In particular the following values and principles are key; the supremacy of the Constitution, the rule of law, fundamental human rights and freedoms, equality of all human beings, good governance and transparency and accountability. It may be asked how the legal framework for the JSC enables it to do this.

4.4 The JSC and the legal framework

The Constitution grants the JSC clearly the power to drive and implement judicial reforms.[19] However, as has been highlighted above, the mandate of the JSC to make regulations has to be exercised with the approval of the Minister of Justice.[20] When the JSC was first established under the Lancaster House Constitution, it had no secretariat and had to meet only when the need arose.[21] Despite this, there were a number of developments between 2006 and 2013 that positively enhanced its justice delivery mandate. These include its important role in pushing for the passage of the Judicial Service Act in 2006, the adoption of the Judicial Service Regulations in 2015, the Judicial Service (Code of Ethics) Regulations in 2012 and the Judicial Service (Magistrate's Code of Ethics) Regulations in 2019. These statutes were necessary in giving effect to the mandates and functions of the JSC, and most importantly in promoting judicial independence. A short analysis of some of these laws is therefore apposite.

The Judicial Service Act *[Chapter 7:18]* was passed in 2006, giving effect to section 91(1) of the old Lancaster House Constitution. Quite evidently, the JS Act predates the 2013 Constitution. Section 5 (1) of the Act outlined the functions of JSC to include fixing conditions of service, administering and supervising the judicial service, appointing persons and exercising disciplinary powers among other functions. Clearly, the Act predated the 2013 Constitution and needed to be aligned; this was done under the General Laws Amendment Act 3 of 2016, which

[19] *See* G.G. Chidyausiku, 'The Role of Judicial Service Commissions in Enhancing Judicial Independence and Ensuring the Right to a Fair Trial', 27 -30 August 2015, paper presented during the *Southern Africa Chief Justices Forum Annual General Meetings and Conference* (2015) p. 4.

[20] Section 190 (3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

[21] Chidyausiku, *supra* note 19, p.4.

clearly captured the functions of the JSC as currently reflected in section 190 of the Constitution.[22] Consequently, and subject to the provisions of the Constitution, the Act now emphasizes the JSC role of promoting and facilitating the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice in Zimbabwe, as espoused in Section 190 of the Constitution.

In the same light, the Judicial Service (Code of Ethics) Regulations were passed in 2012, and similarly predate the 2013 Constitution. The Judicial Service Regulations, 2015 are guided by the Constitution as they post-date the Constitution. It is argued that this set of Regulations is one of the key achievements of the JSC to date; they establish a comprehensive framework on procedures for appointment and recruitment of judicial members, performance, resignation, termination of employment and salaries. Generally, under the Regulations, in order to promote efficiency and effectiveness, the JSC is required to recruit members with knowledge and ability about the task, relevant experience and requisite qualifications and qualities.[23] Therefore, recruitment is based on merit.[24] On disciplinary issues and procedures,[25] the important aspect is what constitutes acts of misconduct. Some of the acts of misconduct include absence from duty, failure to perform duties, negligence, inefficiency or incompetence, sexual harassment and corruption or dishonesty.[26]

There is no doubt that the Regulations illustrate that the JSC has made significant efforts, at least from a legislative perspective, to contribute to judicial independence, impartiality and integrity. The language used in the regulations is also in accord with international soft law principles and guidelines on judicial service commissions and judicial independence.[27]

The approach at codifying ethical principles is evident in the Constitution, and specifically relates to several other state organs and institutions. For instance, section 106(3) of the Constitution requires passage of an Act of Parliament to 'prescribe a code of conduct for Vice-Presidents, Ministers and Deputy Ministers.' Similarly, section 139 of the Constitution requires Standing Orders for parliamentarians to provide for 'a code of conduct for Members of Parliament'. Further, section 287 of the Constitution requires an Act of Parliament to 'provide for the establishment, membership and procedures of an Integrity and Ethics Committee of Chiefs' whose functions include 'developing and enforcing integrity and ethical conduct on the part of traditional leaders'. Apart from impacting on these three primary organs of the state and government, several other provisions in the Constitution call for these codes in relation to other state agencies, public

[22] *See* Part XV of General Laws Amendment Act No. 3 of 2016.

[23] Section 3 of the Judicial Service (Code of Ethics) Regulations, 2012.

[24] *Ibid*., Section 3 (2).

[25] *Ibid*., Sections 24 -25.

[26] *Ibid*., Section 4.

[27] The Bangalore Principles of Judicial Conduct, 2002; Latimer House Guidelines, *supra* note 11.

officers and institutions.[28]However, despite these clear constitutional provisions, the JSC is one of the few institutions that have developed these codes of ethics, further reflecting the significance of the code to judicial independence, integrity and judicial accountability.

4.5 Judicial Administration and judicial independence

It has been stated that one of the functions of the JSC is to 'promote and facilitate the independence and accountability of the judiciary'. The independence of the judiciary is guaranteed in section 164 (1) of the Constitution, which states that the courts are independent and subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice. The Constitution further recognises that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance.

In this vein, it is evident that the JSC should be not only at the centre of promoting judicial independence, but also play an important role in the achievement of the rule of law and democratic governance. As with judicial independence, the rule of law is also a key pillar of a democratic society and if the rule of law is to be upheld, it is essential that there should be an independent judiciary to scrutinise the actions of government and ensure they are lawful.[29] The force of these twin principles is recognised in the Bangalore Principles of Judicial Conduct. In terms of these Principles, a competent, independent and impartial judiciary is essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.[30]

A conceptual analysis of judicial independence is done by Manyatera in one of the preceding chapters of this book. However, the concept must be briefly outlined order to fully assess how the JSC can and has contributed to judicial independence. The independence of the judiciary is pivotal to the protection of human rights[31]and instrumental in the pursuit of constitutional values and the rule of law.[32]As a starting point, judicial independence was one of the concepts associated with the separation of powers doctrine in the writings of the French jurist, Montesquieu in the second half of the 18th century.[33]The basic importance of judicial independence is that it is a balancing power on the exercise of power by the other two arms of government, namely the executive and the legislature.[34]

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[28]*See* for instance, provisions on independent commissions established in terms of Chapter 12 of the Constitution; section 236 of the Constitution on codes for political parties and candidates; and section 237 affecting public officers.

[29] Lord Phillips, 'Judicial Independence', <www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf>, visited on 2 May 2021.

[30]Bangalore Principles, *supra*, note 27 above.

[31] L. Chiduza, 'Towards the Protection of Human Rights. Do the new Zimbabwean Constitutional Provisions on Judicial Independence Suffice*"* 17 *PER/PELJ* (2014) p. 1.

[32]J. Ferejohn, 'Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary', <www.usc.edu/dept/law/symposia/judicial/pdf/ferejohn.pdf>, visited on 13 March 2021.

[33]*See generally*, O. C. Ruppel, *'*The role of the Executive in Safeguarding the Independence of the Judiciary in Namibia',
<www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/ruppel.pdf>, visited on 2 April 2021.

[34]N. Horn and A. Bosl (eds.), *The Independence of the Judiciary in Namibia* (10 Konrad Adenauer Foundation, (Macmillan Educational Namibia, 2018).

In principle this means that some constitutional guarantees and safeguards are important to protect the judiciary from interference by the executive. In that regard, the words of Judge 'O' Linn in the Namibian case of *S* v. *Heita* are most apposite. The learned judge stated that;

> "… the judiciary has no defence force or police force. They are not politicians. They cannot descend to the arena to defend themselves…. precisely because they cannot protect themselves, unscrupulous persons may exploit this weakness by scandalizing the court…"[35]

At the international level, judicial independence has been recognised in many instruments, and the emphasis has been on the need for competent, independent and impartial tribunals or courts.[36] Elsewhere in this book, Penduka addresses the key principles and norms that have cascaded from international law into the Zimbabwean system. These principles are largely reflected in the provisions of relevant legislation such as the Judicial Service Act and several regulations made under it. However, there is need to appreciate these international principles in the context of the components of judicial independence. In general, judicial independence has been characterised as having two components or two separate pillars, namely institutional independence and individual independence.[37] It manifests itself through several essential indicia that include security of tenure, integrity, impartial judicial appointments and dismissal mechanisms as well as ability of the judiciary to manage its own budget and administration of the courts.[38]On financial matters, a restricted budget for example can create inefficiency and affect independence and this will eventually cause manipulation of the judiciary by the executive.[39]

However, it has been stated there is an exception to the rule of judicial independence which exists for purposes of facilitating the achievement of the mandate of the judiciary.[40] The exception is the requirement that the state should take measures to protect the judiciary. In fact, the executive is legally obliged to protect the judiciary.[41]Ferejohn candidly stated that, even if judges enjoy some insulation from political intrusions, the Constitution ensures that the institutions, within which they work, that is, the courts, remain remarkably dependent on

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[35]*S* v. *Heita* (1992) 3 SA 785 (NmHC).

[36]*See* Article 19 of the Universal Declaration of Human Rights 1948, Article 14 of the International Covenant on Civil and Political Rights 1966 and Article 7 of the African Charter on Human and Peoples' Rights. The treaties recognise the right of every person to equality and to a fair and public hearing by an independent, competent and impartial tribunal or judiciary established by law.

37International Bar Association, 'Beyond Polokwane: Safeguarding South Africa's Judicial Independence', 20 July 2008, <www.ibanet.org/Article/Detail.aspx?ArticleUid=B2397A56-9D7C-4990-9B57-2749409604A5>, visited on e 3 March 2021.

38See M. Diibotelo, 'Importance of Appointment Procedures in ensuring judicial Accountability and Independence of the Bench', paper presented during The Southern Africa Chief Justices Forum Annual General Meeting and Conference held at Victoria Falls from 27 – 30 August 2015.

39Ruppel, supra note 32, p. 224.

40 Ibid., p.219.

41Ibid.

executive power-wielding officials.[42]This is because the courts rely on parliament and government for implementation of judicial decisions, allocation of funds and passage of laws. This portrays a necessary linkage between the judiciary and the executive. If the limits and scope of this necessary linkage are not not properly established, the legislature, for instance, can interfere with judicial independence by passing legislation to limit the jurisdiction of the courts if they feel threatened.[43] It is however this reality that has made scholars question the capacity of African judiciaries 'to reconfigure, horizontally or vertically, the distribution of power and authority within the postcolonial state'.[44] These conceptual complexities of judicial independence must be appreciated by the judicial administrative bodies in constitutional democracies such as Zimbabwe. Such appreciation strengthens the judicial administrative bodies in its role of facilitating and promoting judicial independence and accountability.

4.6 The contribution of the JSC in promoting judicial independence

As demonstrated above, the concept of judicial independence has significant meaning and relevance for promoting the rule of law and constitutionalism in Zimbabwe. To reiterate, the JSC is supposed to promote the practical application of Section 164(1) of the Constitution which states that courts are independent and are subject to the Constitution and law which they must apply impartially, expeditiously and without fear, favour or prejudice. It can also be argued that under section 164 (2) (a), the state is required not to interfere with the functioning of the courts, and the JSC has an implicit duty to ensure this is the case. Further, given its administrative functions to make the judiciary operate efficiently and effectively, the JSC has a clear duty to ensure, in terms of section 164 (2) (b), that the State assists and protects the courts to ensure their independence and well-being. This, the JSC can do by approaching the state on behalf of the judicial officers for adequate facilities and amenities, including salaries, administration costs, and other necessary arrangements.

In terms of section 165, the JSC has an implied duty to ensure that its members follow the guiding principles related to judicial independence such as not to engage in any political activity or accept or solicit any gift, loan or favour that may influence their judicial conduct.[45] The exact objective of these principles is in keeping with the integrity approach espoused in the Constitution as critical for state organs and public officers.

42Ferejohn, supra note 31, p. 6.

[43] During the height of the land invasions and land reform programme in Zimbabwe between 2000 and 2006, government passed Constitutional Amendment No. 17, which inserted Section 16B in the Lancaster Constitution. Several provisions of this constitutional amendment found their way into Section 72 (3)(b) in the 2013 Constitution which ousts the jurisdiction of the courts. The controversy created by this judicial ouster is well expressed in the case of *Commercial Farmers Union* v. *Minister of Lands and Others* 2000 (2) ZRL 469(S).

[44]H.K. Prempeh, 'Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa', 80:1 *Tulane Law Review* (2006) p. 7.

[45] Section 165 (5) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

As indicated already, the adoption of the Judicial Service Act, the Judicial Service Regulations, the Judicial Service (Code of Ethics) Regulations and the Judicial Service (Magistrates' Code of Ethics) Regulations has been made in order to enhance the mandate, role and responsibility of the JSC under the Constitution. There are many provisions in these Acts that have a direct bearing on judicial independence and those provisions are an expression of the commitment of JSC towards promoting judicial independence. These include personal and institutional independence, integrity, impartiality and competence and diligence.[46] Other important aspects related to judicial independence relate to the need to curb corruption, dishonesty and involvement in political activities.[47] These are similar to the principles expressed in section 165 of the Constitution. Accordingly, it can be stated that, by including these values and principles as part of the ethical framework binding members of the judiciary, the JSC's constitutional mandate of promoting judicial independence is made easy.

4.6.1 Composition of JSC and judicial independence

The composition of the Judicial Service Commission has great implications on the achievement of its goals, and the promotion of judicial independence, both in theory and practice. Theoretically, if the JSC is not composed of fit and proper persons or is not properly packed with the right personnel, it will stutter in combating threats to judicial independence. A corrupt and compromised JSC is likely to play the role of 'enabler' to unwarranted and illegal executive interference in judicial activities and decisions. In this vein, Madhuku correctly notes that the independence of the JSC determines the extent to which the appointment of judges is free from the caprices of politics.[48]

In terms of composition, Section 189 (1) of the Constitution states that the JSC is made up of the Chief Justice, Deputy Chief Justice, Judge President of the High Court, one judge nominated by other judges, Attorney-General, Chief Magistrate, Chairperson of the Civil Service Commission, three practicing legal practitioners, one professor or senior lecturer of law, a public accountant and a person with human resources experience. The Chief Justice presides over the meetings of the Judicial Service Commission.[49] Section 189(3) of the Constitution states that, some members of the JSC will serve for only one non-renewable term of six years. Those that serve one term include the judge nominated by other judges, legal practitioners, law professor or lecturer, public accountant and human resources person.

An analysis of the composition of the JSC shows that there has been an attempt to promote diversity in terms of representation of various interests. Further, the inclusion of the representatives of the senior members from the judiciary and the independent legal profession goes a long way in ensuring judicial

[46] Section 4 of the Judicial Service (Code of Ethics) Regulations, 2012.

[47] *Ibid*., Section 5 (3) .

[48] L. Madhuku, 'title of paper?', *Journal of African Law* (2002) p. 238.

[49] Section 189 (2) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

independence, integrity of the judicial sector and impartiality of judges and magistrates. Manyatera and Fombad, rightly note that such a composition might augur well for assessment of judicial candidates as most of the members are well placed to critically scrutinise the suitability or otherwise of the candidates to the judicial office.[50]

Apart from these observations, however, there are several issues that may in practice affect decisions of the Judicial Service Commission to effectively promote judicial independence, even if it is mainly composed of lawyers. The first issue is that the there are two opportunities for Presidential appointment of members of JSC. These include the human resources person in term of Section 189(1) (k) and a possible appointee by the President from the academic field in terms of Section 189(1) (i). Section 189(1)(i) states that one professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such as association, appointed by the President. What is worrying about this provision is that it is possible that such an association might not exist. If that is the case, then the President will make an appointment of a senior law lecturer or a professor to sit in the JSC for a period of six years. Section 189(1)(i) and (k) are just a simple indication of how it is virtually impossible to completely exclude political appointments to the JSC.

The second point arising from Section 189 in relation to nominations by associations is that it is not clear what criteria the associations will use within their internal systems to select members who will sit in the JSC. Both the Constitution and the Judicial Service Act appear to be silent on the qualities and abilities of members that may be chosen to represent their associations in the JSC. The importance of this is that, given the crucial role the JSC is supposed to play in the appointment, removal and administration of justice, the qualities of people who should be chosen by the associations to sit in JSC should also fit within the framework of what is called a fit and proper person.

The third and somehow worrying point is that, as in other countries, the Chief Justice is the Chairperson of the JSC. The Chief Justice already has other responsibilities. At the moment, he is the head of the Supreme Court and the Constitutional Court among other functions. There is too much concentration of powers in one individual, and there is a high chance of him failing to effectively fulfil his duties. He can also hold too much sway over other members, especially in cases where he has proximity to the Executive. In practise, the Chief Justice has so much power to drive judicial policies even where the majority of members of the JSC dislike such policies. A powerful Chief Justice may however be a good option where an independent judiciary needs to resist and soak in the pressures from the Executive and other sources. However, he is a bad prospect where that power grants him opportunities to bully and whip into line subordinate judges, members of the JSC, and even the Law Development Commission, where s/he is chairperson, for personal or executive interests. Granting the Chief Justice *ex officio seat* in the

[50]Manyatera and Fombad, *supra,* note 6, p.18.

JSC, or alternatively, a non-chairing position therein may reduce the enormous powers that reside in this office.

Comparatively, the composition and leadership of the JSC under the South African system is more controversial; the members of the JSC are heavily weighted with Presidential and parliamentary appointees. This makes the JSC too politically oriented.[51]Section 174 (4) of the South African Constitution clearly states that the 'judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly'. Section 173 (3) is curiously worded as follows:

> "The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal."

In essence, this means that the President consults the JSC and political party leaders in Parliament in the appointment of the Chief Justice and Deputy Chief Justice. The appointment of the President and Deputy President of the Supreme Court of Appeal also requires the President to consult the JSC in South Africa. The consultative role of the JSC is retained in the appointment process. However, there is no such role in the appointment of other judges of the Constitutional Court. Section 174 (4) states that the JSC role extends to preparing a list of nominees with three names more than the number of appointments to be made, and submitting the list to the President.[52]

The justification for this rather controversial route is the pursuit for a multistakeholder approach. Consequently, the South African JSC is made up of representatives of the judiciary, legal profession, including attorneys, academics, advocates, political parties represented in parliament, members of the national and provincial executive and presidential appointees.[53] Commenting on the composition of the South African JSC, Magaisa stated that it is a system that says democracy is about majority rule, but it also considers the interests of the minority and recognizes the importance of skills and expertise.[54] This is a sober assessment of the South African position; it raises the risk of political-party based decision making, and which, consequently, can taint the appointment process.

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[51] E. Camer, 'Judicial Selection Process', <www.courtingjustice.com/judicialselection.html>, visited on 4 April 2021.
[52]*See* L. Siyo and J.C. Mubangizi, 'The independence of South African judges: A constitutional and legislative perspective', 18:4 *PER* (2015) p. 822.
[53]*See* Democratic Governance and Rights Unit, '*Judicial Selection in South Africa*', available at <www.dgru.uct.ac.za/usr/dgru/...judicial%20selectionoct2010pdf>, accessed 9 May 2021.
[54]A. Magaisa, 'Does the public have a role in Zimbabwe's new Judicial appointment process?', <alexmagaisa.com/does/-the-public-have-a-role-in-zimbabwes-new-judicial-appointments-process/>, visited on 30 February 2021.

4.7 The JSC and judicial appointment

The JSC plays a critical role in the appointment of judicial officers. This is a critical role since the appointment of judicial officers has a great bearing on judicial independence. Theoretically, there are several threats to judicial independence that may be brought about through the mechanics of the judicial appointment process. Executive controlled judicial appointments mostly result in "court packing", whilst a poor system fails to ensure appointment of qualified, professional and suitable candidates to judicial office. The International Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recommend that an independent body should be entrusted with selection of judicial officers.[55] There are a wide variety of judicial appointment mechanisms across the world which reflects different levels of adherence to the concept of judicial independence.[56] In the USA, for example, the President appoints judges, and these are then subjected to interrogation by the Senate. During apartheid in South Africa, the courts were packed with political appointees; prosecutors and judges had to follow the direction of the incumbent leaders and deal with enemies of the apartheid regime.[57]

As stated already, the Latimer House Guidelines makes it clear that constitutional systems should have an appropriate independent process in place for judicial appointments and that appointments should be made by a judicial service commission and should be based on merit,[58] while judicial positions are also advertised.[59] What this boils down to is that, to secure judicial independence, judicial appointments should be made on the basis of clearly defined criteria and a publicly declared process to enhance equal opportunity.[60] On tenure, the UN Basic Principles state that once a person is appointed as a judge, their tenure should be guaranteed until mandatory retirement age or expiry of their term of office. Therefore, security of tenure is an important factor in promoting judicial independence.

The existence of this body of law illustrates that there is a comprehensive body of soft law that establishes principles and norms that the JSC can use in its functions. This means that the JSC can find guidance from both domestic legislation applicable to it, and international normative frameworks that are relevant to its work. The appointments are in terms of the Constitution and the Judicial Service Act. There is an interesting framework for the appointment of judges, and this must be briefly illustrated.

Section 180(1) of the Constitution provides for the appointment of all judges, including the Chief Justice, the Judge President and judges of other superior

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[55]Chiduza, *supra* note 30, p 376.

[56]G Ginsburg and I.Garoupa, 'The Comparative Law and Economics of Judicial Councils', 27:1 *Berkeley Journal of International Law* (2008) p. 53.

[57]Diescho, *supra* note 2, p. 35.

[58]Principle II of Annex of the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003), and*see also* Principle 12.3 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010).

[59]Latimer House Guidelines, *supra*, note 12.

[60]*Ibid*.

courts. However, due to amendments to the Constitution, there are now two systems of appointment. The first one is stated in section 180(1), and covers the appointment of ordinary judges, apart from the Chief Justice, the Judge President and the Deputy Chief Justice. According to this provision, in the appointment of judge, the JSC must *advertise* the position and *invite the President* and the *public* to make nominations. Thereafter, JSC is required to prepare a list of three qualified persons as nominees and submit the list to the President whereupon the President must appoint one of the nominees. However, if the President considers that none of the persons on the list submitted by the JSC is suitable for appointment, he must require the JSC to submit a further list of three qualified persons from which the President must appoint one of the nominees.[61]

There is debate as to meaning of these provisions. Two interpretations are possible regarding the requirement to submit three names. The first is the literal interpretation in which JSC prepares a list of three names and the President chooses one judge to appoint from that list. The provisions definitely had in mind a case of one judicial vacancy not several vacancies. Going by a literal interpretation implies that for every vacancy, the JSC must submit three names. Consequently, based on this interpretation, if there are ten (10) vacancies, the JSC prepares a list of thirty (30) nominees. It is difficult to accept that this is the intention of the provisions since there is a high chance of absurdity which may not have been intended by the constitution makers. For instance, since the President can reject the list submitted to him, s/he can reject the thirty nominees submitted for the ten vacancies, based on the above hypothetical case scenario. Clearly, this interpretation may not accord with the mischief intended to be cured from the Lancaster House Constitution, which is to check and whittle down the powers of the President in judicial selection. Arguably, the list of three nominees for a vacancy envisaged a situation where only a single vacancy needs to be filled.

A second interpretation that serves the purpose of ensuring judicial selection whilst limiting executive powers in the process exists. In terms of the second interpretation, the JSC must identify the number of vacancies to be filled and must prepare a list of the number of candidates required plus two additional names. A purposive interpretation clearly implies that the formulae for the number of nominees to submit where there are multiple vacancies is to have two additional nominees to the number of vacancies or posts available. It is submitted that the 'plus two' approach is the principle implicit in section 180 of the Constitution, which in essence requires the JSC to submit three names, that can be broken down to two names plus the single vacancy needed to be filled. This implies that, where there are five posts to be filled, the JSC can submit to the President a list of seven names. In practise, this means that when the President picks one suitable nominee from the list, there are always two or more names remaining on the list. This interpretation makes judicial interviews less cumbersome and less laborious than the first

[61]Section 180(3) of the Constitution of Zimbabwe.

interpretation. Importantly, it is an interpretation that is consistent with the need to check or limit executive discretion in judicial selection.

A justification of the second interpretation can be found in other parts the Constitution where comparable appointments are made. Section 254(1)(b) of the Constitution requires the President to appoint eight commissioners of the Zimbabwe Anti-Corruption Commission from a list of not fewer than twelve nominees submitted to him/her by the Committee on Standing Rules and Orders. In terms of section 237 (1)(d) of the Constitution, the President is required to appoint commissioners of independent commissions from 'a list of the appropriate number of nominees for appointment'. From these two parts of the Constitution, there is the intention of limiting the excessive free play of the President's hand. It is submitted that the second interpretation is more consistent with the constitutional principles aimed at the limitation of executive power.

Another interesting development impacting on the role of the JSC was introduced by Constitutional Amendment Number 2. This amendment excluded the public interview process in the appointment of the Chief Justice, the Deputy Chief Justice and the Judge President. It also removes the public interview process from the appointment of a sitting judge to the next higher court.[62] The removal of public interviews for the Chief Justice, the Judge President and the Deputy Chief Justice grants the JSC a limited, consultative role. The JSC is now only consulted in the appointment of these offices. This position is a return to the Lancaster House Constitution which gave the JSC only a consultative role, instead of an advisory role. For a sitting judge promotion to the next higher court, the President acts on the recommendation of the JSC, which is a more useful role than the consultative role.[63]

4.7.1 Advertisement of positions

The first issue to note is the requirement that the JSC should advertise the vacant position of a judge. This is a mandatory duty.[64] Clearly, this is a positive development since this is underpinned by transparency, whilst meeting internationally accepted standards.[65]Advertising has been hailed as vital in that it opens the door to a wider group of potentially qualified persons.[66] Advertisement means competition, and competition might improve the chances of selecting the best candidates. Since 2014, the JSC has openly advertised vacancies for judges, of the High Court, Supreme Court and the Constitutional Court. The adverts are widely circulated and flighted in the private and public media, as well as social media. In essence, the adverts invite members of the public to nominate suitably qualified persons to fill the positions of a judge of these courts. Members of the public who intended to nominate

[62]Section 180 (4) of the Constitution.

[63]The term 'consultation' is defined in section 339 of the Constitution to mean that the person who seeks consultation is 'not obliged to follow the recommendations made by the other person'.

[64] Magaisa *supra*, note 52.

[65]Principle II of Annex of the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003) calls for advertisement of judicial positions; see also Principle 12.3 of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010).

[66]Democratic Governance and Rights Unit *supra*, note 51, p.26.

candidates were advised to obtain nomination forms from the offices of the Judicial Service Commission in Harare, or the offices of Provincial Magistrates in the Provinces and also online from the JSC website. This was another progressive and transparent public relations exercise by the JSC.

It must be noted, as shown above, that Constitutional Amendment Number 2 removed advertisements and the interview system in the appointment of sitting judges to the next higher court. This has benefitted sitting judges from the High Court, the Supreme Court, the Administrative Court and the Labour Court. Constitutional amendment number 1 removed advertisements for the position of the Chief Justice, the Deputy Chief Justice or the Judge President.

From these provisions, the role of the JSC comes into focus. Clearly, the two amendments do not strengthen or expand the role of the JSC. Their combined effect is to reduce the spaces for the influence of the JSC, giving it a consultative and not advisory role. Without doubt, the consultative role whittles the powers the JSC possessed in 2013, since it was mandated to interview these persons first before appointment. Secondly, the consultative role of the JSC in the appointment of sitting judges is a limited space since the President can ignore the recommendations given and act in terms of his/her wishes. It has however been argued that the consultative role granted to the JSC is good enough; the JSC can initiate a process of making the recommendations for the President to act upon. Further, it has been argued that there is no need to continually subject sitting judges to interviews for promotion to higher courts since they were interviewed at entry. Optimists assert that the President must have the power to promote whomsoever s/he wishes, acting on JSC recommendations, and in doing so, is likely to promote experienced, well qualified and suitable judges. Whilst there is some merit in these assertions, it remains beyond doubt that the role of the JSC is trimmed or diluted, at best, especially considering the enormous powers it wielded before the amendments.

4.7.2 Nominations by the President and the Public

The requirement that the JSC should invite the President and the public to make nominations has also raised eyebrows.[67] In essence, the Constitution requires the JSC to invite the President and the public to make nominations. There is no procedure on how the President is invited, or how s/he submits his/her nomination for consideration. There are several questions that arise, for instance, whether the President is separately invited, or s/he is invited through the public notice inserted in the media that is meant for members of the public. Critically, in what form does the President submit his/her nomination, and how is his/her nomination filed? Is there a requirement for the JSC to separately file the President's nomination, or give the President reasons if in the opinion of the JSC, the President's nominee is not suitable for interviews?

Without doubt, there is no clarity on these issues, and this contradicts the principle of transparency that is ingrained in the constitutional provisions on judicial

[67]Section 180(2)(b) of the Constitution.

appointments. What has to be guarded against is an opaque process where the JSC receives the President's nomination in full knowledge that it is the President's nomination. Chiduza rightly contends that this provision is alarming.[68] In general, the fact that the Constitution requires a specific invitation to be made to the President puts the JSC in an invidious position. It is submitted that if the provisions had required the JSC to invite the public only, nothing would have barred the President from submitting his/her nominations. The real danger that exists in the current provisions is that, where the JSC consciously receives a Presidential nomination, there is a high chance that the nomination will be separately filed and dealt with differently, and a high chance that the nominated candidate will make the shortlist for interviews. Magaisa aptly stated that the situation creates a moral hazard, which he called the risk that the appointing authority is more likely to prefer his/her own nominees for appointment over those by the public.[69] The pressure on the JSC to shortlist the Presidential nominee is massive. Magaisa cautions against this, and recommends a transparent procedure that guarantees fairness, impartiality and that gives equal opportunity to all candidates regardless of the source of their nomination.[70] Indeed, as Magaisa advocates, there is need for a merit-based nomination approach where there is disclosure of the source of nomination and all other information about the candidates, including their personal background, qualifications, and track records.[71] The moral hazard and pressure that is visited upon the JSC is neither necessary nor justified.

4.7.3 Short listing for Public Interviews

The JSC is required to consider applicants that meet the listed criteria and then carry out public interviews of the prospective candidates.[72] The constitutional provisions do not mention shortlisting – however, it is submitted that the JSC can actually shortlist candidates as this is implicit in the appointment process under section 180. Further, this is standard practice in appointment processes; the JSC is allowed to conduct vetting, selecting, screening or shortlisting candidates through other means such as preliminary psychometric tests. It is submitted that this approach safeguards judicial independence, and ensures that the best candidates are selected, thereby ensuring 'efficient, effective and transparent administration of justice in Zimbabwe'.[73] It is submitted that the pre-appointment procedures are critical, and failure to conduct the initial checks, vetting and assessment may compromise judicial independence and integrity, especially where persons that are not fit and proper are selected.[74]

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[68]Chiduza, *supra*, note 30, p. 382.

[69] Magaisa, *supra*, note 52.

[70]*Ibid.*

[71]*Ibid.*

[72]*Ibid.*

[73]Section 190(2) of the Constitution of Zimbabwe Amendment (No.20) Act 2013.

[74] On a 'fit and proper person', *see* Section 177(2), 178(2) and 179(2). *See also,* C. Mashoko, 'Judicial appointment in Zimbabwe: defining the concept of 'fit and proper person'', 1:1 *University of Zimbabwe Law Journal* (2018) pp. 101-116, < ir.uz.ac.zw/handle/10646/3905>, visited d on 10 March 2021.

Despite this, however, there is controversy in the constitutional provisions in relation to the pre-interview screening. It can be argued that section 179 of the Constitution sets out qualification criteria which requires the JSC to shortlist the persons meeting this criterion. The argument goes that the JSC may not add to this criterion at all since the Constitution did not grant the JSC such power. This interpretation is narrow and must be rejected. The JSC is empowered to create a shortlist for the interviews based on other considerations in addition to those explicit in section 179. The first one is that the JSC has broad powers to reject applications where the person is 'not currently fit to practise'. There are several reasons that disqualify a person from practicing that are not explicit from section 179. Secondly, the JSC must not waste its time shortlisting a person for interviews if that person meets the criterion in section 179 (1) (a-b) of the Constitution but is not a 'fit and proper person to hold office as a judge.' This added qualification criterion grants the JSC power to develop pre-interview procedures that enable them to vet and screen persons that are not suitable for appointment. The JSC can justify this approach based on section 190(2) of the Constitution, which grants the JSC 'all the powers needed' to promote and facilitate the independence and accountability of the judiciary, and the efficient, effective and transparent administration of justice in Zimbabwe.

Apart from the constitutional provisions, the question is whether the technical pre-assessment procedures are provisioned for in the Judicial Service Act or the Regulations thereof. The 2012 Regulations outline some of the general principles applicable to recruitment of members used by the JSC such as merit, knowledge, experience, qualifications and potential for training.[75] Section 5(5) is apposite; it states that the JSC shall complete 'to its satisfaction all the checks necessary to confirm that the candidate is eligible for appointment'.[76] The point here is that the technical assessment procedures that are lacking in the Constitution are given flesh in the JS Act and the Regulations. Read together, these provisions provide adequate guidance on the procedures followed by JSC in selecting, screening or shortlisting candidates who would have been nominated by the public or the President for interviews for the position of a judge.

4.7.4 The JSC and the role of the President

As already pointed out, the other function of JSC is to submit a list of three qualified persons as nominees to the President,[77] whereupon the President must appoint one of the nominees to office. However, the President has an ace card. He may reject the list of three nominees that would have been submitted by the JSC using section 180(3) of the Constitution. The provision allows him to reject the list if s/he considers that none of the persons on the list submitted by JSC are suitable for appointment. Consequently, the JSC is required to submit another list from which the President must choose one nominee. From the second list, it is mandatory that

[75]Section 3 of the Judicial Service (Code of Ethics) Regulations, 2012.

[76]*Ibid*., Section 5(5) .

[77] Section 180(2)(d) and (e) of the Constitution.

the President must appoint one of the nominees.[78] This may sound like a buffer for ensuring that a 'suitable' candidate or a 'fit and proper' person is chosen. Again, once the President rejects the first list, there is a degree of pressure on the JSC. It is submitted that this pressure is unwarranted.

The question is whether the President owes a duty to submit reasons to the JSC for rejecting persons submitted to him. It can be argued that the President must publicly submit reasons. Submitting reasons is in line with the principles of transparency, accountability, good governance and merit-based appointments to public office. As they are, the provisions permit the President to exercise his/her discretion subjectively. Chiduza argues that the President might refuse to make appointment merely on the subjective basis that his/her preferred candidates are not included on the first list submitted by the JSC.[79] This is very possible; there is no safeguard in the Constitution for the President not to exercise his/her discretion subjectively or based on irrational reasons. Magaisa, alive to the dangers of Presidential nominations, suggests that the only safeguard to curb this is the disclosure of the sources of the nominees from the President and the public.[80] This may help to curb the possible abuse of the powers by the President to reject nominees submitted by the JSC since it will subject the whole process under the public spotlight. It is also contended that the existing provisions give the President too much veto power, akin to the veto power he/she has in rejecting legislative bills submitted to him after thorough debates, considerations and deliberations by Parliament.[81]

4.8 Appointment of Magistrates and role of JSC

The appointment of magistrates is now the responsibility of the JSC in terms of section 182 of the Constitution. Such appointment must be made transparently and without fear, favour, prejudice or bias. Previously, magistrates were appointed by the Public Service Commission, a commission under the ministry of Public Service, and not Justice. This made them less independent from the executive. In theory, the transfer of magistrates from the Public Service Commission to the Judicial Service Commission is a welcome development. However, it might be argued that the appointment of magistrates has not been treated with much weight as that of judges. The motivation for this was done for practical purposes, since it would be difficult and costly to advertise, invite public and presidential nominations and hold public interviews for appointment of magistrates given the high number of magistrates required at various stations in the country. However, this laxity in the appointment system has been responsible for the lack of professionalism, integrity, high levels of corruption and breach of judicial ethics in the magistrates.[82]

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[78] Magaisa, *supra* note 52.

[79] Chiduza, *supra* note 30, p.382.

[80] *See* Magaisa, *supra* note 52.

[81] *See* section 131 of the Constitution for this legislative veto.

[82] *See* 'Rots sets in at Rotten Row', *Mail and GuardianSouth Africa*,1 February 2013,<mg.co.za/article/2013-02-01-rot-sets-in-at-rotten-row/>, visited on 20 February 2021.

It must be reiterated that although magistrates' courts are lower courts and inferior to the higher courts, the concepts of judicial independence, impartiality, rule of law and democracy which are the bedrock of our Constitution should not be sacrificed because of the court hierarchy system. It is also important to note that while the appointment of magistrates does not enjoy extensive constitutional recognition like that of judges, this may pose a threat to judicial independence. This is because the magistrates' courts are the court of first instance.[83] In fact, the magistrates' court is usually the first court where litigants appear and for some, it is their only contact with the justice delivery system of Zimbabwe.[84] Many problems related to judicial independence, impartiality, lack of competence and corruptions among others occur at the lower courts.

The Magistrates' Courts are also a fertile ground for political interference and court packing if the appointment processes by the JSC are not water-tight in practice. Many people are convicted and may not appeal, or the cases are not reviewed. This is despite the fact that the appeal or review process is supposed to act as a way of ensuring that people who face injustice at the lower courts at least find justice in the upper courts. In the case of *Van Rooyen and Others* v.*The State and Others*, Chief Justice Chaskalson (*as he then was*) stated that;

> "…magistrates' courts are courts of first instance and their judgments are subject to appeal and review. Thus, higher courts have the ability to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions."[85]

In practice, therefore, judicial independence should not be restricted to judges of the superior courts; it should begin at the lower courts where external influence and pressure is easy to exert on adjudicating personnel. This role of the JSC is equally important in the context of Magistrates' Courts as it is in relation to judges in the superior courts.

[83] Magistrates Court Act *[Chapter 7:10].* Section 5 states that the Magistrate Court shall be a court of record.

[84] Judicial Service Commission, <www.jsc.co.zw> this cant be full webpage. Include all the information., visited on 10 July 2021.

[85] *Van Rooyen and Others* v. *The State and others* (2002) ZACC 8; 2002 5 SA 246.

4.9 Conclusion

There is little doubt that an independent judicial service and a proactive Judicial Service Commission are both critical in the realization and promotion of the rule of law and constitutionalism in Zimbabwe. The Constitution generally enhances the role and purpose and integrity of the judicial system in Zimbabwe, and clearly departs from the system established under the 1980 Lancaster House Constitution. The relevant provisions, as has been demonstrated throughout the Chapter, go a long way towards promoting judicial independence, integrity, transparency and accountability. Indeed, the system is not perfect, with practical as well as legal loopholes that need to be addressed, going forward. Sadly, some concerning provisions introduced by Constitutional Amendment Number 2 of 2021 leave a lot to be desired; their effect is to whittle the role of the JSC in judicial selection and leaves the President with unchecked power to promote judges and select the leadership of the judiciary with minimal assistance from the JSC. It is hoped that in practice, the JSC will continue to find itself and assume more responsibilities in its work, despite ever-present political and other pressures.

Chapter 5

Judicial Relations with the Executive Arm of Government in Zimbabwe

Nkosana Maphosa and Patience Chigumba*

[I]f the legislative and executive authorities are one institution, there will be no freedom. There won't be freedom any way if the judiciary body is not separated from the legislative and executive authorities.

Charles-Louis de Secondat, Baron de La Brede *et* de Montesquieu

5.1 Introduction

Although writing an exhaustive treatise on the relationship between the judiciary and the executive under the Constitution is practically impossible, this chapter illuminates the theoretical and in some instances, the practical bases in which judicial-executive relations can be examined. Foremost, it provides a conspectus of the general constitutional principles on the three pillars of the State, that is, the Executive, Legislative and the Judiciary, to the extent that these assist in providing essential context for the subject under review. Secondly, it argues in the main that an independent and impartial judiciary is the core of the burgeoning post 2013 Zimbabwean constitutional enterprise.

Thirdly, to illustrate the various ways in which the judiciary and the executive interact, this contribution deploys elements of constitutionalism and established tenets of the constitutional order such as the separation of powers, the rule of law, judicial independence and judicial review etcetera, to further amplify an understanding of the tensions and envisaged institutional comity between or among the three branches. Fourthly, to achieve the overarching objective, the contribution invokes constitutional history to inform the present constitutional trajectory. In other words, an historical constitutional analysis of the erstwhile or pre-2013 Constitution era is used to create context, and provide lenses upon which relevant constitutional provisions, particularly Chapter 8 of the Constitution and precedent

*Nkosana Maphosa & Patience Chigumba, Lecturers at Great Zimbabwe University.

must be evaluated. As such, the treatise constitutes an introduction to a series on judicial and executive relations in Zimbabwe.

The dominant impression created by the literature and constitutional practice during the period cited above arguably demonstrates constant clashes between the branches, admittedly sometimes necessary and in some instances, constituting undue incursions into the heartland of another branch particularly the judiciary. All in all, as already mentioned, this chapter should be viewed as a precursor to further works to further excavate the practical issues and constitutional provisions. Nonetheless, the chapter conjectures that the constitutional law has attempted to create systems and auxiliary precautions, which require consistent attention to perfect, for the constitutional vision of equality, freedom, justice, peace and sustainable development to be achieved.

5.2 Background to Understanding Judicial Relations with the Executive under the Constitution of Zimbabwe

Although the primary function of the judicial branch is to administer justice, it is also clothed with an oversight role over the activities of other pillars such as the legislature and executive, administrative actors, institutions and other actors.[1] Judicial review is an excellent example of the courts' power to "review legislative or executive action for compliance with the constitution".[2] The case of *Brown* v. *Leyds NO 4 off Rep*[3] reflects this constitutional thinking.[4] Nevertheless, this legal power conferred on the judiciary does not create a hierarchy whereby other branches become inferior to it. In practical terms, most constitutions including the Constitution of Zimbabwe[5] (hereinafter referred to as 'the 2013 Zimbabwean Constitution' or "the Constitution of Zimbabwe'), entrench and protect judicial independence and at the same time constrain it "to some extent by affording the other branches a degree of influence over its composition and functions".[6] As such, the interrelatedness of judiciary and executive functions should be understood in this light. Importantly, the distinctiveness and interrelatedness of these functions nonetheless creates a form of tension, which in the words of Former Lord Chancellor, Mackay "is inevitable and healthy because from time to time the judiciary are called upon to adjudicate under the judicial review procedure and in other ways on actions of the executive", and[7] there are not many people who competently welcome their activities being judged, particularly if they are found to have failed.[8]

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[1] N. Hedling, 'A Practical Guide to Constitution Building: The Design of the Judicial Branch,' *International Institute for Democracy and Electoral Assistance* (2011) p. 1.
[2] *Ibid.*
[3] 17 (1897).
[4] *See also Marbury* v. *Madison* 5 US (1Cranch 137 1803).
[5] Constitution of Zimbabwe Amendment (No.20) Act, 2013.
[6] *Ibid*. Emphasis added.
[7] House of Lords Select Committee on the Constitution, 'Relations between the Executive, the Judiciary and Parliament', 6th Report of Session (2006) p.16.
[8] *Ibid.* Emphasis added.

In Zimbabwe, examples such as one involving Judge Fergus Blackie in September 2002, who was arrested and charged with obstructing justice and corruption in a matter involving the quashing of a conviction of a white woman on fraud charges without consulting the black judge who sat with him in the case.[9] It is also alleged that judge Blackie had earlier on sentenced Justice Minister Patrick Chinamasa to three months in prison and fined him 50, 000 Zimbabwean dollars for contempt of court. The end result is that Judge Blackie was accused of being racist. Moreover, the adverse findings against Mr Chinamasa were later overturned on appeal. Again, in March 2002, there were claims that Chief Justice Anthony Gubbay failed to support the land reform policy by aligning with white farmers.[10] Given the politicized nature of land reform programme at the time and pressure from war veterans, Chief Justice Gubbay had to step down from office. A 2003 conference on separation of powers held in Blantyre, Malawi, commented that:

> "He (Chief Justice Gubbay) agreed to a compromise with the government trying to dismiss him from his post Chief Justice Gubbay agreed to take his immediate pre-retirement leave but remained as CJ for the remaining 4 months. In return for his departure, the government acknowledged *the importance of the independence of the judiciary*."[11]

Furthermore, there is an argument that the pre-2013 constitution era was characterized by unhealthy tensions between the three pillars of the state, being the executive, legislature and judiciary. In our view, the alleged claims could be supported by several constitutional amendments which sought to accentuate the executive's power and control over the judicial appointments. The flip side of this argument is that the legislature virtually failed to fulfil its oversight and accountability role by playing a rubber stamp role. Several court decisions were overruled through legislative amendments. Examples include, *Patriotic Front-ZAPU* v. *Minister of Justice Legal and Parliamentary Affairs* (on reviewability of the president's prerogative powers);[12] *S* v. *A Juvenile*[13] which outlawed judicial corporal punishment and subsequently overturned through a constitutional amendment.[14] For Mhodi, *S* v. *A Juvenile* arguably illustrates "a culture of defying and undermining court orders which has permeated the political landscape of Zimbabwe".[15] Thus, this claim is buttressed in several subsequent cases and constitutional amendments. For example, in *Catholic Commission for Justice and Peace* v. *Attorney General and Others,*[16] the Supreme Court found that "the delays of fifty-two months and seventy-two months from the date the death sentence was imposed to the

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[9]D. Jere, *Separation of Powers in a Constitutional Democracy, Discussions and Papers on Southern Africa,* Mount Soche Hotel, Blantyre, Malawi, 28-31 January 28- 2003 (2003) pp. 4-5.
[10]*Ibid*., p. 5.
[11]*Ibid*.
[12] 1986 (1) SA 532 (ZS).
[13] 1990 (4) SA 151 (ZS).
[14] Constitution of Zimbabwe Amendment (No 11) Act 30 of 1990.
[15]P.T. Mhodi, 'The Constitutional Experience of Zimbabwe: Some Basic Fundamental Tenets of Constitutionalism which the New Constitution Should Embody,' LLM Dissertation, *University of KwaZulu-Natal* (2013) p. 22.
[16]1993 (4) SA 239.

proposed date of execution were repugnant with section 15(1) of the Constitution."[17] Unfortunately, the Parliament sought to reverse this progressive decision through Constitution of Zimbabwe Amendment (No.13) Act 9 of 1993.

In our view, the unhealthy tensions between the judiciary and the executive are further demonstrated by Constitution of Zimbabwe Amendment (No.14) Act 14 of 1996 which sought to defy and undermine the precedent set out in *Rattigan and Others* v. *Chief Immigration Officer Zimbabwe and Others,*[18]a case which extended the constitutional right to freedom of movement to cover a foreign husband married to a Zimbabwean woman's right to obtain permanent resident status. Chief Justice Gubbay (as he was then) found merit in the applicant's argument and as such held that the right to freedom of movement due to a Zimbabwean woman married to a foreign husband would be unduly limited if her husband was denied the right to permanently live in Zimbabwe.[19] Moreover, in *Salem* v. *Chief Immigration Officer Zimbabwe and Another*,[20] the applicants' prayer was for the Supreme Court to extend the *Rattigan* jurisprudence, to allow a foreign spouse the right to work in Zimbabwe. This claim was brought under the ambit of the right to freedom of movement under the now defunct section 22(1) of the maiden Constitution of Zimbabwe.[21] The Court found that the constitutional right to freedom of movement subsumed the right to work and importantly, that dismissing the applicant's claim would have defeated the very foundation why such rights were protected in the first place.[22] Nevertheless, Constitution of Zimbabwe Amendment (No.14) Act, 14 of 1996, was enacted to defy and undermine the progressive jurisprudence developed by the apex court.

Another germane epoch to provide a constitutional context for judicial relations with the executive is the case of *Mike Campbell (Pvt) Ltd and Another* v. *Minister of National Security Responsible for Land, Land Reform and Resettlement (Campbell)*.[23] The background to *Campbell* was a ploy to challenge the lawfulness of section 16B (3) of the Constitution of Zimbabwe Amendment (No.17) Act 5 of 2005, which sought to ouster the jurisdiction of courts "in matters relating to land acquisition".[24]Mhodi crisply observes and argues that "the true import of section 16B (3) is (was) that the constitutionality of the acquisition of land is (was) not justiciable. The courts can (could) only adjudicate on the amount of compensation payable. This is regrettable as it marks an erosion of judicial review which is one of the core tenets of constitutionalism".[25] Given this background, and keeping in mind the previous interactions between the judiciary and other pillars, the Supreme Court limited the inquiry into the procedural aspects of the matter. In other words,

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[17]*See* Mhodi, *supra* note 13, p. 24 and *Catholic Commission for Justice and Peace* v. *Attorney General and Others* p. 270 A-F.
[18]1995 (2) SA 182 (ZS).
[19]*Ibid*., pp. 190 H and 191 A-B.
[20] 1995 (4) SA 280 (ZS).
[21]*Ibid*., p. 283F.
[22]*Ibid*., pp. 282F-G and 283I.
[23][2008)(2/2007) [2008] SADCT 2 (28 November 2008).
[24]Mhodi, *supra* note 13, p. 28.
[25]*Ibid*.

instead of focusing on constitutional aspects of the ouster clause, Malaba JA only concerned himself with whether or not the said amendment was passed following a proper legal procedure.

Thus, the claim was quashed since the court was of the view that Constitutional Amendment (No.17) was enacted following a constitutional procedure. This prompted the aggrieved applicants to approach the Southern African Development Community Tribunal (SADC Tribunal) for recourse.[26] Although the tribunal found that it had jurisdiction, and specifically that the constitutional amendment undermined the rule of law, was discriminatory and that Zimbabwe was liable to pay compensation, the tribunal was nonetheless subsequently disbanded. Arguably, these incidents demonstrate how the courts have become a forum to settle controversial polycentric and political questions, and as such this has stirred up tensions. For practical purposes, the cases cited here create a context to understand the envisaged relationship between the judiciary and the executive under the 2013 Zimbabwean Constitution.

Given these events, it is no wonder why most constitutional law scholars regard the independence of the judiciary as the crux of constitutionalism and the rule of law. Accordingly, judicial independence denotes that there should be: institutional arrangements for judicial autonomy, financial arrangements for judicial autonomy, presence of arrangements pertaining to security of tenure, adequate remuneration, transparency in the appointment process and judicial accountability.[27] Notwithstanding this realisation, it has been argued that the appointment of judges is flawed, that seminal judicial decisions have been negated, and extra-legal means have been used to remove judges from office.[28] The former president of Zimbabwe, Robert Gabriel Mugabe, is quoted as having said that, "*the Courts can do whatever they want, but no judicial decision will stand in our way…my own position is that we should not even be defending our position in the courts…*"[29] In the converse, the postulation and argument of Hofisi and Feltoe is persuasive given the above statement:

> "The politicization of the judiciary to create a compliant judiciary is inimical to the rule of law and proper administration of justice. The intimidation of judges who hand down judgements at variance with the ruling party's interests is a matter of on-going concern. The President has openly criticized judges who have acted in a manner which he perceives to be unfavourable to ruling party interests. Further, the purging of the Gubbay led Supreme Court bench in 2001 orchestrated by the ruling party allowed for the appointment of new judges that were more acceptable to the ruling party." *The current Constitution departs from this paradigm by insulating judicial appointments from the whims of the executive. Any changes to the appointment process must, in the letter and spirit of the Constitution, facilitate greater independence and accountability. Unfortunately,*

[26] *Mike Campbell (I),supra* note 21.
[27] Mhodi, *supra* note 13, p. 50.
[28] *Ibid*., p.53.
[29] *Ibid*., p. 80.

> *Constitution of Zimbabwe Amendment (No.1) Bill 2016 is the antithesis if independence, accountability and indeed good governance*.[30]

The context for the above excerpt emanates from the constitutional matter challenging the appointment of the current Chief Justice of Zimbabwe, Honourable Luke Malaba, following the procedure laid out in section 180 of the 2013 Constitution. According to this constitutional provision, the Judicial Service Commission (JSC) was mandated to advertise the position of the Chief Justice, and then invite the President and public to make nominations which would be followed by public interviews of prospective candidates.[31] Also, the JSC was required to prepare a list of three qualified candidates and submit the same to the president. The president must appoint one of these nominees as the Chief Justice unless if he finds none of them unsuitable for appointment. The JSC called for nominations in October 2016 and four candidates were identified: Deputy Chief Justice Luke Malaba, Justice Paddington Garwe, Justice President George Chiweshe and Justice Rita Makarau. In *Zibani* v. *Judicial Service Commission and Others*,[32] the applicant argued that the process of appointing the Chief Justice was flawed in that it was opaque and defeated the values of transparency and accountability. The argument was that most of the candidates were from the JSC such that the appointment process itself could be biased. Also, there was a declared intent on the part of the Ministry of Justice, Legal and Parliamentary Affairs to amend section 180 of the Constitution. Justice Charles Hungwe halted the appointment process. In other words, he found in favour of the applicant. Justice Hungwe's challengeable holding was that:

> "It occurs to me that where a lawful process leads to an absurd result, in that sense that colleagues select each other for entitlement to public office, as argued by the applicant, it cannot be sanctioned on the ground that it is provided for in the law. Such an approach is irrational".[33]

From the above we can deduce the arguments of politicization of the judiciary which stem from the pre-2013 era, finding themselves into the new and supposedly transformative constitutional spectrum. An argument can be made that section 180 (on the appointment of judges), and section 191 (on the JSC) provided for increased transparency and accountability on the appointment of judges. However, it appears that there is a strand of thinking in Hofisi and Feltoe hinging on elements of interference from the executive and political quarters on the appointment of judges of the superior courts. That Zibani I was premised on flawed ground is beyond question. One problematic aspect of the decision was the holding that intent to effect a constitutional amendment could halt judges' interviews. Post *Zibani* I, the JSC conducted interviews of which three candidates attended: Deputy Chief Justice

[30]D. Hofisi and G. Feltoe, 'Playing Politics with the Judiciary and the Constitution?, 1 *Zimbabwe Electronic Law Journal* (2017) p.19.
[31]*Ibid*., p. 2.
[32] High Court Harare Case Number 797 of 2017.
[33]*Ibid*., pp. 7-7. *See also* Hofisi&Feltoe, *supra* note 28, p. 4.

Luke Malaba, Justice Makarau and Justice Paddington Garwe. In terms of case timeline, the JSC filed an appeal against the decision of the High Court, on 13 February 2017. It upheld the section 180 procedure followed by the JSC (*Zibani* II). Furthermore, in a third attempt, Mr Zibani sought to challenge the appointment of a retired judge alleging that it flouted constitutional requirements.

For present purposes, the *Zibani* matter demonstrates tensions between the judiciary and the executive. Also, it can be argued that it highlights the executive's interests to consolidate its power in the appointment of judges, as was the case during the former Constitution. As such, Constitution of Zimbabwe Amendment (No.1) 2016 and Constitution of Zimbabwe Amendment (No.2) 2019 support this reading to the extent that there is desire to significantly change the manner in which judges are appointed. Constitutional scholars have questioned the intent to do away with public interviews and the radical stance taken by the executive and legislature to repeal section 186 of the 2013 Constitution and replace it with a new provision. There is a sense in which recent constitutional amendments seek to return to the defunct Lancaster House Constitution. According to Mavedzenge,[34] the challenge lies in the fact that the 2013 Zimbabwean Constitution could be an undemocratic Constitution. In the context of judicial independence, this scholar argues that the retention of a weak and partial judiciary through Schedule 6 of the Constitution undermined the quest to achieve democratic objectives. For him, a democratic constitution is one that underpins the idea of government by popular sovereignty[35] and provides for mechanisms that sustain, protect and implement democracy[36] such as the provision of a bill of rights, constitutional supremacy, judicial review, regular free and fair elections, transparency and accountability, separation of powers, multipartyism and judicial independence.[37] For our purposes, we concur with the writings of this scholar to the extent that the Constitution provides for mechanisms to promote and protect the independence of the judiciary, and that it is this independence which guarantees the realisation of the other mechanism of a democratic constitution or auxiliary mechanisms of constitutionalism. A few examples to demonstrate judicial relations with the executive under the 2013 Constitution include the case of *Morgan Tsvangirai* v. *Chairperson of the Zimbabwe Electoral Commission and Others,*[38]*Jealous MbizvoMawarire* v. *Robert Gabriel Mugabe,*[39] *Nixon Nyikadzino* v. *President of the Republic of Zimbabwe and Others.*[40]All these cases could be relied on to illustrate the courts' failure "to stamp its authority in the face of abuse of power" by the executive and other organs. Accordingly, our view is despite the codification of tenets of

[34] J.A. Mavedzenge, 'An Examination of the Relationship between Public Participation in Constitution Making Processes and *the Objective to Write a Democratic Constitution. The Case of Zimbabwe 2010-2013 Constitution Making Exercise', LLM Dissertation, University of Cape Town* (2014).
[35] *Ibid*., p. 21.
[36] *Ibid*., p.22.
[37] *Ibid*., pp. 21-22.
[38] EC 27/13.
[39] CCZ 1/13.
[40] CCZ 34/13.

constitutionalism, the same are nonetheless undermined by a weak and partial judiciary.

Consequently, to provide a compelling critical assessment of the judiciary's relations with the Executive under the Constitution, a discussion influenced by some core elements of constitutionalism such as the separation of powers, the rule of law, constitutional supremacy, judicial independence, judicial review among others is necessary. The intent is not only to locate the architecture of the 2013 Zimbabwean Constitution within this legal orthodoxy; but to also summarise the legal and practical underpinnings of these elements given their considerable primacy in our jurisdiction. More importantly, the overarching objective is to demonstrate how the drafters of the 2013 Constitution could have envisaged the relationship between the judiciary and the executive to look like. Thus, a brief overview of key terms is necessary to create context.

5.2.1 Constitutionalism

Foremost, constitutionalism is the theory of constitutional law.[41] At its core is the view that the exercise of public or private power should be constrained. Currie and De Waal define it as "a body of theoretical prescriptions," in that "it prescribes what a Constitution and Constitutional law should do as opposed to simply describing what a particular Constitution does".[42] Mhodi quoting Fombad conceptualises constitutionalism to "encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations".[43] In practical terms, the concept of constitutionalism embodies the following tenets: the provision for the recognition and protection of fundamental rights; the separation of powers; presidential term limits; judicial independence; provisions on constitutional amendments; institutions supporting democracy among others.[44] Furthermore, it prudent to consider the separation of powers doctrine.

5.2.2 Separation of Powers

The separation of powers doctrine denotes comity between the executive, the legislature and the judiciary. Although there are two versions, stricter and more flexible approaches, the Zimbabwean constitution envisages a flexible criterion in that there is interrelatedness in how the three pillars discharge their functions.[45]

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[41] I. Currie and J. De Waal, *The New Constitutional and Administrative Law* (1), 1st edition, (Juta, Cape Town, 2001) p. 10.
[42] *Ibid.*
[43] Mhodi, *supra* note 13, p. 35.
[44] *Ibid*., pp. 35-36.
[45] Mavedzenge, *supra* note 32, pp. 37-38.

5.2.3 Judicial Independence

Hedling postulates that "judicial independence is the touchstone of the rule of law, which demands the impartial application and interpretation of the law. It is also essential to the enforcement of human rights provisions and other constitutional guarantees and to the strengthening of the judiciary's ability to engage in independent and meaningful dispute resolution and constitutional review".[46] Thus, judicial independence is the ability of the courts to apply the law objectively, judiciously without fear or favour. It encompasses individual and institutional visions of independence. In sum, it usually relates to the selection of judges (age limits, ethnicity, regional origin, legal qualifications and experience), terms of service of judges, removal of judges from office and financing of judicial operations.[47] Having introduced judicial independence, the next heading crisply describes the tenet of judicial review.

5.2.4 Judicial Review

Under the 2013 Zimbabwean Constitution, courts have the power to review laws or actions such as administrative decisions or executive acts for compliance with the Constitution.[48] Thus, judicial review "refers to the institutional arrangements whereby courts of law exercise the power to examine the constitutional validity of the decision of the legislature, the executive and administrative officials".[49] In the main, the judicial review ensures that the exercise of power is reasonable and subject to constitutional imperatives. It is therefore a practical tool to guard against unreasonable or abuse of power. Inherent in it are concepts such as rationality, legality and so on. *Marbury* v. *Madison*[50] is the *locus classicus* case on judicial review. In that case, the court held that:

> "The province of the court is not to inquire how the executive or executive officers perform duties in which they have discretion. Questions in their nature political or which are, by the constitution or laws, submitted to the executive, can never be made in this court."[51]

Given the introductory scope of this paper, we argue that certain aspects under the concept of judicial review are arguably at the heart of understanding the relationship between the executive and the judiciary. In future works, it would be ideal to investigate the extent to which the judiciary has managed to develop canons on when it will adjudicate on otherwise political questions. It might be that our law does not recognise the political question doctrine where certain matters should be left in the heartland of either the executive or the legislature, but our view is that

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[46]Hedling, *supra* note 1, p. 15.

[47]*Ibid.*, pp. 17-20. *See also* Currie & De Waal, *supra* note 39, pp. 300-306 in general and specifically emphasing the three components of judicial independence namely, security of tenure, basic degree of financial independence and institutional independence.

[48]Hedling, *supra* note 1, p. 6.

[49]Mavedzenge, *supra* note 32, p 41. *See* for example, sections 167 (2) (d) and 167 (3) of the Constitution of Zimbabwe.

[50]This case carries persuasive weight.

[51]170.

the few cases which have come before our courts justify the need for judicial guidelines on policy matters, for example. The cases cited above, such as *PF ZAPU*, *Ratting*, *Salem*, *Catholic Commission*, *Campbell* and various constitutional amendments pre and post 2013, could support an argument, based on a nuanced reading of the separation of powers, judicial review and other tenets, of the need to evaluate, without taking a radical stance, the political question doctrine in Zimbabwe. The next section provides a concise overview of the rule of law.

5.2.5 The Rule of Law

Although the rule of law (ROL) is a multifaceted, contested and an arguably equivocal concept; Bingham[52] has nonetheless postulated that for it to be said to exist certain requirements should be satisfied. The first requirement he advances is that "the law must be accessible and so far as possible intelligible, clear and predictable".[53] Linked to it, is the second component which speaks to the requirement that "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion".[54] Thirdly, he contends that for the rule of law to thrive, "the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation".[55] Furthermore, Bingham posits that "ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably".[56]

Additionally, he advances the perspective that "the law must afford adequate protection of fundamental human rights".[57] As such, the inclusion of fundamental human rights and freedoms in the Bingham rule of law conceptualisation extends the latter to a 'thick' as opposed to a 'thinner' or exclusively procedural version of the rule of law. Moreover, the sixth constituent part of the doctrine translates to the requirement that "means must be provided for resolving without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve".[58] Seventh, Bingham argues that "adjudicative procedures provided by the state should be fair".[59] Moreover, he contends that "the rule of law requires compliance by the state with its obligations in international law as in national law".[60] However, the ROL as it is known today in constitutional parlance was popularized by Dicey.[61]

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[52]*See specifically*, T. Bingham, *The Rule of Law* (Penguin Books, 2011). The rule of law is one of the founding values and principles enunciated under section 3 (1) (b) of the Constitution. Moreover, Chapter 8 and Schedule 6 Part 4, section 18 provide for elaborate constitutional rules on the judiciary.
[53]*Ibid*., p. 37.
[54]*Ibid*., p. 48.
[55]*Ibid*., p. 55.
[56]*Ibid.,* p. 60.
[57]*Ibid.,* p. 66.
[58] Ibid., p. 85.
[59]*Ibid*., p. 90.
[60]*Ibid*., p. 110.
[61]Currie & De Waal, *supra* note 39, p. 75.

According to the Diceyan formulation, the ROL denotes three things: firstly, "the absolute supremacy of law as opposed to arbitrary power",[62] secondly, that there be "equality before the law",[63] and thirdly, "that the Constitution was the result of the ordinary law of the land".[64] In the main, it suffices to note that the rule of law contains formalistic/institutional, substantive, or thin versus thick formulations. Besides its constitutional nuance, the rule of law has been gained provenance as a potential tool to promote development.[65] As such, an evaluation of the relationship between the judiciary and the executive, in the context of the rule of law, should be understood, in light of "efforts to improve law and related institutions"[66] such as the judiciary.

In sum, the idea with most the tenets of a constitutional order, is to constrain power. As such, the relationship between the judiciary and the executive should be understood in light of a constitutional context which seeks to promote accountability through a system of checks and balances, judicial review and other elements of constitutionalism. Besides giving brief explanations on the concepts, the section above provided important entry points into the discussion under review. Importantly, one gets a sense that an exhaustive analysis of the various issues on the judiciary-executive points of convergence impractical in a chapter of this nature. We nonetheless, hope to generate a discussion on the by providing this general treatise on important topic.

5.3 Units of Analysis

In 2020, several constitutional events took place. The lapse of the seven years since the coming into effect of the 2013 Zimbabwean Constitution saw the Constitutional

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[62] *Ibid*.

[63] *Ibid*.

[64] *Ibid.* The holding of the Constitutional Court of South Africa, in *Fedsure Life Assurance Ltd* v. *Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC) paras. 56-59 are amplifying. It was held that '[i]t is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law-to the extent at least that it expresses this principle of legality- is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has a greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality […]. There is of course no doubt that the common law principles of ultra vires remain under the new constitutional order. However, they are unpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to "administrative action" the principle of legality is enshrined in s 24(a) [IC]. In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted intra vires in this case remains a constitutional question." Quoted in Currie & De Waal, *supra* note 39, p. 77.

[65] *See for example* T.F.Mclnerney, *Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries,* (International Development Law Organization, Rome, 2006) p. 11. *See generally* A. Santos, The World Bank's Uses of the Rule of Law's Promise in Economic Development (Cambridge University Press 2006)p. 253, who posits that "[l]aw is at the centre of development discourse and practice today. The idea that the legal system is crucial for economic growth now forms part of the conventional wisdom in development theory. This idea's most common expression is the "the rule of law" (ROL): a legal order consisting of predictable, enforceable and efficient rules required for a market economy to flourish."

[66] *Ibid*.

Court and the Supreme Court being severed,[67] followed by the much-publicized interviews for justices of the Constitutional Court. In the same year, the Labour Court building was officially opened. Also notable was, the Chief Justice's annual speech on the official opening of the legal year continually emphasized the importance of access to justice and the consolidation of the rule of law. Additionally, criminal justice reforms were characterized by the introduction of Anti-corruption courts and proposals of an electronic judiciary. In the same period, several key legislative amendments were touted as a threat to judicial independence. Of note are the first constitutional amendment of 2018 and the robustly criticized second constitutional amendment of 2020, the latter was seen by most constitutional law experts, civil society organizations and democrats, as a threat to constitutionalism since it seemingly bestows enormous powers on the executive branch. Further, the dismissal of Justice Bere, investigations into the fitness of Justice Ndewere to hold office as a judge and the alleged politicization of bail applications lay at the heart of judicial relations with the executive in Zimbabwe during 2020.

5.3.1 Selected Legal Instruments at the International, Regional and Domestic Levels

The international, regional and domestic laws enjoin countries to guarantee judicial independence and therefore dissuade executive and legislative intrusion into the judiciary's terrain. To this effect, legal tools such as the Bangalore Principles on Judicial Conduct (2002), the International Bar Association Minimum Standards of Judicial Independence (1982), the Montreal Universal Declaration on the Independence of Justice (1983), Article 10 of the Universal Declaration of Human Rights (1948), Article 7 and 26 of the African Charter on Human and People's Rights (ACHPR, 1981), the United Nations Basic Principles on the Independence of the Judiciary (1985), the Latimer House Guidelines on the Independence of the Judiciary (1998) and the Universal Principles on Judicial Patronage provide useful guidelines on various ways in which the judiciary independence and impartiality can be operationalized. Relevant to this discussion, for example, is Article 14 of the International Covenant on Civil and Political Rights (CCPR) which provides that "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 26 of the ACHPR directly speaks to judicial independence and enjoins that:

> "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of

[67] Schedule 6, Part 4, paragraph 18 (2) (a), (b) and (3) of the Constitution contains a proviso to the application of s 166 (Constitutional Court) of the Constitution as follows: "[n]notwithstanding section 166, for seven years after the publication date, the Constitutional Court consists of- the Chief Justice and the Deputy Chief Justice; and seven other judges of the Supreme Court; who must sit together as a bench to hear any constitutional case. A vacancy on the Constitutional Court occurring in the first seven years after the publication date must be filled by another judge or an additional or acting judge, as the case may be, of the Supreme Court."

appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."[68]

Moreover, the Draft Universal Declaration on the Independence of Justice (the "Singhvi Declaration" (1989), Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary (1989) and African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) further ventilate the legal rules and steps governments should adopt to promote the independence of the judiciary. In a sense, these instruments provide guidance on the practical ways in which the judicial branch can be organized to promote objective and impartial justice delivery.

5.4. Constitutional Underpinnings: The Past and Present on Judicial Relations with the Executive

Nevertheless, there are claims that the Zimbabwean judiciary has been weakened over the years. For an example, a 2019 report has noted that notwithstanding the fact that "the Constitution provides for an independent judiciary, but executive influence and interference remained a problem. There continued to be some instances where the judiciary demonstrated its independence despite being under intense pressure to conform to government polices".[69] Again, these claims cut across the scholarship discussed elsewhere in this work. At the practical and philosophical level, it is essential to note the evolving constitutional landscape in Zimbabwe. Furthermore, the Constitutional Commission Draft of 2000, National Constitutional Assembly Draft of 2001 and the Kariba Draft of 2007 complete the picture of the pre-2013 constitutional history discussions.

5.4.1 Pre-2013 Literature on the relationship between the judiciary and the executive

The body of literature before the enactment of the 2013 Zimbabwean Constitution demonstrates, to a larger extent, a relationship full of alleged tensions, distrust or undue interference by the executive branch in the domain of the judiciary. To name

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[68]Article 7 of the Charter states that:

"1. Every individual shall have the right to have his cause heard. This comprises:

1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
3. The right to defence, including the right to be defended by counsel of his choice;
4. The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

[69] United States Department, Bureau of Democracy, Human Rights and Labour, 'Zimbabwe 2019 Human Rights Report', p. 8, <state.gov/wp-content/uploads/2020/03/ZIMBABWE-2019-HUMAN-RIGHTS-REPORT.pdf>, visited on 17 April 2021.

a few, the work of Madhuku,[70] Kersting,[71] Mhodi,[72] Mavedzenge,[73] Marumahoko,[74] Chitimira, [75]Mapuva,[76] Hofisi and Feltoe[77] and pronouncements by the former Chief Justice of Zimbabwe, Chidyausiku[78] discuss some themes which directly or indirectly speak to. The above scholarship brings to the fore debates on institutional independence, constitutionalism, judicial review and the desire to create a democratic constitution, judicial review, the rule of law and the separation of powers. Importantly, these core elements of constitutionalism create a legal system that either undermines or ignores them culminates in a culture of impunity, lawlessness and abuse of fundamental freedoms and human rights. In our jurisdiction, the executive has been accused of intently defying court orders or reversing them through legislative amendments. Commenting on judicial independence in 2010, the former Chief Justice of Zimbabwe at the Annual General Meeting of the Southern African Chief Justice Forum, GG Chidyausiku stated that:

> "[B]ut the reality is that the question of the respect for the independence of the judiciary goes deeper than constitutional guarantees as to appointments, security of tenure, and salaries. It is a product of the actual relationship between the judiciary, the executive and the legislature. Put bluntly, independence is not achieved solely by the presence of a neat structural balance (as theorized by the doctrine of separation of powers) but in addition, three factors are required, namely-
> (a) The attitude of the executive and the legislature to judicial independence and what it entails;
> (b) The commitment of judges themselves to guard and defend their independence; and
> (c) The readiness of the people to support the independence of judges as defenders of people's liberties."[79]

In the same instance, Chidyausiku used the cases of *Central African Examiner (Pvt) Limited* v. *Howman & Ors* (2) SRLR and *Madzimbamuto* v. *Lardner-Burke*,[80] to buttress his views on the executive's complicated relationship with the judiciary. In his presentation, he further intimated incidents where judges resigned from the bench were either "matter[s] of judicial conscience" or came about when they decided to "accept the situation in Rhodesia as it is today". Importantly, the former Chief

[70] L. Madhuku, 'Constitutional Protection of the Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa', 46:2 *Journal of African Law* (2002) pp. 232-245.
[71]N. Kersting (ed.), *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (Friedrich-Ebert-Stiftung, 2009).
[72]Mhodi, *supra* note 13.
[73]Mavedzenge, *supra* note 32.
[74]S. Marumahoko, 'Constitution-making in Zimbabwe: Assessing Institutions and Processes', Doctor of Philosophy, *University of the Western Cape* (20 April 2016).
[75] H. Chitimira, 'A Conspectus of the Functions of the Judiciary under the Zimbabwe Constitution 2013', 25:2 *African Journal of International and Comparative Law* (2017) pp. 221-238.
[76]J. Mapuva, 'The Trials and Tribulations of Constitutionalism and the Constitutional Making Process in Zimbabwe' 11.1 *Alternatives Turkish Journal of International Relations* (2012).
[77]Hofisi&Feltoe,*supra* note 28.
[78]G.G. Chidyausiku, 'Modern Challenges to the Independence of the Judiciary', Conference and Annual General Meeting of the Southern African Chief Justice Forum, Johannesburg, South Africa,13-14 August 2010.
[79]*Ibid*., p. 5.
[80]1968 (2) SA 284.

Justice used the land reform programme as an incident that divided the judiciary and had long-standing repercussions on judicial relations with the executive. To recap, through constitutional amendment number seventeen there was a ploy to make matters arising from land acquisition not justiciable. In the main, he insightfully concluded his presentation by noting that nuanced modern challenges to judicial independence:

> "[A]re likely to take a more, subtle form than their precursor. In modern times individuals wielding political power do not telephone judges, by night, about pending decisions nor do they send letters of instructions. Yet, the pressures, if more subtle, are non-the-less insidious. They normally take the form of cries in the name of lack of judicial accountability by leading to suggestions of amending the Constitution with the intention of introducing some mechanisms of parliamentary review of judicial decisions".[81]

Furthermore, the Chief Justice noted other forms of 'threats' to judicial independence which according to him were typified by "calculated and well-publicized criticisms of judicial decisions by powerful interest groups" and "the control of the judicial budget by the executive". In comparative such as South Africa, scholars such as Mhango[82] have inquired if there is currency in developing guidelines to assist courts when dealing with political questions. He contends 'that the political question doctrine is an appropriate mechanism through which the South African judiciary can address the recent problem of the proliferation of cases brought to the courts that raise non-justiciable political questions and threaten to delegitimize the role of the courts in a democracy'.[83]As demonstrated in other sections above, there is a sense in which the executive thinks that certain matters fall far beyond the reach of judicial review. Thus, such a claim, deserves serious consideration and debate in constitutional circles.

Just like the Mhango's treatise sought to answer several questions which interrogated the potential existence of a political question doctrine in South Africa; the nature, scope and limit of judicial authority under the Constitution; similar question should be asked about how courts in Zimbabwe should jurisprudentially give effect to the vital limits on judicial authority; the Constitution's design for courts to leave certain matters to other branches of government; whether the principle of separation of powers can be developed to incorporate a coherent political question doctrine; if a political question doctrine can be developed as a part of the principle of separation of powers just like the principle of legality was developed from the concept of the rule of law in the Constitution, whether there is a sufficient authority from existing jurisprudence to sustain a view that the authority to resolve certain constitutional questions rests with the political branches and whether the text of the Constitution contemplates political rather than judicial accountability in relation to the resolution of certain constitutional questions. If so, Mhango further

[81]Chidyausiku, *supra* note 78, p. 10.
[82] M.O. Mhango, 'Separation of Powers and the Political Question Doctrine in South Africa: A Comparative Analysis' Doctor of Laws Thesis, University of South Africa (January 2018).
[83]*Ibid.*

contemplates how the judiciary should give effect to this constitutional imperative when approached to resolve such questions, and if the Constitution contemplates limits of the power of judicial review in relation to questions that it or the law gives discretion to the political branches.[84]

Although Mhango's doctoral thesis affirms the political question doctrine (as subsumed by the separation of powers doctrine) as informed by an evaluation of South African, American, Ghanaian and Nigerian court jurisprudence, his study highlights the importance of discourse on judiciary-executive relations, even in other constitutional systems such as Zimbabwe. In other terms, the study introduces us to vital epochs which can be used as tools of analysis each time an inquiry into the interactions and relationships between the executive and judiciary is conducted. As already stated, there is need for robust analysis of these issues as they could assist us to understand the tensions between the two pillars.

Furthermore, Mhodi, who explored whether the Lancaster House Constitution (1979) subsumed constitutionalism and concluded that it provided for 'a veneer' or 'semblance' of constitutionalism), correctly argued that the tenet of constitutionalism notwithstanding its elusive and fluid definition could be understood in light of core elements or auxiliary mechanisms. These include the separation of powers, the rule of law, the Bill of Rights and entrenchment provisions,[85] independence of the judiciary, judicial review, and supremacy of the constitution and so on.[86] Accordingly, some of these core elements, as Mhodi would call them, are relied on to discuss, albeit at the general and introductory level, the judicial relations with the executive.

Additionally, Le Roux and Davis' acclaimed text, *Lawfare: Judging Politics in South Africa*, "provokes and confronts the growing debate on constitutionalism and the material transformation of our society," It further evaluates the function of the judiciary, considering "…the Constitution is emphatically transformative and capable of dismantling a horrific past and birthing a new and just society".[87] In the Foreword to *Lawfare*, Pravin Gordhan argues that "in a context of poor governance, questionable executive conduct and the forces of state capture and corruption for nearly a decade, we need to examine what the role of a new phase in lawfare should be to restore the democratic state as a servant of citizens, and to ensure that social and economic development advances social justice".[88] He cites cases where the judiciary held repositories of power accountable such as *Minister of Home Affairs and Another* v. *Fireblade Aviation Proprietary Limited and Others* and *McBride v Minister of Police and Another*.

LeRoux and Davis quote, with approval, Comaroff's observation that "politics itself is migrating to the courts […] conflicts once joined in parliaments, by

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[84]*Ibid*., pp. 45-46.
[85]*See generally* S. Liebenberg, 'Reflections on Drafting Bill of Rights: A South African Perspective', in Kersting, *supra* note 69, p. 21.
[86]Mhodi, *supra* note 13, p. 10.
[87]Views of the former Deputy Chief Justice of South Africa, DikgangMoseneke extracted from M. le Roux and D. Davis, *Lawfare: Judging Politics in South Africa* (Jonathan Ball Publishers, Johannesburg & Cape Town, 2019).
[88]*Ibid*., p. x.

means of street protests, mass demonstrations, and media campaigns, through labour strikes, boycotts, blockades, and other instruments of assertion, tend more and more […]to find their way to the judiciary. Class struggles seem to have metamorphosed into class actions".[89] In our view, the Zimbabwean discussion on judicial relations with the executive should synonymously be examined under a constitutional context where "[t]he use of the courts in this fashion' is seen 'as constituting as a form of lawfare[…]as society increasingly uses law as a means of control, the targets of the state invoke the cry of human rights to persuade courts that law has an intrinsic quality of accountability, certainty and the recognition of the basic freedom of the individual citizen".[90] And importantly, Le Roux and Davis added with equal force and clarity that:

> "[I]n this way, citizens fight attempts to control them through the law by using the law. Thus, politics in many societies is played out more in the courts than it is in the streets, more by the use of law and its disguised violence than by unfettered brutal force, absent of any legal constraint."[91]

In practical terms, as true dictates of constitutionalism, and therefore constitutional supremacy, would provide, "political claims became legal complaints as, increasingly, the courts became the primary dispute-resolution mechanism replacing Parliament, political struggles, community activism and engagement, and media campaigns."[92]

5.4.2 Strained Relations or Practical Constitutionalism?

In Zimbabwe, judicial relations with the executive should be understood within a certain constitutional history, legal and political culture. For example, since independence, the executive has registered a keen interest in 'interfering' with the structure and operations of the judiciary branch of government. That this is true is given cogency by the numerous (nineteen to be exact) constitutional amendments that the government effected in 'liberalizing' 1979 Constitution.

Mhodi surveyed these amendments and in our analysis, it seems there was a gradual ploy by the executive to concentrate or consolidate power its power. In the initial phases of independence, this quest was a noble one since they were inspired by the desire to promote transformation and therefore had little impact on the independence of judges save to open up the bench to black lawyers. These amendments include among others, Constitution of Zimbabwe Amendment (No.1) Act 27 of 1981 (altered qualification for the Senate Legal Committee, the Public Service Commission and the Judicial Service Commission); Constitution of Zimbabwe Amendment (No.2) Act 25 of 1981 (established the Supreme Court separate from the High Court, made provision for 'the qualification periods for appointment as a judge', membership of the JSC); Constitution of Zimbabwe

[89] *Ibid*., p. 1.
[90] *Ibid*., p. 4.
[91] *Ibid*.
[92] *Ibid*.

Amendment (No.3) Act 1 of 1983 (no significant amendment which relevant to judicial relations with the executive at this stage); Constitution of Zimbabwe Amendment (No.4) Act 4 of 1984 (appointment of judges for a fixed period and retirement age capped at 65 years, the Attorney General and three other appointments to be part of the JSC, powers of the president to appoint certain office bears); Constitution of Zimbabwe Amendment (No.5) Act 4 of 1985 (adaptations were made to the provisions relating to the removal of judges).

Furthermore, the seventh constitutional amendment[93] 'was a major constitutional alteration to Zimbabwe's political system'[94] as the country transitioned from 'a parliamentary regime into a semi-presidential regime'.[95] For scholars such as Mhodi, this chapter in Zimbabwe's constitutional history is best described as a period in which the promotion of a politically and economically extractive culture was sought and the ushering in of 'an era of executive terrorism' took place.[96] During this period, the president was given broad powers to appoint the Secretary or Deputy Secretary of a Ministry, Director of Prisons and the Comptroller and Auditor General. Significantly, the president was given authority to appoint the Chief Justice and other judges 'after consultation with the Judicial Service Commission', and if 'the appointment was inconsistent with the recommendations of the JSC, the House of Assembly had to be notified'.[97] This very fact was criticized by Professor Madhuku[98] as problematic since the amendment was seen as a gateway to executive 'terrorism'. The criticism refers to the fact that the Parliament could neither veto nor hold the president to account. His task was merely to report to it, which according to constitutionalists was cosmetic.

The appointment of the current Chief Justice in 2017, Honorable Luke Malaba, attracted heated discussions and prompted aborted and contentious litigation in the *Zibani* matter, which Hofisi and Feltoe vividly describe as the politicization of the judiciary and the Constitution. Moreover, both the first and second constitutional amendments to the 2013 Constitution are indicative of a desire to continue with a particular strand on the judicial relations with the executive: that of control and interference which can only be understood by evaluating our constitutional history particularly the seventh constitutional amendment to the 1979 Constitution.

Also, Mavedzenge, who discusses participatory constitution-making and the desire to produce a democratic constitution, contends that the 2013 Zimbabwean Constitution is very well indeed legitimate but nevertheless undemocratic. The reason for this, according to Mavedzenge, is a flawed appreciation of some fundamental contextual (the legal context prevailing at the time of the constitution making, political culture of the society and its leadership, manipulation of public views by the dominant forces and constitutional illiteracy)

[93] Constitution of Zimbabwe Amendment No.7 1987.
[94] *Mhodi*, *supra* note 13, p. 18.
[95] *Ibid*.
[96] *Ibid*.
[97] Mhodi, *supra* note 13, pp. 18-19.
[98] Madhuku, *supra* note 68.

and conceptual challenges (the doctrine of popular sovereignty and the doctrine of nation building and national reconciliation).[99] In the same spirit, several studies record a culture of defiance by the executive marked by a failure to obey court orders, expressly or impliedly, in most instances by reversing them through constitutional amendments. This is a significant marker on the background on which judicial relations with the executive must be understood.

Judicial pronouncements before 2013 speak to the political and legal culture which prevailed in the country. In *Patriotic Front-ZAPU* v. *Minister of Justice, Legal and Parliamentary Affairs*,[100] the Supreme Court confirmed, as a general rule, the non-justiciable nature of the prerogative powers of the president. However, the court also considered the ruling in *Council of Civil Service Union and Others* v. *Minister for Civil Service*,[101] which serves as authority that illegality, irrationality and procedural impropriety were considered salient grounds for judicial review. In the sections below, we examine the auxiliary mechanism of judicial review specifically under section 68 of the 2013 Zimbabwean Constitution, to generate conversations on the differences in approach under the former and current constitutions, respectively. In the main, the dominant theme is that the Constitution is the main source of law, and all power is thus derived from it. Nonetheless, the deliberate weakening of the judiciary and interference by the executive pillar in its internal affairs has rendered this nascent Constitution ineffective.

Converse to the above state of affairs, Chitimira posits that the judiciary is important to entrench a democratic culture.[102] His treatise investigates 'whether the 2013 Constitution will enhance the promotion and respect of key-related concepts such as the independence of the judiciary, the rule of law and the doctrine of separation of powers in Zimbabwe'.[103] As already established above, these principles fall under what can be termed auxiliary precautions of constitutionalism. Moreover, Madhuku postulates that judicial independence is a logical corollary of the principle of separation of powers.[104] In practical terms, the Chitimira piece is important because it analyses the literature and constitutional landscape before and after 2013. Of note in his study is succinct discussion of the works of Manyatera and Fombad,[105]Chiduza,[106] and Mhodi.[107] In terms of literature mapping, his publications can be classified alongside the writings of, *inter alia*, Mavedzenge, Marumahoko and others who examined the constitutional terrain post-2013.Thus, scholars and

[99]Mavedzenge, *supra* note 32, p. viii.
[100] 1986 (1) SA 532 (ZS).
[101] (1984) 4 ALL ER 935.
[102]Chitimira, *supra* note 73, p. 221.
[103]*Ibid*.
[104] Madhuku *supra* note 68, p. 232.
[105] See, Chitimira*supra* note 73, p. 221 citing the work of G. Manyatera& M. Fombad, 'An Assessment of the Judicial Service Commission in Zimbabwe's New Constitution', XLVII *Comparative and International Law Journal of Southern Africa* (2014).
[106] See, Chitimira, *supra* note 73, p. 221 citing the work of P.L. Chiduza, 'Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?' 17:1 *Potchefstroom Electronic Law Journal* (2014) p. 368.
[107] See, Chitimira, *supra* note 73, p. 221 citing the work of P.T Mhodi, 'An Analysis of the Doctrine of Constitutionalism in the Zimbabwean Constitution of 2013', 28 *SAR* (2013) p. 383.

practitioners must interrogate the claim of whether the legal culture has changed or not since the adoption of the much-acclaimed 2013 Constitution. As demonstrated in the paragraphs above, the answer is far from clear.

5.5 A Summary of the Judiciary under the Lancaster Constitution

In the former Constitution, judicial authority was distributed amongst the Supreme Court (which was the apex court), the high court and other smaller or subordinate courts.[108] In line with the strand in Madhuku, Chitimira briefly adds that 'judicial authority could be vested in a person or authority other than a court in terms of an Act of Parliament under the Lancaster House Constitution.[109] Following conventional constitutional wisdom at the time, the judiciary was headed by the Chief Justice, the Deputy Chief Justice together with the judges presiding over High Courts and other presiding officers.[110] The Supreme Court was the highest court in Zimbabwe and its decisions bound all inferior or subordinate courts.[111] Furthermore, the Supreme Court was a final appellate court that had expansive adjudicative powers. Chitimira notes that the Chief Justice, Deputy Chief Justice and other judges that were appointed by the president. Moreover, the Chief Justice had the authority to adjudicate upon all the matters that could be filed in the Supreme Court.[112] Additionally, the powers of the Chief Justice were far-reaching in that he could 'interfere with the duties and functions of the Judge President of the High Court'.[113] According to section 79B of the Lancaster Constitution, 'all officials of the courts, judges and other relevant members of the judiciary were obliged to execute their duties without undue influence or manipulation from any person'. However, contrary to the dictates of the Constitution, there are claims of executive interference in the domain of the judiciary under the Lancaster Constitution. Also, this was worsened by a culture of secrecy and politically charged appointments and removals of judges from office between 1999 and 2012 such as the resignation of Chief Justice Gubbay, Justice Moses Chinhengo, Sandra Mungwira and Michael Majuru.[114]

Under the 1979 Constitution, the president could also appoint judges after consultation with the JSC.[115] And in cases of inconsistency, the president was required to inform the Parliament. The qualification to become a judge was also criticized as weak since it gave the president a ticket to make biased political appointments.[116]

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[108]Chitimira, *supra* note 73, p. 222, discussing section 79 (1) of the Lancaster House Constitution.
[109]*Ibid*.
[110] Section 74A (d) of the Lancaster House Constitution.
[111]Chitimira, *supra* note 73, p. 222.
[112]*Ibid.*, p. 233.
[113]*Ibid.*
[114]*Ibid.*, p. 224, *see particularly*, footnote 37.
[115] Sections 84 and 85 read conjunctively with ss 82, 83, 90 and 91.
[116]Chitimira, *supra* note 73, p. 225.

5.6 Selected Core Elements of Constitutionalism Relevant to the Theme of Judicial Relations *with the Executive*

5.6.1 The Separation of Powers Doctrine

As stated above, the separation of powers doctrine is based on the ideology that no one person or body should control the legislature, judiciary and executive. It provides that bipartite or tripartite control of these three branches is not allowed in a nation with political liberty as an object of its constitution.[117] In principle, it provides that there should be no duplication of personnel under the three tiers of the state and functions across them should be separate.[118] In essence, the executive, legislature and judiciary should theoretically and practically confine their operations to their own spheres.[119] According to this division or specialisation of functions, the executive is mainly charged with the administration and implementation of the law;[120] the legislature mainly enacts general law[121] and the judiciary[122] settles legal disputes by interpreting and applying the law.[123]

The theory of pure separation of powers dictates that there should be a complete separation between or among the three arms of state and that there exists a carefully and practically designed constitutional demarcation and mutual relations among these pillars.[124] The less pure separation of power theory states that organs of government are interrelated and they provide checks and balances for each other.[125] This theory acknowledges the fact that the three pillars of the state should work with each other is a political reality and the exercise of powers and functions are not housed with a particular state organ, each branch is checked and balanced by the other branch.[126] In the main, the Zimbabwean judiciary in interpreting the doctrine of separation of powers has adopted the less pure theory.[127] The courts have followed the stance taken in the South African case of *Ex parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution*

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[117] M. Ryan, *Unlocking Constitutional and Administrative Law* Routledge, Oxfordshire (2007) p. 79.
[118] *Ibid*.
[119] *Zimbabwe Lawyers For Human Rights* v. *Minister of Transport, Communication and Infrastructure Development N.O and Ors* 2014 (2) ZLR 44 (H) and *Lillian Timveos& Another* v. *Douglas Mwonzora& Others* HC 2527/20.
[120] Ryan, *supra* note 114, p. 80.
[121] *Ibid*., p. 81.
[122] In *Smith* v. *Mutasa NO &Ano* 1989 (3) ZLR 183 (SC), the Supreme Court, held that the judiciary is the guardian of the Constitution and the rights of the citizens. As such, this meant that the Parliament could not disregard the fundamental rights enshrined in the Constitution. It further states that in a constitutional democracy it is the judiciary not parliament that determine the lawfulness of actions of bodies, including parliament.
[123] Ryan, *supra* note 114, p. 82.
[124] *Ibid*.
[125] *Ibid*.
[126] *Ibid*., p. 80.
[127] See, the*Mlilo*v. *The President of the Republic of Zimbabwe* (HH 236-18, HC 9829/17) [2018] ZWHHC 236 decision, where the Court stated that "[i]t follows from the foregoing, therefore, that complete separation of powers of the three organs of the State – i.e the Executive, the Legislature and the Judiciary –is a myth. It is not achievable in the context of the Constitution of Zimbabwe."

of the Republic of South Africa[128]which held that there is no absolute separation of powers.[129]

Furthermore, in the *Milo case,*[130] it was held that:

> *"[*T]he principle of separation of powers, on the one hand, recognizes the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another." In this sense, it anticipates the necessary and unavoidable intrusion of one branch into the terrain of another. No constitutional scheme can reflect a complete separation of powers: The scheme is always one of partial separation"

The rationale for the separation of powers lies in ensuring that power is not concentrated in one organ of the state as this can lead to tyranny or oppression. Secondly, it provides checks and balances between the branches of the state which enables efficient governance and the safeguarding of the judiciary.[131] However, there are conflicting views on the role of the judiciary[132] in light of the separation of powers. One view holds that the judiciary should have unrestricted law-reviewing and law-making powers in developing states.[133] To respect the separation of power doctrine, executive decisions are not merely set aside by the judiciary on the grounds of unreasonableness or procedural unfairness but they can be set aside on the grounds of irrationality.[134] The current head of the judiciary in Zimbabwe opines that no judiciary in a democratic State is completely independent.[135] The judiciary relies on the executive and legislature to provide resources and services, in particular on the legislature to provide finances and the legal framework which it has to interpret in applying the law.[136] In practical terms, the separation of powers doctrine is closely linked to judicial independence, discussed below.

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[128] 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) states that"[t]here is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute.."

[129]*Biti & Another* v. *Minister of Justice Legal and Parliamentary Affairs and Another* [2002] ZWSC 10 is authority for the proposition that the separation of powers is a broad and flexible doctrine.

[130]*Mlilov. The President of the Republic of Zimbabwe*, *supra* note 124.

[131] Ryan, *supra* note 114, p. 82.

[132] B. Hlatshwayo, 'Judicial Activism and Development: Warning Signals from Zimbabwe', 9:10 *The Zimbabwe Law Review* (1992) p. 4.

[133]*Ibid*.

[134]*Democratic Alliance* v. *President of South Africa* CCT 122/11, [2012] ZACC 24, 5 Oct 2012, para. 41.

[135] L. Malaba, 'Judicial Independence', *Judicial Service Commission Standard Paper* (2020) p. 8available at www.jsc.org.

[136]*Ibid*.

5.6.2 Judicial Independence[137]

Judicial independence is a principle formally recognised in our Constitution[138] and is thus a corollary of the separation of powers doctrine.[139] The Constitution provides that it is the duty of the state and institutions or agency of government not to jeopardize judicial independence.[140] Judicial independence protects the judiciary against political pressure when reaching decisions which do not favour government and other powerful interests.[141] Even statements by the executive which impugn an individual judge are against judicial independence.[142] Bradley importantly postulates that criticism of the judiciary should be restricted to substantive motion and there should be no reflection cast on a judge's conduct or upon judges generally.[143] He furthermore[144] submits that an independent judiciary is essential for the rule of law to have substance. If judicial power is joined to executive power, it can have the force of a tyrant.[145]

The apex principle of judicial independence is the security of tenure because a judge cannot be merely dismissed on the grounds of impropriety by the executive.[146] It is unclear whether Section 187 of the Constitution provides full proof security on judicial tenure; however, this provision prevents judges from being dismissed at the whim of the executive.[147] The Constitution embraces a strong formal commitment to judicial independence and separation of powers.[148] Judges acting at the behest of the executive in a political process are increasingly anomalous due to the rescission of judicial involvement in politics.[149]

Concerns of the court structure, court buildings and remuneration, benefits and allowances are government concerns which it alone can decide and not the judiciary itself.[150] These issues are subject to the approval of the President in consultation with the Minister of Justice upon recommendation from the Minister

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[137] R. Brazier, *Constitutional Reform: Reshaping the British Political System*, 2nd edition (Oxford University Press, 1998) p. 172 provides as follows that "[w]hat does judicial independence, properly defined, entail? In general the public must feel confident in the integrity and impartiality of the judiciary: judges must therefore be secure from undue influence and be autonomous in their own field. That possibly implies that neither the government nor Parliament should have any role in the appointment or removal of judges, which has never been the case in this country. More precisely, judicial independence may be said to require: (a) that appointments to judicial office, renewal of part-time appointments, and promotions, should not depend on uncontrolled ministerial patronage; (b) that judges should be free from improper attempts by Ministers, Members of Parliament, or peers to influence the result of cases still under adjudication; (c) that judicial salaries should not be reduced; and (d) that judges should not be removed from office unfairly or without reason."

[138] Section 164 of the 2013 Zimbabwean Constitution.

[139] Madhuku, *supra* note 68, p. 232.

[140] Section 164 (2) (a) & (b) of the Constitution of Zimbabwe.

[141] A.W. Bradley, K.D Ewing and C.J. S Knight, *Constitutional and Administrative Law,* 6th Edition, (King's College University, London 2002) p. 328.

[142] Madhuku, *supra* note 68.

[143] *Ibid*.

[144] Bradley, Ewing & Knight, *supra* note 138.

[145] *Ibid*.

[146] Section 187 of the Constitution provides that a judge can only be removed on the grounds of mental and physical incapacity, which renders them incapable of performing their functions, gross incompetence and gross misconduct.

[147] Bradley, Ewing & Knight, *supra* note 138, p. 329.

[148] *Ibid*., p. 330.

[149] *Ibid*. See also, section 165 (4) of the Constitution which stipulates that judges should not be seen to be engaged in political activities.

[150] *Ibid*., p. 342.

of Finance.[151] This undermines the theory that the judiciary is a constitutional partner of the executive rather than mere subjects of change.[152] The government has the overall responsibility of the judiciary through the Ministry of Justice, Legal and Parliamentary Affairs. Having a provision in the Constitution stating that the remuneration, allowances and benefits of judges are fixed from time to time is said to be a safeguard against executive tampering with Judges' salaries and benefits to diminish the authority of the judicial branch of government.[153] The power to reduce judicial salaries and benefits would create the most danger to the independence of the Judiciary.[154] The next section examines the concept of constitutional or judicial review, and argues that it is one of the epochs in which the relationship between the judiciary and executive should be examined.

5.6.3 Judicial Review

Judicial review is the exercise of courts' inherent power to determine whether an action or actions are lawful or unlawful and then award suitable relief.[155] The courts are enjoined to perform their ordinary functions of enforcing the law.[156] Common law is the main basis for judicial review although most cases on judicial review arise from statutes.[157] Judicial review is the power of the courts to enforce the Constitution.[158] Moreover, judicial review is mostly concerned with administrative issues whose justiciability depends on one's understanding of the concept of a state and how the theory of division of power between the branches of the state is and ought to be.[159] Constitutionalism asserts the power of the Judiciary through constitutional interpretation and review of legislation.[160]The separation of powers[161] and the protection of fundamental human rights[162] are arguably dependent on the courts for enforcement, via judicial review.[163] Power can only be exercised within its true limits.[164] When the judiciary stakes claims of constitutional autonomy it endangers itself to claims of being unelected, unaccountable and thus devoid of democratic legitimacy.[165]

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[151]*See* section 188 (1) of the Constitution.
[152]Bradley, Ewing & Knight, *supra* note 138, p. 343.
[153]*See*, Malaba *supra* note 132, p. 18; and section 183 (1), (2) and (4) of the Constitution.
[154]*Ibid.*
[155]H.W.R Wade and F. Forsyth, *Administrative Law,* 11th Edition (Oxford University Press, 2014) p. 26.
[156]*Ibid.*
[157]*Ibid*., p. 27.
[158] Currie & De Waal, *supra* note 39, p. 20.
[159] C. Hoexter and R. Lyster, *The New Constitutional and Administrative Law*, Vol 2, 1st Edition (Juta, South Africa2002) p. 68.
[160]*Marbury*v. *Madison*, *supra* note 4.
[161] Section 2 of the Constitution.
[162] Section 44 of the Constitution states that "[t]he State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter", and s 68 (3)(a) of the same Constitution stipulates that: (3) An Act of Parliament must give effect to these rights, and must— (a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal."
[163]Currie & De Waal, *supra* note 39, p. 20.
[164]Wade & Forsyth, *supra* note *152,* p. 27.
[165]*Ibid*.

Early in the 20th Century judicial review was restricted to only legal questions and the courts could not interfere in political matters as they fell under the ambit of the other state branches (executive and legislature).[166] The judiciary can now hand down decisions on broad social and political issues and not merely just interpret the Constitution, which used to be regarded as a political role.[167] The common law judicial review has now been largely subsumed by the Constitution[168] and Administrative Justice Act.[169]

Judicial review[170] is an essential process in a constitutional democracy founded upon the rule of law[171] where the judiciary exercises jurisdiction over the legality of decisions made by the executive when exercising public power.[172] The courts keep the state within the bounds of its constitutionally-mandated powers and protect citizens from abuse of this power.[173] It is based on the reasoning that decisions have to conform to the law and fair procedure.[174] The judiciary's point of call is to determine which legal rules apply and whether the rules have been breached.[175] Judges provide an opinion on the reasonableness or motive of government actions and whether or not such action should be condemned under judicial review.[176] Judicial review tends to fragment into various law branches.[177] Judicial review also involves the development of legal principles against complex changing legislation.[178]

Court decisions are bound to have a political impact or cause friction with the executive branch in cases concerning sensitive policies that the executive ascribe great value or importance to.[179] The review of such policies by the judiciary can lead to criticism of the judiciary and political bias.[180] Parliament, which is

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[166]*Ibid*. *See also*, J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Vol 15, (Berkeley Electronic Press, Califonia, 1980*) p. 637.*

[167] *See generally*, Wade & Forsyth, *supra* note 152, p. 27. In *Mlilov. The President of the Republic of Zimbabwe* case, *supra* note 124, the Court crisply stated, as follows:

> "I mention in passing that human rights activism and constitutionalism took root in Zimbabwe in the late 1980s and early 1990s. Many non-governmental organisations sprouted through the length and breadth of the country. Activists who fell into, and continue to remain in, this very important field of work brought the government of the day to account for its conduct in such areas as the due observance of the rule of law, people's fundamental rights, democracy and elections."

[168] Section 68 of the Constitution of Zimbabwe.

[169]*[Chapter 10:28].*

[170]*See Chief Constable of the North Wales Police* v. *Evans* [1982] 3 All ER 141, which supports the position that "judicial review is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power."

[171] Hoexter &Lyster, *supra* note 156, p.18 states that "[i]n terms of this theory, the courts function is that of a politically impartial watchdog over the rest of government, and especially over its executive branch."

[172]Wade & Forsyth, supra note 152, p. 23. *See also,* Bradley, Ewing & Knight, *supra* note 138, p. 629.

[173]Hoexter &Lyster, *supra* note 156, p. 69.

[174]Bradley, Ewing & Knight, *supra* note 138, p. 630.

[175]*Ibid*.

[176]Wade & Forsyth, *supra* note *152, p.* 27.

[177]*Ibid*.

[178]*Ibid.*, p. 631.

[179]*Ibid.*

[180]*Ibid.*

inclusive of the executive,[181] has the power to legislate on the scope of judicial review (executive and legislature checks and balances on the judiciary).[182] Should a political crisis develop regarding judicial review parliament can enlarge or restrict judicial review (judicial interference).[183]

Recent judicial opinion on the justification of judicial review posits the rule of law as being the ultimate factor on which a constitution is based. In ensuring state functions take place within the confines of the law, the judiciary fulfils its constitutional duties by adjusting the balance of forces in the Constitution by promoting fairness and justice in government under the rule of law.[184] The main grounds upon which judicial review can be invoked are illegality, irrationality and procedural impropriety.[185] Those who perceive that some acts of legislation confer unfettered discretion on the executive are guilty of constitutional blasphemy and where the rule of law reigns unfettered discretion cannot exist.[186] Wade & Forsyth[187] state that the power to prevent abuse is the acid test of effective judicial review.

Accordingly, the paragraphs above demonstrate the perspective that judicial review is a means by which courts control the exercise of power by government departments.[188] The practical point is that judicial review is an illustration of the separation of powers whereby the judicial arm of government checks and balances executive actions.[189] This is a mechanism legally used to make the executive accountable.[190] Judicial review acts as a check on executive power.[191] Judicial review is concerned with the decision making process of government bodies and not the decision itself.[192] The constitutional function of judicial review is not for the judiciary to act as an appellant court by looking into the merits of a decision by the executive but it examines the lawfulness and legality of the actions taken.[193] This is a restriction on the power exercised by the court and if not observed it amounts to usurp of power.[194] In questioning the process undertaken to reach a decision, the courts will examine whether or not the public authority has misinterpreted its powers, took into consideration irrelevant matters, ignored a relevant matter, acted with improper purpose in mind or acted in a procedurally unfair manner through

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[181] *Mlilov. The President of the Republic of Zimbabwe*, *supra* note 124, states, "[t]he legislative authority of Zimbabwe is reposed in the Legislature. This comprises Parliament and the President acting in accordance with this Chapter. Sections 116, 117 and subsections (2), (3), 5 (a), 6 (a) and (b), 7 (a), 8 (a) and (b), (9) and (10) of s 131 of the Constitution of Zimbabwe spell out the complimentary roles which Parliament and the President play in Zimbabwe's law-making process. They check and balance each other's work. The one cannot make law without the input of the other and vice-verse."

[182] *Ibid*.

[183] *Ibid.*

[184] Wade & Forsyth, *supra* note 152, p.30.

[185] *CCSU v. Minister of Civil Service* [1985] AC 374, 410.

[186] Wade & Forsyth, *supra* note 152,p. 27.

[187] *Ibid*., p. 26.

[188] H. Barnette, *Constitutional and Administrative Law,* 6th Edition (Routledge Cavendish, Oxfordshire 2006) p. 719.

[189] See, Ryan, *supra* note 114, p. 557.

[190] *Ibid*.

[191] *Ibid.,* p.554.

[192] *Ibid*.,p. 555.

[193] *Ibid*.

[194] *Chief Constable of the North Wales Police* v. *Evans* [1982] 1 WLR 1155.

ignoring statute requirements or failed to follow common law rules of natural justice.[195] In essence, the courts will only intervene through judicial review when the executive misunderstands or misuses its power or assumes a defective decision-making process.

5.6.3.1. Substantive Judicial Review

Substantively, judicial review submits that decision-makers, in this case, the executive, must act in accordance with the law, act fairly, act reasonably[196] and act in promotion and protection of fundamental human rights.[197] Thus, substantive judicial review looks at the appropriate role of the courts in regulating executive action which is subject to democratic oversight.[198] This is an area of concern for both the judiciary and government because it raises constitutional questions.[199] It is one area where judicial review can be used as a legal and political tool to attack unfavourable policy decisions and courts are generally slow to intervene in this area.[200]

The doctrine of *ultra vires* is the juristic basis of judicial review which describes acts where one exercises power vested by legislation but not in accordance with the power-giving legislation. Thus, the act or acts fall outside the limits of the power and conditions given, rendering it or them illegal.[201] *Ultra vires*[202] also applies in the rare circumstances where common law prerogative powers are exercised to determine whether powers have been used fairly and rationally by the executive.[203] Critics argue that the *ultra vires* doctrine is a facade of constitutional decency with mere lip service to the government.[204]

It is argued that the constitutional reasoning for judicial review is mainly concerned with questioning actions that are *ultra vires*.[205] In assessing illegality as a ground for judicial review, judgment is passed on the decision maker's understanding of the law regulating his or her decision-making power and giving effect to it.[206] Instances where one acts *ultra vires* include; misinterpretation of public law powers, wrongful delegation, acting for an improper purpose or ulterior motive, abuse of discretion and acting in a manner incompatible with the fundamental human rights in the Constitution.[207]Unlawful use of discretionary power refers to choosing between several decisions which may be lawful but, in executing the discretion the decision or action becomes unlawful.[208] Under this rule,

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[195] Ryan, *supra* note 114, p. 555.
[196] Bradley, Ewing & Knight, *supra* note 138, p. 631.
[197] Section 44 of the Constitution.
[198] Bradley, Ewing & Knight, *supra* note 138, p. 632.
[199] *Ibid*.
[200] *Ibid*. *See also Mlilo* v. *The President of the Republic of Zimbabwe*, *supra* note 124.
[201] *Ibid*.
[202] Wade & Forsyth, *supra* note *152, p.* 28.
[203] Bradley, Ewing & Knight, *supra* note 138, p. 632.
[204] *Ibid*.
[205] *Ibid.*
[206] *Council of Civil Service Unions* v. *Minister of the Civil Service* [1985] 1 AC 374.
[207] Ryan, *supra* note *114,* p. 580.
[208] *Ibid*., p. 636.

a public authority is entrusted with discretion to direct itself properly on the law. Failure to do so will result in the declaration of its decision as invalid.[209] This rule also appreciates that courts are not the only interpreters of the Constitution; the legislature is also permitted to express its interpretation of the law.[210]

Unauthorised delegation refers to the exercise of discretion that legislatively cannot be delegated to another person unless expressly stated by statute.[211] The rule against unauthorised delegation may require all powers vested in a particular minister to be personally exercised by him or her.[212] Improper purpose exercise of power includes malice/ personal dishonesty on the part of the official.[213] Most cases of improper purpose arise on mistaken interpretation by a public authority due to excessive zeal.[214] Irrationality[215] is when a decision is unreasonable. Unreasonableness denotes an action which no sensible authority, acting with due appreciation of its responsibilities, decides to adopt.[216] Proportionality requires a structured analysis of the decision challenged and the justification of the decision-maker against the challenge.[217] This is a general review standard under violations of human rights.[218] The South African Constitutional Court held that the standard used is that of substantive reasonableness, to test policy against a meaningful concrete standard of review.[219] Critics argue that this is the wrong position, the Court should enquire as to whether the failure or refusal of the state agency to address a particular state of affairs which flowed from a particular policy or interpretation, is reasonable in the circumstances.[220] A response to this criticism has been that it is due to the separation of powers that the courts have to take a secondary role to the political process.[221] On the relationship between the court and other arms of government in the enforcement of socio-economic rights the *Mazibuko* case[222] provides that:

> "The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of the government. Simply put, through the institution of the courts, government can be called upon to account as citizens for its decision. This understanding of socio and

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[209] *Ibid.*

[210] *Hira* v. *Booysen* 1992 (2) SA 1 (C) 13. *See also*, Hoexter &Lyster, *supra* note 156, p. 155.

[211] Bradley, Ewing & Knight, *supra* note 138, *p.* 641.

[212] *Ibid.*

[213] *Ibid.*, p. I640.

[214] *Ibid*.

[215] In essence, rationality does not conceive of differing thresholds. It cannot be suggested that the decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one.

[216] *Education Secretary* v. *Tameside Council* [1977] AC 1014.

[217] Bradley, Ewing & Knight, *supra* note 138, p. 645.

[218] *De Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

[219] *Government of the Republic of South Africa v. Grootboom* 2000 1 SA 46 (CC).

[220] D.M. Davis, 'The Relationship Between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What about Separation of Powers?",15:5 *Potchefstroom Electronic Law Journal* (2012) p. 8/638.

[221] *Ibid.*

[222] *Mazibuko* v. *City of Johannesburg* 2010 4 SA 1 (CC) paras. 160-161.

> economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open".[223]

In our jurisdiction, the same understanding was buttressed in the *Milo* case,[224] which states that:

> "Judicial work does not work in a vacuum. It operates upon a set of rules chief among which is a country's constitution and any legislation which is relevant to a case which is being decided. It interprets the law as it exists in a country's constitution and other law. It interprets those against a certain set of stated matters".[225]

The courts have limited scope in this area, due to the restraining influence of the doctrine of separation of powers.[226] Davis opines that the doctrine of separation of powers will be undermined if executive decisions are all too easily set aside, and the judiciary crosses into the executive's sphere.

5.6.3.2 Prerogative Powers

Traditionally, our courts have viewed the exercise of prerogative powers as non-justiciable.[227] The prerogative is a common law conception, although it is also recognized in statute.[228] It refers to an old English concept which describes the Crown's common law power to confer honour, pardon and reprieve offenders, appoint and recognise diplomatic agents, declare war and make peace, ratification and entering into treaties.[229] The exercise of this power has always been shrouded in controversy on the extent to which such power is subject to judicial review.[230] Modern-day prerogative powers exercised by the President include, for example, the power to dissolve the Parliament, appointments of commissions of inquiry, executive assent to legislation and making of treaties with foreign states.[231] These powers were historically regarded as political and not legal matters that the judiciary could scrutinise. It is perceived that even in appointments of the head of the judiciary,[232] the executive exercises unfettered discretion which is non-justiciable.[233]

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[223]*Ibid*.
[224]*Mlilo* v. *The President of the Republic of Zimbabwe*, *supra* note 124.
[225]*Ibid*.
[226] Davis, *supra* note 217.
[227]G. Feltoe, *A Guide to Administrative and Local Government Law in Zimbabwe* (Zimbabwe Legal Information Institute, Harare, 2017).
[228]Presidential Powers (Temporary Measures) Act *[Chapter 10:20].*
[229]Hoexter &Lyster, *supra* note 156, p. 18.
[230]*Council of Service Unions* v. *Minister of the Civil Service* [1984] 3 All ER 935 (HL) held that certain prerogative powers were reviewable on the grounds of illegality, irrationality and procedural impropriety; *See also Sachs* v. *Donges* NO 1950 (2) SA 265 (A) and*Boesak* v. *Minister of Home Affairs* 1987 (3) SA 665 (C).
[231]*Ibid*.
[232]Section 163 (2) of the Constitution stipulates that the Chief Justice is the head of the Judiciary.
[233]*Zibani* v. *JSC &* Others (HH 797/16 HC 12441/16) [2016] ZWHHC 797. Hofisi&Feltoe, supra note 28, p. 14, where the authors dismiss an incorrect perspective by one member from the executive at time who hold the view that "[w]e have one person who is above the executive, the judiciary and the legislature – the Head of State. So when he exercises his powers to appoint the Speaker, Chief Justice – he does that as Head of State […]"

Currie and De Waal[234] contend that the prerogative powers have not survived the Constitution although the Constitution[235] has bequeathed functions to the head of state and head of the national executive, which resemble prerogative powers.[236] Since executive prerogative powers are derived from the Constitution they are reviewable in the same way any other constitutional power is reviewable.[237] The rationale is that when the President acts as head of state or head of the executive, he is acting as an executive organ of the state in terms of the Constitution.[238] Importantly, the constitutional and administrative rule that all constitutional power must comply with the Constitution as the supreme law[239] and the doctrine of legality is not iron clad.[240] An example of this is that when the President appoints a commission of inquiry such power is not reviewable under administrative justice because such power is given to him as head of state not the head of the executive.[241] The non-reviewable status of appointments of commissions of inquiry also relates to cases with a strong political flavour closely related to policy and the power of mercy.[242] Although Constitutional prerogative powers are reviewable other than under administrative justice, the judiciary tends to treat them with deference due to their political nature.[243]

5.6.3.3 The Controversial Nature of Judicial Review

The courts themselves have developed, expanded and sophisticated the principles and grounds upon which judicial review applies.[244] It is perceived that the judiciary lacks a democratic mandate in supervising the executive as judges are unelected and mostly unrepresentative of society.[245] Accordingly, in a democratic state, it is paramount that the executive does not exceed its powers to uphold the rule of law.[246]

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[234] Hoexter &Lyster, *supra* note 156, p. 18.

[235] *See specifically* sections 110, 111, 112 and 113 of the Constitution, which states that executive functions includes powers to, declare state of emergency, war and peace, power of mercy and states of emergency.

[236] Hoexter and Lyster, *supra* note 156, p. 19.

[237] See for example, *President of the Republic of South Africa* v.. *Hugo* 1997 (4) SA 1 (CC); *President of the Republic of South Africa* v. *SARFU* 2000 (1) SA 1 (CC); *PF ZAPU* v. *Minister of Justice* (2) 1985 (1) ZLR 305 (S) which held that such powers were normally not subject to judicial review but court could check and see whether such power was exercised under lawful conditions and within the law." It is submitted that this ……**When the judiciary looks at the lawfulness of the exercise of the power, it is judicial review.** (emphasis added)

[238] Hoexter and Lyster, *supra* note 156, p. 19.

[239] Section 2 of the Constitution.

[240] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

[241] *President of the Republic of South Africa* v. *SARFU* 2000 (1) SA 1 (CC) and Currie and De Waal, *supra* note 39, p. 19.

[242] *Ibid*.

[243] *Ibid*.

[244] Ryan, *supra* note 114, p. 558.

[245] *Ibid*.

[246] *Ibid*.

5.7 Conclusion

Although writing an exhaustive treatise on all the issues relating to the relationship between the judiciary and the executive under the Constitution is practically impossible, this chapter sought to provide the theoretical and in some instances, the practical bases in which this relationship can be understood and interrogated. Foremost, it provides a conspectus of the general constitutional principles on the three pillars of the state, that is, the Executive, Legislative and the Judiciary, to the extent that these assist in providing context for the topic under review. Secondly, it argues in the main that an independent and impartial judiciary is the core of the burgeoning post 2013 constitutional enterprise.

Thirdly, to illustrate the various ways in which the judiciary and the executive interact, this contribution used elements of constitutionalism and established tenets of the constitutional order such as the separation of powers, the rule of law, judicial independence and judicial review, to further amplify an understanding of the tensions and comity between these branches. Fourthly, to achieve the dominant objective, the contribution invoked the past to inform the present. In other words, a historical constitutional analysis of the erstwhile or pre-2013 Constitution era was used to create context, and provide lenses upon which relevant constitutional provisions, particularly Chapter 8 of the Constitution must be understood.

The dominant impression created by the literature and constitutional practice during this period demonstrates constant clashes between the branches, admittedly sometimes necessary and in some instances, undue incursions into the heartland of another branch. All in all, the chapter should be read a precursor to further works to further excavate the practical issues, constitutional provision by provision. Nonetheless, the overall argument that the chapter has emphasised that the constitutional law has attempted to create systems and auxiliary precautions in place, which require consistent attention to perfect, for the constitutional vision of equality, freedom, justice, peace and sustainable development to be achieved.

Chapter 6

The Judicial Selection Mechanisms for Superior Courts and Specialised Tribunals

Gift Manyatera[1]

6.1 Introduction

The mechanisms of judicial selection for superior court judges are an important corollary of an independent judiciary, which in itself is an important element of constitutionalism. Tons of pages in constitutional discourse have been dedicated to this critical element of an independent judiciary. How a nation ought to select its superior court judges has remained a hotly debated topic for law reformers and policymakers alike. What is particularly significant is that the 2013 Zimbabwean Constitution introduced far reaching reforms in the manner in which superior court judges are selected. This was against the backdrop of the Lancaster House Constitution which gave the executive an unfettered discretion in the selection of superior court judges. Further, it is also important to note that the 2013 Zimbabwean Constitution has already been amended, with the amendment introducing changes to the selection of the senior superior court judges.

The Chapter analyses the post 2013 constitutional changes in judicial selection for superior courts and attempts to gauge the prospects for an independent judiciary in Zimbabwe which is free from external and internal influences. The discussion focuses on the constitutional framework governing judicial selection, focusing particularly on the judicial appointment commission's (JAC)[2] constitutionally entrenched role, as well as the constitutional criteria utilized in superior court judicial selection.

6.2 Constitutional and legislative framework governing judicial selection

Possibly inspired by the South African Constitution, the 2013 Zimbabwean Constitution introduced fundamental changes to the legal framework governing the judiciary. These fundamental changes are hardly surprising considering the serious concerns which existed regarding the independence of the Zimbabwean judiciary.[3]

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[1]Executive Dean, Faculty of Law, Midlands State University, Zimbabwe.

[2] In the Zimbabwean context, the JAC refers to the Judicial Service Commission.

[3] For a detailed analysis of the problems which bedevilled the Zimbabwean judiciary in the past decade, *see* D.Matyszak, 'Creating a Compliant Judiciary in Zimbabwe', in K.Malleson and P.H.Russell (eds.), *Appointing Judges in an Age of Judicial Power, Critical Perspectives from Around the World* (University of Toronto Press, Toronto, 2006) p.

Unlike the position under the former constitution, the judicial independence principle is constitutionally entrenched in detail in section 164 of the 2013 Constitution.[4] Judicial authority is vested in the courts with the newly created Constitutional Court being the apex court.[5] The detailed constitutionally entrenched judicial selection processes are a complete departure from the provisions in the former constitution.[6]

The Judicial Service Act operationalized the JAC,[7] but the main document insofar as judicial selection is concerned is the Zimbabwean Constitution of 2013. It sets out the qualifications for the different categories of judges as well as the establishment of the thirteen member JAC,[8] and the detailed procedures for judicial selection.[9] In addition to the general qualification requirements for the superior courts, the Zimbabwean Constitution sets out the critical judicial selection criteria as follows:

> 'To be appointed as a judge of the [Constitutional Court, Supreme Court, High Court, Labour Court, Administrative Court] a person must be a fit and proper person to hold office as a judge.'[10]

While the Zimbabwean process is relatively new, it is anticipated that the lack of clarity in respect of what a 'fit and proper person' entail can subject the whole process to subjective interpretations. As the following discussions will show, it would appear that the South African quagmire in respect of the same vague criteria can easily manifest itself in the Zimbabwean context. It is therefore critical for the JAC to come up with regulations on judicial selection which would address the gaps in the constitutional text. The following analysis on the Zimbabwean JAC which plays a key role will shed more light on the efficacy and desirability of the constitutional text on superior court judicial selection.

6.3 Assessment of the judicial appointment commission

There are several methods for selecting judges but judicial appointment commissions are perhaps one of the most popular methods utilized across the

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334. *See alo* L. Van de Vijver (ed.), *The Judicial Institution in Southern Africa: A Comparative Study of Common Law Jurisdictions* (Siber Ink, University of Cape Town, Democratic Governance and Rights Unit, Cape Town, 2006).

[4] Section 164 and 165 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (hereafter, the Zimbabwean Constitution').

[5] The Supreme Court is the final court of appeal in non-constitutional matters.

[6] The Lancaster House Constitution was the first post-independence Zimbabwean Constitution and it was amended 19 times before it was repealed by the current constitution. For an analysis of the judicial selection mechanisms under the Lancaster House Constitution, *see generally* L.Madhuku, 'The Appointment Process of Judges in Zimbabwe and its Implications for the Administration of Justice', 21 *SAPL* (2006) p. 345. *See also* G.Linington, "Constitutional Law of Zimbabwe" Legal Resources Foundation, Harare, (2001) pp. 170-178.

[7] Act No. 10 of 2006. The Judicial Service Act was however operationalized in 2010 with the establishment of the Judicial Service Commission Secretariat.

[8] Section 177-179 of the Zimbabwean Constitution.

[9] *Ibid*., sections 180, 189-191.

[10] *See* sections 177(2), 178(2) and 179(2) of the Zimbabwean Constitution.

world.[11] The popularity of the commission model cuts across the common and civil law divide. A recent study opines that judicial appointment commissions appear to be the most popular method of judicial recruitment in new democracies as well as in established democracies undergoing reform.[12] An independent judicial appointment commission has better prospects for appointing judges in a fair and transparent manner than one which is merely an appendage of the executive. Considering the critical nature of the JAC in the selection of superior court judges, more attention will be given to its status, composition and appointment of members and the JAC procedures.

6.3.1 Status of judicial appointment commission

The 2013 Zimbabwean Constitution for its part establishes a JAC which is an improvement on the commission previously established under the repealed Lancaster House Constitution.[13] The JAC is constitutionally mandated with promoting and facilitating the independence and accountability of the judiciary.[14] Furthermore, the JAC is also required to conduct its proceedings in a fair and transparent manner.[15] The commission advises the government on matters relating to the administration of justice and the government is constitutionally obliged to pay due regard to any such advice.[16] However, this progressive stance is watered down by section 190(3) of the Constitution which provides that the JAC requires the approval of the Minister responsible for justice in making its own regulations. This position contrasts sharply to the provisions in the South African Constitution which clearly demarcate the functions of the commission from the executive domain.

Critically, the constitutional text attempts as far as possible to demarcate the functions of the JAC from the executive and legislative spheres of influence. While constitutional prescriptions alone are not enough to secure the independence of the judiciary, the fact that the JAC is given recognition in the Constitution goes a long way in insulating it from unnecessary external pressures since it is much more difficult to tamper with a constitutionally entrenched body.

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[11] *See* L.Tiede, 'Judicial Independence: Often Cited, Rarely Understood', 15*Journal of Contemporary Legal Studies* (2006) p.136. *See also* S.Shetreet, 'Who will Judge: Reflections on the Process and Standards of Judicial Selection', 61 *Australian Law Journal* (1987) p.766.

[12] *See* M. L Volcansek, 'Judicial Selection: Looking at how other nations name their judges', (Winter) *The Advocate (Texas)* (2010). *See also* C.Baar, 'Comparative Perspectives in Judicial Selection Processes in Appointing Judges: Philosophy, Politics and Practice', *Ontario Law Commission, Ontario* (1991) p. 46.

[13] *See* sections 189 and 190 of the 2013 Zimbabwean Constitution. For a discussion of the flaws of the Judicial Service Commission under the Lancaster House Constitution, *see generally* L Madhuku, *supra* note5. *See also* K.Saller (ed.), *The Judicial Institution In Zimbabwe* (University of Cape Town, Cape Town, 2004).

[14] *See* section 190(2) of the Zimbabwean Constitution.

[15] *Ibid*., Section 191.

[16] *See* section 190(1) of the Zimbabwean Constitution.

6.3.2 Composition and appointment of members

Closely intertwined with the composition of the commissions is the question of how the commission members are appointed and by whom.[17] It is important that the appointment of commission members be insulated as much as possible from purely political choices. There are various typologies of judicial appointment commission membership across jurisdictions. As such, there is no accepted blue print which completely eliminates the risks of political manipulation of the appointment of JAC members. Generally, typologies of JAC membership include selection by political bodies (executive and legislature), *ex officio* members, and nominating bodies representative of key stakeholders in the justice delivery system.

Moving on to the Zimbabwean position, it appears the composition of the JAC entrenched in the 2013 Zimbabwean Constitution borrowed heavily from the South African Constitution. Section 189 of the Constitution establishes a 13 member JAC whose members' tenure, with the exception of the *ex officio* members, is limited to single non-renewable period of six years.[18] The Commission is made up of three types of members, namely judges, lawyers and others chosen for their professional competences.[19] It is not without any practical significance that the new commission is a departure from the commission in the repealed Lancaster House Constitution which had 6 members directly or indirectly appointed by the executive.

It appears that the composition of the 2013 JAC was intended to represent a complete break with the past judicial selection processes in which the JAC was not representative of key stakeholders in the justice delivery system and merely performed a perfunctory role of rubber-stamping executive preferences. The JAC is composed of a minimum of ten members with legal qualifications, that is, five judges, five lawyers, one ex-officio member and two lay persons.[20] The above composition shows a careful balance between members of the judiciary, and those from the legal profession. Of critical importance is the fact that the composition of the JAC is now representative of the legal fraternity compared to the position under the former constitution. The legal fraternity which provides a significant pool of judicial candidates, is represented by three practising legal practitioners designated by the bar association. The legal academia is also represented on the JAC. Overall, such a composition might perhaps augur well for the assessment of judicial candidates as most of the commission members are well placed to critically

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[17] *See* K.. Malleson, 'The New Judicial Appointments Commission in England and Wales', in K. Malleson and P. H. Russell (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, Toronto, 2006) p. 50.

[18] *See* section 189(3) of the Zimbabwean Constitution.

[19] The Judicial Service Commission is composed of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court, one judge nominated by all the judges of the superior courts, the Attorney General, the Chief Magistrate, the Chairperson of the Civil Service Commission, three legal practitioners of at least seven years experience nominated by the Law Society of Zimbabwe, a professor or senior lecturer of law, one person qualified as an auditor or public accountant and one person with at least seven years experience in human resources management.

[20] *See* section 189 of the Zimbabwean Constitution.

scrutinize the suitability or otherwise of potential judicial candidates.[21] A logical analysis of this trend is that the composition and manner of appointing the JAC commissioners post 2013 is most likely to instilll more confidence in the selection of judges compared to the previous regime of judicial selection.

A noticeable peculiarity is the absence of politicians on the Zimbabwean JAC. While politicians indirectly appoint the *ex officio* members of the commission, it is noteworthy in the Zimbabwean context that the commission has been insulated theoretically from direct political influences since the President only makes a single direct appointment.[22] Further, only two JAC members owe their appointments indirectly to the President.[23] This effectively means the President has a direct and indirect influence on 23 percent of the JAC membership. In the premises, the possibility of caucusing to adopt common positions over particular judicial candidates is theoretically reduced. However, much depends on the integrity of the commission members in discharging their constitutional mandate.

6.3.3 Judicial appointment commission procedures

It appears the Zimbabwean JAC and its judicial selection procedures have been heavily influenced by the South African approach. Unlike the former commission under the Lancaster House Constitution whose selection processes were shrouded in secrecy,[24] the judicial selection procedures for the 2013 JAC are constitutionally entrenched in detail. Section 180 of the Zimbabwean Constitution governs the selection procedures for all judges of the superior courts as follows. In the event of a vacancy, the JAC is constitutionally obliged to advertise the position inviting the President and the public to make nominations.[25] The JAC subsequently conducts public interviews and submits a list of three nominees for a single vacancy from which list the President makes the appointment.[26] If the President considers that none of the nominees submitted to him or her are suitable for judicial appointment, the JAC is obliged to submit a further list of three qualified persons and the President has to appoint one of the nominees submitted.[27]

The Zimbabwean Constitution directs that judicial appointments must reflect broadly the diversity and gender composition of Zimbabwe.[28] While it is not clear how this constitutional goal in respect of judicial selection can be met in practice, important lessons on diversity and gender transformation can be learnt from the manner in which the South African JAC has had to grapple with judicial

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[21] *See* G.Manyatera and C. M.Fombad, 'An assessment of the Judicial Service Commission in Zimbabwe's new Constitution', XLVII 1 *CILSA* (2014) p. 89.

[22] Section 189(1)(f) of the Zimbabwean Constitution. For a contrast with the former constitution, *see* D 'Matyszak, *supra* note2, p. 334.

[23] These are the Chairperson of the Civil Service Commission and the Attorney General. *See* section 89 (e)(g) of the Zimbabwean Constitution.

[24] *See* Madhuku, *supra* note 5,p. 345.

[25] *See* sections 180(2) (a)(b) of the Zimbabwean Constitution.

[26] *Ibid*., Section 180(2)(c-d).

[27] *Ibid*., Section 180(3).

[28] *Ibid*., Section 184.

transformation issues.[29] The critical lesson is the extent to which 'merit' in judicial selection can be overridden by transformative goals and considerations. Whilst judicial transformation is a major theme in the South African context more than it is in Zimbabwe due to the different historical contexts, it remains to be seen how the Zimbabwean JAC will implement these transformation goals in practice.

It is apparent that the judicial selection procedures entrenched in the Zimbabwean Constitution are intended to ensure greater transparency and accountability in the selection of judges. This is underscored by the fact that the JAC is constitutionally required to conduct its business in a just, fair and transparent manner.[30] The 2013 judicial selection process represents a paradigm shift insofar as the legal culture of judicial selection is concerned. The extent to which the judicial selection process will achieve its constitutional promise will depend on how these constitutional provisions will be implemented in practice. Theoretically, the post 2013 judicial selection procedures will go a long way towards enhancing public confidence in the selection of judges as the processes are now subject to public scrutiny. It augurs well for a participatory democracy to have as many stakeholders in the justice delivery system having an input in the processes leading to the appointment of judges. Since the JAC is empowered to make regulations to govern its procedures,[31] there is a clear need to go beyond the constitutional text and clarify the judicial selection processes in detail in the subsidiary legislation. Just like the South African process, there is need to clarify a number of issues. These include: determining how public the interview proceedings are, clarity in respect of the deliberations of the JAC, whether or not they are held in camera, and making public the interview scores for the candidates. Addressing these issues will go a long way in instilling public confidence if the recent criticisms of recent JAC interviews are to be considered. While it is too early to judge the Zimbabwean process despite the few public interviews conducted, important lessons can be taken from the issues which the South African process has had to grapple with. These lessons will then inform the salient details of the JAC's procedures which will be incorporated into the JAC regulations on judicial selection.

6.4 Assessment of judicial selection criteria: ordinary superior courts

The Zimbabwean Constitution establishes the court structure in section 162. The ordinary superior courts comprise the Constitutional Court, the Supreme Court and the High Court.[32] The 2013 Constitution entrenched a common judicial selection process for all superior court judges but this was subsequently changed by Constitutional Amendment No 1 which now differentiates the selection processes for the Chief Justice, Deputy Chief Justice and Judge President of the High Court from the rest of the superior court judges. It is also important to note that at the

[29] *See generally* P. Andrews, 'The South African Judicial Appointments Process', *Osgoode Law Journal* (2007) p.565; M. Wesson and M. Du Plessis, 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary', 24 *South African Journal on Human Rights* (2008) p.188.

[30] *See* section 191 of the Zimbabwean Constitution.

[31] *Ibid*., Section 190(3).

[32] *Ibid*., Section 162(a-c).

time of writing this Chapter, Constitutional Amendment No 2 was being debated whose effect would impact on the selection of superior court judges. The point of departure among the various superior courts relates to the qualification criteria for each court which is the focus of this discussion. It is important to note that the Constitutional Court was established by the 2013 Constitution as a separate court. Significantly, the 2013 Constitution's transitional provisions provided that the old Supreme Court bench will double as the Constitutional Court for seven years from the Constitution's effective date.[33] This observation is critical as it impacted on new Constitutional Court judicial appointments which were stalled for seven years. Furthermore, the transitional provisions impacted on acting judicial appointments which had to be resorted to due to the anticipated problem of recusals in matters referred to the Constitutional Court from the Supreme Court. Despite these initial provisions, post the transitional period, the Constitutional Court is now fully established as a separate court.

The Constitution entrenches the qualification criteria for judicial appointments to the Constitutional Court. To be appointed as a Constitutional Court judge, a prospective candidate must satisfy six constitutional requirements.[34] The person must be a Zimbabwean citizen, be at least forty years old, and have a 'sound knowledge' of constitutional law.[35] Additionally, the person must have been either a judge in a Roman-Dutch or English law jurisdiction, or had qualified as a legal practitioner in Zimbabwe, or in any Roman-Dutch or English law jurisdiction for at least twelve years.[36] Finally, to be appointed a Constitutional Court judge, a person must be a 'fit and proper person' to hold judicial office.[37]

It is apparent that the Constitutional Court criterion was intended to ensure that candidates with vast legal experience qualify for appointment to the apex court. While the criterion is yet to be tested in practice, it would appear that the key criteria for appointment to the Constitutional Court relates to a candidate's ability to demonstrate firstly, 'sound knowledge' of constitutional law and secondly, the 'fit and proper person' requirement. The other criteria relating to citizenship, age and years of experience in a Roman Dutch or English law jurisdiction are rather straightforward and therefore not contentious. The point of concern however is in relation to the key criteria highlighted above. The constitutional text itself does not provide clarity in respect of what 'sound knowledge of constitutional law' and a 'fit and proper person' entail. The wording of the constitutional text necessarily opens these criteria to different interpretive evaluations. It is anticipated that controversies can arise as a result of the criteria's subjective overtones. It is not clear whether a law degree suffices for the purposes of 'sound knowledge' of constitutional law or there is need for a candidate to have specialized in constitutional law either in practice or in academia. It is also not clear if superior court judges who ordinarily do not deal with constitutional matters are

[33] *See* the section 18(2) of the 6th Schedule to the Zimbabwean Constitution.
[34] *See* section 177 of the Zimbabwean Constitution.
[35] *Ibid.*, Section 177(1).
[36] *Ibid.*, Section 177(1)(b).
[37] *Ibid.*, Section 177(2).

automatically ineligible for appointment to the Constitutional Court. This point is pertinent considering that courts such as the High Court have specialized divisions in various aspects of the law and this specialization in other areas of the law can be a disadvantage as per the constitutional criteria.

While the 'fit and proper person' criteria can be given meaning by the infusion of constitutional values in it, it is again important for the JAC to come up with supplementary criteria which further clarifies the constitutional criteria. In fact, one of the major criticisms of the judicial selection process under the former constitution was the lack of clear criteria on judicial selection which resulted in questionable appointments. Since the Zimbabwean judicial selection process is relatively new, there are opportunities which the JAC can take advantage of in coming up with more clear guidelines on judicial selection. The gazetting of judicial appointments supplementary criteria will necessarily instil greater public confidence in the judicial selection process.

The Constitution also entrenches the qualification criteria for judicial appointments to the Supreme Court. To be eligible for appointment, a person must be a Zimbabwean citizen, and be at least forty years old.[38] Furthermore, the person must either, has been a judge in a Roman-Dutch or English law jurisdiction, or had qualified to practice as a legal practitioner for at least 10 years.[39] The final requirement is that the person must be a 'fit and proper person' to hold judicial office.[40] While the other criteria are rather straightforward, it appears the key criteria for the Supreme Court judicial appointments relates to the 'fit and proper person' requirement which, as noted above, is prone to subjective interpretations. It is anticipated that the same problems in giving meaning to these potentially subjective constitutional criteria experienced in South Africa are likely to arise in the Zimbabwean context. As noted under the Constitutional Court discussion, it is pertinent for the JAC to come up with clear supplementary criteria which would give guidance on the interpretation of the constitutional criteria. It is critical to note that the JAC has traditionally nominated sitting High Court judges for Supreme Court positions. While the criteria in the 2013 Constitution opens up the Supreme Court judgeships to lawyers outside the judiciary, it remains to be seen if the JAC will depart in practice from its long-established tradition. The first Supreme Court judicial appointments under the 2013 Constitution surprisingly had only judges as candidates.[41] Perhaps important insights into the Supreme Court criteria can be extrapolated from the July 2014 Supreme Court interview questionnaire. The questionnaire had ten standard set of questions which encompassed several themes and all candidates were assessed on the basis of these questions. The themes included work background, leadership skills, collaboration, team-work and co-operation, planning and organization, decisiveness, independence, work standards, motivational fitness and lastly integrity.

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[38] *See* section 178(1) of the Zimbabwean Constitution.
[39] *Ibid*. Section 178(1)(b).
[40] *Ibid*. Section 178(2).
[41] Supreme Court interviews attended by the researcher on 15 July 2014. Ten candidates were shortlisted and all of them were judges.

Regarding the High Court, the Constitution entrenches four qualification criteria for appointment to the High Court. Prospective High Court judges must be at least forty years of age. In addition, prospective candidates must have been judges in a Roman-Dutch law or English law jurisdiction, and/or have legal practice experience of at least seven years.[42] Lastly, the prospective candidates must be 'fit and proper persons' to hold judicial office.[43] It is apparent that the constitutional text entrenches more or less the same judicial selection criteria for all superior courts. The only differences in the criteria in the three ordinary superior courts relates to professional experience threshold as well as the peculiar requirement for 'sound knowledge' in constitutional law for the Constitutional Court. The commonality of the judicial selection criteria albeit with minor differences makes the need for more clarity all the more compelling. It is prudent for the JAC to pre-empt some of the potential problems that can arise in the determination of the constitutional criteria on judicial selection by further de-constructing it.

6.5 Assessment of judicial selection criteria: specialized superior courts

The Zimbabwean constitutional and legislative framework establishes the Administrative Court, the Labour Court and the Fiscal Appeals Court as specialized superior courts of record.[44] However, it is important to note that in terms of the Electoral Act,[45] the Electoral Court is not established as a stand-alone court. Jurisdiction over electoral disputes other than the presidential elections is vested in the High Court which sits as the Electoral Court.

The judicial selection criterion for the Administrative Court and the Labour Court is discussed concurrently below due to the similarity of the selection criteria. The Labour Court and Administrative Court judges are appointed in the same manner as the High Court judges in terms of the process leading to the appointment, as well as the qualification criteria.[46] The key constitutional provision in the appointment of these judges provides that *"[t]o be appointed as a judge of the High Court, the Labour Court or the Administrative Court a person must be a fit and proper person to hold office as a judge."*[47]

The above constitutional provision is complimented by the general selection criteria that a candidate be at least forty years old plus seven years' experience either as a judge or legal practitioner in a Roman-Dutch or English law jurisdiction.[48] Furthermore, both the Administrative Court Act and the Labour Act set out three similar qualification criteria for prospective judges. To be eligible for appointment, a candidate must be a former judge of the Supreme Court or High Court, or is qualified to be a High Court judge, and/or has been a magistrate for not less than

[42] *See* section 179 of the Zimbabwean Constitution.
[43] *Ibid*.
[44] Section 162(d-e) of the Zimbabwean Constitution. *See also* section 3 of the Fiscal Appeals Court Act *[Chapter 23:05]*.
[45] Section 36 of the Electoral Act *[Chapter 2:01]*.
[46] Section 179(1) of the Zimbabwean Constitution.
[47] *Ibid.* Section 179(2).
[48] *Ibid.* Section 179(1)(a-b).

seven years.[49] While the provisions of the 2013 Constitution are supreme to any other law, the qualification criteria set out in the Administrative Court Act and the Labour Act needs to be aligned with the 2013 Constitution. These amendments can perhaps go a step further in detailing the attributes expected of a prospective judge in terms of expertise in administrative and labour law.

Similarly to the Administrative and Labour Courts, the Fiscal Appeals Court Act sets out two qualification criteria. Firstly, a candidate is qualified for appointment if he/she is a former judge of the Supreme Court or the High Court, and secondly, if the candidate is qualified to be appointed as a judge of the Supreme Court or High Court.[50]

A number of observations can be made in respect of the judicial selection criteria for the specialized superior courts in Zimbabwe. Significantly, the subsidiary legislation establishing all three specialized courts entrenches more or less similar qualification criteria. Perhaps the most critical lacuna in the legislative texts is the omission to specify the requisite skill and expertise antecedent to judicial appointment for each specialized court. While it can be assumed that during the interviewing process, questions relating to a candidate's experience in a specialized area of the law are likely to arise, it is important that the law clearly gives guidance as to the qualities expected of each specialized superior court judge. This point is pertinent considering the recent past experiences where Labour Court judges appointed had no previous experience in labour matters.[51] Consequently, it came as no surprise when the Chief Justice bemoaned the poor quality of service delivery in the Labour Court when officially opening the 2014 legal year.[52]

[49] Section 85 of the Labour Act *[Chapter 28:01]. See also*, section 5 of the Administrative Court Act *[Chapter 7:01]*.
[50] Section 3 of the Fiscal Appeals Court Act *[Chapter 23:05]*.
[51] *See* 'Zimbabwe: Four Labour Court Presidents Sworn In' available at <http://allafrica.com/stories/201307180483.html>, visited on 18 July 2014.
[52] The speech by the Chief Justice is available at <http://www.jsc.org.zw/>,visited on 12 March 2014.

6.6 Conclusion

The chapter emphasized the importance of a clear constitutional and legislative framework for the selection of superior court judges. Paramount to this is the constitutional entrenchment of the judicial appointment commission which plays a key role in judicial selection. The powers and competences of the JAC need to be clearly spelt out in the constitutional text in order to safeguard it from unwarranted external pressures. The constitutional entrenchment of JACs necessarily brings into perspective three important attributes characteristic of JACs generally. These are the status which is given to the commission within the constitutional matrix, the composition and appointment of JAC members and the procedures utilized in the selection of judges. These elements are important in determining the extent to which a judicial selection process can be expected to produce a meritorious and politically independent bench. Particularly significant in this endeavour was the attempt at de-constructing the textual meaning of the entrenched constitutional and legislative judicial selection criteria. The chapter has further demonstrated that, the criteria for judicial selection are not an end in themselves. They are a means to an end. First, judicial selection criteria provide guidelines on the calibre of appointed superior court judges. Second, they act as a safeguard against unfettered executive discretion. Critically, executive discretion is limited by directing executive preferences to candidates who meet the stipulated minimum professional threshold.

Chapter 7

Disciplinary Process of Judicial Officers in Zimbabwe

Valantine Mutatu*

7.1 Introduction

The purpose of this chapter is to consider the disciplinary processes of judicial officers in the Zimbabwean context. In making this determination, this chapter shall explore other key pillars of the judiciary such as judicial independence and security of tenure before turning attention to disciplinary measures against members of the judiciary respectively which is the core of the chapter. Without doubt, the constitutional mandate of the judiciary demands public certification as a vital source of authority for its public moral standing and integrity in an open and democratic society.[1] This is influenced by the fact that the judicial mandate vested on duty bearers in the justice system is largely a matter of public confidence with a trust relationship that can only be maintained through independence, impartiality and integrity. Conversely put, this judicial mandate can be eroded by questionable conduct from members of the judiciary. From this evaluation, any disciplinary proceeding against members of the judiciary is therefore a matter that is likely to attract public interest and attention.

Apart from the fact that the Constitution imposes a high standard of independence, impartiality, and fairness on the judiciary in terms of section 164,[2] on face value, it is imperative that any complaints or disciplinary action against any figure of the judiciary will automatically attract public attention thereby making such processes an extremely sensitive issue.[3] This is the rationale behind the need for a stringent, clear and consistent legislative framework designed to regulate this area so as to protect such matters against inferences of bias and manipulation, mainly

* Valantine Mutatu, Chairperson: Public Law Department at the Midlands State University Faculty of Law, PhD candidate Wits University, LLM Midlands State University, MBA Midlands State University, LLBS University of Zimbabwe, Member of the Law Society of Zimbabwe, Registered Legal Practitioner in Zimbabwe. Email address: vmutatu@yahoo.co.uk

[1]In terms of section 164 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013, the public certification of the judiciary's constitutional mandate is entrusted to various key organs of state to assist, promote and protect the independence, impartiality, dignity, accessibility and effectiveness of the judiciary. *Seealso,* Section 165 of the Constitution which can be interpreted as implying that the public certification of the judiciary is further qualified by a more stringent demand coercing judges to uphold and maintain the ethical rules which govern their activities and behaviour both on and off the bench.

[2]Constitution of Zimbabwe Amendment (No.20) Act, 2013.

[3]L.Siyo and J. C. Mubangizi, 'The independence of South African Judges: A Constitutional and legislative perspective', 1:18(4) *Potchefstroom Electronic Law Journal* (2015) pp 820-821.

from the corridors of political power.[4] Thus the appointment; terms and conditions of service; disciplinary processes; and termination of services for judicial officers[5] are areas that fall within the ambit of discussion and evaluation in this chapter.

7.2 Judicial Independence

By definition, judicial independence relates to freedom of conscience for the judiciary. This conscience should be exercised without interference and interrogation thereby implying that individual members of the judiciary should be free from the idiosyncratic views, orders and undue influence of private parties or common majorities.[6] On face value, judicial independence is a normative value in the public interest which safeguards the ability of judges to be seen in the public realm as capable of performing their duties free of fear, favour, bias, undue influence or coercion from any internal or external interference.[7] This implies that the judiciary should be vested with security of tenure and financial security in order to guarantee its constitutional mandate. Furthermore, the judiciary must have authority and control over its own administrative functions and activities. This section interrogates the sufficiency or adequacy of the existing legislative framework governing judicial independence in preventing improper influence and abuse of the judiciary in Zimbabwe. The major question to be addressed relates to the extent to which the current legal framework adequately protects the independence and impartiality of the judiciary in line with section 164 (2) of the Constitution.[8] This provision is a point of reference when considering assertions from political, media and public domains doubting the existence of judicial independence on various occasions following a series of questionable rhetoric from the executive and the judiciary.[9] To this end, in addressing the important question of judicial independence within the Zimbabwean context, this chapter sequentially

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[4] *Ibid.*

[5] Sections 180 and 181 of the Constitution deals with the appointment of judges, section 186 deals with security of tenure for judges, section 187 deals with the removal of judges from office. Likewise, section 182 deals with the appointment of magistrates and other judicial officers other than judges. Section 182 functions as an enabling provision since it stipulates that an Act of Parliament must provide for the appointment of magistrates and other judicial officers other than judges. The most striking feature is that laws of general application are sacrosanct to every aspect pertaining the judicial office and this seemingly default position is designed to guard against the 'rule of man' inside and outside the judiciary.

[6] G.E. Devenish,'The doctrine of separation of powers with special reference to events in South Africa and Zimbabwe', *Journal for Contemporary Roman-Dutch Law* (2003) p.19. *See In re Certification of the Constitution of South Africa (First Certification Case)* 1996 (4) SA 744 (CC) pp. 752-755. *See also* M. Marshall, 'The Separation of Powers: A Comparative View', in J. Klaaren (ed.), *A Deicate Balance: The Place of Judiciary in a Constitutional Democracy*: *Proceedings of a Symposium to Mark the Retirement of Arthur Chaskalson, Former Chief Justice of the Republic of South Africa* (The School of Law, University of the Witwatersrand, 2006) pp. 18-19.

[7] D.T. Hofisi and G. Feltoe, 'Playing Politics with the Judiciary and the Constitution', *The Zimbabwe Electronic Law Journal* (2016) p 9.

[8] This section of the Constitution provides that organs of the State should support and protect the independence of the Court through legislative measures and any other conceivable means. See also section 164 (1) which states that 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.

[9] R. Muponde and M. Matenga,'Judges confirm judicial capture', *Newsday,* 29 October 2020, p 2. The publication in the *Newsday* article confirmed that some sections of the judiciary expressed frustration over the way the judiciary was captured by the Chief Justice in a letter sent to the President of Zimbabwe.

examines the appointment of judicial officers, security of tenure, complaints and disciplinary proceedings and the removal of judicial officers from office.

7.2.1 Appointment of judicial officers

The coming into effect of the 2013 Constitution brought drastic changes in the appointment process of judicial officers. The starting point is that judicial placements should be entrusted to people who are fit and proper.[10]What constitutes 'fit and proper person' is, however, not defined in the Constitution. There is therefore no clear yardstick that can be used in selecting proper candidates to hold judicial office.[11]It has been suggested that in determining whether a person is fit and proper to hold judicial office, consideration must given to "the prestige, status, and dignity of the profession, and the responsibility, standards of professional conduct and integrity of practitioners".[12]However, such a requirement is a safeguard to ensure that only man and women of ability are given this responsibility. Judicial appointments must reflect the broad diversity and gender composition of Zimbabwe at large.[13]On face value, judicial appointments that broadly reflect the gender, ethnic and racial composition of society boost public confidence in it. Unless otherwise provided in the Constitution of Zimbabwe, no one can be appointed as a judicial officer in more than one court.[14]

Section 180 of the Constitution is the hallmark of the procedure to be followed in the appointment of judges, inclusive of the Chief Justice.[15] The point of departure is that judges are appointed by the President from a list submitted by the Judicial Service Commission pursuant to the public interviews provided for in terms of the Constitution. In this context, it involves a rigorous transparent and consultative process up to the appointment of suitable candidates.[16] Thus the process of appointing judges as introduced in the Constitution has been significantly improved by diminishing presidential influence in the selection of candidates.[17] It is agreed in general that this position is in line with international best practice.[18]

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[10]*See* section 177 (2) of the Constitution of Zimbabwe which reads ''[t]o be appointed as a judge of the Constitutional Court a person must be a fit and proper person to hold office as a judge''. *See also* section 178 (2) and section 179 (2) of the Constitution of Zimbabwe.

[11]C. Mashoko, 'Judicial appointment in Zimbabwe: Defining the concept of "fit and proper person', *Zimbabwe Electronic Law Journal* (2018) p 1.

[12]*Ibid. See also Kaplan* v. *Incorporated Law Society*, *Transvaal* 1981 (2) SA 762 (T).

[13]Section 184 of the Constitution of Zimbabwe.

[14]*See* section 183 of the Constitution.

[15]Section 180 (1) of the Constitution reads ''[t]he Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section''.

[16]In-order for the JSC to advise the president on suitable candidates for appointment as judges, the JSC has a Constitutional mandate in terms of section 180 (2) of the Constitution to advertise the position of judges upon which the president and the public can make nominations for prospective candidates to be interviewed before the successful candidates can be recommended for appointment to the president.

[17]*See* general comments made by D. Matyszak, 'Presidential Power and the Draft Constitution' *RAU* February 2013, <www.researchandadvocacyunit.org>, visited on 3 November 2020. However, since the President is involved in the nominations of candidates the selection process can be compromised because he can still appoint his nominees even if they have not been found on the initial list submitted by the JSC. *See* section 180(3) of the Constitution.

[18]*See* A. Magaisa, 'Five myths behind ZANU PF's proposed constitutional amendment', 14 December 2016 available at <www.bigsr.co.uk/singlepost/2016/12/14/Five-myths-behind-ZANU-PF%E2%80%99s-proposed-constitutional-amendment>, visited on 12 November 2020. Magaisa remarked that section 180 of the Zimbabwean Constitution

However, there has been an amendment relating to the appointment of the Chief Justice, Deputy Chief Justice and the Judge President of the High Court.[19] The effect of this amendment is that it places the appointment of these three top-most senior judicial offices under the exclusive preserve of the executive.[20] The implication is that the appointment for these top most positions, when juxtaposed with the appointment of judges in general, demands the executive to act after consultation with the JSC rather than act upon the advice of the JSC. At this point there is need to contextualise the strict definition of the term 'consultation' in Section 339(2) of the constitution which is deemed to be the offering of views which are obligatory but not mandatory on the appointing authority, thus the views of the JSC to the executive with regards to the appointments of these three top most positions are only persuasive and not binding. This position should be juxtaposed with the position under Section 180 of the Constitution which demands the views of the JSC to be binding with regards to the appointment of Judges in general, exclusive of the three top most positions which are now regulated by the Constitutional Amendment Act No.1 of 2017. Viewed in this light, the consequence therefore is that the amendment reverses the seemingly positive gains initially earned under Section 180 of the Constitution.[21]

Although there have been various viewpoints in support of the amendment,[22] it is clear that the need for a consultative process involving key stakeholders in the administration of justice will go a long way in instilling public confidence in the judicial sector and reinforce the key elements of impartiality and independence.[23] Conversely put, the amendment presents an opportunity for bias and cadre deployment to such offices thereby entrenching an undesired impression that the judiciary is captured by the executive. The consequence is that public confidence in the appointment of these three top most judicial officials is severely weakened thus resulting in many sections of the public questioning the impartiality and independence of the judiciary. On the whole, it is arguable that the

mirrors international best practice as it is aligned or closely resembles judicial appointments in the South African jurisdiction,

[19] Refer to the specific section relating to the amendment. *See* Constitution of Zimbabwe Amendment (No. 1) Act, 2017.

[20] *Ibid.* However, in *Gonese& Anor* v. *Parliament of Zimbabwe* CCZ4-20, Amendment (No.1) was declared invalid because the Bill had not garnered enough votes in the Senate as prescribed in terms of the 2013 Constitution.

[21] The complexity presented by the amendment to section 180 of the Constitution is that if there is a differing view of opinion between the President and the JSC, the opinion of the former will take precedence. Viewed in this light, it can be concluded that the sole discretion to appoint these three top most judicial officers has now been placed under the direct control of the president.

[22] One of the justifications in favour of the amendment was to get rid of the influence of subordinating stakeholders from determining the affairs of these top most superior offices.

[23] *See* Veritas, 'Constitutional Amendment to Extend Presidential powers', in *Constitution Watch* 2 of 2017 (25 January 2017). In this Constitutional watch, Veritas, a Constitutional Watchdog, proffered viewpoints that go a long way into giving fundamental flaws inherent in disregarding key Constitutional benchmarks safeguarded by means of a referendum resoundingly supported by the majority. Digressing from the popular standpoint in favour of amendments which reflect the views of minority elites in control of political power and policing authority is therefore a potential threat to the constitutional foundation and fundamentals.

responsibility of appointing judges should be vested solely in an independent JSC to avoid negative interference from the executive.[24]

7.2.2 The remuneration of judges

The remuneration of judges plays a key role in the independence of the judiciary.[25] The Constitution is very clear in providing that judges are 'entitled to salaries, allowances and other benefits fixed from time to time by the Judicial Service Commission with the approval of the President given after consultation with the Minister responsible for justice and on the recommendation of the Minister responsible for finance'.[26] Therefore, the remuneration of judges should be competitive as a means of guarding against the temptation of illicit financial seductions and bribes from unethical parties with an interest in a particular case before the courts of law.[27] In *De Lange* v. *Smuts*,[28] it was held that ensuring that judges are well remunerated protects the justice sector from corrupt and seemingly unethical behaviour since a poorly paid judge may find it difficult to resist corrupt inducements that influence a judicial outcome in a matter before that particular judge. Secondly, competitive remuneration also serves to attract highly talented and best candidates to the judiciary.[29]

The salaries, allowances and other benefits of members of the judiciary must not be reduced while they hold or act in the office concerned.[30] This is to guard against the possibility of any government attempts to influence or put pressure on judges through salary reductions. To this end, the suspension of Justice Erica Ndewere without pay and benefits seemed to have been influenced by the desire to exert an unwarranted punishment for her supposedly granting of bail to critics of the current administration.[31] It is not in doubt that the suspension of Justice Erica Ndewere without salary and benefits attracted criticism, rightly so, because the President assumed a responsibility over the remuneration of Judges contrary to section 188 of the Constitution.[32] Further criticism to this seemingly dangerous precedent whereby the executive withholds a judge's access to salary and benefits pending investigations by a tribunal is that it exerts unwarranted pressure on a judge to opt for resignation under section 186(5) of the Constitution as a way of retaining material benefits post resignation. If this is anything to go by, then the withholding

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[24]H. Chitimira, 'A Conspectus of the Functions of the Judiciary under the Zimbabwe Constitution', 25:2 *African Journal of International and Comparative Law* (2013) p.233 .*See* also L. Madhuku, 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa', *Journal of African Law* (2002) p.232.
[25]*Ibid*. *See also* R. Brazier, *Constitutional Reform: Reshaping the British Political System* (Oxford University Press, New York, 1998) p.13-14.
[26]Section 188 (1) of the Constitution.
[27]See *De Lange* v *Smuts* 1998 3 SA 785 (CC) para 70.
[28]*Ibid.*
[29]*Ibid.*
[30]Section 188 (4) of the Constitution.
[31]C. Laiton, 'Ndewere Challenges Suspension of Salary, Benefits', *The Zimbabwe Independent*, 13 November 2020.
[32]The doctrine of separation of powers forbids the president to be solely in charge of the remuneration of judges. The protection of judicial independence is sacrosanct to an extent that no single figure should adversely or positively interfere with a Judge's condition of service.

of salary and benefits by the President will be tantamount to constructive dismissal which is illegal and inconsistent with the ideals of the Constitution.[33]

7.2.3 Security of tenure

Security of tenure is another key pillar to the independence of the Judiciary. The Constitution of Zimbabwe provides that a judge of the Constitutional Court is appointed for a non-renewable term of 15 years or until the age of 70 whichever comes first.[34] There are commendable traits from this empowering provision with regards to the security of tenure for this esteemed office. Firstly, the term of office is fixed for a period of 15 years thereby providing stability and establishing certainty with regards to duration of service. Secondly, the term of office is non-renewable, thereby enclosing any prospect of special extensions on the term of office to any Judge. The non-renewability of term of office should not be underscored as it entrenches a high degree of judicial independence by pre-empting and demystifying the fear that a judge's term of office will not be renewed if they do not act favourably to their supposedly employer vested with the power to renew the term of office.[35] Judges of the Constitutional Court and the Supreme Court hold office from the date of their assumption of office until they reach the age of seventy years, when they must retire' unless before they attain that age, they elect to continue in office for an additional five years.[36] The election to continue in office beyond 70 years does not apply to judges of the High Court. There are no good grounds laid out in the constitution for the apparent constitution discrimination of the judges of the superior court in respect of electing to remain in office beyond the age of 70 years. This creates reasonable suspicion that promotion of judges from the High Court to either the Constitutional Court or the Supreme Court may be manipulated by the promoting authority thereby compromising judicial independence. However, the tenure of a judge may be cut short if a judge resigns from his or her office at any time.[37] Secondly, the Constitution makes a ground for the President to discharge a judge from judicial office on the basis of incapacity due to ill health, gross incompetence or gross misconduct.[38] The corresponding implication is that a judge's tenure of office is determinant upon the lapse of time, resignation, retirement or dismissal from office.

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[33] *See* Magaisa, *supra* note 16.

[34] *See* section 186 (1) read together with sub-subsection (a) of the Constitution.

[35] *See* the reasoning tendered in the case of *Justice Alliance of South Africa* v *President of South Africa* 2011 5 SA 388 (CC) para. 73 wherein it was submitted that the non-renewability of a judge's term of office entrenches judicial independence since judges will have to perform their constitutional mandate without fear that their terms of office will not be renewed; and at the same time, it will discourage unorthodox tendencies or attitude by judges aimed at seducing a renewal to the term of office.

[36] Section 186 (2) of the Constitution.

[37] Section 186 (5) of the Constitution, in this case the Judge writes a notice to the President which is submitted through the Judicial Service Commission.

[38] *See* section 187 (1) (a), (b) and (c) of the Constitution. This reflects internationally accepted principles, that is, the United Nations's *Basic Principles on the Independence of the Judiciary* 18, adopted by the 7th UN Congress on the Prevention of Crime and endorsed by the General Assembly (June 1999), *The Judicial Officer*, which states that judges may be removed or suspended ''only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.''

7.3 Removal of Judges from Office

The Zimbabwean legal framework governing disciplinary action against judges for impeachable complaints is carefully couched under Section 187 of the Constitution.[39] Disciplinary actions for serious but non-impeachable complaints are regulated by section 190 (4) of the Constitution. This section makes provision for an Act of Parliament to confer on the Judicial Service Commission roles in connection with the disciplinary measures against persons tenured with the commission in the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court and other courts. Therefore, the Judicial Service Act,[40] as an enabling piece of legislation to section 190 of the Constitution, plays a complementary and supplementary role to section 187 of the Constitution. The complaints mechanism against judges, although enshrined in the Constitution and the Judicial Service Act, also finds extended meaning in the Judicial Service Code of Ethics[41]and the Judicial Service (Magistrate's Code of Ethics) Regulations.[42] The mentioned statutes provide add-ons to the provisions entrenched in the Constitution. These claims are substantiated by the fact that Part III the Judicial Service Code of Ethics contains a detailed enforcement mechanism of the disciplinary process. In summary, Part III of the mentioned Code, provides for both the form and substance that informs the disciplinary committee; its composition, constitution, deliberations, mandate, time-frames and competence of authority. The same can be said about the Judicial Service (Magistrate's Code of Ethics) Regulations which provide the supplementary form and substance of the complaints mechanisms against magistrates in the lower courts. This can be gleaned from the plain reading of section 23 (3) of the Magistrate's Code of Ethics which provides that complaints against the Chief Magistrate should be directed to the Secretary of the JSC:[43]

> complaints against the Deputy Chief Magistrate, Regional Magistrates and a Provincial Magistrate should be directed for the attention of the Chief Magistrate[44]; and lastly, complaints against all other judicial officers should be directed for the attention of the Provincial Magistrate.[45] If the complaint lacks merit, at least for all other magistrates excluding the Chief Magistrate, Deputy Chief Magistrate, Regional and Provincial magistrates, the head of the court, who is designated as the head of the province may, without the need for further investigation, reject the complaint and inform the complainant and the judicial officer concerned. However, if the designated provincial head determines that the complaint attract merit, the

[39] *Ibid*. This reflects internationally accepted principles.
[40] *[Chapter 7:18]*.
[41] This is by virtue of Section 17 of the Judicial Service Act [*Chapter 7:18*] makes provision for the establishment of a Code of Conduct that outlines the disciplinary rules to be observed, acts or omissions that constitute misconduct, the procedures to be followed in the case of any breach of the code and the person or authority responsible for enforcing the rules and penalties for such a breach.
[42] The Judicial Service (Magistrate's Code of Ethics) Regulations, 2019 (SI 238-2019). This Statutory Instrument specifically addresses the conduct expected of Magistrates.
[43] *Ibid.,* section 23 (3) (a).
[44] *Ibid.,* section 23 (3) (b).
[45] *Ibid.,* section 23 (3) (c).

next stage is to bring the complaint to the attention of the Chief Magistrate who will preside over the matter in line with Part X of the Judicial Service Regulations of 2013.

7.3.1 The Complaints Mechanism

The Constitution imposes a heavy burden upon organs of state to safeguard and warrant the protection of courts in order to facilitate the transparency, independence and dignity of the judiciary.[46] Against this backdrop, it is imperative that any disciplinary action against any member of the judiciary should be done in accordance with laws of general application so as to survive constitutional scrutiny. At the very least, the basis of any disciplinary action against any member of the judiciary as mandated by the law should be premised upon the fact that a judicial officer has conducted himself or herself in a manner that appears to violate any provision of the Code of Ethics.[47]

7.3.1.2 Superior Courts

It is very clear that serious acts or commissions that demand serious punishment such as dismissal for a judicial officer in the superior court should be based on the grounds of incapacity, incompetence and gross misconduct.[48] Unlike the ground of incapacity which is pronounced in terms of ambit and application, terms such as 'gross misconduct' and 'gross incompetence' are less pronounced because the Constitution, The Judicial Service Act and the Code of Ethics[49] are equally silent as to what these somewhat foreign terms mean. Several questions can be raised, what actions, conduct or omissions constitute gross misconduct or gross incompetence? What is the difference between misconduct and gross misconduct? What is the difference between incompetence and gross incompetence?

Failure to set the tone concerning the ambit and scope of actions that constitute 'gross misconduct' and 'gross incompetence' therefore grants too much discretionary power to the sanctioning authority thereby opening an opportunity for bias and manipulation, which in turn defeats the tenets of impartiality and independence which reign supreme in the normal functioning of the judiciary. However, a generous and purposive interpretation of these terms in the Constitution should be adopted so as to give effect and meaning to the underlying values and normative system the Constitution seeks to achieve. Viewed in this light, there is a confirmed degree of certainty that the terms encompass criminal

[46]Section 164 of the Constitution provides "that courts are independent to the extent that no person or state organ may interfere with the functioning of the courts". Subsection 2 further provides that the State has an obligation through legislative means and any other viable alternative, to ensure the independence, impartiality, and dignity of the judiciary.

[47]For Judicial officers in the higher courts the relevant Code of Ethics is the Judicial Service (Code of Ethics) Regulations, 2012 (*SI.* 107-2012). For Judicial officers other than judges i.e. those in the lower courts, the applicable Code of Ethics is the Judicial Service (Magistrate's Code of Ethics) Regulations, 2019 (*SI.* 238-2019).

[48]*See* section 187 (1) (a) (b) and (c) of the Constitution of Zimbabwe.

[49]Both the Judicial Service (Code of Ethics) Regulations, 2012 (SI 107-2012) and The Judicial Service (Magistrate's Code of Ethics) Regulations, 2019 (SI 238-2019) are silent on this matter.

misconduct within its definitional ambit.[50] The South African system classifies these terms as acts or omissions '*unbecoming of the holding of judicial office*' and include any action '*prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts*'.[51] From this juxtaposition, there is need for a clear and consistent law of general application to set perimeters or at least define a minimum yardstick of misconduct that qualifies as 'gross' in a bid to give effect and meaning to the constitutional provisions that warrant dismissal of judges from office.

7.3.1.3 Inferior courts

The legislative framework in terms of complaints, disciplinary proceedings and the removal of judicial officers in the lower courts is contained in the Third Schedule to the Judicial Service Regulations, 2015, published in Statutory Instrument 30 of 2015.[52] Section 23 (3) of the Magistrate's Code of Ethics provides the complaints mechanism against magistrates in the lower courts. The baseline is that, complaints against the Chief Magistrate should be directed to the Secretary of the JSC; complaints against the Deputy Chief Magistrate, Regional Magistrates and a Provincial Magistrate should be directed for the attention of the Chief Magistrate; and lastly, complaints against all other judicial officers should be directed for the attention of the Provincial Magistrate.[53] Although there is provision for the establishment of the Magistrate's Ethics Advisory Committee as per the dictates of Part IV of the Code, it is worth mentioning that it has a conscripted, albeit constricted mandate which is best characterised as advisory in nature. The implication is that any recommendation by this committee is merely considered as advisory opinions that hold no persuasive force to the extent that no disciplinary committee is entitled to be bound by such opinions unless the disciplinary committee decides to that effect.

7.3.2 The role of the Judicial Service Commission (JSC)

The JSC is a vital organ that promotes the normal administration of justice in a constitutional democracy.[54] Thus the JSC is the chief custodian in promoting the fundamental values of integrity, impartiality, accountability and independence of the judiciary. The justice delivery mandate of the JSC, apart from being encapsulated in the Constitution, is also enshrined in the Judicial Service Act and the Judicial Service Codes of Ethics. However, the Judicial Service Act predates the Constitution hence the roles, duties and responsibilities of the JSC as enshrined in this Act are

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[50] *See Paradza* v. *Minister of Justice Legal and Parliamentary Affairs and Others* 2003 (3) ZLR 68 (S) where Justice Sandura JA argued that failure to recognise criminal misconduct within the ambit of misconduct that warrant removal of a judge from office would imply that a judge can be removed from his or her position for ethical transgressions but could not be removed from office if he or she committed a criminal offence, no matter how serious the offence may be. The general impression is that this will be *contra-proferens* the intention of the Constitution framers.

[51] The South African Judicial Services Commission Act 9 of 1994, section 14.

[52] This is in terms of section 21 and 22 of the Judicial Service (Magistrate's Code of Ethics) Regulations, 2019.

[53] *Ibid.,* section 23 (3) (c).

[54] *See* section 190 of the Constitution.

inconsistent with Section 190 of the Constitution.[55] Thus the Judicial Service Act does not give a consistent framework of the regulatory and administrative functions of the JSC as endeared in Section 190 of the Constitution. This lacuna or inconsistency in the Judicial Service Act can be cured through aligning section 5 of the Judicial Service Act with Section 190 of the Constitution. This alignment can take the form of an amendment to section 5 of the Judicial Service Act so that it confers on the JSC its roles and responsibilities as envisaged in section 190 of the Constitution.

7.3.3 Instituting a complaint

Although the Constitution, Judicial Service Act and the Code of Ethics are silent in terms of who can institute a complaint against a judicial officer, it is common cause that members of the public, including those in the legal profession can bring forward complaints against any member of the judiciary. Complaints against the Chief Justice should be addressed to the President.[56] Complaints against the person of the Deputy Chief Justice and the other judges of the Supreme Court, the Judge President of the High Court, the Senior President of the Labour Court, and the Senior President of the Administrative Court should be directed for the attention of the Chief Justice.[57] Complaints against judges of the High Court should be addressed for the attention of the Judge President.[58] Complaints against the Presidents of the Labour Court shall be directed for the attention of the Senior President of the Labour Court.[59] Complaints against the Presidents of the Administrative Court shall be directed for the attention of the Senior President of the Administrative Court.[60] It is imperative that a complaint against a judge should be responded to.[61] Either the complaint must be dismissed if it lacks merit or it must be investigated through the process of a formal disciplinary hearing.[62]An inquiry into serious but non-dismissal complaints against judges should be conducted in terms

[55]J. Tsabora and S. Mtisi, 'Assessing the Justice Delivery Mandate of the Judicial Service Commission in Zimbabwe's Constitutional Framework', 1:1 *Rule of Law Journal* (2017) p. 9-11. These authors argue that there is a need to amend the Judicial Services Act so that it clearly captures the functions of the JSC as currently reflected in the Constitution. This is their viewpoint based on the fact that the JSC has a constitutional duty of promoting and facilitating the independence and accountability of the judiciary as per section 90 of the Constitution, which duty is not clearly made provision for in the Judicial Service Act.

[56]*See* section 187 (2) of the Constitution. *See* also - the Judicial Service (Code of Ethics) Regulations, 2012 (SI 107-2012) particularly Section 25 (3) (a).

[57]Judicial Service (Code of Ethics) Regulations, 2012 (SI 107-2012) section 25 (3) (b).

[58]Code of Ethics, *supra* note 47, Section 25 (3) (c).

[59]*Ibid*., section 25 (3) (d)

[60]*Ibid*., section 25 (3) (e).

[61]*Ibid.,* section 25 (3) read together with section 25(4).

[62]*Ibid.*

of the Judicial Service Code of Ethics.[63] An inquiry into serious and impeachable complaints against judges should be conducted in terms of the Constitution.[64]

7.3.3.1 Serious but non-impeachable complaints

The complaints mechanism against any judge for serious but non-impeachable offences exclusively lies within the domain of the Chief Justice's prerogative powers hence the Chief Justice, in terms of his or her opinion, determines whether the serious but non impeachable complaint has merit to warrant further investigation or not.[65] The investigation proceedings are centralised on the disciplinary committee appointed by the Chief Justice in conformity with Section 21 of the Code of Ethics. Section 21 (2) reads:

> '[a] disciplinary committee shall be appointed on an ad hoc basis, and shall be composed of three members who are sitting or retired judicial officers, and who may be sitting or retired judicial officers from Zimbabwe or any other country in which the common law is Roman-Dutch or English and English is an official language: Provided that two of the members shall be from Zimbabwe, and at least one member must be a sitting judicial officer serving in Zimbabwe, other than the Chief Justice.'

The disciplinary committee makes recommendations regarding the appropriate disciplinary action, if any, to be taken against a judicial officer whose conduct was the subject of the investigation. However, the final decision rests with the Chief Justice in terms of Section 24 which reads ''notwithstanding the recommendations of a disciplinary committee, the final decision as to what disciplinary measure to take shall be within the exclusive discretion of the Chief Justice. Although the Chief Justice is vested with too much discretionary power on disciplinary measures against judges,[66] it must be noted that the law contorts this power from abuse by imposing two stringent requirements for disciplinary action against any judge. Firstly, the inquest into any misconduct should be investigated by a disciplinary committee and not the Chief Justice.[67] This serves to ensure that the process is done transparently to maintain public confidence and to ensure that the judicial officer who is facing allegations of misconduct or incompetence is afforded protection from vexatious or unsubstantiated accusations.[68] Secondly, the severity of disciplinary measures that may be adopted by the Chief Justice are limited to reprimands only and do not

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[63]*See* section 21 (1) which provides that 'subject to the Constitution and any other enactment, if, in the opinion of the Chief Justice, a judicial officer has conducted himself or herself in a manner that appears to violate any provision of the Code, the Chief Justice shall appoint a disciplinary committee, which shall investigate the acts or omissions allegedly constituting the violation and submit its findings and recommendations for the consideration of the Chief Justice'.

[64]*See* section 187 (2) of the Constitution which provide that If the President considers that the question of removing the Chief Justice from office ought to be investigated, the President must appoint a tribunal to inquire into the matter.

[65]Code of Ethics, *supra* note 47, section 21 (1).

[66]*Ibid*., s14 states that ''[n]otwithstanding the recommendations of a disciplinary committee, the final decision as to what disciplinary measure to take against a judge shall be within the exclusive discretion of the Chief Justice''.

[67]Code of Ethics, *supra* note 43.

[68]*Ibid.*, section - 22 (2) (b) read together with Section 22 (3).

encompass dismissal.[69] It can therefore be deduced that the Chief Justice's authority with regards to disciplinary actions is restricted to somewhat minor offenses hence serious offences that can be classified as 'gross' should be brought forward to the attention of the President in terms of the Constitution.

7.3.4 Composition of the disciplinary committee

The Chief Justice has powers to appoint a disciplinary committee to investigate any serious but non-impeachable complaint. This is in line with section 21 of the Judicial Service Code of Ethics. The disciplinary committee, although appointed by the Chief Justice, draws its mandate, Constitution and composition from the letter of law.[70] This insulation is necessitated by the need to neutralize the Chief Justice's manipulation of the process, findings and recommendations. The disciplinary committee should be composed of any three members who are sitting or retired judicial officers. These judicial officers can be selected from Zimbabwe or any other common law jurisdiction with a component of Roman-Dutch law or English law provided that English is an official language of that legal jurisdiction. The composition of the disciplinary committee and two of the members are from Zimbabwe of which one member must be a sitting judicial officer serving in Zimbabwe, other than the Chief Justice. In this light, the composition of the disciplinary committee demands the appointment of veterans well versed with the administration of justice from a Roman-Dutch or English law perspective. This seemingly high standard guards against the appointment of puppets that can be easily frogmarched or manipulated at the whims of the Chief Justice.

7.3.4.1 Procedure of the disciplinary committee

The disciplinary committee is not tied to any recognised procedure in its operation. The most striking feature is that the proceedings of the disciplinary hearing should be confidential and 'otherwise be transparent in its procedures so as to strengthen public confidence in the judiciary and thereby reinforce judicial independence'.[71] A major problem therefore is whether it is possible to conduct a disciplinary hearing in confidence and at the same time retaining the element of transparency? This also prompts a further question as to how do we reconcile the element of confidence and transparency in the proceedings of a disciplinary hearing of such magnitude? The Code of Ethics clearly emphasises and reinforces on the need for the disciplinary procedure to be held in confidence. This is buttressed by the fact that section 22 (2) (a) of the Code of Ethics, read together with Section 22 (3) of the same Code, prioritises confidentiality in the disciplinary process to ensure and protect the judicial office from vexatious or unsubstantiated accusations. However,

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[69]A reading of the Judicial Service (Code of Ethics) Regulations, 2012 (SI 107/2012) .Section 24 (1) implies that the Chief Justice can only make reprimands against a judge found to have broken the code of ethics. Serious offenses leading to dismissal from office are regulated in terms of Section 187 of the Constitution.

[70]Code of Ethics, *supra* note 43, section 21 of the Code deals with the composition of the disciplinary committee; Section 22 deals with the procedure of the disciplinary committee and section 23 deals with the findings and recommendations of the disciplinary committee.

[71]Code of Ethics, *supra* note 43, section 22 (2) (a) and (b).

with regards to the disciplinary process being transparent, the Code of Ethics informs very little to nothing at all. This is exacerbated and accentuated by the fact that the disciplinary committee is not bound to any legally recognised procedure in its operation. The only explicit guiding principle in terms of the disciplinary procedure is that the committee should use its best endeavours to expeditiously conduct and finalise its investigation.[72]

The mere fact that the Code of Ethics demands the disciplinary process to be 'transparent' in word without prescribing a clear framework on the procedure to be followed is a major flaw to say the least. In other words, demanding transparency in the process of a disciplinary hearing is not enough in itself if not accompanied by corresponding rules and guidelines established in terms of laws of general application. Thus, the unwarranted freedom of choice for rules to be followed by the disciplinary committee exposes judicial officers to potential discrimination which is prejudicial to the sacrosanct right to equality as enshrined in the Constitution.[73]Conversely put the fact that each disciplinary committee has the freedom and entitlement of adopting its rules of procedure serves to weaken public confidence in the judiciary and in turn severely compromises judicial independence.

To solve the challenges precipitated by this approach, the Code of Ethics should be amended to encompass rules and guidelines of good practices that should be followed in every disciplinary proceeding. The advantages for adopting this viewpoint are manifold; firstly, a 'one size fits all' approach serves to maintain clarity, certainty and consistency in all disciplinary proceedings of this nature and subsequently guards against discrimination, bias and victimisation of the judicial officer subject to the inquiry. Secondly, a standardised approach will amplify the judicial officer's right to seek review of the disciplinary procedure if dissatisfied. The rationale of this approach is that it resonates well with the entrenched principle of transparency as demanded by the Code of Ethics when dealing with disciplinary processes.

7.3.4.2 Investigation by disciplinary committee and outcome thereof

In order for investigations against serious but non-impeachable complaints to run smoothly, it is necessary for the judicial officer subject to the investigation not to interfere with the disciplinary process. Perhaps this is one of the many reasons why the Chief Justice has the discretion to order the judicial officer whose conduct is the subject of the investigation to take leave of absence.[74] Upon completion of the investigations, the disciplinary committee is entitled to furnish the Chief Justice with findings and recommendations for the appropriate disciplinary action to be adopted.[75] Upon receiving the findings and recommendations from the disciplinary process, the Chief Justice has an option to 'invite the concerned judicial officer to

[72]Section 22 (5) of the Code of Ethics demand that the findings and recommendations of the committee should be brought to the attention of the Chief Justice within a period of ninety (90) days from the date when the committee is constituted, unless there are compelling grounds to warranty a further extension of not more than 60 days.

[73]Section 56 of the Constitution.

[74]*See* Section 23 (1) of the Code of Ethics.

[75]*See* Section 23 (2) of the Code of Ethics.

submit written representations in relation to the conduct of the investigation and the findings of the committee'.[76] This formality raises questions. Firstly, are the written representations made by the judicial officer in relation to the 'conduct' of the investigation under Section 23 (3) of the Code of Ethics synonymous with an appeal or application for review? Secondly, do the written representations amount to mitigation? If these questions can be answered negatively, the implication is therefore clear that there is no option for application for a review or an appeal against the conduct of the disciplinary committee and the outcome thereof. Alternatively, if these questions can be answered in the affirmative then on face value, the Code of Ethics is therefore inconsistent with section 69 (1) of the Constitution which states that 'Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court'.[77] The inconsistency emanates from an implication that the Code of Ethics only affords the right to an appeal and or review at the instance of the Chief Justice's discretion which is contrary to Section 69 (1) of the Constitution.

The essence of the disciplinary committee is further eroded by the fact that the Chief Justice, notwithstanding the recommendations of a disciplinary committee, makes the final decision with regards to the disciplinary measure in a manner consistent with his or her own discretion.[78] The consequence of this reality is that the composition and constitution of a disciplinary committee only serves to sanitise the disciplinary process against judicial officers in the public eye, without contorting the authority of the Chief Justice in whipping and bullying the judiciary.

7.3.5 Serious and impeachable complaints

Serious complaints leading to dismissal are dealt with in terms of the Constitution which sets parameters upon which the tenure of judges is secured. The securitisation of judges' tenure is self-evident when considering the fact that judges may only be removed in exceptional circumstances and subject to complying with procedural formalities.[79] The grounds for the removal of judges from office are spelt out in the Constitution, and manifest in the form of incapacity, gross incompetence and gross misconduct.[80] It is reasonable to conclude that the reason for entrenching these exceptional grounds as the only legitimate and recognised grounds for the removal of a judge from office is the need to adhere to the strict principle of securing the tenure of judicial officers. Furthermore, the fact that the power to remove a judge from office solely rests with the President neutralises the over-concentration of powers in the judiciary hence this is in line with the concept of

[76] *Ibid.,* section - 23 (3).

[77] Section 69 (1) of the Constitution stipulates that "[e]very person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

[78] Section 23(4) of the Code of Ethics provides that, "[n]otwithstanding the recommendations of a disciplinary committee, the final decision as to what disciplinary measure to take shall be within the exclusive discretion of the Chief Justice."

[79] In terms of Section 187 (1) of the Constitution the only substantive grounds upon which a judge can be dismissed are incapacity, gross incompetence and gross misconduct; procedurally, a judge can only be dismissed subject to investigations being conducted by the tribunal in line with section 187 (2) of the Constitution.

[80] Section 187(1) of the Constitution.

separation of powers which is central to a functioning democracy. Although it can be said that the substantive grounds of dismissing a Judge from office, particularly 'incompetence', can qualify as a highly subjective determination that endows the executive with a potential weapon to unfairly dismiss an unfavourable judge, it is true that the constitution is invested with enough procedural insulation against this abuse. This insulation is hidden in the reality that the President is not endowed with over-arching powers to bully the judiciary at will as he or she is mandated to set up a tribunal to investigate and make recommendations on the allegations of incapacity, gross misconduct or gross incompetence.[81] However, this insulation can also be abused especially when one considers that the President is the one vested with the authority to constitute the tribunal to preside, interrogate and deliberate on the complaints. All the findings of the tribunal should be brought to the attention of the President who in turn should act upon the tribunal's recommendations. An adverse finding by the tribunal means that the judge concerned will fall victim to dismissal.[82]

7.3.5.1 Disciplinary process

The Constitution provides for the offences that may lead to the removal of judges from office whilst the Code of Ethics provides for what are known as non-impeachable offences meaning offences that do not warrant the removal of a judge from office if found guilty. The question that arises is who should determine whether and what criteria should be used to determine that the alleged offence is an impeachable one. The situation is worsened by the fact that the Constitution does not explain or define what constitutes 'gross incompetence' or 'gross misconduct.' Since the procedures by which non-impeachable offences and impeachable offences are dealt with are different, there ought to be a laid down yardstick to guide decision makers. The issue was raised by Justice Francis Bere in *Bere* v. *Judicial Service Commission & Others*.[83] The High Court however declined to comment on the issue arguing that to do so would be tantamount to reviewing the merits of the decision of the JSC to refer the matter to the President.

Against this background, it is important to lay down what constitutes 'gross incompetence' and 'gross misconduct'. Incompetence can be defined as "the lack of skill or ability to do a job or task as it should be done."[84] In *Muyaka* v. *BAK Logistics (Pvt) Ltd*, the court stated that "[a]n incompetent employee lacks the knowledge of what to do and how to do it." *Gross* can be defined as something of great intensity. This therefore means that 'gross incompetence' entails that the lack of knowledge of the judicial officer is so great that he or she cannot be allowed to continue in office. It is self-evident that the reality of imposing onerous substantive and

[81]The purpose of an independent tribunal is to insulate against an unfettered discretion of the executive so as to avoid any suspicion or doubt that a particular judge is being victimized by the executive for his or her views or decisions in the line of duty. For this discussion *see**Paradza**case*, *supra* note 41, commentary on the joint statement by the Chief Justices of Botswana, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Uganda and Zambia on 5 March 2003 upon the arrest and detention of Judge Paradza.

[82]Section 187 (1) of the Constitution.

[83]HH510-20.

[84]*See Muyaka* v. *BAK Logistics (Pvt) Ltd*SC 39-17.

procedural requirements in the dismissal of judges is to ensure and buttress the principle of security of tenure. In addition, although the judiciary is vested with administrative power to discipline judicial officers, the power to dismiss judges is limited to the executive which position is consistent with the principle of separation of powers and its corollary duty of maintaining checks and balances in the arms of the state in a constitutional democracy. To this effect, when the President considers the removal of the Chief Justice, or any judge as advised by the JSC, the President must appoint a tribunal to inquire into the matter.[85] This is a welcome development as it further eliminates the prospects of bias and manipulation of authority by the executive arm of the state. Surely the President cannot be the complainant, the adjudicator and the enforcer at the same time in matters involving the removal of judges from office.[86] This separation of roles maintains the sanctity of impartiality necessary to the smooth functioning of the judiciary and protects the judiciary from executive overreach. It also enshrines the system of checks and balances as espoused in the Constitution.

7.3.5.2 Composition of the Tribunal

A tribunal instituted for the purposes of inquiring into serious allegations against a judge should be composed of at least three people. The Constitution imposes stringent formalities in the appointment of the tribunal commissioners.[87] The strict formalities imposed on the selection of commissioners to constitute the tribunal place enough safeguards against the appointment of malleable candidates sympathetic to the executive. This is secured by the fact that members of the tribunal should be selected from candidates familiar with the legal profession and its corollary demand of high ethical standards related to fairness, justice, impartiality and integrity. Secondly, the composition of the tribunal is a consultative process involving stakeholders in the legal profession in Zimbabwe.[88] The composition of the tribunal demands that at least one of the commissioners must be a person who has served as a judge of the superior courts in Zimbabwe; or holds or has held office as a judge of a court with unlimited jurisdiction in a country whose common law is Roman-Dutch or English, and English is the official language. The remaining two or more candidates of the tribunal are selected from a list of three or more legal practitioners of seven years' standing or more who have been nominated by the Law Society of Zimbabwe.[89] Thus, the Law Society of Zimbabwe must prepare the list of suitable candidates from which the President can select the remaining

[85]Section 187 (2) read together with Section 187 (3) of the Constitution.

[86]This will be in conflict with the established principle of *nemo judex in sua causa h*ence the President cannot be a judge in his own case.

[87]*See* section 187 (9) of the Constitution which provide that a tribunal appointed under this section has the same rights and powers as commissioners under the Commissions of Inquiry Act *[Chapter 10:07],* or any law that replaces that Act. Thus, the constitution authorises the tribunal and its members to function under the powers equivalent to commission of inquiry and as commissioners respectively.

[88]The Constitution demands that the President should select candidates for the tribunal from a list of candidates submitted by an association, constituted under an Act of Parliament which represents legal practitioners.

[89]Section 187 (4) (b) of the Constitution.

candidates of the tribunal.[90] From the selected commissioners of the tribunal, the President has the prerogative power to designate any one of them to be the chairperson of the tribunal.[91]

7.3.5.3 Disciplinary Proceedings and outcome

A tribunal appointed under Section 187 of the Constitution must inquire into and investigate the serious and impeachable allegations levelled against a judge. Subsequent to this investigation, the tribunal is mandated to report its findings to the President. The findings of the tribunal should be appended with recommendations of the appropriate disciplinary action to be taken against the judge- that is to say whether or not the judge should be removed from office. Upon receipt of the recommendations made by the tribunal, the President is bound to act upon those recommendations without discretion.[92] The constitutional provision for the President to act in a certain manner is peremptory.

The Constitution is however silent on what substantive and procedural remedies are available to both the affected judicial officer and the Tribunal if the President acts contrary to the recommendations. If for instance the tribunal makes a finding that the affected judicial officer was only guilty of a misconduct or incompetence but not gross as required by the Constitution. That finding will fall short of the constitutional grounds of removal from office. The tribunal should therefore recommend that the threshold for removal was not met. If, however, the President proceeds to act against such recommendations, the Constitution does not provide for both procedural and substantive remedies. The situation is compounded by the fact that it is only the tribunal which is privy to the recommendations and not the affected judicial officer. A rogue President can get away with 'murder'.

In order to promote transparency and accountability between the two institutions, that is the tribunal and the President, it is suggested that there must be set rules of the tribunal. These rules, like any other rules of court, must outline both substantive and procedural steps to be taken during a tribunal inquiry. The record of proceedings must be accessible to the affected judge. The current scenario where each tribunal follows its own designated method of inquiry is not only undesirable but appears to violate the principle of equality before the law. The removal of a judge is a critical element in the independence of the judiciary, but the lack of openness of the rules of procedure of the tribunal and the absence of both substantive and procedural remedies upon removal from office of a judge shakes the very foundation of the independence of the judiciary. In terms of section 187(7) of the Constitution, the tribunal must report its findings to the President and recommend whether or not the Judge should be removed from office. This provision by literal interpretation suggests that it is only the President who is entitled to the report and the recommendations. However, this provision should

[90] *Ibid.,* section 187 (5).
[91] *Ibid*., section 187 (6).
[92] *Ibid*.

be read together with section 68(1) and (2) of the Constitution.[93] In terms of the right to administrative justice, any administrative conduct must be both substantively and procedurally fair.[94] In addition, a person whose right, freedom, interest or legitimate expectation has been adversely affected by an administrative conduct has the right to be given promptly and in writing the reasons for the conduct. In this context the affected judicial officer ought to be availed with the record of proceedings and recommendations upon request. This will enable the judicial officer to invoke remedies such as review proceedings as the case may be. The apparent legal gap is that the affected judicial officer may not know when the tribunal forwards its findings and recommendations to the President. This creates two problems; the first one is that the affected judicial officer will be in the dark regarding the finalisation of the proceedings and the second one is that if the affected judicial officer intends to take up the decision on review in terms of Rule 62 of the High Court Rules, there are time frames to be complied with.[95]

The decision being taken on review is the tribunal's findings and recommendations, but ultimately the order sought may be to set aside the decision by the President to dismiss the judge from office. In the absence of rules of the tribunal being put in place there are no effective remedies against an unreasonable or unjust decision or recommendations being made by the tribunal and endorsed by the President. This would mean that the right to administrative justice of the concerned judicial officer would be threatened which therefore raises questions as to whether the rule of law can be upheld in such circumstances.[96] The South African legislative framework provides some safeguard on the removal of judges from office. In terms of section 177(1) (b) of the Constitution of South Africa, a judge can only be removed from office if the resolution to dismiss the judge has been adopted by two-thirds majority of the National Assembly.[97] The involvement of the National Assembly in the removal of the judge from office is important for two reasons; first, it ensures that the judge's tenure of office is secure and also that checks and balances are maintained since the power does not rest solely on the President.

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[93]Section 68of the Constitution of Zimbabwe provides that:

> "(1)Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. (2) Every person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct."

[94]*See* W.T.Chikwana,'The constitutional protection of the right to administrative justice in Zimbabwe: Prospects and challenge', *Midlands State University Law Review* (2020) p.7.*See also* G.Feltoe, *A Guide to Administrative and Local Government Law in Zimbabw*e (Zimbabwe Legal Resource Foundation, Harare,2014) p. 26.

[95]Rule 62(4) of the High Court Rules, 2021 provides that, "[a]ny proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred." In-*Bere* v. *Judicial Service Commission & Others* HH510-20 Justice Francis Bere applied for review of the decision of the Judicial Service Commission to recommend the President to appoint a tribunal to investigate the alleged misconduct levelled against him. The application however failed. The importance of this authority is however that the affected judge can challenge proceedings against him by way of a review.

[96]*See* Chikwana, supra note 94, p.8. *See* alsoFolke Bernadotte Academy and Office for Democratic Institutions and Human Rights OSCE's Office for Democratic Institutions and Human Rights (ODIHR) *Handbook for Administrative Justice* (September 2013) p. 12.

[97]I.Siyo and J.C.Mubangizi, 'The independence of South African: A constitutional and legislative perspective', 18:4 *Potchefstroom Electronic LawJournal* (2015) p.834.

7.3.5.4 Remedies available to a dismissed judge

The absence of laid down procedures which should be followed by the tribunal during disciplinary proceedings makes it difficult for an aggrieved judge to challenge procedural irregularities if any that would have been made by the tribunal. The regulations are silent as to the recourse that a dismissed judge may have if not satisfied either by the way in which the Tribunal approached the proceedings or the conduct of the President.[98] The absence of clear set down remedies available to an affected judicial officer does not necessarily mean that there are no remedies. The regulations provide that the tribunal should be guided by principles of natural justice when discharging its obligations.[99] That being the case, the aggrieved judge's only recourse is common law remedies.[100] Section 68 of the Constitution codified the common law right to administrative justice.

The provision also states that an Act of Parliament must be enacted to provide for the review of administrative conduct.[101] Pursuant to section 68 of the Constitution, a judicial officer who is not satisfied by the decision of the disciplinary tribunal can challenge the substantive and procedural correctness of the decision by way of a reviewprocess. The challenge that arises, however, is that there are no set down disciplinary procedures for judicial officers. Generally, the substantive correctness of a decision is challenged on appeal. However, the manner in which the right to administrative justice is worded shows that the substantive correctness of an administrative decision can be challenged by way of a review.[102] Like many other pieces of legislation, the Administrative Justice Act has not been aligned to the Constitution since its adoption in 2013. That being the case, the Act still provides that only the procedural fairness of an administrative conduct can be challenged on review.[103] Since the Constitution is the supreme law of the land, the provisions of section 68 of the Constitution prevail.[104] A person aggrieved by administrative conduct can approach the High Court seeking review.[105] The High Court can confirm or set aside the decision being challenged,[106] refer the matter back to the disciplinary tribunal for consideration, direct the tribunal to take administrative action within a certain period of time, direct the administrative authority to supply reasons for its administrative action within a certain period of time or give any directions it may consider necessary or desirable to achieve compliance by the

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[98]*See* Chikwana, *supra* note 94, p.8. in which he argued that there ought to exist a court or tribunal in which the lawfulness and appropriateness of an administrative conduct can be reviewed. The appropriateness in this case entails the substantive and procedural correctness of an administrative conduct.

[99]*See* section 22(1) of the Judicial Service (Code of Ethics) Regulations, 2012

[100]The right is also provided for in Article 8 of the Universal Declaration of Human Rightswhich provides that, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law."

[101]Section 68(3)(a) of the Constitution of Zimbabwe

[102]*See* Chikwana, *supra* note 94, p.12.

[103]*Ibid*., p. 13.

[104]*See* section 2 of the Constitution.

[105]Section 4(1) of the Administrative Justice Act which provides that, "subject to the Act or any other law, any person who is aggrieved by the failure of an administrative authority to honour its obligations to act lawfully, procedurally fair, reasonably and to supply reasons can apply to the High Court for relief."

[106]*Ibid*., section 4(1)(a).

tribunal.[107] Another challenge that is faced by a judicial official whose right to administrative justice has been violated is that he or she cannot approach the court through section 85 of the Constitution which is the enforcement of human rights clause.[108] In the case of *Zinyemba* v.*The Minister of Lands and Rural Resettlement and Another,* Malaba DCJ (as he then was) stated that;

> "Where there is an Administrative Justice Act which gives full effect to all the substantive and procedural requirements for effective protection of the fundamental rights guaranteed under s 68, the Act must surely govern the process for the determination of the question whether a specific administrative conduct is in accordance with the standards of administrative justice. There cannot be an allegation in terms of s 85(1) of the Constitution of administrative conduct violating the fundamental right to administrative justice enshrined in s 68 of the Constitution when there is an Act of Parliament which validly gives full effect to the requirements for the protection of the fundamental right against the provision of which the legality of the administrative conduct must be tested."

7. 4 Conclusion

This contribution venerated the gaps and opportunities prevalent in the disciplinary processes of judicial officers in the Zimbabwean context. It is trite that the judiciary should be seen upholding its constitutional mandate so as to attract the needed public buy-in necessary to instil confidence in the administration of justice. The Constitution, in a bid to secure the tenure of office for judges, limits circumstances under which judges can be removed from office. This research established that the Constitution makes provision for detailed mechanisms for the security of tenure of judicial officers. This is further elaborated by major highlights such as the fact that the tenure of office is non-renewable; the fact that the JSC continuously plays an oversight role in the appointment, deliberations and dismissal of judges. However, there is a potential threat to this security of tenure as there are gaps, accommodated under subjective unpronounced substantive grounds that can be manipulated and abused by the executive to mete out a subjective dismissal beyond the constitutional standard. The legislative framework differentiates between non-impeachable complaints that do not lead to a dismissal from office and impeachable complaints that lead to a dismissal. The reality, as expressed from the breadth of the constitution, is that the constitution empowers the executive to strategically participate in the hiring and firing of judicial officers.

Although there is an insulation against an abusive meddlesome approach by the executive in the 'hiring and firing' of judicial officers, encapsulated in formal and substantive guarantees entrenched in the Constitution, the research has exposed several loopholes that require attention to fortify judicial independence in Zimbabwe. The loopholes exposed manifest in the fact that, firstly, the executive wield immense and somewhat unrivalled authority in the 'hiring and firing' of Judicial officers. The perceived involvement of the JSC is merely designed to sanitize the process rather than add meaningful substance due to the fact that they play a second

[107] *Ibid.,* section -4(1)(e).

[108] *Zinyemba* v. *The Minister of Lands and Rural Resettlement and Another* 2016 (1) ZLR 23 (CC) pp. 26E-F.

fiddle role which is advisory in nature. Secondly, although the procedural aspect related to the dismissal of judicial officers is clearly spelt out, the substantive aspect informing such process is riddled with subjective elements that are prone to manipulation to suit an egoistic conclusion. Thirdly, though the president is mandated to act in accordance with the recommendations of the tribunal presiding over a disciplinary process, the substantive deliberations of the tribunal lack transparency and accountability measures for the public, or at least the judge involved, to monitor whether the president's decision is consistent with the recommendations of the tribunal. Fourthly, there is a high degree of uncertainty whether the recommendations of the tribunal as upheld by the executive will constitute a decision or ruling that can be appealed or reviewed; and to which court can it be appealed or reviewed. These are some of the major concerns raised in this research and there is need for legislative reform to respond to these gaps in order to fortify judicial independence in Zimbabwe. Lastly, there is need to come up with uniform rules of procedure to be used by a tribunal appointed to investigate impeachable complaints against a judicial officer in terms of the constitution. The rules ought to provide for further procedural rights of the affected judge in the event that he or she is not satisfied with the decision of the President.

Chapter 8

The Early Years of Implementation of the 2013 Constitution by Zimbabwe's Constitutional Court: Spotlight on Human Rights, Rule of Law and Constitutional Interpretation

*Musa Kika**

8.1 Introduction and Background

A few years into the 2013 Constitution, the Constitutional Court is now an established juridical entity handling an increasing number of cases. There is potential contestation as to the role the Court has thus far played in helping shape a new constitutional dispensation and jurisprudence for Zimbabwe. An analysis of the structure, jurisdiction and appointment of judges on the one hand and a survey of the treatment of disputes that have come before the Court thus far helps us resolve the contestation, at least partially.

After almost 15 years of failed attempts at constitution-making, Zimbabwe finally adopted the Constitution of Zimbabwe Amendment (No. 20) Act in March 2013, repealing the old 1979 Lancaster House Constitution, a liberation war ceasefire document negotiated and adopted in London. Many novel provisions were included in the 2013 Constitution, one of which was the setting up of a new Constitutional Court to replace the Supreme Court as the highest court on constitutional matters in the country. The mandate of the Constitutional Court is to provide guidance in constitutional interpretation and in operationalising the Constitution, as the country seeks to retrace its path to re-establishing the rule of law. Both this Constitution and the Constitutional Court were necessitated by the desire to develop mechanisms to redress governance deficiencies and ensure observance of the rule of law in the polity. The Constitutional Court is now an established juridical entity, receiving a progressively increasing number of appeals, referrals and applications. Through an analysis of the way the Constitutional Court has been approaching its work and the jurisprudence it has produced, this study seeks to evaluate the role and attitudes of the new Constitutional Court towards

reinstating the rule of law and constitutionalism since its inception in 2013.[1] This assessment will use an empirical and interpretive model to understanding the work the Constitutional Court is doing and the attendant attitudes.

Some pronouncements made by the Constitutional Court have been progressive while some have been worrisome. There is possible contestation as to whether the Constitutional Court is serving the constitutional project well or is falling short in this regard. This study evaluates progress and challenges in the work of the Constitutional Court, assessing the judicial leadership - or lack thereof - being provided by the Court and the judges as institutional actors, as well as their attitudes and approach to their role as guarantors of the country's constitutional project. Sample key jurisprudence of the Constitutional Court over its period of existence thus far is assessed and referred to. Some of the aspects covered in this piece include the judicial philosophy of the Court and its approach to constitutional interpretation; writing of judgments; the ongoing reform of statutes for constitutional conformity; judicial independence; judicial activism, and use of international and foreign law to aid to constitutional interpretation. As a start, some background information on the creation, structure and jurisdiction of the Court is given to provide context and framework.

8.2 A new Constitutional Court

Section 162 of the Constitution establishes the Constitutional Court. The mandate of this institution is vitally important; the Court is the chief guardian and watchdog of the Constitution, and there is a transformative mandate implicitly imposed upon the Court. This means that the Zimbabwe 2013 Constitution is centred on the need to transform Zimbabwe into a society based on democratic values, social justice and fundamental human rights. The commitment to transform the Zimbabwean society is thus central to our constitutional order, and transformation will thus continue to play a key role in interpreting the Constitution.[2]

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* *PhD Public Law (UCT); LLM (Harvard); LLB (summa cum laude) (UKZN); Cert. Advanced Human Rights (Pretoria). To the memory of my late friend, Gavin Gomwe.*

[1]The rule of law speaks of a society where the law is respected and is the ultimate authority. Under rule of law, no one given power by the law for a certain purpose may act beyond the confines of such powers, or usurp the power conferred on another – a principle known as ultra vires. *See* T. Bingham, *The Rule of Law* (Allen Lane, London, 2011) p. 60; S. Humphreys, *Theatre of the Rule of Law: Transitional Legal Intervention in Theory and Practice* (Cambridge University Press, 2010) and G. Devenish 'The rule of law revisited with special reference to South Africa and Zimbabwe', 4 *TSAR* (2004)p. 675. Constitutionalism is defined by its fundamental elements, and means principles which govern the legitimacy of government action by describing and prescribing both the source and the limits of governmental power. Such principles include, among others, accountability, responsiveness, separation of powers, rule of law and supremacy of the Constitution. *See* M. Kika, 'Fashioning judicial remedies that work in a constitutional society – Establishing a framework for a functional approach to the awarding of constitutional damages in South African law and comparative jurisdictions' 2019, University of Cape Town, <www.open.uct.ac.za/bitstream/handle/11427/31479/thesis_law_2019_kika_musa.pdf?sequence=1&isAllowed=y> , visited on 18 September 2021.

[2]P. Langa, 'Transformative constitutionalism', 3 *Stellenbosch Law Review* (2006) p. 351; K. Klare 'Legal culture and transformative constitutionalism', 14 *South African Journal on Human Rights* (1009) p. 150 and M. Pieterse, 'What do we mean when we talk about transformative constitutionalism?', 20 *Southern African Public Law* (2005) p.155.

8.2.1 Structure and Independence

Structurally, the Constitutional Court is headed by the Chief Justice, who is head of the judiciary and is also in charge of the Supreme Court.[3] The Court includes the Deputy Chief Justice and five other judges.[4] If the services of an acting judge are required for a limited period, the Chief Justice may appoint a judge or a former judge to act as a judge of the Court.[5] In terms of quorum, the Constitution provides for three variants. Firstly, cases concerning alleged infringements of a fundamental human right or freedom enshrined in the Declaration of Rights, or concerning the election of a President or Vice-President, must be heard by all the judges of the Court.[6] Secondly, all other cases that fall outside the first category must be heard by at least three judges of the Court.[7] Thirdly, the Constitution provides that for interlocutory matters, an Act of Parliament or rules of the Court may provide for these to be heard by one or more judges of the Court.[8] Notwithstanding these provisions, however, a transitional provision under the Sixth Schedule requires that for seven years after the publication date, the Chief Justice, Deputy Chief Justice and seven other judges must sit together as a full bench on all matters before the Court.[9]

Sections 164(1) and (2) make provision for the independence of the judiciary, and provide that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance; hence the courts are to be independent and are subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice. Yet another general provision affecting the judiciary as a whole is s 165, which sets out the principles guiding the judiciary. In exercising judicial authority, it says, members of the judiciary must be guided by the principles that justice must be done to all irrespective of status, that justice must not be delayed, and that members of the judiciary must perform their judicial duties efficiently and with reasonable promptness, with the role of the courts being paramount in safeguarding human rights and freedoms and the rule of law.[10] Sections 165(2) and (3) require that members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence

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[3]Section 163(2).
[4]Section 166(1).
[5]Section 166(2).
[6]Section 166(3)(a).
[7]Section 166(3)(b).
[8]*Ibid.*
[9] Section 18(2) of the Sixth Schedule. The answer to how this arrangement came to be is political compromise. The issue of the Constitutional Court was one of the sticky issues in the negotiations between the parties driving the Constitution-making process. When COPAC had finalised its draft, ZANU PF still opposed, among other things, the setting up of a Constitutional Court and its composition. This thus stood as one of the seven sticky points. While the two MDC parties wanted a Constitutional Court with new judges, ZANU PF was not too keen on having that court. A compromise was then reached that a new Constitutional Court would be established, but on the proviso that the old members of the Supreme Court would preside over that Court for seven years from the date the Constitution is adopted. The agreements were included in the final draft of 1 February 2013, which was accepted in the 16 March 2013 referendum. *See* K. Vollan, *The Constitutional History and the 2013 Referendum of Zimbabwe*, A Nordem Special Report (Norwegian Centre for Human Rights, 2013) p. 40.
[10]Section 165(1).

in order to maintain public confidence in the judicial system. It is also laid down that when making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence. Also significant is the provision that members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.[11]

8.2.2 Jurisdiction

In terms of its jurisdiction, the Constitutional Court is the highest court in all constitutional matters and issues connected with decisions on constitutional matters, and its decisions on these matters bind all other courts.[12] The Constitutional Court makes the final decision whether a matter is constitutional, or whether an issue is connected with a decision on a constitutional matter.[13] Similarly, the Constitutional Court makes the final determination on 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.[14] On these matters, the jurisdiction of the Constitutional Court is concurrent with other courts, the provision being that the Constitutional Court is the final arbiter on those constitutional matters. The Constitution also confers exclusive jurisdiction to the Constitutional Court to advise on the constitutionality of any proposed legislation when referred to it as per the Constitution; to hear and determine disputes relating to election to the office of President; to hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President; or determine whether Parliament or the President has failed to fulfil a constitutional obligation.[15] In addition, only the Constitutional Court may determine the validity of a declaration of a state of public emergency and the extension thereof.[16] It may also review a decision to dissolve Parliament on application by any Member of Parliament where Parliament is dissolved by the President if the National Assembly has unreasonably refused to pass an Appropriation Bill.[17]

The Constitution provides that an Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court.[18] As to how these rules of court must allow for access to the court, the Constitution follows the new broader approach of liberalised *locus standi*, and provides that the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court, to bring a constitutional matter directly to the Constitutional Court, to appeal directly to the Constitutional Court from any other court, or to

[11]Section 165(5).
[12]Section 167(1)(a) and (b).
[13]Section 167(1)(c).
[14]Section 167(2).
[15]*Ibid*.*See also* section 93(1) & (2)
[16]Section 113(7).
[17]Section 143(4).
[18]Section 167(4).

appear as *amicus curiae*.[19]In addition to the above, section 176 of the Constitution 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 the Constitution.

It can be noted here that both the jurisdiction and access provisions of the Constitutional Court are quite broad and expansive. The limiting of the jurisdiction of the Court to constitutional matters and issues connected therewith, although seemingly restrictive, is in practice quite broad and permissive when it comes to what matters come before the Court. Many matters or issues can be made constitutional issues, or can be connected to constitutional matters. Nonetheless, it still excludes matters that will not be able to be linked to constitutional matters, and these will also be many, with the court of final instance on such non-constitutional matters being the Supreme Court.[20] A similar jurisdiction limitation existed in respect to the South Africa Constitutional Court, before it was abandoned by Constitution Seventeenth Amendment Act of 2012 to allow for any matter to go to the Constitutional Court as the court of final appeal.

8.2.3. Appointment of Judges

The 2013 Constitution revolutionised the appointment of judges, including judges of the Constitutional Court. The appointment of judges is no less important than their substantive work, as the former informs the latter. The appointment of judges is therefore a crucial gatekeeper that determines who goes to the bench, holding what philosophy and doing what with it, and to whom and in what manner they are accountable. The very functioning of the courts is dependent on who sits on the bench. According to the 2013 Constitution as originally adopted, judges of the Constitutional Court are appointed for a non-renewable term of not more than fifteen years, but are required to retire earlier if they reach the age of seventy years, and after the completion of their term, they may be appointed as judges of the Supreme Court or the High Court at their option, if they are eligible for such appointment.[21] Whereas previously the President had expansive appointment powers, with the Constitution only requiring him to appoint judges *after* consultation with the Judicial Service Commission (JSC), the President was not bound by the JSC's recommendations and could disregard any advice he received from the body.[22] The Constitution now lays down a different procedure. In terms of section 180, the President is still the appointing authority for all judges in the judiciary. However, the 2013 Constitution as originally adopted, introduced a much

[19]Section 167(5).
[20]Section 169(1).
[21]Section 186(1).
[22]Section 84 of the Constitution (as amended) provided as follows:

> "(1) The Chief Justice and other judges of the Supreme Court and the High Court shall be appointed by the President after consultation with the Judicial Service Commission.
> (2) If the appointment of a Chief Justice or a judge of the Supreme Court or the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (1), the President shall cause the House of Assembly to be informed as soon as is practicable."

more transparent and insulated from political manipulation, and whenever it was necessary to appoint a judge, the JSC was required to advertise the position and interested candidates would apply, including when nominated by either the President or members of the public. This did away with a system of 'tapping on the shoulder' for one to become a judge. A full list of applicants would then be published, and the public is invited to make submissions on the candidates which will be considered by the JSC. Public interviews of the prospective candidates would then be conducted, and the JSC would prepare a list of three qualified persons as nominees for each vacant office, and it is from that list submitted to the President that a candidate is appointed. Crucially, the President could no longer appoint outside the submitted list.

This system applied to all judges of the Constitutional Court, but that was until Constitution of Zimbabwe Amendment (No. 1) Act in September 2017[23] and Constitution of Zimbabwe Amendment (No. 2) Act of May 2021. Under Amendment (No. 1) Act, the President could now appoint the Chief Justice, the Deputy Chief Justice and the Judge President notwithstanding any recommendation from the JSC, on the proviso that he or she informs the senate "as soon as is practicable".[24] Presidential powers were thus now enhanced in the appointment of these key judicial officers. Amendment (No. 2) Act further reversed the original 2013 position, allowing the President to appoint a sitting judge of the Supreme Court, High Court, Labour Court or Administrative Court to be a judge of the next higher court whenever it is necessary, without subjecting them to a public interview process, and without needing to abide by the advice or recommendations of the JSC. The Amendments also allow the President to extend the tenure of a siting judge of the Supreme Court or Constitutional by up to five years, beyond retirement age. For that to happen, the judge must elect to continue in office for an additional five years, and this is subject to the President accepting a medical report as to the mental and physical fitness of the judge so to continue in office *after* consultation with the Judicial Service Commission. This new position has been subject of litigation, and has been widely criticised as opening the judiciary to executive interference and control.[25]

It is a requirement that appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe.[26] The JSC is now much more representative under the chairpersonship of the Chief Justice, and is made up of judges and representatives of stakeholders in justice delivery and the legal

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[23]Amendment (No. 1) faced legal hurdles when the Constitutional Court in *Gonese& Anor* v. *Parliament of Zimbabwe & 4 Ors* (CCZ-4-2020, [2020] ZWCC 4 ruled that the Act was not passed procedurally as the Senate vote did not meet the required two thirds majority threshold. This was rectified in 2021, with the law being placed before the Senate for a re-vote. Still, the Act remains shrouded in controversy as this re-vote was done some three years later, when the Eighth Parliament which considered that Act had dissolved. Section 147 of the Constitution of Zimbabwe states that a Bill lapses upon dissolution of Parliament.

[24]*See* section 6 of the Amendment Act.

[25]*Kika* v. *Malaba &Ors* HH 264-21 and Southern Africa Litigation Centre (SALC) 'An analysis of Zimbabwe's proposed constitutional amendments relating to the judiciary' *SALC Policy Brief 3 of 2020*, <www.southernafricalitigationcentre.org/wp-content/uploads/2020/06/Policy-Brief-No.-3-of-2020-June.pdf>, visited on 5 September 2021.

[26]Section 184.

profession, with a mix of Presidential appointees and those appointed by the bodies they represent on the Commission.[27] This is important because the extent to which the appointment of judges is free from political manipulation is largely reliant on the independence of the JSC.[28] It is clear from the composition of the JSC that the President's influence over the appointment of members of the JSC has been significantly diminished compared to the Lancaster House Constitution. Although some members sit on the Commission by virtue of being appointed to office by the President, considerable efforts have been made to ensure that there is independent representation on the Commission. Such independent representation will therefore ensure that appointments to the judiciary are made impartially and without overbearing political considerations.

Section 191 of the Constitution mandates the JSC to conduct its business in a just and transparent manner. This provision seeks to ensure that the JSC maintains fairness and transparency in its work so as to avoid any political manipulation. Given the efforts made to secure the independence of the JSC, the body will thus be able to exercise checks and balances over the President and ensure that judicial appointments are made on merit without any undue political influence.

Notwithstanding these provisions, the judges who made up the Constitutional Court during the first seven years were not appointed using these criteria. This is because a transitional provision was inserted in the Constitution's Sixth Schedule to the effect that notwithstanding section 166, for seven years after the publication date, which is 22 May 2013, the Constitutional Court consists of the Chief Justice and the Deputy Chief Justice and seven other judges of the Supreme

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[27]"189. Establishment and composition of Judicial Service Commission

1. There is a Judicial Service Commission consisting of-
   a. the Chief Justice;
   b. the Deputy Chief Justice;
   c. the Judge President of the High Court;
   d. one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court;
   e. the Attorney-General;
   f. the chief magistrate;
   g. the chairperson of the Civil Service Commission;
   h. three practising legal practitioners of at least seven years' experience designated by the association, constituted under an Act of Parliament, which represents legal practitioners in Zimbabwe;
   i. one professor or senior lecturer of law designated by an association representing the majority of the teachers of law at Zimbabwean universities or, in the absence of such an association, appointed by the President;
   j. one person who for at least seven years has practised in Zimbabwe as a public accountant or auditor, and who is designated by an association, constituted under an Act of Parliament, which represents such persons; and
   k. one person with at least seven years' experience in human resources management, appointed by the President.

[…]

3. The members of the Judicial Service Commission referred to in paragraphs (d), (h), (i), (j) and (k) of subsection (1) are appointed for one non-renewable term of six years."

[28]L. Chiduza, 'Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?', 17:1*Potchefstroom Electronic Law Journal* (2014) p.379.

Court who must sit together as a bench to hear any constitutional case.[29] The effect of this provision was that the judges who were sitting in the Supreme Court on the publication date of the Constitution were the ones who constituted up the Constitutional Court. This transitional clause remained in operation until May 2020. During that transitional phase, a vacancy on the Constitutional Court bench occurring in the first seven years after the publication date had to be filled by another judge or an additional or acting judge of the Supreme Court.[30] Eventually, permanent judges were appointed to the Constitutional Court in May 2021, following interviews that were conducted in September 2020, before Amendment (No. 2) Act was passed.

This transitional arrangement was the result of a political compromise that, unfortunately, did not lend to the legitimacy and efficiency of the newly-created Court, delivering something of a still birth to the country's democratic and constitutional project.[31] When South Africa adopted a new Constitutional Court first through the Interim Constitution of 1993, and then in the 1996 Final Constitution, the framers paid particular attention to the composition of the Court. Krotoszynski explains this as follows:

> "Several scholars posit that the creation of a new juridical entity was, at least in part, an effort to vest the power of judicial review with a court that was not tainted by active participation, and hence complicity, in the system of apartheid. By creating an entirely new constitutional court, the framers of the 1993 Interim Constitution, and final 1996 Constitution, sought to ensure the political legitimacy of judicial review. Simply put, vesting the enforcement of the new Constitution with the judges who staffed the apartheid-era courts would have presented serious, and quite difficult, issues of institutional legitimacy that would have greatly undermined public confidence in both the interim and new permanent constitutions."[32]

Unfortunately, the Zimbabwean approach missed this crucial aspect, and instead allowed the judges who had been complicit in undermining the rule of law and constitutionalism in the post-2000 era to be the champions on the rule of law and constitutionalism under a new Constitution, albeit sitting in a new court room with a new court title, but under the same government they had so faithfully served and benefited from over the years.[33] Thus an assessment of the work the Constitutional

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[29]Section 18(2) of the Sixth Schedule to the Constitution.

[30]*Ibid*., section 18(3).

[31]*See* note 9 above for an explanation of the political compromise.

[32]R.J. Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to be Left Alone* (Oxford University Press, New York, 2016) p.85.

[33]A good number of judges who found themselves on the bench were recipients of farms forcibly seized from their owners. A study by M. Dongo revealed some of the beneficiaries to be judges, some of whom were elevated to the Supreme Court from the High Court at the height of the land reform programme. (Centre for Housing Rights and Evictions, 'Land, Housing and Property Rights in Zimbabwe' Geneva, COHRE, 2001, 17. <www.cohre.org/downloads.zimbabwe%report.pdf>, visited 28 May 2017. While information on who received farms is difficult to get, various sources have been recorded to confirm that several judges received farms, and according to Eric Matinenga, a former judicial officer and MDC MP and Minister in the unity government who carried out an extensive study of the judiciary in Zimbabwe, up to 95 percent of judges were allocated farms that were forcibly seized from white commercial farmers. Human Rights Watch, "Our Hands Are Tied": Erosion of the Rule of

Court is doing, is not necessarily an assessment of a fresh crop of judges, but to a larger extend of a significant number of the post-2000 Supreme Court judges. Have the attitudes changed then and now? Has a new legal dispensation brought in a new constitutional culture and a more progressive adjudication? The optimistic view has been that the new Constitution represents a promising new start, and that the new Constitutional Court represents a new chapter in rule of law and adjudication in the country. Was this optimism correct or simply misplaced euphoria?

8.3 Constitutional Court Adjudication under the 2013 Constitution

The Constitutional Court has thus far heard and decided on a number of cases spanning various issues. In what follows, I conduct a brief discussion on thematic areas, with reference to cases selected based on the variety of issues they deal with, specifically human rights, rule of law and constitutional interpretation. The idea is to sample cases upon which to base an assessment of how the Court has been performing *vis-à-vis* the constitutional expectations and the constitutional promise.

8.3.1. Court Rules and Operations

The Constitution sets out that an Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court. This latter took a while to happen, while the former is yet to happen.[34] In 2013, the Chief Justice issued Practice Directive No. 2 of 2013 to regulate the procedure of the Constitutional Court, and how cases were to be

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Law in Zimbabwe, 15-16 November 2008. One of the judges, Ben Hlatshwayo, acquired a farm and an application for leave to sue him for the applicant's eviction from the farm on the basis of illegal occupation was dismissed by then Judge President of the High Court, Paddington Garwe, in strong terms. Reported in *The Herald* of 13 March 2003. A 2004 report by a group of common law lawyers who visited Zimbabwe on a research mission also confirmed this, finding that "some Supreme Court and High Court Judges have been allocated land under the government's […] scheme and hold that land at nominal rents and at the government's pleasure", concluding that Zimbabwe's justice system had, as a result, ceased to be independent and impartial. 'The State of Justice in Zimbabwe', A Report to the International Council of Advocates and Barristers by Five Common Law Bars into the state of Justice in Zimbabwe, 4-5 December 2004. The judges received other gifts as well. On 1 August 2008 the government, through the Reserve Bank of Zimbabwe, announced in the state run newspaper *The Herald* that it had bought and delivered luxury cars, plasma television sets and electricity generators to all judges, 'Gono buys cars, TVs, generators for judges', *The Herald*, 2 August 2008 part of an established pattern of such 'gifts' which were intended to ensure the loyalty of pro-ZANU PF judges or win over those who sought to maintain their impartiality, particularly in matters involving the government or the opposition. Human Rights Watch, "Our Hands Are Tied" : Erosion of the Rule of Law in Zimbabwe, 15-17 November 2008. The RBZ also allocated houses to judges and directly augmented their salaries over and above constitutionally guaranteed remuneration from the Consolidated Revenue Fund. ('RBZ Splurges on Judges', *Zimbabwe Independent*, 7 August 2008.) The then President of the Law Society of Zimbabwe, Beatrice Mtetwa, explained that while the Law Society supported proper remuneration for judges, remuneration by the Reserve Bank compromised the administration of justice. Human Rights Watch, 'Our Hands Are Tied - Erosion of the Rule of Law in Zimbabwe', 15-17 November 2008.

[34]Transitionally, the Sixth Schedule to the Constitution in 18(4) provided that:

> "Until different provision is made by or under an Act of Parliament-
>
> a. rules may be made under the Supreme Court Act [*Chapter 7:13*] to regulate the procedure of the Constitutional Court;
>
> b. the rules of the Supreme Court apply, with any necessary changes, to the procedure of the Constitutional Court in relation to any matter that is not provided for in rules made in terms of subparagraph (a);
>
> but any such rules, in so far as they apply to the procedure of the Constitutional Court, must be consistent with section 85 and Chapter 8."

brought before it. Nonetheless these were not the substantive rules contemplated by the Constitution. It was not until September 2016 that the substantive rules of the Court were adopted through Constitutional Court Rules Statutory Instrument 61 of 2016. This ended a three-year period of the Court operating without substantive rules of its own, a situation that saw a number of inconsistencies in the way issues were approached procedurally both by the Court and the practitioners appearing before it. This proved problematic. Problems with the way the Court has been approaching the rules however persist to this day. As will be shown below, one of the Court's preferred approaches as apparent from its rulings has been to avoid dealing with sensitive issues by using technicalities to strike cases off the roll, and in some cases to dismiss them altogether. There is strong belief among many lawyers practicing at the Constitutional Court that the Court itself struggles with its own procedure.[35] So cases keep getting struck off the roll on technical grounds, some of which technicalities have been dealt with inconsistently, and some so minor that the Court may be expected to condone non-compliance in the exercise of its discretion. For instance, one of the most talked about Constitutional Court cases in the media in 2016 involved a government minister, Jonathan Moyo, trying to get the Court to stay proceedings against him by the Anti-Corruption Commission. Moyo's application was struck off the roll and he was ordered to pay costs because his record was not paginated.[36] According to Jonathan Moyo's lawyers, the Registrar had indicated to them that it was not necessary to paginate the record.[37]Before that matter was raised, other cases had reportedly been heard on un-paginated records.[38] I mention this not to trivialize the kind of matters I canvass here, but to highlight the extent to which the Court has been inconsistent on its own procedure, a dynamic whose impact in justice delivery cannot be downplayed or countenanced.

The adjudicative system established post-2013 by the Constitution is one that must eschew overreliance on technicalities over substantive consideration of matters on merit. This is a position that does not advocate a mutilation of all procedure to the point of non-recognition, but a commitment to substantive justice over procedure. Section 85(3) of the Constitution makes it abundantly clear that the rules of every court providing for procedure must be such that "(b) formalities relating to the proceedings, including their commencement, are kept to a minimum; (c) the court, while observing rules of natural justice, is not unreasonably restricted by procedural technicalities". It is an incident of a constitutional dispensation with a liberalised *locus standi* and a purposive orientation that elevates substantive justice. This same position is carried in rule 5 of the Constitutional Court rules:

[35]This is based on several discussions conducted with some of the lawyers practicing at the Constitutional Court.
[36] '"Court defers Moyo appeal hearing', Daily News, 9 February 2017. The matter was eventually dismissed in Moyo v. Sergeant Chacha&Ors CCZ-19-2017.
[37]*Ibid.*
[38]Interview with lawyers practicing in the Constitutional Court, April 2017, Harare.

"5. Departure from rules and directions as to procedure

(1) The court or a judge may, in relation to any particular case before it or him or her, as the case may be –

(a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he or she, as the case may be, is satisfied that the departure is required in the interests of justice;

(b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him or her, as the case may be, to be just and expedient.

(2) The court or the Chief Justice or a judge may –

(a) of its, his or her own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules;

(b) give such directions in relation to matters of practice or procedure or the disposal of any appeal, application or other matter as the court or the Chief Justice or judge may consider just and expedient."

The need to establish uniformity and adherence to procedural justice cannot be over-emphasised, especially in the nascent years of a court and a new constitutional dispensation, but never at the expense of substantive justice. With departure from rules and strict procedure, the control measure is always whether such a departure or condonation would prejudice the other party and the interests of justice. If the answer is no, a court is enjoined to condone and address the matter on merits.[39] Section 85(3) of the Constitution and rule 5 scream for the attention of the Constitutional Court, together with the underlying reasons for their existence.

Although the Constitutional Court now has published rules, there is still need for a Constitutional Court Act which will back the rules, and among other things, create a Constitutional Court Registry.

8.3.2. Avoidance

Of all the cases that have gone to the Constitutional Court since 2013, a reading of the orders granted reveals that most have been struck off the role or dismissed, many of them on technicalities, including matters of significant importance that the country would have benefited much from having the Constitutional Court pronounce on them. A good example is the challenge to the introduction of Zimbabwe's controversial 'bond notes', a pseudo-currency devised by the central bank to arrest a biting cash crunch hitting the economy. The opposition party then led by former Vice President Joice Mujuru, the Zimbabwe People's First, brought a challenge against the introduction of the currency on the basis that there was no legal framework to introduce this unknown form of money, among other arguments. The Reserve Bank of Zimbabwe had announced the introduction of bond notes without any legal framework, and after the threats of a legal challenge

[39] I am fully aware that procedure plays a critical role in law, to protect rights and interests many times in just a similar way as substantive justice does. For instance, procedure is there to protect a party that may not be so powerful as to influence process and the substantive consideration of issues by an adjudicator or an arbiter. Such a party will find protection and due process in the rules of procedure.

were issued, then President Mugabe invoked the much abused and loathed Presidential Powers (Temporary Measures) Act[40] to issue a Presidential decree creating a legal framework for the issuing of the bond notes. It is the legality of this legal framework that Mujuru challenged. However, when the matter started and just before it could be heard on merits, the full Constitutional Court bench led by the then Chief Justice, the late Godfrey Chidyausiku disposed of the matter on a technicality and struck it off the roll, saying the reasons for the decision would follow in due course – another problematic issue discussed below. The Court reasoned that Mujuru ought to have first approached the High Court and made an application in terms of s 85 of the Constitution seeking to have the Act declared unconstitutional before approaching the Constitutional Court. As a result, despite the urgency of the matter and the far-reaching impact the introduction of this pseudo-currency was to have on the country, the Constitutional Court never dealt with this matter, and the unprecedented bond notes are still in use in Zimbabwe today, with a questionable legal framework.

In yet another politically sensitive case, in February 2017 a full bench of the Constitutional Court unanimously dismissed a challenge brought by an activist, Promise Mkwananzi, leader of a youth citizens' movement called #Tajamuka, on the fitness of the then 93-year-old President Mugabe to hold office, given that President Mugabe was constantly travelling to Singapore to receive medical attention. Mkwananzi argued that President Mugabe was to be blamed for the poor state of the economy, corruption, high unemployment, and alleged human rights abuses in Zimbabwe. In his founding affidavit, Mkwananzi said: "[President Mugabe] is old and frail and no longer has the agility and concentration to superintend over critical affairs of the State. His incapacity [to lead] poses a real danger to the stability and security of the country. He must accept his fate and go to rest."[41] The Court's basis for the dismissal of this application was that proper court procedures were not followed, specifically that President Mugabe had not been personally served with the papers in compliance with Court Rule 9(g) of the Constitutional Court, which requires that service be effected upon the President at his place of residence or office. Responding to the dismissal, Promise Mkwananzi said that: "This is just a convenient excuse for the Constitutional Court to bite the bullet".[42] Regrettably, the avoidance or the perception of avoidance has grained traction.

One troubling aspect of the excessive dismissal of cases on technicalities is that until September 2016, the Constitutional Court was operating without rules of its own, as has been noted. The three years the Court had operated as such featured a lot of dismissals on technicalities, most of the technicalities of which were essentially arbitrary given that there was no reference point in the form of substantive rules specific to the Constitutional Court. Not only were practitioners unaware of the rules and procedures, but the Court itself seemed unsure of the rules, and would seemingly operate on a case-by-case basis, leading to

[40] *[*Chapter 10:20*].*

[41] 'ConCourt rejects 'Mugabe unfit' case', Newsday, 9 February 2017.

[42] 'Unfit to rule case against Mugabe dismissed', *Al Jazeera*, 8 February 2017.

inconsistencies in the Court's treatment of cases. But conveniently for the Court, this allowed for the *en masse* dismissal of sensitive cases. Equally troubling has been the failure by the Court to condone some of the trivial technical issues that did not affect any procedural or substantive fairness issues in the interests of justice, if the Court were to proceed to decide on those matters, especially on the urgent ones.

But the avoidance has not only been via procedural technicalities before merits are considered. As with the Chidyausiku JA-led Supreme Court of the post-2000 era, the Court's approach to controversial matters has often been that of avoidance even after considering merits. On many issues, especially the politically sensitive, the Court has seemingly taken a hands-off approach to operationalising the Constitution, deferring to the executive on many issues that ought properly to be pronounced on by a court of law in a principled manner. This has been seen in several cases in which the Court has failed to protect rights, such as in *S* v. *Madzore*[43] wherein the Court failed to protect the applicant's rights to speedy trial as per the requirements of our criminal procedure, the applicant being an opposition MP, and in the Zimbabwe Broadcasting Corporation (ZBC) licensing cases,[44] where freedom of expression and access to unbiased information was at stake. In the ZBC licensing cases the Court decided to turn a blind eye to the blatant propaganda of the state broadcaster ZBC and the abuse of the institution, choosing instead a dry approach to Declaration of Rights adjudication. In *S* v.*Chikumbu*[45] where the applicant also alleged as in *Madzore*that his constitutional rights had been infringed by not being prosecuted timeously, the Constitutional Court dismissed the application on the basis, *inter alia*, that the applicant "did not assert his constitutional right to a speedy trial," when the delay was so inordinate and blatantly apparent to the Court that dismissing the case on that basis alone amounted to an elevation of form over substance, and when the Court itself has concluded that "[t]aking into account that this was not a particularly complicated case, the matter should have been finalised in a much shorter period. In the circumstances, it is my view that the delay in this case was presumptively prejudicial". Similarly, in *S* v. *Manyara*[46] the Court dismissed an application to stay a prosecution in respect of a charge that arose more than 8 years ago, an application raised, as with the other cases above, on the basis that the right to fair trial within a reasonable time as enshrined in s 18(2) of the former Constitution had been violated. Thus far, three challenges to the constitutionality of section 33 of the Criminal Code (insulting the President) have been before the Constitutional Court,[47] all dismissed without ventilation of the specific question of

[43]CCZ-12-2016, [2016] ZWCC 12.

[44]*Majome* v. *ZBC &Ors* CCZ-14-2016 and *S &Ors*v. *Wekare and S & Anor* v.*Musangano Lodge (Pvt) Ltd* CCZ-9-2016.

[45]CCZ-1-2015 [2015] ZWCC 01.

[46]CCZ-3-2015, [2015] ZWCC 03.

[47] One such case is *S* v. *Mwonzora*CCZ-88-2013 [2016] ZWCC 17. In this case Mwonzora's conviction under section 33 of the Act was reversed, but the Court refused to entertain the challenge to the constitutionality of s 33(2)(a) of the Criminal Law Code, and this part of the application was dismissed. While this dismissal seemed to be legally correct given that that challenge ceased to be a live controversy or issue lying for determination as the prosecution of the applicant had been declared unlawful, s 33(2)(a) remains alive in the meantime, heavily used to arrest journalists, activists, protestors and opposition politicians, thereby curtailing free speech and insulating the President from criticism.

constitutionality. The latest is a September 2017 decision of *S* v. *Rusike*[48] wherein the Court dodged the issue altogether, instead dealing with the conviction of the accused. A fourth challenge to the constitutionality of the provision was filed in the Constitutional Court in November 2017 by political activist Acie Lumumba, represented by the Zimbabwe Lawyers for Human Rights. However, when the case was filed, the State withdrew the criminal case against Lumumba citing the precedence set in the *Mwonzora* case.[49]

As Gomwe noted, since the appointment of Chief Justice Chidyausiku, the Supreme Court - and now the Constitutional Court - has deliberately taken a 'hands off' approach with regards to highly politically charged cases, coupled with demonstrating a tendency in high profile and electoral cases to lend its process to the service of the State.[50] This culture seems to have transposed to the new Constitutional Court.

As the result of the continued avoidance and the minimal uptake of cases, the new expansive Declaration of Rights has found little enforcement by the Constitutional Court.

8.3.3. Reserved Judgments and Failure to Write Judgments

In those cases that the Court in its benevolence has decided to give audience, the Constitutional Court has not done much, at least as expected, in articulating the rights in question or dissecting the rule of law matters attendant, and in developing detailed and progressive jurisprudence. Statistically, a look at the law reports reveals very worrying results. The meagre number of reported judgments from the highest court in the land is disturbing.

The Constitutional Court has granted orders without judgments in important matters. This was the case in *Ex Parte Prosecutor General,*[51] in which the Prosecutor-General was committed to prison for contempt of court (with the sentence wholly suspended on condition of compliance with the Constitutional Court's order within 10 days) and in *Tavengwa Bukaibenyu* v. *Chairperson, Zimbabwe Electoral Commission &Ors*,[52] in which the applicant, a registered voter living in South Africa, made an application to the Court seeking an order declaring unconstitutional sections of the Electoral Act[53] that deny Zimbabweans in the diaspora the right to vote and an order allowing them to be granted the postal vote that diplomats and government officials based in foreign countries enjoy. The court dismissed the application in June 2013 with no judgment, only to issue one in 2017. It is cases like

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[48] CCZ-17-2017, [2017] ZWCC 17.

[49] *See* note 46 above.

[50] G. Gomwe, 'A critical analysis of the advent of judicialisation of politics in Zimbabwe in light of *Jealousy MbizvoMawarire* v. *Robert Mugabe N.O. &Ors* CCZ-1-2013',(Unpublished LL.B. thesis, University of Zimbabwe, 2013) p.13. He proceeds: "In cases challenging the constitutionality or legitimacy of measures that are clearly in violation of the law the Supreme Court has departed from established legal principle in order to legitimate executive action. This has left one with the uncomfortable feeling that judicial independence at this point in time exists solely at the whims of the Executive".

[51] CCZ-12-2016, [2016] ZWCC 12.

[52] Case Number S-126-2012.

[53] *[Chapter 2:13].*

these, dismissed without detailed explanation at law as there should, that make credible the belief that the Court avoids confronting politically sensitive matters dismissing cases without primary regard to the merits, and at times providing reasons after the matters are overtaken by events. In the *Bukaibenyu* case, the Zimbabwe Electoral Commission itself had chosen not to oppose the application stating instead, to its credit, that it would abide by the decision of the Court. But the government functionaries, the Registrar-General of Voting and the Minister of Justice, confused their government roles and instead started defending a party, submitting as a defence that: "allowing persons in the diaspora to vote from wherever they are is in itself unfair to one of the main political parties which will contest the elections. This is so because a number of western countries imposed sanctions on members of ZANU (PF). This in turn means the opposition will have an unfair advantage over ZANU (PF) since the diaspora vote is predominantly opposition as members of ZANU (PF) are currently barred from travelling to these western countries".[54] The Court clearly agreed with this open affiliation and defence of the ZANU PF interests by the respondents, using those partisan interests as a basis to disenfranchise millions of Zimbabweans in the diaspora. Yet the Court did not find it necessary to explain why it dismissed the case at the time of issuing the order.

Similarly, in *Dewah* v. *The President, Ministers of Constitutional and Parliamentary Affairs and of Justice &Ors,*[55] the court dismissed without judgment an application by the President of the Good People's Movement party seeking an extension of the nomination date of election candidates in the 2013 elections by two weeks, and also challenging the constitutionality of the Political Parties (Finance) Act,[56]arguing that small parties not party to the then global political agreement (GPA) did not have access to funding from foreign sources or the treasury. Similarly, in July 2013 the Constitutional Court dismissed without reasons for judgment the case of *Zimbabwe Development Party* v. *Minister of Justice and Legal Affairs, Minister of Constitutional and Parliamentary Affairs&Ors*[57] in which the constitutionality of s 3(3) of the Political Parties (Finance) Act[58] was challenged for failure to provide state funding for small political parties in light of s 67(2) of the Constitution on the basis that it infringes the constitutional right of every Zimbabwean to form, join and participate in the activities of a political party. Two other cases seeking extension of election dates after the *Mawarire*v. *President of Zimbabwe*decision,[59]*Nyikadzino*v. *President of the Republic of Zimbabwe & 12 Ors*[60]

[54]*See* a discussion of the case in SADC Lawyers Association, 'An Analysis of the Electoral Legal Environment for the 2013 Zimbabwe Harmonized Elections', (2013) p.35. <www.osisa.org/sites/default/files/an_assessment_of_the_electoral_legal_environment_for_the_2013_zimbabwean_harmonised_elections_sadcla.pdf>, visited on 18 June 2017.
[55]CCZ-39-2013.
[56]*[Chapter 2:11*].
[57]CCZ-33-2013.
[58]*[Chapter 2:11*].
[59]CCZ-1-2013, [2013] ZWCC 1.
[60]CCZ-31-2013 and CCZ-34-2013.

and *Maria Phiri* v. *The President & 5 Ors*[61] were dismissed without judgments. In *Nyikadzino* the argument was that the date set by the Court in the *Mawarire*case did not leave enough time for registered voters to complete all the processes required for elections to be held in a constitutional manner. In *Phiri* the applicant sought an extension of the election date to allow persons formerly wrongfully classified as 'aliens' but confirmed as citizens by the new Constitution time to acquire citizen ID cards to enable them to register as voters for the election. In *Morgan Tsvangirai* v. *The President & 7 Ors*[62] the Constitutional Court also dismissed without judgment an application by the opposition leader challenging the constitutional validity of the Presidential Powers regulations and the election proclamation that followed.

Granting orders without judgments is perpetuation of a very undesirable culture of not writing judgments or only writing judgments after protracted delays that is evident in the High Court especially, but also in the Supreme Court. In most of the matters where the Constitutional Court has handed down judgments, it has become the norm rather than the exception that written opinions only follow later. In *Mawere* v. *Registrar General &Ors,*[63] although the Court's decision was handed down on 26 June 2013, the judgment was not made available until March 2015, almost two years later. In *S* v.*Madzore,*[64] *S* v. *Stander*[65] and *Meda*v. *Sibanda &Ors*[66] among many other cases, reasons only followed later after the decision. In other democratic countries, it is highly unusual for a Supreme Court, not to mention a Constitutional Court, to issue orders without judgments or opinions and yet judgments are imperative to enable the parties and those affected to follow the reasoning of the court.

Another hallmark of the Court is delayed pronouncement of rulings. In the case of *Mavedzenge*v. *Minister of Justice & Ors*,[67] the applicant challenged s 192(6) of the Electoral Act[68] which allows for the Minister of Justice to approve electoral regulations promulgated by the Zimbabwe Electoral Commission (ZEC), on the basis that it infringes on the constitutional independence of ZEC. This matter was time-sensitive and was certified as urgent by the Constitutional Court. Curiously, the matter was argued on the 5th of July 2017, but ruling was only handed down on 31 May 2018. Meanwhile, the matter has been overtaken by events and ZEC proceeded to promulgate regulations which were approved by the Minister of Justice using a potentially constitutionally flawed provision. Perhaps the most famous or infamous of the Court's decisions thus far, *Chamisa* v. *Mnangagwa & 24 Ors,*[69] finds itself in the same list of matters pending full reasons for decision, despite the vital importance of the case. The ruling was handed down on 24 August 2018, with the unanimous Court, per Malaba CJ, issuing abridged reasons and expressly

[61]CCZ-28-2013.
[62]CCZ-37-2013.
[63]CCZ-4-2015, [2015] ZWCC 04.
[64]CCZ-12-2016, [2016] ZWCC 12.
[65]CCZ-1-2016, [2016] ZWCC 1.
[66]CCZ-10-2016, [2016] ZWCC 10.
[67]CCZ-5-2018, [2018] ZWCC 5.
[68]*[Chapter 2:13*].
[69]CCZ-42-2018, [2018] ZWCC 42.

stating that "It must be noted that it, however, does not contain the full reasons thereof. These will be issued in due course." Full reasons were only handed down under the citation *Chamisa* v. *Mnangagwa & Ors* CCZ 21/19 in November 2019, over a years later. Another case is point is *Zimbabwe Law Officers Association & Anor* v. *National Prosecuting Authority & Ors,*[70] where on the 29th of February 2019 the Court handed down judgment in the case of four years after the matter was argued on the 14th of January 2015. In that matter the applicants challenged the constitutionality of the employment of police officers and military personnel and prosecutors in the civilian courts. Despite the seriousness of the issues at stake, the Court took for years to come to a ruling, and in spite of finding the practice to be unconstitutional, proceeded to give the Prosecutor-General 24 months to correct the illegality. This was also the case with the challenge to Constitution of Zimbabwe Amendment (No. 1) Act, which was filed in 2017, argued in January 2018, and judgment was only handed down in in March 2021.[71]

Compounding this problem of failure to deliver written judgments on time is that of the written judgments by the Constitutional Court, many are arguably highly inadequate and insufficient insofar as they seek to expound on the young Constitution, and in displaying legal reasoning that pierces to the logical conclusion of salient matters under review. This is not merely an exercise in unnecessary detail, but it is key in developing constitutional jurisprudence for a nascent democracy such as ours. The Constitution must be dissented for the benefit of those under it, and the Constitutional Court has to be deliberate about this. It is not about waiting for another day to address what can be addressed now, and by this I do not agitate for the Court to venture into non-germane or academic enquiries, but I say this in reference to any issue as presented before the Court within the four corners of that issue.

Reserved and delayed judgments, as well as delivering rulings without written judgments, are however no novel challenges. It has been known to occur in other jurisdictions. Yet that is neither a defence nor justification for our purposes. South Africa, for instance, takes a strong stance against reserved judgments and failure to write judgments. Reserved judgments are monitored to measure the compliance with the set Judicial Norms and Standards and the Code of Judicial Conduct. Paragraph 5.2.6 of the Judicial Norms and Standards[72] stipulates that, judgments in constitutional, criminal and civil matters should generally not be reserved without a fixed date for handing down. The exception is that judges have a choice to reserve judgments *sine die* where circumstances are such that the delivery of a judgment on a fixed date is not possible. The Judicial Norms and Standards state that Judicial Officers should make every effort to hand down reserved judgments no later than three (3) months after the date of the last hearing.

[70] CCZ-1-19, Constitutional Application No. CCZ-32-13.
[71] *Gonese, supra* note 23.
[72] Norms and Standards available at <www.justice.gov.za/legislation/notices/2014/2014-02-28-gg37390_gon147-supcourts.pdf>, visited on 18 July 2021.

In addition, Article 10(2) of the Code of Judicial Conduct[73] provides that: "A Judge must deliver all reserved judgments before the end of the term in which the hearing of a matter was completed, but may – (a) in respect of a matter that was heard within two weeks of the end of that term; or (b) where a reserved judgment is of a complex nature or for any other cogent and sound reason and with consent of the head of the court, deliver that reserved judgment during the course of the next term".[74] The need for a similar regime of norms and standards, as well as a Code of Judicial Conduct addressing these and other issues in Zimbabwe is self-evident. The rules of the Constitutional Court lack particularity in this respect, and abets the challenge. Rule 54 which deals with judgment provides as follows:

> **"54. Judgment**
> (1) After the completion of the hearing of an application, appeal or other matter, judgment may be given forthwith or at such date as the court or judge thinks fit and by the issue, thereafter, of an order by the registrar.
> (2) A judgment, if not given immediately after the conclusion of the hearing of the matter or at a time specified by the court or a judge, shall be given at such date and time as may be notified to the parties by the registrar.
> (3) A judgment shall be pronounced in such manner as may be determined by the court or by the judge, as the case may be whether or not he or she was present at the hearing.
> (4) The registrar shall certify all judgments issued by him or her."

Not only do the rules permit the delivery of judgment to be put in indefinite abeyance; they are silent on reasons for judgment.

8.3.4. A Court in Permanent Unanimity

There is the highly unsettling fact that the nine judges of the Constitutional Court have agreed in almost every case save in a few. It is highly curious that nine individual legal experts with independent minds can agree on almost everything for years on end. Whatever the reason may be, this is a highly undesirable judicial culture that does not lend a hand to the development of the country's jurisprudence – more so critical legal debate and multiplicity of views and approaches. Multiplicity of views and approaches are a standing feature of the law, and the absence thereof is what becomes questionable as opposed to the prevalence thereof.[75] The result of the highly unusual concurrence rate more so without separate concurring opinions - is that it deprives our jurisprudence of critical legal debate, and turns our law into black and white matter which, of course, is a fallacy. To the democratic project and

[73]Code available here: <www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor865-judicial-conduct.pdf/> visited on 18 July 2021.

[74]The Judiciary, Republic of South Africa, *The South African Judiciary Annual Report* 2017-18 p. 48.

[75]For a discussion on the importance of dissenting and concurring opinions in judgments, *see* W. Stager, 'Dissenting Opinions. Their Purpose and Results', 11:7*The Virginia Law Register, New Series*, (Nov, 1925), pp. 395-399 and E.M. Gaffney Jr., 'The Importance of Dissent and the Imperative of Judicial Civility', 28 *Valparaiso University Law Review* (1994) p. 583.

the new constitutional culture that is sought to be established, the result is underdevelopment of constitutional jurisprudence. But not only that; the precedent set by the Constitutional Court does not give a good lead to the High Court, in which some judges have failed to write judgments or have produced only skeletal opinions.[76]

8.3.5. Legislative Reform

A good number of challenges that have been before the Constitutional Court have been prompted by delays by the government in reforming Acts of Parliament for conformity to the Constitution. This is true of cases such the child marriages case,[77] the death penalty cases[78], the freedom of expression cases,[79] and the citizenship cases,[80] among many others.

Concern has been raised over the slow pace of the government in aligning the laws to the Constitution. Since the Constitution was enacted, over four hundred (400) Acts of Parliament needed to be aligned,[81] as their provisions were no longer in line with the new Constitution. Of these, well over a hundred remain to be aligned, while most have simply been aligned for technical as opposed to substantive compliance. This in turn means that quite a good number of unconstitutional legislative provisions remain in effect, requiring that the Constitutional Court need to pronounce on some of these aspects as and when the matters come before the Court. However, the fact that the Constitutional Court has been dismissing many of the challenges, and has been taking a hands-off approach, means that very little aid has been given by the Court in legislative alignment, leaving those affected by the unreformed laws at the mercy of unconstitutional laws. Section 33 of the Criminal Law (Codification and Reform) Act is a case in point.[82] Similarly, the dismissal of the *Mavedzenge* challenge raises concern over the Court's view of independence as it pertains to certain key institutions of democracy, such as the Zimbabwe Electoral Commission, when a Minister of the Executive is granted powers by statute to approve (and disapprove, by implication) regulations made by an independent constitutional body. In *Shumba & 2 Ors* v. *Minister of Justice, Legal & Parliamentary Affairs & 5 Ors*[83] the Court made an unsurprising yet disturbing ruling

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[76]*See* Z. Murwira, 'Chidyausiku slams lazy judges', *The Herald*, 1 October 2016, in which one High Court judge is reported to have written only two judgments in a year.

[77]Mudzuru& Another v. Ministry of Justice, Legal & Parliamentary Affairs (N.O.) &Ors CC-12-2015 [2015] ZWCC 12.

[78]*Farai Lawrence Ndlovu & Anor* v. *The Minister of Justice Legal & Parliamentary Affairs*Constitutional Application No. 50 of 2015 and C*hawira& 13 Ors*v. *Minister, Justice Legal & Parliamentary Affairs &Ors*CCZ-3-2017.

[79]*Majome*v. *ZBC &Ors* CCZ-14-2016.

[80]Mawere v. Registrar General &Ors CCZ-27-13 and Madzimbamuto v. Registrar General &OrsCCZ-114-2013.

[81]*See* Veritas, 'General Laws Amendment Bill Gazetted', Bill Watch 15-2015, 12 May 2015.

[82]Section 33 of the Criminal Code [*Chapter 9:23*] makes it a criminal offence to "[undermine] the authority of or [insult] the President". As to what would amount to undermining or insulting the President, the provision is so broadly framed that it is used and abused to silence dissent and insulate the President from legitimate and fair criticism. At least four Constitutional Court challenges have sought a nullification of the impugned provision as discussed further below, but the patently unconstitutional and undemocratic provision remains intact to this day.

[83]CCZ-4-2018 [2018] ZWCC 4.

that section 23 of the Electoral Act does not violate the Constitution on the right to vote insofar as it prevents Zimbabweans outside the country from exercising the right to vote. While such kind of rulings may seem politically expedient for the day, the cost to constitutional jurisprudence and the abetment of constructional infraction is staggering. As bad law as this decision is in its failure to read the Constitution purposively, far worse is that not only does it state that the Constitution does not require government to allow or facilitate for the diaspora vote, but ventures to say that "Zimbabwean law does not provide for the diaspora vote. This should be a basis for agitating for the amendment of the Constitution at the request of any aggrieved party".[84] Essentially, if one goes by the Constitutional Court's ruling, the only way the diaspora vote is to be achieved in Zimbabwe is through a constitutional amendment. As has become predictable, the nine-member bench was once again unanimous, in the sense of mere agreement with none writing a concurring opinion to display an alternative reasoning or view that nonetheless arrives at the same conclusion.

The Court however is to be commended for coming down heavily in declaring section 27 of the Public Order and Security Act (POSA)[85] as unconstitutional in the case of *Democratic Assembly for Restoration and Empowerment & 3 Ors* v. *Saunyama N.O & 3 Ors.*[86] In that case, the Court quashed a provision used to limit the right to demonstrate and to petition, a right which is enshrined in section 59 of the Constitution. Makarau JCC held in that case that "I may add on a general note that protests and mass demonstrations remain one of the most vivid ways of the public coming together to express an opinion in support of or in opposition to a position […] Long after the demonstrations, and long after the faces of the demonstrators are forgotten, the messages and the purposes of the demonstrations remain as a reminder of public outrage at, or condemnation or support of an issue or policy".[87] Demonstrations, she said, "have thus become an acceptable platform of public engagement and a medium of communication on issues of a public nature in open societies based on justice and freedom".[88]

8.3.6. Politics and the Judiciary

If one reads some of the Court's decisions, judicialisation of politics and, in equal measure, the politicisation of the judiciary, seem to be continuing in line with the post-2000 tradition that places premium on political considerations and uses the law as a proxy to mask what are latently and at times patently political decisions. The law is very much capable of this. The very first case before the Constitutional Court, *Mawarire* v. *Robert Mugabe N.O. &Ors,*[89] falls in this worrisome category, which gave a shocking and even bizarre interpretation of the Constitution, giving

[84] *Ibid.,* p. 26.
[85] *[Chapter 7:11*].
[86] CCZ-9-2018, [2018] ZWCC 9.
[87] *Ibid.,* p. 8.
[88] *Ibid.*
[89] 2013 (1) ZLR 469 (CC).

President Robert Mugabe and his party an early election that he so desired, and leading him to a contested victory.

8.3.7 Enforcing Constitutional Compliance

The above is not the complete picture, however. A reading of some of the judgments would lead one to say, at least in comparative terms pre- and post-2013, the Court has done some commendable work in providing some form of judicial leadership to other courts in the country. Indeed, a number of decisions emanating from the Court have been progressive. Examples of such cases are *Mawere* v. *Registrar General &Ors*[90] wherein the Court interpreted the Constitution's citizenship clause to permit dual citizenship; the *ex parte* case of *The Prosecutor General of Zimbabwe on the Question of his Constitutional Independence and Protection from the Direction and Control of Anyone*[91] in which the Court ruled to commit Zimbabwe's Prosecutor-General to prison for 30 days for contempt of court (suspended on condition of him complying with the Court's order within a specified time) for deliberate contemptuous failure to issue certificates of private prosecutions in violation of High Court and Supreme Court orders; *Madanhire& Anor* v. *Attorney General*[92] in which criminal defamation was held to be inconsistent with the Constitution; *Mudzuru& Anor v. Minister of Justice &Ors*[93] *which outlawed child marriage*s; and*Makoni* v. *Prisons Commissioner & Anor*[94] wherein life imprisonment without the possibility of parole was held unconstitutionalfor violation ofthe rights to equal protection and human dignity and the prohibition on cruel and degrading punishment.

In April 2019 in *State* v. *Willard Chokuramba*[95]the ConstitutionalCourt handed down a celebrated judgment outlawing judicial corporal punishment for children, nullifying section 353 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* for the reason that it is in contravention of section 53 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the Constitution is confirmed. In its judgment, the court made extensive reference to regional and international child protection instruments and standards, including a review of scholarly opinion. The court extensively outlines sentencing options available for courts in cases of children in conflict with the law, where resort had previously been had to corporal punishment. The best interests of the child found expression with the court finding that "Interpretation of what constitutes the best interests of the male juvenile offender cannot be used to justify practices which conflict with the juvenile's human dignity and right to physical integrity. The measures adopted in giving effect to the sentence imposed on the authority of section 353 of the Act do not protect the offender from physical and mental violence. Judicial corporal

[90]CCZ-27-2013, [2015] ZWCC 04.
[91]CCZ-13-2017, [2017] ZWCC 13.
[92]CCZ-02-2015, [2015] ZWCC 02.
[93]CCZ-12-2015, [2015] ZWCC 12.
[94]CCZ-8-2016, [2016] ZWCC 8.
[95]CCZ-10-19.

punishment is not in the best interest of the male juvenile".[96] In so doing, the court made strides in shaping up a child justice system that is compliant to the Constitution. The position of outlawing judicial corporal punishment was reflected in the Child Justice Bill which was proposed by the government subsequent to the ruling.

In these judgments, we see the Court interpreting the Declaration of Rights expansively and purposively as it ought to, and bringing our law in line with our international law obligations, but also international best practices in reading and enforcing rights. Unfortunately, one struggles to find more of the same types of judgments.

8.4 Analysis

The ultimate question is whether on the whole the Constitutional Court has played its constitutionally mandated role of operationalising the Constitution, enforcing constitutional rights and providing judicial leadership to the lower courts. The importance of mapping the work of a young Court in the infancy of a democratic Constitution is self-evident, and indeed an interesting and revealing exercise. A thorough examination of the cases in the five-year existence of the Court would lead one to the conclusion that very little can be credited to the Constitutional Court for breathing life to the Declaration of Rights.

One cannot help but make a comparison with the South African Constitutional Court which did a stellar job to immediately operationalise the Bill of Rights on adoption in 1993 and then in 1996 with the adoption of the final Constitution, and provide the transformative leadership in the understanding of rights and the application and enforcement thereof. This was the case beginning with the very first matter to come before the Court, *S* v.*Makwanyane& Anor*,[97] in which the Court declared the death penalty unconstitutional, producing an illuminating opinion on the content, substance and meaning of the right to life vis-à-vis other rights as encapsulated in the Constitution. *Makwanayane* remains a globally celebrated opinion cited in all and sundry jurisdictions that care about constitutionalism and human rights. One cannot say the same with the debut judgment by the majority in the *Mawarire* case. That case, the very first case before the Court, *Mawarire*, with its unorthodox approach to constitutional interpretation and its political undertones is seen as a false start by the new-born Court, seemingly confirming fears of tainted legitimacy through the transitional clause in the Constitution that makes the post-2000 Supreme Court bench (effectively) the new Constitutional Court during the first years.[98] Across the border, not only did the

[96]*Ibid.,* p. 40.

[97]ZACC 3, 1995 (3) SA 391 (CC).

[98]*See* SIXTH SCHEDULE: COMMENCEMENT OF THIS CONSTITUTION, TRANSITIONAL PROVISIONS AND SAVINGS section 18(2) and (3):

> "2. Notwithstanding section 166, for seven years after the effective date, the Constitutional Court consists of-
> a. the Chief Justice and the Deputy Chief Justice; and
> b. seven other judges of the Supreme Court;
> who must sit together as a bench to hear any constitutional case.

South African Constitutional Court handle by far a higher volume of cases in its first year alone relative to the country's population, but the Court has since its first year been writing detailed and instructive opinions on all the cases coming before it. In that first year, the South Africa Constitutional Court made a particular point in highlighting the difference in the times between apartheid and the new democratic era in which constitutionalism and the Bill of Rights are at the core. Subsequent to *Makwanyane*, the South African Constitutional Court made significant pronouncements during that first year of sitting in cases such as *S* v. *Zuma &Ors,*[99]in whicha section of the Criminal Procedure Act was declared unconstitutional for providing for reverse onus and infringing on the right to a fair trial; *S* v.*Mhlungu&Ors*[100]in which the court rejected an attempt to excludecertain criminal cases that were pending when the Constitution came into force on 27 April 1994 from the purview of the Bill of Rights; and *S* v. *Williams &Ors*[101] in which the Court found judicial corporal punishment to be unconstitutional for violating the constitutional right to human dignity and the protection against cruel, inhuman or degrading punishment. In *Coetzee* v. *Government of the Republic of South Africa; Matiso&Ors*v. *Commanding Officer, Port Elizabeth Prison, &Ors*[102] the Court ruled that the imprisonment of judgment debtors who fail to pay is unconstitutional and in *S v. Bhulwana; S* v. *Gwadiso*[103] the Court held that a reverse onus provision in the Drugs and Drug Trafficking Act, in terms of which any person found in possession of more than 115 grams of dagga would be presumed to be dealing in dagga, was unconstitutional because it violated the presumption of innocence.

Several other cases were decided by the South African Constitutional Court that had a bearing on the new Constitution, with the Court seizing every moment to advance human rights and constitutional jurisprudence. Not even President Nelson Mandela himself was spared by the Court in that very first year. In *Executive Council of the Western Cape Legislature & Ors* v. *President of the Republic of South Africa &Ors,*[104]the President had used his powers under a 'Henry VIII clause' in the Local Government Transition Act to amend that Act by proclamation, in order to transfer control over the local government delimitation process from the provincial governments to the national government. The Court held that Parliament could not constitutionally delegate to the Executive the power to amend Acts of Parliament, and therefore held the amendments to be invalid. It was highly unlikely that the current Constitutional Court bench in Zimbabwe would have made a ruling of this nature against President Robert Mugabe. All the above cited South Africa Constitutional Court cases were heard in the first year of the Court's existence alone. I do acknowledge debates from a few constitutional lawyers, mostly outside South Africa, who have argued that the Constitutional Court bench is South Africa

3. A vacancy on the Constitutional Court occurring in the first seven years after the effective date must be filled by another judge or an additional or acting judge, as the case may be, of the Supreme Court."

[99]ZACC 1, 1995 (2) SA 642 (CC).
[100]ZACC 4, 1995 (3) SA 867 (CC).
[101]ZACC 6; 1995 (3) SA 632 (CC).
[102]1995 (4) *SA* 631 (CC).
[103]1996 (1) SA 388 (CC).
[104]1995 (4) *SA* 877 (CC).

is anti-executive. But if one were to come to that conclusion simply on the basis that the Court rules against the Executive fearlessly and consistently in cases of constitutional infraction, then one can say that the Constitutional Court bench in Zimbabwe is executive-minded, on the same yardstick albeit on the flipside.

Cases subsequent to the debut *Mawarire*, have seen the Constitutional Court missing countless opportunities to create progressive jurisprudence that would form the foundation of constitutional adjudication to posterity. Among the Court's hallmarks are avoidance of sensitive issues though dismissing cases on technicalities; granting orders without written judgments or opinions; delayed resolution of disputes and allowing matters to be overtaken by events; and inconsistency in approach to its own rules. Very little can be credited to the Court in the manner of aiding to the ongoing legislative alignment. It is also unusual that to date, the judges of the Constitutional Court have been seemingly in perpetual unanimity, serve for very few cases.

There have been some moments of celebration. Cases such as *Mudzuru* v. *Minister of Justice & Ors*[105] have shot the Court to fame through its illustrious approach to expansive and purposive interpretation of the Declaration of Rights and the aligning of our law to Zimbabwe's international obligations. The recent decision in *Democratic Assembly for Restoration and Empowerment & 3 Ors*v.*Saunyama N.O & 3 Ors*[106] equally salvaged a Court whose decision in the Presidential election challenge in *Chamisa* v. *Mnangagwa & 24 Ors*[107] had been battered. Yet, there are only a few such cases to undo the dark cloud lingering over the Court. Thus far, a lot of work remains to be done and the Court itself needs transformation if it is to effectuate its transformative role under the new Constitutional dispensation.

[105]CC-12-2015, [2015] ZWCC 12.
[106]CCZ-9-2018, [2018] ZWCC 9.
[107]CCZ-42-2018, [2018] ZWCC 42.

8.5 Conclusion

Balancing the good and the not-so-good, more work lies ahead in transforming the Constitutional Court itself before we can speak of a Court ushering transformative constitutionalism under a new constitutional dispensation under a new, more progressive Constitution. Anything short of this may as well qualify for what Landau aptly calls 'abusive constitutionalism', among whose facets is *performing* democracy, when institutions of democracy are used to put a facade of democracy in action when in fact all it is, is a smokescreen.[108] The number of missed opportunities to develop progressive constitutional jurisprudence and protect the rule of law, and the number of less-than-desirable rulings and judgments far outweigh the opposite. Yet as Madhuku has argued, the horizons of our Constitution are not limited by the current judges and the views they hold and the approaches they take.[109] The possibilities of this fundamental living document are glittering and they wait to be explored and mined to afford the people of Zimbabwe the promise of the Constitution.

[108] *See* D. Landau, 'Abusive Constitutionalism',47 *University of California Davis Law Review* (2013) pp. 195-200 (defining and explaining "abusive constitutionalism"), and also I. Samuel, 'Constitutional Courts and Consolidated Power' New York University Public Law and Legal Theory Working Papers.Paper 459, (2014) <www.lsr.nellco.org/nyu_plltwp/459>, visited on 14 May 2020, pp. 9-10.

[109] L. Madhuku, "Constitutional interpretation and litigation", Presentation given at the Zimbabwe Women Lawyers Association Annual Conference, 18 December 2018, Harare.

Chapter 9

The Judiciary and Electoral Adjudication in Zimbabwe

Tarisai Mutangi

9.1 Introduction

On that very day, in the 16th Century, when the House of Commons in England took the decision to delegate or transfer to the judiciary the responsibility to determine election petition, courts, especially those from the common law tradition, took over the reins of electoral adjudication to this day. The House of Commons was 'the sole proper judge' of its members' returns, 'without which the freedom of election were not entire.'[1] Around 1868, through the Parliamentary Elections Act of that year,[2] the jurisdiction to adjudicate proceedings was transferred to courts of law with little changes in terms of procedure. This law was the vehicle to effect transfer of power. Prior to transfer of responsibilities, any aggrieved candidate would approach the Commons Committee for the filing and determination of that electoral grievance. In other words, politicians would self-resolve all election-related disputes in finality without the involvement of the judiciary. This competence was exclusive.

The reasons for surrendering the adjudicatory jurisdiction were many. Chief of them was that, 'it later became apparent that partisanship was eroding the credibility of the House decisions on elections and the ultimate diminution of public confidence in elections as a whole.'[3] In other words, the sting of partisanship giving rise to bias undermined the meritorious adjudication of election disputes. Political affiliation appears to drive the outcome of the adjudication proceedings. Impartiality was the order of the day as was lack of independence of the members of the Commons Committee who perhaps more represented party interests than substantive electoral justice. This infirmity begged for the involvement of the judiciary, an institution that is constitutionally required to adjudicate disputes independently, competently and with impartiality. Yet the House Commons deserved credit for accepting the internal institutional weakness ad defer such as important task to an independent arm of the state established for that purpose.

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[1]C. O'Leary, *The Elimination of Corrupt Practices in British Elections 1868-1911* (Oxford University Press, Oxford, 1962) p.4.

[2]The Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125), sometimes known as the Election Petitions and Corrupt Practices at Elections Act or simply the Corrupt Practices Act 1868, is an Act of the United Kingdom Parliament, since repealed.

[3]H. 'Nyane, 'A Critique of Proceduralism in the Adjudication of Electoral Disputes in Lesotho', *Journal of African Elections* (2018) p.4.

The transition of the adjudicatory role was dramatic. At first, the judiciary was averse to accepting jurisdiction over election petitions. The famous and widely quoted words of the Chief Justice to the Lord Chancellor on the 6th of February 1868 deserve direct quotation over a century and half later:

> "This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a judge is to proceed to the scene of recent conflict, while men's passions are still roused. The decision of the judge given under such circumstances will too often fail to secure the respect which respect, which judicial decisions command on other occasions. Angry and excited partisans will not be unlikely to question the motives, which motives, which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs".

The Lord Chancellor made a strong case against transfer of the adjudicatory role to the judiciary. He made a number of points to support his reservation. Firstly, that involving courts in electoral dispute resolution was likely to be a catalyst for destroying public confidence in the judiciary. Secondly, the top judge described the emotive environment associated with post-polling electoral disputes where passions tend to be 'aroused'. Thirdly, court decisions given under such a fractious period are vilified and disrespected as feuding parties seek basis for the court's ill motive. Fourthly, such motives, emanating as they do from 'angry and excited partisans', find their way to the media. Finally, the judge was afraid of the 'distrust and dislike of whatever interferes with party objects and party triumphs'. It is clear that courts or the judiciary is the 'whatever interferes' with political party objectives and triumphs in those settings. It would be interesting to assess the extent to which these factors are applicable to electoral adjudication in Zimbabwe.

However, much as we have a clear history of judicial adjudication over electoral petitions, scholarship does not seem to dedicate similar time and space to the origins of general jurisdiction of courts in pre and post polling electoral proceedings other than electoral petitions. One would assume that electoral disputes being civil in nature, the judiciary draws its jurisdiction from common law (original jurisdiction) or specific pieces of legislation adopted to establish the jurisdiction.

This chapter joins a host of eminent others in this publication, dealing with specific aspects of the judiciary and the constitution. The chapter focuses on electoral justice in Zimbabwe. It first explores the history of electoral adjudication in Zimbabwe to put matters in perspective. The second part is dedicated to legislative provisions providing for electoral issues such as principles on electoral system, but focussing on electoral adjudication. Thirdly, the chapter explores the development of the electoral jurisdiction of courts. Finally, the chapter assesses the performance of the judiciary vis-à-vis electoral dispute resolution as seen through its jurisprudence, factors extraneous to the judiciary and scholarship.

9.2 Electoral justice: the scope

This Chapter is essentially about electoral justice with Zimbabwe as a case study. The concept of electoral justice is fluid.[4] Some describe it as ensuring that electoral processes are conducted in accordance with the complete electoral law, which includes applicable national and international law.[5] The concept also enshrines the right of aggrieved persons to challenge electoral processes and receive a remedy. Electoral justice is ubiquitous in the electoral cycles consisting of pre-polling, polling and post-polling phases. It also 'encompasses both the means for preventing violations of the electoral legal framework, and those mechanisms that are aimed at resolving electoral disputes that arise from the non-observance or breach of the provisions of the electoral law'.[6] There is a view that mechanisms infused into electoral systems to resolve electoral disputes could be formal as well as informal. In other cases, there is a combination of competences where courts, electoral bodies, the legislature and other bodies could be vested with this competence.

Fluid as it may be, the bottom line on the scope of the concept is that, first, it must provide for the legal framework that determines the rules for elections. Second, it should provide a procedure to follow when a grievance arises. Finally, competent and independent institutions should be established, vested with appropriate jurisdiction to expeditiously deal with disputes. In short, any person should be able to access justice for the resolution of an electoral dispute or grievance. Perhaps we should add the duty of the respondent, whether state entity or individual, to comply with court decisions on elections. Such compliance is critical to the fullness of electoral justice.

The prevention of violations and infusion of mechanisms for adjudication of electoral disputes could be described as the role of courts. The author articulates the role of courts in electoral adjudication as two-fold. In the first place, courts review legal rules that regulate the electoral process (rule evaluating role) to ensure an 'even playing field'. This is prevalent in pre-electoral phase where candidates and their political parties jostle for all manner of advantages over others. For instance, courts could be involved in disputes pertaining to voter registration; access to public media and other resources; right to freely associate and gather for purposes of campaigning, among others.

The second role of the courts is to ensure that rules that provide for fair play are followed or enforced (rule enforcing). In this role, courts ensure the review of all actions and decisions that did not follow the laid rules. In this role, courts enforce compliance with legal rules. Their jurisdiction includes nullifying all acts and decisions adjudged as illegal. In this role, courts have to content with criticism based on the counter-majoritarian dilemma. This is a timeless argument essentially attempting to undermine the legitimacy of the judiciary because of its appointment

[4]IDEA, *Electoral Justice: The International IDEA Handbook* (2010) para.22. *See also* L.A.Nkansah, 'Dispute Resolution and Electoral Justice in Africa: The Way Forward', XLI:20 *Africa Development (*2016) pp. 97– 131.
[5]*Ibid. See also* S.F.Huefner, 'Remedying election wrongs', 44 *Harvard Journal on Legislation* (2007) pp. 265-326.
[6]IDEA, *supra* note 4, para. 22.

process that does not include or involve election by the public.[7] The argument further asserts that by allowing courts to exercise judicial review, they stand a chance to nullify democratic decisions.[8] For instance, a court that nullifies an election is regarded as reversing a democratic decision in favour of minority. However, the question of the extent to which the public is bothered by the counter-majoritarian argument remains unanswered. Is the principle not merely a construct of scholars with little to none practical implications on the ground?

9.3 International law principles on EDR

The focus of this chapter is the role of the judiciary in EDR. Taking into account the provisions of section 46 of the Constitution (the interpretation clause), the judiciary is enjoined to take into account international law especially treaties and conventions to which Zimbabwe is a state party.[9] Zimbabwe, as a member has subscribed to EDR principles adopted by inter-governmental bodies such as the United Nations (UN); the African Union (AU) or the Southern African Development Community (SADC). The idea here is to explore these principles and later assess their consistency with constitutional principles to be discussed later in the paper.

It should be pointed from the outset that international law provides for principles that guide, and in some cases bind states in their choices of appropriate electoral systems. Constitutional law (municipal law) predominantly regulates electoral systems. International law and its supervisory institutions seem to have 'deferred' to national systems to adopt a political system that fits their respective context. The only proviso to such deference is that whatever system a state adopts, it must be compatible with that state's international legal obligations engaged by the electoral law.[10]

There are two key treaties on EDR principles. Article 25 of the International Covenant on Civil and Political Rights[11] ('ICCPR') and Article 13 of the African Charter on Human and Peoples' Rights (ACHPR) accord every citizen "the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".[12] The two supervisory institutions established to oversee implementation of the two treaties have expounded on the meaning of this right in relation to elections and rights accorded to citizens under electoral law.

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[7]A.M. Bickel, *The Least Dangerous Branch: The Supreme Court At The Bar Of Politics* 16-17 (2d ed., Yale Univ. Press, 1986). For a more contemporary account of this principles, *see* K. Dent, 'Minority Rights in the South-African Context: An Exploration of the Counter-Majoritarian Dilemma', 26 *Stellenbosch L. Rev*. (2015)p. 518 ;N. Reynaud and J. Brickhill, 'The Counter-Majoritarian Difficulty and the South African Constitutional Court', 25:2*Penn State International Law Review* (2006).

[8]The separation of powers principle has been advanced as the answer to the criticism. In essence, the argument counters that the executive and legislature are key players in elections and therefore, too close to make any decision to do with the validity of any decision or act done under the electoral law. Because of constitutional guarantees of the independence of courts, the judiciary stands a good chance to impartially and independently deal with electoral disputes.

[9]Section 46(1)(c) of the Constitution.

[10]UN Human Rights Committee General Comment No. 25, para. 21.

[11]The International Covenant on Civil and Political Rights (1969).

[12]Adopted in 1981 and came into force in 1987. Available at: https://www.achpr.org/legalinstruments/detail?id=49.

The go-to resource is *General Comment No. 25 on Participation in the public affairs and the right to vote*[13] (hereinafter 'General Comment 25'). United Human Rights Committee (hereinafter 'UNHRC'), the treaty body that oversees the implementation of the ICCPR, adopted it as part of its methods of work. General comments or recommendations are authoritative interpretations of treaties by institutions so established to oversee implementation.[14] The UNHRC commented, "citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office",[15] or during the constitution making process when they adopt it by way of referendum or election.[16] However, participation through representatives is by way of elections and such representatives are expected to only exercise power as has been conferred upon them in accordance with constitutional provisions.[17] The Committee commented further "genuine periodic elections [...] are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them".[18] General Comment 25 then goes on to consider in turn electoral processes such as registration of voters, the need for voters to express themselves and associate freely for purposes of effective participation. However, the underlying principle is that all measures expected to be adopted by states are designed to ensure effective participation, directly or otherwise, by citizens in the public affairs of the state, but never mentions adjudication.

On its part, the AU has adopted instruments that define the continental architecture for human rights, democracy, elections and governance. Article 13 of the ACHPR provides for the right to participate in the governance of one's country. Human rights bodies that supervise implementation have interpreted these provisions in case law. For instance, in In *Jawara*v. *The Gambia*, the African Commission on Human and Peoples' Rights (African Commission), found that banning of certain individuals from standing for political office is a violation of Article 13 of the African Charter.[19]*Lawyers for Human Rights* v. *Swaziland*[20] was a case in which a proclamation banning political parties in Swaziland was declared contrary to the ACHPR, while in *Gorji-Dinka* v. *Cameroon* a unilateral act of removing voters from the voter's register was also found by the UNHRC to be a violation of Article 25 of the ICCPR.[21]

In *Mtikila* v. *Tanzania*,[22] yet another AU human rights body, namely, the African Court on Human and Peoples' Rights (African Court) was invited to

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[13]United Nations, Compilation of General Comments and General Recommendations (adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev.8, 8 May 2006) p. 207.

[14]The ICJ has stressed that interpretations by institutions established to do so must be given deference over any other interpretations.

[15]UN Human Rights Committee General Comment No. 25, para. 6.

[16]*Supra*note15.

[17]UN Human Rights Committee General Comment No. 25, para. 7.

[18]*Supra* note18.

[19]*Jawara* v. *The Gambia* (2000) AHRLR 107 (ACHPR 2000) paras. 70 and 75. See also *Modise v. Botswana* (2000) AHRLR 25 (ACHPR 1997).

[20]*Lawyers for Human Rights* v. *Swaziland* (2005) AHRLR 66 (ACHPR 2005).

[21]*Gorji-Dinka* v. *Cameroon* (2005) AHRLR 18 (HRC 2005) para. 5.6.

[22]African Court on Human and Peoples' Rights, Application No. 011/2011.

determine whether a constitutional amendment that prohibited participation of independent candidates in national elections was consistent with Tanzania' obligations under the ACHPR and other human rights instruments ratified by that state. The Court found that such amendments were contrary to Article 13 of the ACHPR and other instruments and ordered the state to initiate the constitutional process to remove that provision.[23] The essence of this finding is that national laws may not unduly limit the right to stand for political office through discrimination, as this would violate section international law obligations.

The AU has adopted more principles on electoral systems. The African Union *Declaration on the Principles Governing Democratic Elections in Africa* (AU Declaration) set the tone in Africa in terms of putting principles on free, fair and regular elections in the limelight.[24] As for EDR, the Declaration provides in Part III that states must:

> "Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections (emphasis added)."

The AU Declaration identifies two key national institutions necessary for electoral management. These are the electoral management body and courts for EDR purposes. It further qualifies their existence by demanding that they be allowed to operate impartially, with inclusivity, competently and with accountability. These principles are important to EDR, which often takes place in an environment described by the Lord Chancellor in 1868 as one of 'heat and excitement' at a time when 'men's (sic) passions are aroused'.[25]

The above provision was quoted verbatim in subsequent regional and sub-regional principles on the conduct of elections and election observation. For instance, Article 7.3 of the *SADC Principles and Guidelines Governing Democratic Elections* and paragraph 1 of the *Guidelines for African Union Electoral Observation and Monitoring Missions* has restated the principle verbatim.[26] The African Charter on Democracy, Elections and Governance (ACDEG) is a binding treaty that introduces a new dimension to the need to establish competent institutions to deal with election disputes. Article 17(2) of this Charter enjoins states to "establish and strengthen national mechanisms that redress election related disputes in a timely manner". The new aspects added to the element of dispute resolution are the need to 'strengthen' these mechanisms as well as ensuring that these institutions determine election related disputes 'timely'. It then follows that it is not sufficient to establish special courts to deal with election-related disputes while the rules of

[23]The United Republic of Tanzania has since withdrawn its consent to the African Court competence to adjudicate over cases brought before it by individuals and anon-governmental organisations. This consent is the declaration filed in terms of Article 34(6) of the Protocol to the African Court on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).
[24]AHG/Decl.1 (XXXVIII), 2002.
[25]*See* 9.1 above.
[26]EX.CL/91 (V) Annex II.

procedure thereof do not emphasise on the need for urgency in resolving such disputes. Further, such institutions thrive in an environment of independence, impartiality and competence. National authorities should guarantee these in law and in practice.

9.4 Judicial adjudication of elections in Zimbabwe

Sithole *et al* warn that 'the temptation in any discussion of elections in Zimbabwe is to start from the 1980 independence election',[27] yet there is need to retreat to the 'internal settlement' of 1979 Constitution which produced the short-lived Muzorewa government of 1979. Five political parties contested in that election.[28] The authors argue that 'many major patterns and characteristics of Zimbabwe electoral politics are traceable from this election'. These include some practices and mechanisms that have generated a great deal of acrimony in Zimbabwean electoral legacy requiring judicial intervention for their settlement. Such practices and mechanisms include the inception of universal adult suffrage, bicameral parliament, reserved seats for whites only, the election management body, election directorate, the practice of inviting international election monitors, voter education, polling procedures, the use of "indelible" ink, among others. These practices owe their existence to the 1979 internal settlement.[29] Then came the 1980 elections in which nine political parties contested and ZANU PF came out victorious.

The inaugural post-independence elections were held in 1985. However, it was not until in the 1995 elections that a number of reforms were first introduced such as introduction of independent candidates. This was partly a result of a 'decline in elite cohesion' within ZANU-PF. Notable and relevant developments in that election was the inception of electoral petitions, where aggrieved independent candidates would approach courts of law for electoral justice attracting the nomenclature of 'democratisation by litigation'.[30] A disgruntled Margret Dongo filed one such petition. In *Dongo* v. *Mwashita,*[31] the issues for discussion were the state of the voters' roll, the eligibility of voters, and management of the polling and vote-counting processes. More and more successful 'petitions were lodged at the courts for the nullification of more city council and executive mayoral election results on grounds that there had been "irregularities" in the elections'.[32] This petition was recorded as the first successful electoral challenge[33] after failed attempts in *Pio* v.

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[27]M. Sithole and J. Makumbe, 'Elections in Zimbabwe: The ZANU (PF) Hegemony and its Incipient Decline', 2:1 *African Journal of Political Science* (1997) pp.122-139.

[28]These were the United African National Council [UANC]; Zimbabwe African National Union [ZANU] (led by Sithole); UNFP; ZANU (PF) and PF-ZAPU (together representing the mainstream nationalist movement), did not take part in these elections.

[29]Sithole and Makumbe, *supra* note 27, p.125.

[30]*See* J. Makumbe, *One Step Forward and Two Steps Backward: The Zimbabwe 1995-1996 Elections (University* of Zimbabwe Publications, Harare, 1997).

[31]*Dongo* v.*Mwashita& Ors* 1995 (2) ZLR 228 (HC).

[32]*Ibid*.

[33]L.M.Sachikonye, 'Zimbabwe: Constitutionalism, the Electoral System and Challenges for Governance and Stability', 3:1 *Journal of African Elections* (2004) p.153.

Smith[34] and *Chitungo* v. *Munyoro and Another*.[35] However, with more opposition political parties entering what had been effectively a *de facto* one party state, electoral disputes increased in number many of which found their way into courts of law. It became necessary that a specialised court on elections with exclusive jurisdiction over such matters be established. With further modifications to the electoral dispute settlement framework, more courts are now vested with competence to adjudicate electoral disputes, subject only to the limits imposed by the law itself. Accordingly, the following part explores the legislative framework in terms of the electoral dispute resolution (EDR) architecture for Zimbabwe. Inherent in that exploration is the discussion on the jurisdiction of courts and matter incidental to that.

9.5 Constitutional principles on elections and electoral adjudication

Constitutional principles, be they electoral or something else, are of utmost importance. They do not exist in the Constitution for their sake. They underpin the values and aspirations of the people of Zimbabwe as far as that subject matter is concerned. Their inclusion in the Constitution seeks to affirm them as building blocks upon which the Zimbabwean society is established. In other instances, they are a reminder of our resolved departure from a dark past, and a transformation into a future called a democratic society. Often, they are drafted in such a way as to contrast between the dark past and the future it promises. Therefore, principles underpinning the electoral system should be viewed in that light.

This chapter argues that political parties (ZANU-PF and MDC) drove the constitution-making process that led to the adoption of the 2013 Constitution. The Constitution was politically negotiated. It came after a period of election-related violence that peaked in 2008. Inevitably, provisions on elections were expected to be conspicuous in the new document. Consequently, debates surrounding electoral principles dominated Zimbabwe's political discussions resulting in the adoption several amendments to the 18th April 1980 Constitution. These consultations, and in some cases literal feuds between ZANU-PF and MDC formations, culminated into the adoption of the current Constitution of Zimbabwe Amendment No. 20. In essence, therefore, Zimbabwe does not have a 'new' Constitution as has become the cliché since May 2013.[36] Nevertheless, the current version of the Constitution introduced new provisions on elections expected of a modern constitution. As will be elaborated in turn below, the provisions include those dedicated to the judiciary and elections in Zimbabwe, which is the subject matter of this chapter.

There are 'National Objectives' contained in section 3 of the Constitution, which reaffirm some aspects of the electoral system that we have. It provides for a multi-party democratic political system and an electoral system based on universal adult suffrage and equality of votes; free, fair and regular elections; and adequate representation of the electorate. As discussed before, some of the hallmarks of our

[34] *Pio* v. *Smith* 1986 (3) SA 145 is regarded as the first electoral petition to be recorded in independent Zimbabwe.
[35] *Chitungo* v.*Munyoro and Anor* 1990 (1) ZLR 52
[36] Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

electoral system were first introduced in the 1979 'internal settlement'.[37] The orderly transfer of power following elections and respect for the rights of all political parties are also endeared objectives as a nation. However, there is no reference to EDR in spite of the influx of electoral disputes since the turn of the current millennium.

9.5.1 Chapter 7 of the 2013 Constitution

One of the key features of the 2013 Constitution is Chapter 7, which is exclusively dedicated to 'Elections'. The Chapter encompasses important aspects of elections such as timing of elections and delimitation of electoral boundaries. As will be discussed later, these issues have aroused heated disputes many of them falling for determination before courts of law. The principles of 'regular, free and fair elections' and universal adult suffrage punctuate this provision. However, more importantly to the discussion, section 155(2)(e) of the 2013 Constitution restates the principle that the state must 'take all appropriate measures, including legislative measures, to ensure that effect is given to the principles' set out in Chapter 7, which include ensuring 'the timely resolution of electoral disputes'. Further, section 157 envisages an act of parliament to provide for electoral law that regulates the conducting of elections and referenda. This law is the Electoral Act.[38] That law should, among other things, provide for 'challenges to electoral results'.[39] In essence, two principles on electoral adjudication come to the fore. First, that the law obligates the state to provide facilities for EDR and the possibility of aggrieved persons to specifically initiate proceedings to challenge electoral results (electoral petitions). Second, such EDR should be established on a principle that the dispute resolution should be done expeditiously.

9.5.2 Section 67 of the Constitution

Section 167 of the Constitution, otherwise known as 'political rights', is an embodiment of almost all rights and freedoms necessary to nurture and give effect to the right to vote. It is part of the Declaration of Rights and hence it enjoys all rights and privileges that come with it. Being part of the Declaration of Rights, it has implications on the procedure of its enforcement, and the adaptations courts have to accept when adjudicating disputes arising from it. Section 67 is comprehensive in its formulation. It is almost a complete code of the right to vote and its consequences from the pre-electoral, electoral and post-electoral phases of the electoral cycle. Section 67 of the Constitution contains the following rights and freedoms, which are exclusive to Zimbabwean citizens;

i. Right to free, fair and regular elections for any elective public office;
ii. Right to make political choices freely;
iii. Right to form a political party or organisation of their choice;
iv. Right to join a political party or organisation of their choice;

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[37] *See* paragraph 2 above.
[38] Electoral Act *[Chapter 2:13].*
[39] *See* section 157(1)(g) of the Constitution.

v. Right to participate in the activities of a political party or organisation of their choice;
vi. Right to campaign freely for a political party or cause;
vii. Right to campaign peacefully for a political party or cause;
viii. Right to participate in peaceful political activity;
ix. Right to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause;
x. Right of every adult to vote in all elections and referendums to which this Constitution or any other law applies;
xi. Right to vote in secret;
xii. Right to stand for election for public office; and
xiii. Right, if elected, to hold such office;

Adjudication of electoral disputes, including electoral petitions (post-electoral phase) is firmly planted in the Declaration of Rights under section 67. Any of the above rights and freedoms constituting political rights could be a subject of resolution. In some instances, it would appear our courts and the law treat election petitions as private law disputes between two parties, while in others they view EDR as a human rights issue. In *Mugari* v. *Tungamirai*,[40] Justice Hungwe observed as follows;

> 'Election petitions form part of a fundamental constitutionally entrenched process for the enjoyment of the political rights of citizens in section 67 of the Constitution. Where a citizen is aggrieved by an administrative action, that citizen is entitled to a process of redress that is prompt, efficient, reasonable, proportionate, impartial and both substantially and procedurally fair as guaranteed in section 68 of the Constitution.'

By their nature, constitutional provisions are rarely self-executing. This means that they are not directly implicated in the running of the day-to-day business or affairs of the state. This principle applies with equal measure to provisions of the Declaration of Rights. The appropriate approach and established practice is that the state adopts laws, institutions and in some cases policies to implement constitutional obligations and other imperatives. These tools are subsidiary to the constitution and may not create new obligations for the state or remove existing obligations established by the constitution. Their role is to facilitate implementation. However, in the course of implementation, the state exercises exclusive decision-making in terms of determining the limitations applicable to certain rights and freedoms.

9.5.3 The Electoral Act

The Electoral Act, first enacted in 1979,[41] remains the key Act of parliament providing for several aspects of the electoral law including EDR as envisaged by the Constitution. This Act is the main tool by which the state implements the provisions of the Constitution on the applicable electoral system. The Act played this role since 1979 (Lancaster House Constitution) during the 'Internal Settlement' elections, and has since been on the scene though subjected to frequent amendments post-

[40] EC30/18.
[41] Act No. 14 of 1979.

independence,[42] just as the constitution went through the same metamorphosis. In its current form, the Electoral Act is one of the most comprehensive pieces of legislation because it covers electoral issues in the three phases of the electoral cycle. Relevant to this discussion,[43] Part XVII of the Act partially regulates the filing of electoral petitions in presidential elections;[44] while Part XXII is dedicated to the establishment, composition, jurisdiction and rules of the Electoral Court. This part is key as it vests in the Court competence to deal with electoral disputes in spite of the phase of the electoral cycle they arise. However, Part XXIII elaborately provisions for the handling of electoral petitions, primarily those relating to parliamentary and local authority elections. The courts have issued several judgments on electoral petitions over the last decade thereby allowing for a fair assessment and observation of their EDR philosophy, which shall be discussed in depth in the parts to follow. Suffice to state that, subject to future challenges, the Electoral Act is a masterpiece of legislation in terms of enforcing electoral morality, having been inspired by the centuries-long experiences of the British electoral system as well as lessons learnt from general elections of 2000 where several people lost lives in election-related violence, and to some extent regional guidelines and principles on elections. Justice Devittie expressed admiration of the electoral law in *Makamure v. Mutongwizo* as follows;

> 'We thus have at our disposal as effective an instrument as in any English-speaking jurisdiction to deal with electoral malpractices. I have attempted to demonstrate that the provisions in our Act which deal with the enforcement of electoral morality were refined on the anvil of British electoral experience'.[45]

9.6 Electoral adjudication

Establishing this discussion on the foundation of the electoral justice theory, electoral adjudication has no clear history in Zimbabwe, but appears to have existed pre-independence. For instance, the 1979 Electoral Act already had provisions regulating the filing and adjudication of electoral petitions. In this regard, the *Pio* v. *Smith*

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[42]The Electoral Act has been amended as follows; Act 25/2004, 17/2007, 1/2008, 3/2012, 5/2014, 6/2014, 3/2016, 6/2018. SIs. 13B/2008, 43/2008, 96/2008, 85/2013, 117/2017. GN 359C/2018.

[43]While the focus of this Chapter is adjudication of electoral disputes, such may arise in respect of any provision of the Electoral Act. For instance, a great deal of disputes arose from voter registration; independence of ZEC; access to the voter's roll; voter education; nomination of candidates; eligibility to vote for specific population groups. These issues will only be discussed in the context of on-going or completed electoral disputes in the courts of law.

[44]Section 111 of the Electoral Act implements section 93 of the Constitution by recognising the exclusive competence of the Constitutional Court in adjudicating over presidential election petitions.

[45]*Makamure* v.*Mutongwizo& Ors* 1998 (2) ZLR 154 (HC) at p168. The Court further observed that the Electoral Act establishes an effective inquisitorial machinery to enforce electoral morality. It subjects candidates and their agents to public scrutiny in open court in respect of allegations of electoral malpractice levelled against them. A witness in an election trial is obliged to answer questions that may be incriminating. The High Court is given inquisitorial powers: it may summon and examine a witness not called by either party. Further, the Act provides an effective machinery for visiting criminal penalties upon all persons guilty of contravening the code of conduct. If, in its report to the Speaker, the court finds that certain persons are guilty of electoral malpractice, the Registrar must submit the report to the Attorney-General for possible institution of criminal proceedings in the High Court. The court may, in the course of the election trial, inquire into and impose appropriate penalties against any person found guilty of contravening the provisions of the Act.

petition decided in 1986 was founded on the 1979 Electoral Act.[46] It is clear that since then, courts enjoy wide jurisdiction to deal with electoral disputes. While the election petition procedure is specific in its formulation and practice, specialised courts were established for EDR or those with original civil jurisdiction such as the High Court enjoy jurisdiction over disputes arising from the infraction of any part of the Electoral. However, it is important to explore the formal electoral jurisdiction of courts as provided in legislation, especially the Constitution, and as interpreted by the courts in their jurisprudence.

9.6.1 Electoral jurisdiction of courts

This paper has already argued that there appears to be general jurisdiction of courts in electoral matters, yet others have specialised competences over electoral disputes. The following section traces the electoral jurisdiction of each court demonstrating its foundations and a brief discussion of electoral disputes the court has resolved in the past.

9.6.2 The Constitutional Court

The Constitutional Court of Zimbabwe (CCZ) is a product of the current Constitution.[47] Previously, the Supreme Court of Zimbabwe (SCZ) had the competence to sit as a constitutional court when dealing with constitutional matters especially the enforcement of the Declaration of Rights. A specialised court of this nature only deals with constitutional issues. These are disputes involving the 'interpretation, enforcement and application' of the Constitution.[48] The jurisdiction is narrow as it is specialised. This Court has the final say in terms of whether a matter is constitutional or a decision is connected to a constitutional issue.[49] Electoral disputes are constitutional issues as they implicate the Constitution.

The CCZ exercises both exclusive and concurrent jurisdiction on electoral matters. Electoral jurisdiction is exclusive where only the CCZ may exercise it in given circumstances. Section 167(2) of the Constitution articulates the exclusive jurisdiction of the CCZ providing that only the CCZ may 'hear and determine disputes relating to election to the office of President' and 'hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President'.[50] Section 93 of the Constitution further elaborates this jurisdiction in the context of a petition challenging the result of a presidential election.

The CCZ has so far exercised its jurisdiction over disputes relating to the election to the office of the President on two occasions since its establishment. The first time was in the case of *Tsvangirai* v. *Mugabe & Others*.[51] The petitioner challenged the result of the 2013 presidential elections on fourteen grounds

[46]This was an electoral petition filed in terms of the then section 63(2) of the 1979 Electoral Act on the validity of ballot papers used in an election and section 141 regulating time frame for presentation of petitions.
[47]Section 166 of the Constitution deals with the creation and composition of the CCZ.
[48]*See* section 332 of the Constitution.
[49]Section 167(1) of the Constitution.
[50]Section 167(2)(b) and (c) of the Constitution.
[51]*Tsvangirai* v. *Mugabe &Ors* CCZ 20/17.

including electoral fraud, intimidation, non-compliance with electoral laws among other grounds. However, the petitioner withdrew the challenge having been refused access to sealed ballot boxes by the Electoral Court in different but related proceedings.[52] The denial of access to information the applicant regarded as primary evidence meant that the challenge had no chances of success. Nevertheless, the CCZ still went ahead to set down the matter for hearing notwithstanding the notice of withdrawal. In its reasoned judgment, the Court held that the phrase 'hear and determine' a petition filed in terms of section 93(3) meant that the petition cannot be withdrawn. The CCZ held as follows;

> "In the absence of an express provision for a right of withdrawal of the petition or application, the immediacy of the direct connection between the right to be heard and the corresponding obligation on the Court to hear and determine the petition or application lodged with it under s 93(1) of the Constitution excludes the right of withdrawal of the petition or application from the application of the provisions of s 93(3) of the Constitution."[53]

The Court provided elaborate reasons for this finding. They included holistic interpretation of section 93; the public interest in the election to office of the president; the importance of a presidential election; our constitutional design; the legislative history on presidential election petitions and the obligation imposed on the court to 'hear and determine' a petition once filed and so on. It is in fact the perceived 'duty to hear and determine' argument that deserves further analysis. In another part, the CCZ held that 'It cannot put itself, or let itself be put, in a position in which it is unable to hear and determine the petition or application' by allowing a withdrawal of a petition.[54] In final analysis, the legal position is that a presidential petition, once filed cannot be withdrawn because the right to withdraw it does not exist. This finding makes a clear distinction between presidential and other electoral petitions.

Five years later, the CCZ dealt with the same dispute, albeit between different parties. The successors of Morgan Tsvangirai and Robert Mugabe had their own feud in the aftermath of the 2018 presidential elections in the case of *Chamisa* v. *Mnangagwa & 23 Ors*.[55] The case recorded a first in the country for the televising of court proceedings due to 'public interest' in the matter. It held that;

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[52]In *Tsvangirai* v. *Chairperson, ZEC & Ors* EC 27 & 28/2013. The Applicant, who was a candidate in the just ended presidential elections, sought access to voting residue from the Electoral Court in order to determine whether his party could lodge petitions to challenge results. Section 70 of the Electoral Act vests in the Electoral Court the exclusive competence to determine requests for access to the residue. However, the Electoral Court was firmly of the view that access to voting material in those circumstances amounted a dispute relating to a presidential elections and held that 'this Court has no jurisdiction to hear and determine both applications as they relate to disputes concerning the election of the applicant to the office of President'. *See also Timba*v. *Chief Elections Officer & Others* Judgment No. SC 69/15 Civil Appeal No. SC 9/14 wherein the Supreme Court seemed to agree with the interpretation that section 70(4) is not applicable to presidential petitions and that the Electoral Court has no jurisdiction to order it. Yet the Constitutional Court categorically indicated to the Applicant in the *Chamisa* case that he ought to have exercised his rights under section 70(4) in relation to the 2018 presidential petition.

[53]*Tsvangirai*, *supra* note 51, p.16.

[54] *Ibid.,* p.17.

[55]Judgment No. CCZ 21/19; Constitutional Application No. CCZ 42/18.

> "Once it is accepted that the proceedings before the Court were not only limited to the parties' interests but extended to those of all citizens to a free, fair and credible Presidential election, it is clear that it was in the interests of justice to allow the live streaming through national television of the proceedings. Members of the public had an interest in having knowledge of the evidence produced by the disputants. They had an interest in witnessing how the Court handled the matter and what decision it reached. They had an interest in deciding whether, in their own objective assessment, the decision of the Court was fair and just".[56]

The petitioner's main allegations included lack of independence by ZEC; unequal access to state media; political involvement of traditional leaders among others. Yet the outcome of the case would revolve around Applicant's failure to seek access to the voting residue (primary evidence) to demonstrate that 'results announced were incorrect and did not reflect the true will of the people of Zimbabwe'.[57]

This case is a direct opposite of the 2013 *Tsvangirai* case. In the Chamisa matter, the CCZ held that the petitioner 'was also free to apply to the Electoral Court in terms of s 70(4) of the Act for an order which would have given him the right of access to the primary evidence contained in the closed and sealed ballot boxes and the sealed packets'.[58] Yet in the 2013 *Tsvangirai* challenge, the applicant sought access to voting residue in terms of the same provision, but was denied by the Electoral Court on the basis that the Electoral Court lacked jurisdiction. Five years later, the same court, without any legislative amendments to its jurisdiction, now has jurisdiction to determine disputes on access to voting residue in presidential election.

This chapter has selected three issues debated and determined by the CCZ in the *Chamisa* case, which deserve special mention as far as they attempt to define judicial approach to EDR. First; one point of contention was that although filed within seven days, as is stipulated by section 93(1) of the Constitution, the court application was served on the respondents on the eighth day, in violation of Rule 23(2) of the CCZ Rules. However, due to the importance of a presidential election; the public interest it draws and the fact that non-compliance was for a period of a single day with no recorded prejudice on the respondents, the Court condoned the non-compliance on application.[59]

Second, the Court had to determine the applicable standard of proof in electoral petitions, especially presidential petitions. In other words, to which traditional or other standard of proof should a petitioner and or respondent, prove their case in an election petition? The dichotomy is now important given the finding in the 2013 Tsvangirai challenge that the constitutional design is such that it makes distinctions between presidential and other electoral petitions. Following a survey

[56] *Ibid.,* p.13.
[57] *Ibid.*, p.95.
[58] *Ibid.*, p.103.
[59] Chamisa , *supra* note 55, pp.27-44.

of jurisprudence that spanned across some African countries, England and Canada, the CCZ held as follows;[60]

> Where the allegations of electoral malpractices do not contain allegations of commission of acts requiring proof of a criminal intent, such as fraud, corruption, violence, intimidation and bribery, the standard of proof remains that of a balance of probabilities. In allegations that relate to commission of acts that require proof of criminal intent, the criminal standard of proof beyond reasonable doubt would apply. There is no basis for departing from settled principles of standards of proof to hold a petitioner to a higher standard of proof in electoral petition cases simply by reason of their *sui generis* nature. In the view of the Court, there is no justification for an "intermediate standard of proof" to be applied in election petitions.

The Court's finding makes it clear that, although election petitions are *sui generis*, they are civil proceedings where the nature of the allegation determines the applicable standard of proof. Thus, where allegations are of a civil nature, the petitioner proves them on a balance of probabilities while criminal allegations require proof beyond reasonable doubt.

The final issue is that of 'primary evidence rule' in terms of proving allegations to support the nullification of an election. In essence, the CCZ held that the petitioner ought to have tendered evidence, primary in nature in terms of providing allegations 'related to the results and the figures announced by the Commission'.[61] It is evidence, 'the best that the nature of the case will allow'.[62] The Court adjudged that the applicant failed the test. It wished that;

> "If the applicant had placed before the Court the V11 Forms from all the polling stations where he had election agents, a simple analysis of those V11 Forms and comparison with the V11 Forms from the sealed packets would easily have achieved a number of positive results".[63]

The CCZ took its time to explain its reasons behind its finding that applicant did not tender primary evidence in support of the allegations. The Court not only elaborated on the definition and scope of application of the principle of primacy of evidence, but also went on to apply the principle to the applicant's case in rigorous detail that was commendable. It identified the nature of evidence required to support each allegation of irregularities. By so doing, the Court went further than just hearing and determining a presidential election petition in terms of section 93(3) of the Constitution. In essence, it provided jurisprudence so articulated that future petitions will be much better prepared and prosecuted if prospective litigants give heed to the judgment.

The CCZ has also dealt with elections-related disputes outside of the armpit of presidential electoral petitions. For instance, *Mavedzenge*v. *Minister of Justice,*

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[60] *Ibid*., pp.94-95.
[61] *Ibid*., p.95.
[62] *See Ford* v. *Hopkins* (1700) 1 Salk. 283, 91 E.R. 250; *Omychund* v. *Barker* (1745) 1 Atk 21 at 48; *Doe D Gilbert* v. *Ross* (1840) 7 M. & W. 102 at 106 on the principle of primary evidence quoted with approval in the *Chamisa* Judgment.
[63] *Chamisa*, *supra* note 55, p.105.

Legal & Parliamentary Affairs & 2 Others,[64] the applicant challenged the constitutionality of section 192(6) of the Electoral Act, which empowers the Minister of Justice Legal and Parliamentary Affairs 'to approve' regulations that are made by the ZEC. He alleged that such a provision violated the independence of ZEC as provided in sections 235 (1), 235 (3) and 67 (1) (a) of the Constitution of Zimbabwe. The CCZ dismissed the challenge reasoning that there are sufficient checks and balances to ensure rigorous scrutiny of the regulations.

Thus, it is evident that even though the regulations must be placed before the Minister for approval, they are still subject to mandatory scrutiny by Parliament. They cannot be promulgated unless the Parliamentary Committee tasked with their scrutiny and confirmation has been given the opportunity to do so and has confirmed that they are in compliance with the laws of the country and, more importantly, that they are valid under the Constitution.[65]

Thus, it is clear that the CCZ, although it has to this day not presided over a petition appealed from the Supreme Court (SCZ), it exercises both exclusive jurisdiction over presidential petitions in section 93 of the Constitution, or as appeals. It is clear that its jurisprudence in this regard is still developing and perhaps it is too early to identify a trend, pattern or philosophy. Nevertheless, its jurisprudence is instructive of future litigation. In that way, it guides both lower courts and prospective litigants in terms of the expected legal requirements for filing and prosecuting electoral petitions. Its approach to condoning non-compliance with rules in defined circumstances, elaboration of the primary evidence rule in electoral proceedings and the absence of a petitioner's right of withdrawal, are ground-breaking principles that will hopefully guide lower courts, the bar and litigants in future engagements.

9.6.3 The Supreme Court (SCZ)

Section 169 of the Constitution as read with the Supreme Court Act provides for the electoral jurisdiction of the former apex court. It 'is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction'.[66] In other words, this Court has neither original nor specialised electoral jurisdiction. It only exercises electoral jurisdiction as a court of appeal in respect of matters appealed from the High Court or Electoral Court. In that regard, the SCZ has not handled many appeals since the adoption of the current Constitution. In *Moyo* v. *Nkomo*,[67] the Court dealt with an appeal involving a petition arising from parliamentary elections. The main argument was that the form taken by the petition filed in the lower court did not comply with statutory requirements. The Rules governing election petitions before the Electoral Court, namely, Electoral (Applications, Appeals and Petitions) Rules[68] provide that a petition shall take the general form of an application. Accordingly, the appellant had attached affidavits to

[64](CCZ 5/18, Constitutional Application No. 32/17) [2018] ZWCC 5 (31 May 2018).
[65]*Ibid*., p.13.
[66]Section 169(1) of the Constitution.
[67]Judgment No. SC 67/14; Civil Appeal No. SC 34/14.
[68]*SI.* 74A of 1995.

his petition in support of the grounds. The court a quo adjudged the petition to be 'fatally defective' that it had to be dismissed, and it was. The SCZ confirmed the decision of the lower court essentially because a petition cannot be brought on notice and that the supporting affidavits attached are not contemplated in the Rules. The *Moyo decision* is the law. It is extant. The issue of the form of a petition has been a thorn in the flesh of many a petitioner and their legal representatives since 2008 when the number of petitions filed post-election soared. There is no definition of a petition in the Electoral Act, hence the Rules take precedence. Comparatively, section 93(1) of the Constitution refers to a 'petition or application'. The two presidential petitions filed so far in 2013 and 2018 have taken the form of a typical court application. In both instances, no respondent has ever contested the form of these petitions. In fact, the 2018 presidential petition was filed and determined after the adoption of the Constitutional Court Rules (CCZ Rules).[69] Rule 23(1) of the CCZ Rules provides that '[a]n application where the election of a President or Vice President is in dispute shall he by way of court application'. This manner of drafting put to bed any doubts about the form of a presidential election petition, yet the parliamentary election petition procedure is a minefield on such trial procedural issues, which in any case have no bearing on the merits of the dispute. This dichotomy of processes (presidential vs parliamentary election petition procedures) that should otherwise be substantially similar is much ado about nothing. It should never exist in a unified EDR system such as the one we have in the country.

The case of *Bukaibenyu* v. *Chairman, ZEC &Ors*[70] represents one of the key cases the SCZ dealt with prior to the adoption of the current Constitution. It is the 'diaspora vote case' where citizens living abroad required the state to put in place facilities and mechanisms to enable such persons to vote from their current domiciles. Applicant filed the case in 2012, and the Court decided it in 2017. However, in terms of the transitionary provisions of the Constitution, the previous Constitution remained applicable. In essence, the applicant challenged the constitutional validity of sections 23(3) and 71 of the Electoral Act as interfering with his right to vote as enshrined in s 23A (2) of the Constitution (now 67). Section 23(3) of the Act required that a voter be resident in a constituency in order to vote and that if such voter was absent from the constituency for a period of over twelve months, his or her name would be removed from the voters' roll, thus infringing his right to vote. Dismissing the application, the Court confirmed its findings in the earlier cases of *Registrar General of Elections &Orsv. Morgan Tsvangirai*[71] and *Madzingo and Others* v. *Minister of Justice and Others*[72] that the right to vote is not absolute and its limitation on the basis of constituency-based electoral system does not amount to a violation of this right. The latest of this string of decisions was *Shumba & 2 Others* v. *Minister of Justice, Legal & Parliamentary Affairs & 5 Others.*[73]

[69]Constitutional Court Rules, SI 61/2016.
[70] CCZ 12-17.
[71] SC 2002(1) ZLR (S) 204.
[72]2005 (1) ZLR 171 (S).
[73](CCZ 4/18, Case No. CCZ3/18) [2018] ZWCC 4 (30 May 2018).

The consistent interpretation in these cases spanning nearly two decades redeems the courts in their approach. This paper concludes that the legal framework falling for interpretation in these cases is clear and unambiguous in limiting the right to vote. Arguments in favour of allowing diaspora vote are many, chief of which is acknowledgment of their contribution to the domestic economy through international remittances. Feltoe concludes that it would be 'insensitive' to deny them a voice in terms of the election of leaders and representatives that would take charge of their long-term interest in the country.[74] It is apparent that this area of electoral law needs to reform in order to bring it to the level of the values and aspirations of the Zimbabwean electoral systems that is based on the principle of adult suffrage. At the core of this principle is the obligation of the state to deploy all resources available to it to ensure that every person who is eligible to vote is able to do so with minimum inconveniences. In any case, many other African countries with more or less similar economic status as Zimbabwe have begun implementing diaspora vote. If Zimbabwe wishes to be recognised among civilised states, such is the innovation that could even earn it the respect of its people and peers.

9.6.4 The High Court

The Constitution and the High Court Act establish the High Court of Zimbabwe (HC), with seats currently in Harare, Bulawayo, Masvingo and Mutare. This Court has levels of jurisdiction germane to the discussion. First, it has 'original jurisdiction over all civil and criminal matters throughout Zimbabwe'.[75] Second, 'it may decide constitutional matters except those that only the Constitutional Court may decide'. Finally, '[a]n Act of Parliament may provide for the High Court to be divided into specialised divisions, but every such division must be able to exercise the general jurisdiction of the High Court in any matter that is brought before it'.[76]

The HC indeed has original jurisdiction in all civil and criminal matters. This jurisdiction is original including in the context of EDR where it takes two forms. On one hand, the HC may hear and determine any electoral dispute especially during the pre-phase where individual rights provided in the Electoral Act are implicated. On the other hand, the HC exercises specialised electoral jurisdiction through its specialised division known as the Electoral Court. During every electoral period, the Judge President appoints or commits a number of judges to sit in the Electoral Court for purposes of expeditiously presiding on electoral disputes.

9.6.5 The Electoral Court

The Electoral Court is a division of the HC created in terms of section 161 of the Electoral Act. The Electoral Court has exclusive jurisdiction to hear appeals,

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[74]Case note on the case of *Bukaibenyu* v. *Chairman, ZEC, the Registrar-General of Voters, the Minister of Constitutional and Legal Affairs and the Minister of Justice and Legal Affairs & Ors* CC-12-17. Available at:http://zimlii.org/zw/journal/2018-zelj-01/%5Bnode%3Afield_jpubdate%3Acustom%3AY/casenote-case-bukaibenyu-v-chairman-zec. The author makes the point that applicant's departure cannot be classified as voluntary given the punishing economic situation in the country.

[75]Section 171(1)(a) of the Constitution.

[76]*See* section 171(3) of the Constitution.

applications and petitions in terms of the Act. Appeals contemplated herein are in respect of decisions made by ZEC, while applications are civil proceedings arising from the infraction of the Act while petitions are proceedings challenging results of elections. The Electoral Court also has competence to review any decision of the ZEC, any other person made, or purporting to have been made under the Electoral Act. The Court has power to give such judgments, orders and directions in those matters as might be given by the HC except jurisdiction to try any criminal case.[77] Yet its judgments, orders and directions are enforceable in the same way as those of the HC.

The Electoral Court is one that has seen it all in terms of EDR. The court exists for EDR and no other jurisdiction. Being a creature of statute, the parameters of its jurisdiction are as defined in the Act. In spite of section 165, which provides for the Chief Justice and Judge President to spearhead the adoption of rules, no such Rules have been adopted except those governing electoral petitions. Conscious of the potential tardiness and resultant lacuna that may arise if rules are not made, the legislature cushioned the Electoral Court by allowing it to utilise High Court Rules pending the adoption of its own rules.[78] During each electoral period, the Judge President dedicates a number of judges to sit in this division. The Court has its own registry and court roll. Appeals from the Electoral Court, albeit only on a question of law lay in the SCZ.[79]

This chapter decided to deal with Electoral Court jurisprudence under the thematic headings that follow below. The Electoral Court has produced substantial jurisprudence either sitting as a general division of the HC or as the specialised Electoral Division. The jurisprudence canvasses pre[80] and post electoral phases covering issues inherent in these phases of the electoral cycle. However, it is more associated with post-electoral disputes involving election petition proceedings as these tend to be adjudicated upon soon after results have been announced. That state of affairs creates tensions within the electorate thereby arousing significant public interest in these proceedings. The other reason is that many other pre-electoral phase disputes are administratively resolved by the ZEC thereby foreclosing the need for litigation. Yet the judiciary is the key player in the determination of electoral petitions.

9.7 Criticism of the current adjudication process

This chapter traced the attitude and practice of courts involved in EDR as reflected in their jurisprudence. A few observations have already been made in this regard, though in passing. Based on the principle that every practice allows room for improvement; this section shifts focus to areas of concern in EDR. The paper

[77] *See* section 161(2) of the Electoral Act.
[78] Section 161(3) of the Electoral Act.
[79] Section 172 of the Electoral Act.
[80] See *Tsvangirayi* v. *Registrar General of Elections and Another, Tsvangirayi*v. *Registrar General of Elections and Others* (HC 11843/01, HC 12015/01) [2002] ZWHHC 22 (24 January 2002). Available at: http://zimlii.org/zw/judgment/harare-high-court/2002/22. This case encompassed issues such as the state of the voters' roll; eligibility to vote due to change in citizenship laws that disenfranchised some people; voter registration; among others.

proposes solutions to identified problems. The view is to find durable solutions to challenges that have stalked EDR from the time of its inception.

9.7.1 Unresolved cases

The history of EDR in Zimbabwe reflects instances where some electoral disputes were never finalised. It may sound unrealistic to state that there are electoral petitions lodged in the aftermath of the 2000 general election that still await determination to this day. In *Tsvangirai* v. *Mugabe and Another*,[81] the petitioner filed a petition in April 2002 and had to approach the SCZ in 2005 alleging violation of the protection of law following the HC failure to set down a presidential petition. This means at that point the petition has been pending for over three years, that is, more than half the period for a presidential term of office. It is undesirable that such legal proceedings with constitutional importance lie *in pendens* until they are forgotten. Discharging electoral justice in that manner goes against established framework of EDR framework nationally or internationally.This attitude of courts goes contrary to the regional obligation of states to ensure speedy resolution of electoral disputes in terms of Article 17(2) of the ACDEG read with Chapter 7 of the Constitution. The factual history that informs the inclusion of these provisions in the Constitution seems to suggest the need to confront and address a pandemic of overly protracted electoral petition proceedings in Zimbabwe. Such delay unduly limits the right "to a fair, speedy and public hearing within a reasonable time" protected by section 69(2) which applies to determination of civil rights.

A period of ten years without courts determining a dispute is a practice that does not belong to modern consciousness of justice delivery. In fact, a delay that encroaches into another election period defeats the whole essence of an electoral dispute resolution framework. It might be argued that the petitioners did not prosecute their petitions to finality. Alternatively, it might be that they have abandoned these lawsuits having realised that the remedy would be empty and lacking effectiveness taking into account the lapse of time. It is such exposures of the situation to speculation that must nudge the courts need to 'clear their name' by ensuring that, one way or the other, a process that would trigger the finalisation of such pending lawsuits is adopted even at the instance of the courts. For as long as the petitions remain unresolved, public confidence in the ability of the courts to independently and decisively deal with electoral petitions continues to tumble on a free fall.

9.7.2 Delays in finalising cases

As discussed above, section 155(2)(e) of the Constitution requires the state to take measures necessary to ensure that 'timely resolution of electoral disputes'. The framers of the Constitution knew that the timely finalisation of electoral disputes is important for several reasons. First, whatever the outcome, it diffuses the tension that surrounds post-election legal proceedings. Experience shows that once a decision is rendered, people, including the feuding losing candidates, count loses and

[81]Const. Application 208/05; Judgment No. SC. 84/05.

commences preparations for the next election. Second, pre-electoral dispute resolution is usually in preparation of the electoral phase, hence time is always of the essence as candidates and voters make final preparations to vote. For instance, disputes over voter's roll and eligibility need to be finalised before voting may take place. Such an approach accords ZEC and other parties a chance to realign plans in favour of universal adult suffrage rather than disenfranchisement. Third, it complies with international and constitutional law that requires timely resolution of electoral disputes. Fourth, it facilitates the making of a new government post-election with certainty. The President needs to make appointments with certainty rather than relying on persons whose election is challenged in protracted legal proceedings.

The judiciary is known for rapping litigants who practice tardiness in the filing and prosecution of electoral proceedings, especially electoral petitions. As far back as 1993, the SCZ in *Kutama v. Town Council of Kwekwe* expressed its displeasure to the appellant who had delayed finalisation of the matter beyond the point where the remedy could not be justified on any ground.[82] Expeditious settlement of electoral disputes was emphasised since then. These sentiments were encored five years later in *Makamure* v. *Mutongwizo* where the court dismissed the petition for tardiness, but went at length to analyse and commend the legislative framework in place as sufficient to enforce electoral morality in Zimbabwe.[83]

It appears that provisions such as section 155(2)(e) of the Constitution were grafted as a response to delays in the finalisation of matters that troubled EDR in the country. It was only after the adoption of Constitution in 2013 that section 93 was introduced to regulate the trial of a presidential petition, and in particular timelines for filing and determination of such petitions.[84] As discussed above, the 2002 presidential petition took over three years to commence trial and the outcome of the main issues is not known to this day. Local government and parliamentary election petitions also faced the same problem until the enactment of timelines. The Electoral Act, as recently amended, now provides for fourteen days within which a petition should be lodged,[85] and finalised within six months of presentation or filing,[86] and an appeal should be determined within three months of its lodgement.

A typical case on modern undue delays in determining an electoral petition is that of *Konjana* v. *Nduna*.[87] This is a case filed in 2018. This means it is a post-2013 Constitution as well as post-2018 amendments to the Electoral Act. The petition dealt with a simple complaint, which is that the petitioner alleges that his votes at one polling station were erroneously swapped with those of another candidate when computing overall constituency votes to determine the winner of the National Assembly seat for the Chegutu West Constituency. The petitioner learnt about the error after the ZEC provincial election officer had declared the respondent as the

[82] *Kutama*v. *Town Council of Kwekwe* 1993 (2) ZLR 137 (S) p. 140.
[83] *Makamure* v.*Mutongwizo&Ors*1998 (2) ZLR 154 (HC*). See also Bganya v Chitumba&Ors* 1998 (2) ZLR 171 (HC).
[84] A petition in a presidential election is filed within 7 days of the declaration of the result and must be heard and determined within fourteen days of the filing.
[85] See section 168(2) of the Electoral Act.
[86] Section 182 of the Electoral Act.
[87] *Konjana* v.*Nduna* EC18/2018.

winner. The ZEC investigated the complaint. Its finding resulted in it acknowledging the error in writing. However, but for the provisions of section 451 (3) of the Electoral Act, ZEC could not change the declaration of the winner in favour of the petitioner. This correction could only be effected through a court order in petition proceedings. The Electoral Court dismissed the petition on the grounds that it did not comply with the Rules to the extent that it was brought on notice.

The petitioner appealed to the SCZ in September 2018. In spite of the three-month period imposed by the Electoral Act, the SCZ only heard argument 10 months later in July 2019, yet the determination is still pending to date. Taking into account the narrow scope of the appeal, such delay is inconsistent with the new provisions introduced to rid our electoral system of previous challenges of protracted proceedings. It appears the SCZ is not moved by section 155 of the Constitution and relevant provisions of the Electoral Act, preferring to stick to the old practice of unaccountable delays.

9.7.3 Proceduralism/technicalities

Proceduralism in the determination of electoral disputes enjoys notoriety across EDR systems throughout the world. It is often said 'rules are made for the court and not court for the rules'. This is acknowledgment that rules of court exist to guide the courts in dealing with disputes. Courts should avoid being entangled in procedural requirement to the extent that the merits of the case remain unresolved. In any case, the top judges in the judiciary, who are placed to appreciate the operational and administrative challenges these rules need to address, invariably make rules.[88]

Holdsworth has this to say regarding procedurals in electoral adjudication;[89]

> "One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves."

The author above warns against the dominance of deciding cases on procedural issues with 'occasional and incidental' cases where disputes are determined on the merits. Such is a system where the judiciary has shackled itself in a penchant of procedural approach to EDR. The consequence of such an approach is 'sacrificing substantial justice for procedural technicalities'.[90] Every time that happens, the verdict on the merits of the petition is actually rendered by public opinion thereby essentially undermining the integrity of courts. It arouses suspicions of judicial

[88] *See* section 165 of the Electoral Act placing the responsibility to make rules of the Electoral Court on the shoulders of the Chief Justice and the Judge President.
[89] W.S.Holdworth, *History of English Law* (Methuen & Co, London, 1922) p. 251.
[90] O. Kaaba, 'The challenges of adjudicating presidential election disputes in domestic courts in Africa', 15 *African Human Rights Law Journal* (2015*)* pp. 329-354.

capture, especially where the petitions are then decided in favour of the incumbent. By its nature, judicial capture is easy to allege but difficult to prove.

Post-electoral adjudication has been a minefield in Zimbabwe. Elections petitions have been dismissed on procedural grounds that include non-expeditious filing of petitions in the absence of timelines;[91] presentation on notice;[92] absence of petitioner's signature; absence of security for costs; failed personal service;[93] service out of time;[94] among other grounds.

This chapter picks out two issues for further elaboration. These are the form of a petition that violates the applicable law or rules, and service of the petition. Concerning the form of a petition, this one ground has vexed litigants and their legal representatives for some time. Both the Electoral Act and the 1995 Electoral Petition Rules regulate the form of a petition, other than a presidential petition. For instance, the requirement for the petitioner's signature is in terms of section 168(1)(b) of the Electoral Act. The Rules are silent on it. Nearly all petitions filed in the aftermath 2013 National Assembly elections were dismissed on this ground alone.[95] The court, per Bhunu J, who presided over all the petitions, reasoned that the provision is peremptory. It is one, which did not allow for substantial compliance through signature of the legal practitioner. Personal action was required.

As far as form of the petition is concerned, the case of *Moyo* v. *Nkomo* is worryingly extant. It has given birth to *Konjana* v. *Nduna*. The import of the *Moyo* case, as discussed above, is to say that a petition that is lodged on notice is 'fatally defective' to the extent of its non-compliance with the 1995 Electoral Petition Rules. The disappointing part of this jurisprudence is that even after reading this and other decisions on form, one goes away without understanding the correct legal form a petition that complies with law takes. It sounds more like negative interpretation of the law that does not stress on the positive aspects of the decision. It is an admonishment without counsel.

Petitions were also dismissed in numbers for failure by the petitioner to serve the petition in terms of the law. Section 169 of the Electoral Act requires personal service of the petition within 10 days of presentation. In several cases, petitioners either served out of time or did not effect personal service. In some cases, they served on the political party headquarters of the respondent, but such service was adjudged as noncompliance with the law.[96] It could not even pass for substantial

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[91] *See Kutama* v. *Town Council of Kwekwe, supra* note 82 and *Makamure* v.*Mutongwizo*, *supra* note 83. The Court reasoned in both instances that much as there was no prescription of the timeframe for filing electoral petitions following the declaration of results, electoral petitions should be filed expeditiously in some cases due to importance of the office being disputed or the possibility of unseating a sworn in official.

[92] *Moyo* v. *Nkomo*, *supra* note 67.

[93] *Chabvamuperu & Ors* v. *Jacobs & Ors*, 2008 (1) ZLR 354 (H). In this case, the election petition was served at the head office of the respondent's political party. A copy of the petition was handed to a personal assistant to the Secretary for Administration of the respondent's political party at the party's headquarters in Harare. Service of the petition was also not effected within the 10-day period stipulated under section 169 of the Electoral Act. According to the court, this petition was served 28 days after presentation. In *Kadzima* v.*Chimbetete* 2008 (2) ZLR 96 (E), the petition was served on the respondent's legal practitioners.

[94] *Ibid*.

[95] *Mutinhiri*v.*Chiwetu; Matutu*v.*Shumba;*

[96] *See Chabvamuperu supra* note 93and *Kadzima supra* note 93.

compliance even in cases where respondents were diving and ducking to avoid service in order to undermine the presentation and prosecution of a petition.

As for presidential petitions, it was clarified in the *Chamisa* decision that it should be lodged (filed and served) by the Sheriff within seven days of the declaration of the result in terms of section 93 and CCZ Rules. The CCZ was even generous to condone service outside of the timeframe, citing public interest and absence of prejudice on the respondents as the basis for its decision. It leaned more towards meritorious determination as opposed to the will to dismiss. Had such an application been filed before the Electoral Court, it had no chance of success as that Court is entangled in excessive proceduralism that has seen determination of petitions on the merits such a rare occurrence in Zimbabwean EDR. It then follows that the public decided the merits of these petitions thereby deepening the public disapproval of the Electoral Court.

The more the reasons for a strict approach to electoral petitions, the more flimsy the grounds appear. First, there has been a general acknowledgement that electoral petitions are *sui generis*.[97] One of the upshots of this nature is that 'it is not a proceeding in equity or common law' but founded on statute. In some countries, a new standard of proof known as the intermediary standard[98] has been developed as a way to show that petitions are *sui generis*.[99] This paper submits that there is no basis to venerate electoral proceedings as *sui generis* such that proceduralism becomes the norm of the day.

Second, the courts insist that the Electoral Court is a creature of statute hence its jurisdiction is as defined therein and cannot be found to condone tardiness or non-compliance with provisions of the statute. If ever there was any doubt about the Court's power to condone timelines, such doubt was blotted by section 171(9) of the Electoral Act. It now provides as follows;

> "Except as otherwise provided in this Act, the procedure to be followed in regard to election petitions, including—
>
> (*a*) the provision of security for costs; and
>
> (*b*) the Court's power to condone late filing; shall be the procedure applicable to court applications in the High Court".[100]

The import of this provision is the direct opposite of the Electoral Court attitude over the years – denying its inherent power to condone, on good cause, non-compliance with the Electoral Act. Clearly, the legislative objective of the provision is to deal with crippling proceduralism that has taken root in the Electoral Court. As from April 2018, the Court is vested with power to condone infraction such as late filing of petitions, let alone service. In fact, the Electoral Court should conduct itself as the HC would when presiding over civil proceedings. This is logical; since the

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[97]This means 'in a class of its own'.

[98]*See Odinga & Anor* v. *Independent Electoral and Boundaries Commission &Ors* [2017] eKLR.

[99]*See* the CCZ survey of selected African, American and European judiciaries' approach to standard of proof in election petitions in the *Chamisa* decision.

[100]Subsection inserted by Act 6 of 2018.

Court is established as a 'division' of the HC and competent to exercise the general powers of the HC except criminal.[101]

Further, Rules of the HC are applicable to the Electoral Court proceedings until such a time that the Chief Justice and Judge President have presided over a process to adopt full Rules of the Electoral Court. The HC has original jurisdiction. It can also develop common law and regulate its process. Such privileges also lay at the door of Electoral Court as a division thereof, and as confirmed in the above quotation. Surprisingly, refusal of competence to condone infractions of the Electoral Act continued in the aftermath of the 2018 elections to the prejudice of petitioner who could not get the court to deal with merits of claims. In final analysis, the Electoral Court always had the competence to exercise discretion in instances of non-compliance with the Electoral Act.

Comparatively, the CCZ jurisdiction on petitions is in terms of section 93 of the Constitution, which is the 'complete code'[102] on presidential petitions. However, the CCZ has so far shown no appetite for proceduralism, preferring to determine the 2018 presidential petition on its merits as to end the acrimony, and diffuse the tensions the petition generated.

9.7.4 Inconsistent approach to electoral petition proceedings

Inextricably linked to proceduralism is the emergence of conflicting and or inconsistent jurisprudence or approach in the Electoral Court. The inconsistency manifested in the sense that when several judges of the Electoral Court sit to determine electoral petitions, they tend to apply different levels of proceduralism with some dismissing preliminary issues while others are keen to the extent of setting down petitions to deal with these issues first. A petitioner in one courtroom deals with different procedural barriers to their petition compared to another petitioner both appearing before the same court, who may not face any. Yet in other instances such as the *Konjana* decision, Justice Zimba-Dube raised *mero motu* the procedural ground upon which she dismissed the petition. This was the first time a petition had been filed in terms of section 451 of the Electoral Act (correction of a declaration). The parties expected new jurisprudence regarding such unusual petitions, but the petitioner became one of the several victims of proceduralism and EDR continues to be deprived of transformative jurisprudence. This approach divides and fragments the Electoral Court and adds fuel to allegations of disapproval of this Court. Petitioners who face preliminary issues feel targeted and hard done by the EDR. Consistency brings about uniformity of consequences and predictability to the application of law.

9.8 Conclusion

This Chapter set out to give an appraisal of the role of the judiciary in EDR in view of the Constitution. It made a few observations and conclusions. EDR has a long history in Zimbabwe dating back to the watershed elections in 1979 where several

[101] *See* again section 166 of the Electoral Act.
[102] *Tsvangirai , supra* note 91, p.4.

elements of modern elections were introduced, including universal adult suffrage. Perhaps due to a *de facto* one-party state in Zimbabwe, and growing disgruntlement within ZANU PF, the number of independent candidates participated in the 1995 elections that saw the first successful election petition in *Dongov.Mwashita*. As the numbers of election petitions grew, so did amendments to the constitution and Electoral Act to introduce more measures to enforce electoral integrity, including equipping courts with necessary jurisdiction and other tools to dispense electoral justice.

The 2013 Constitution seeks to affirm the commitment to free, fair and regular elections that are inclusive through universal adult suffrage. In introduced Chapter 7 exclusively dedicated to the prevailing electoral system including principles on election. Two of these are allowing of challenge to electoral results and that all electoral disputes should be settled timely. Such are the new provisions introduced to deal with the dark past where electoral proceedings were protracted with no timelines for filing or determination.

Among courts of law with electoral jurisdiction, only the Electoral Court is specialised in electoral disputes. The CCZ has exclusive jurisdiction on presidential electoral petitions. It has produced ground breaking jurisprudence on the two occasions it has determined presidential election petitions. The SCZ only deals with electoral matters on appeal from the HC or Electoral Court. Otherwise, it does not have original jurisdiction.

Concerning judicial attitude to EDR, this Chapter concluded that, based on survey of its jurisprudence, the Electoral Court has compelling tendency of proceduralism with less and less petitions being heard on their merits. With more numbers of petitions being filed over the last decade, one would expect that the bar and the bench would become more conversant with this procedure. This has not been the case. There is also the scourge of delayed finalisation of cases, especially electoral petitions. Such a practice undermines administration of electoral justice. These challenges required a unified approach to dealing with it. The Chief Justice and Judge President need to supervise the process of adopting Rules of the Electoral Court. Further, the Electoral Court should be composed of judges that have committed themselves to deeper understanding of electoral law through deliberate capacity building programmes at the instance of the Judicial Service Commission (JSC) and Law Society of Zimbabwe (LSZ). Without such radical transformation in this area, the public confidence in the judicial resolution of electoral disputes, especially parliamentary election petitions, continues to erode. Such is a consequence both the Constitution and subsidiary elections never intended.

Chapter 10

Constitutional Labour Rights: Judicial Interpretation of the Right to Fair Labour Practices in Zimbabwe

Tapiwa. G. Kasuso

10.1 Introduction

The past three decades have seen some countries in Commonwealth Africa adopting constitutions with Bills of Rights that go beyond the so-called first-generation rights and protect broad socio-economic rights which include the right to fair labour practices. These countries include South Africa[1], Malawi[2], and Kenya.[3] As with its African counterparts, Zimbabwe is no exception to this development in labour and employment law. The 2013 Constitution of Zimbabwe introduces for the first time in Zimbabwe's history, a Declaration of Rights that entrenches labour rights, including the overarching right to fair labour practices. The framework for the regulation of labour and employment rights is established in section 65 of the Constitution.[4] This provision has since become an indispensable source of

* LLB (Hons) (University of Zimbabwe); LLM (University of South Africa); LLD (University of South Africa). This contribution is based on sections of the author's thesis titled 'Reflections on the Constitutional Protection and Regulation of Individual Labour Law and Employment Rights in Zimbabwe (Unpublished LLD Thesis, UNISA, 2021).

[1]Section 23(1) of the Constitution of South Africa, 1996 provides that everyone has the right to fair labour practices.

[2]Section 31(1) of the Constitution of Malawi, 2010 guarantees every person's right to fair and safe labour practices.

[3]Section 41(1) of the Constitution of Kenya, 2010 entrenches the right to fair labour practices.

4Section 65 of the Constitution is titled "Labour rights" and provides as follows:

(1) Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.

(2) Except for members of the security services, every person has the right to form and join trade unions and employee or employer's organisations of their choice, and to participate in the lawful activities of those unions and organisations.

(3) Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.

(4) Every employee is entitled to just, equitable and satisfactory conditions of work.

(5) Except for members of the security services, every employee, employer, trade union, and employee or employer's organisation has the right to-
   (a) engage in collective bargaining;
   (b) organise; and
   (c) form and join federations of such unions and organisations

(6) Women and men have a right to equal remuneration for similar work.

contemporary labour law, if not the most important source. It heralds the dawn of a new era in Zimbabwean labour law which is now grounded on a rights-based model of constitutionalism.

Traditionally, labour rights in constitutions typically assume the form of framework legislation with the expectation that this will be embellished in labour legislation giving effect to such rights. In the Zimbabwean context, constitutional labour rights are given effect by the Labour Act (Chapter 28:01). However, labour legislation predates the 2013 Constitution with the consequence that constitutional labour rights are a restatement of pre-existing statutory rights. This carries with it the attendant difficulties of reconciling the new rights and the pre-existing regulatory framework. Additionally, some of the provisions in labour legislation are a codification of the common law understanding of labour law. This implies that the enactment of labour legislation and its interpretation do not have any constitutional foundations.[5] As if that is not enough, labour legislation is often drafted in relatively general terms. It is then left to the courts to interpret the provisions of such legislation and give effect to constitutional labour rights. Therefore, the mere existence of the right to fair labour practices in the Constitution is not enough. The scope and content of the right to fair labour practices is largely dependent on the approaches adopted by the courts in interpreting the right. The role of the judiciary in this respect has largely been ignored.[6]

This contribution examines the current judicial attitude towards the scope and content of the right to fair labour practices in Zimbabwe. It questions whether the interpretative approaches of the Zimbabwean courts resonate with the purpose of labour legislation, section 65 of the Constitution, and tenets of constitutionalism. The article seeks to demonstrate how the judiciary can create new regulation through their interpretative mandate and ensure the full enjoyment of workers' rights. The realisation that the judiciary is an important player in the regulation of labour markets can significantly impact our understanding of labour law and as such, allow us to examine how courts contribute to labour law jurisprudence.[7] The contribution commences with a historical overview of the unfair labour practice concept. This is followed by a critical analysis of the nature and scope of the right to fair labour practices based on the interpretation of the right by the Constitutional Court. An examination of the purpose of section 65(1) of the Constitution, its interpretative model and the significance of constitutionalising the right to fair labour practices and its meaning for Zimbabwe's labour law framework will also be made in order to contextualise the contribution.

(7) Women employees have a right to fully paid maternity leave for a period of at least three months.

5See the interpretation of labour legislation by the courts in Nyamande & Another v.Zuva Petroleum (Pvt) Ltd 2015 (2) ZLR 157 (S); DHL International (Pvt) Ltd v.Tinofireyi SC 80/14.

[6]This may be attributed to a narrow perspective of the rule of law, wherein the regulation of society is exclusively the domain of the legislature and not the courts. Alternatively, this can be attributed to an overly positivistic view of law where legal change is seen solely as a political process.

[7]M. Van Staden, 'The Role of the Judiciary in Balancing Flexibility and Security', 46 *De Jure* (2013) p. 470.

10.2 Historical Overview of the Right to Fair Labour Practices

Zimbabwe gained independence from Britain in April 1980. Before independence, employment was generally regarded as a private law matter. As such, labour rights were mainly protected under the Roman-Dutch common law which did not provide for the right to fair labour practices. This is not surprising. The common law contract of employment confers no inherent right to fairness.[8] Independence brought a paradigm shift in the role of the State in the protection of labour rights. The new black government was determined to introduce socio-economic reforms to placate the masses who were aggrieved by the debilitating effects of colonialism.[9] This was achieved through the turn to constitutionalism. To this end, the early social, economic and political transformation of Zimbabwe was predicated on the turn to the Constitution of Zimbabwe, 1980 which contained a justiciable Declaration of Rights.

The 1980 Constitution did not guarantee the right to fair labour practices. The right was only introduced in Zimbabwean labour law by the Labour Relations Act of 1985 (the LRA, 1985). The right was codified under the overarching concept of unfair labour practices. Importantly, the unfair labour practice concept of the LRA, 1985 is still maintained in the current Labour Act, which is the mainstay of Zimbabwean labour law. Thus, the 2013 Constitution elevates the right to a constitutional right. This entrenchment of labour and employment rights in a constitution is generally referred to as the constitutionalisation of labour rights and it entails the importation of constitutional values into the workplace backed by a codified constitution and in some instances judicial interpretation.[10] Therefore, the adoption of the 2013 Constitution provides an interesting opportunity to explore the potent symbolism and practical significance of the constitutional right to fair labour practices. Before this is done, it is necessary to analyse the judicial interpretation of the statutory unfair labour practices concept before the enactment of the 2013 Constitution.

10.2.1 The Labour Act and the Unfair Labour Practice Concept

One of the objects of the Labour Act is to define and specify unfair labour practices.[11] In codifying unfair labour practices, the legislature sought to give effect to the legislature's objective of promoting fair labour standards at the workplace.[12] The scope and nature of unfair labour practices in the Labour Act must be understood within this context. Section 2 of the Labour Act defines an unfair labour practice as 'an unfair labour practice specified in Part III, or declared to be so in

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[8]A. Van Niekerk *et al*, *Law@Work* (LexisNexis, Durban, 2014) p. 183.

[9]P. Cheater, 'Industrial Organisation and the law in the First Decade of Zimbabwe's Independence', *Zambezia* (1991) pp.1-14.

[10]Entitlements that relate specifically to the role of being a worker, whether exercisable individually or collectively are elevated to the status of fundamental human rights. *See* H. Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems,' 19 *Social and Legal Studies* (2010) pp. 403-422; R. Dukes, 'Constitutionalising Employment Relations: Sinzheimer, Kahn-Freud and the Role of Labour Law', *Journal of Law and Society* (2008) pp. 341-363.

[11]*See* the preamble to the Labour Act.

[12]Section 2A (1) (d) of the Labour Act.

terms of any other provision of the Act.' Part III of the Labour Act makes provision for four types of unfair labour practices namely, those committed by employers,[13] trade unions,[14] workers committees,[15] and other persons.[16] Since the purpose of the Labour Act is to define and specify unfair labour practices, courts have held that unfair labour practices falling within the statutory definition of the term are exhaustive. Put differently, to be an unfair labour practice an act or omission must be specifically described as such by the Act. If a practice is not specified or described as such, it cannot be raised as an unfair labour practice under the Labour Act.[17] Further, section 10 of the Labour Act gives the Minister of Labour powers to prescribe additional acts or omissions that constitute unfair labour practices.

There are notable omissions from the list of unfair labour practices in Part III of the Labour Act. It does not enumerate all incidents of employer power. For instance, at the level of the individual employee, unfair conduct by employers relating to promotion, transfers, unilateral variations of conditions of employment, probation, training, benefits, and unfair disciplinary action short of dismissals such as suspensions and demotions, are not covered by the unfair labour practice concept. This does not mean that victims of unfair employer conduct not covered by the statutory right to fair labour practices are remediless. Zimbabwean courts have fashioned remedies based on common law principles. For instance, in *Agricultural Bank of Zimbabwe t/a Agribank* v. *Machingaifa and Another*,[18] workers were entitled to payment of a mileage allowance of 4 000km per month calculated at the Automobile Association of Zimbabwe rates. The contractual benefit was unilaterally withdrawn by the employer on the basis that it was now expensive for it to sustain. The court held that such conduct was not specified as an unfair labour practice under the Labour Act. However, under common law, a party cannot unilaterally alter the terms of a contract without the consent of the other party. The court then proceeded to set aside the decision of the bank on the basis that it was unlawful.[19]

Although it might be unnecessary to have an unfair labour practice remedy if a remedy is available under the common law, it is submitted that the common law is limited in its application. The common law is concerned with the lawfulness of employer conduct and does not intrude into the substantive fairness of such conduct. With this positivist view of the law, the role of the judiciary is limited. It is therefore hoped that with the entrenchment of the broad right to fair labour practices in the 2013 Constitution, it is time to rethink the purpose of keeping an exhaustive list of unfair labour practices in the Labour Act. With this in mind, it is

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[13] *Ibid.,* section 8.
[14] *Ibid.*, section 9.
[15] *Ibid*.
[16] *Ibid.*, section 8 *(g)* and (h).
[17] *Nyamande& Another* v. *Zuva Petroleum (Pvt) Ltd, supra* note 5; *Muwenga* v. *PTC* 1997 (2) ZLR 483 (S); *Mudarikwa & Another* v. *Director of Housing and Community Service* 2007 (1) ZLR 41 (S).
[18] 2008 (1) ZLR 244 (S).
[19] *See Air Zimbabwe (Pvt) Ltd* v. *Zendera* 2002 (1) ZLR 132 (S); *Chirasasa* v.*Nhamo*2003 (2) ZLR 206 (S); *Taylor* v. *Minister of Higher Education* 1996 (2) ZLR 772 (S); *Sagandira* v. *Makoni Rural District Council* SC 70/14; *Rainbow Tourism Group* v. *Nkomo* 2015 (2) ZLR 248 (S); *Guruva* v. *Traffic Safety Council of Zimbabwe* 2008 (1) ZLR 244 (S).

necessary at this stage to interrogate the nature and scope of the constitutional right to fair labour practices, its purpose, interpretation, significance and relationship with the Labour Act.

10.3 The 2013 Constitution and the Right to Fair Labour Practices

10.3.1 The Purpose of Section 65(1)

Labour law seeks to address the inequality of bargaining power inherent in the employment relationship by protecting employees.[20] Similarly, the constitutionalisation of the right to fair labour practices attempts to address the inequality of bargaining power between workers and capital.[21] This countervailing force is achieved through the entrenchment of minimum labour rights. These include collective labour rights such as the right to collective job action, the right to trade union organisation, and the right to collective bargaining. Therefore, the constitutional entrenchment of labour rights adjusts the imbalance in favour of employees. An additional protective function of labour law is to regulate, support, and restrain the power of capital and the power of organised labour.[22] There is in existence a conflict inherent to any industrial society, between capital and labour in respect of the distribution of profits. The constitutional protection of labour rights acts as a balancing mechanism to protect employers and employees from each other party's power. It seeks to regulate the conflict inherent in the employment relationship.[23]

Furthermore, labour law performs the social function of protecting employees from the full operation of market forces by creating a minimum floor of rights for employees.[24] This perspective regards labour law as a tool to further the interests of social justice and is endorsed in section 2A (1) of the Labour Act.[25] Contemporary social justice perspectives acknowledge that the constitutionalisation of labour rights is an important means to define and enforce the protection of workers. They recognise labour rights as a coeval and significant medium to promote social justice in the workplace. The judiciary, therefore, provides the primary mechanism through which labour rights are enforced and competing rights can be assessed and, if necessary, balanced.[26] Lastly, modern notions view the constitutional protection of labour rights and in particular, the right to fair labour practices as designed to promote economic development. Dukes

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[20]P. Davies, & M. Freedland, *Kahn-Freud's Labour and the Law* (Stevens and Sons Ltd, London, 1983) p. 14.

[21]M. Gwisai, 'Enshrined Labour Rights Under s65 (1) of the 2013 Constitution of Zimbabwe: The Right to Fair and Safe Labour Practices and Standards and the Right to a Fair and Reasonable Wage', 3 *University of Zimbabwe Law Journal* (2015) p. 1.

[22] Davies & Freedland, *supra* note 20.

[23]Davis takes the argument further and posits that labour law seeks to protect the interests of the ruling and commercial elite by giving enough rights to workers so as to prevent a disruption of the economic and social system. *See* M. Davis, 'Functions of Labour Law', 13 *The Comparative and International Journal of Southern Africa* (1980) p. 212.

[24]L. Madhuku, *Labour Law in Zimbabwe* (Weaver Press, Harare, 2015) p. 2.

[25]Section 2A(1) of the Labour Act provides that the stated purpose of the Labour Act is to advance social justice and democracy in the workplace by fulfilling the primary objects of the Act in section 2A(1) *(a) – (f)*.

[26]Van Niekerk *et al*., *supra* note 8,p 10.

argues that the purpose of constitutional labour rights is to promote economic efficiency and labour market flexibility in a way that responds to the demands for fair treatment of workers.[27] As with the social justice perspective, this calls for the entrenchment of core standards to protect workers. In light of the foregoing, the interpretation of section 65(1) of the Constitution must fulfil its intended purposes. Moreover, the interpretation of constitutional rights should aspire to fulfil the general purpose applicable to all rights, which is "to give full effect to the rights and freedoms" and to "promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality, and freedom."[28]

10.3.2 The Interpretive Framework

The interpretation of fundamental rights and freedoms in Zimbabwe's constitutional jurisprudence is no longer a contested area. In interpreting the Bill of Rights under the 1980 Constitution, Zimbabwean courts accepted that the literal interpretation of rights failed to give the fundamental rights protected in the Constitution the full measure of protection they deserved.[29] It failed to take into account the purpose of the rights, their scope, and content. Constitutional interpretation requires more than simply according to words their literal or ordinary grammatical meaning. In *Rattigan and Others* v. *The Chief Immigration Officer and Others*,[30] it was held that the preferred constitutional construction is one that serves the interests of the Constitution and best carries its objects and promotes its purpose. The broad, generous, and purposive interpretation was endorsed as the one that gives the full effect of constitutional rights.[31]

Labour rights in section 65 of the Constitution are couched in abstract and open-ended language, thereby leaving room for the courts to formulate wide interpretations about the meaning and scope of these provisions. As a result, constitutional interpretation entails more than locating the ordinary meaning of the provisions under scrutiny. Section 46 of the Constitution enjoins several principles that must guide the interpretation of section 65. These include values and principles underlying a democratic society, international labour standards, principles and objectives of the Constitution, and relevant foreign law.[32] It is striking that section 46 of the Constitution endorses the purposive approach. This method of statutory interpretation is also referred to as the teleological interpretation, a value activating

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[27]Dukes, *supra* note 10.

[28]Section 46(1) *(a) – (b)* of the 2013 Constitution. *See also,* J. Tsabora & T. Kasuso, 'Reflections on the Constitutionalising of Individual Labour Law and Labour Rights in Zimbabwe', 38 *Industrial Law Journal* (2017) p 43.

[29]*Smyth* v.*Ushewokunze& Another* 1997 (2) ZLR 544 (S); *Chavhunduka* v. *Minister of Home Affairs & Another* 2000 (1) ZLR 552 (S).

[30]1994 (2) ZLR (S) 54.

[31]G. Devenish, *Interpretation of Statutes* (Juta, Cape Town, 1992) p. 35 submits that the purposive approach requires the interpreter to infer the design or purpose which lies behind the legislation. In order to do this the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources.

[32]Section 46(1) *(a) – (e)* of the Constitution. For a discussion of section 46 of the Constitution *see* A. Moyo, 'Constitutional Analysis of the Interpretation Clause of the Zimbabwean Declaration of Rights' in a A. Moyo (eds.), *Final Papers of the 2016 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe*, (Raoul Wallenberg Institute, Lund, 2019) 1.

strategy, or the value-coherent theory of interpretation.[33] It has become commonplace in Zimbabwe for this principle to guide the interpretation of constitutional rights and legislation giving effect to such rights and has been endorsed by the Constitutional Court, although reliance is still regularly placed on other theories of statutory interpretation.[34]

The Labour Act also expressly endorses the purposive approach.[35] It has already been established that section 2A (1) of the Labour Act provides that the purpose of the Act is to advance social justice and democracy in the workplace. The interpretative model of the Act is set out in section 2A (2) which provide that the Act must be construed in a manner that best ensures the attainment of its purposes. This provision expresses a social justice perspective of labour relations and it is the one that must guide courts in interpreting labour rights.[36] The dominant perspective underlying labour rights and labour legislation is the protection of workers. Therefore, the purposive approach is best suited to counteract the inequality inherent in the employment relationship and the advancement of social justice in the workplace. In the circumstances, section 65(1) of the Constitution must be interpreted in a manner that transforms the workplace, promotes constitutionalism, equality, and social justice.[37] This demands that labour legislation be construed purposively to give effect to the Constitution. Where labour legislation is capable of two conflicting interpretations, it must be given the meaning that best accords with the Constitution unless there is a clear legislative intention to the contrary.

10.3.3 The Significance of Constitutionalising the Right to Fair Labour Practices

It has since been established that section 65(1) of the Constitution entrenches in a wholesome fashion the right to fair labour practices. This is an unusually broad right not capable of precise definition and it is not necessary or desirable to define it.[38] Despite its enigmatic nature, the inclusion of the right in the 2013 Constitution has generally been hailed as a positive step in the march towards the advancement of social justice at the workplace.[39] There are several reasons why constitutionalisation

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[33]Van Staden, *supra* note 7, p. 476.

[34]*See Mudzuri & Another* v. *Minister of Justice, Legal and Parliamentary Affairs N.O & Others* 2016 (1) ZLR 101 (C); *Chihava & Others* v. *The Provincial Magistrate Mapfumo N.O* 2015 (2) ZLR 95 (C).

[35]In explaining the purposive approach Le Roux states as follows, "The broader approach which the court favours includes the following distinct steps: (i) establish the central purpose of the provision in question; (ii) establish whether that purpose would be obstructed by a literal interpretation of the provision; if so; (iii) adopt an alternative interpretation of the provision that understands (promotes) its central purpose, and (iv) ensure that the purposive reading of the legislative provision also promotes the object, purport and spirit of the Bill of Rights." *See* W. Le Roux, 'Directory Provisions, Section 39(2) of the Constitution and the Ontology of Statutory Law: *African Christian Democratic Party* v. *ElectoralCommission* 2006 (3) SA 305 (CC)', *South African Public Law* (2006) p. 382.

[36]M. Gwisai, *Labour and Employment Law in Zimbabwe* (Zimbabwe Labour Centre, Harare, 2006) p. 49.

[37]For detailed arguments in favour of adopting the purposive approach in construing labour legislation *see* T. Cohen, 'Understanding Fair Labour Practices – *NEWU* v. *CCMA'*, 20 *South African Journal of Human Rights* (2004) p. 482.

[38]R. Le Roux, 'The New Unfair Labour Practice', *Acta Juridica* (2012) p. 41.

[39]T.G. Kasuso & T. Madebwe, 'The Role of the State in the Protection of Individual Labour Rights in Zimbabwe', 21 *African Human Rights Law Journal* (2021) pp. 388-408; J. Tsabora & T.G. Kasuso, 'Reflections on the Constitutionalising of Individual Labour Law and Labour Rights in Zimbabwe', 38 *Industrial Law Journal,* (2017) p. 43.

of the right to fair labour practices has the potential to transform Zimbabwean labour law. Firstly, the consequence of constitutionalising the right to fair labour practices is apparent in section 2(1) of the Constitution. Any fundamental right entrenched in the Declaration of Rights is supreme and any laws, practices, and conduct inconsistent with it are invalid to the extent of the inconsistency. Thus, the right to fair labour practices is now likely to have a greater impact than what it did when it was only a statutory right. It promises greater levels of the realisation of the right.[40] The importation of constitutional values into the workplace provides a useful model for conceptualising how labour law should develop.[41] It enhances the legitimacy of workers' demands for protection and gives credence to policymaking. This legitimising function is described by Collins as the 'potential trumping power of human rights.'[42] There is a greater potential of securing workers' rights by invoking the human rights discourse in the Constitution which has more weight, value, and respect attached to it given its supremacy.

Secondly, constitutionalisation implies that the right is now only subject to limitations in terms of the Constitution as opposed to a statutory right which can be unnecessarily limited by the Labour Act. Section 86(2) of the Constitution provides that rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[43] By restricting the limitation of the right to fair labour practices to the constitutional requirements it enhances the protection and realisation of the right. Thirdly, constitutionalising the right to fair labour practices has the potential of humanising the workplace by removing the workplace from the clutches of the common law.[44] Not only does it advance social justice at the workplace by balancing the power between labour and capital but it also improves the quality of life of workers. In addition, workers tend to enjoy greater job security, basic norms of fairness, and proportionality than previously.[45] The cornerstone of human rights discourse is the promotion of equality, the prohibition of unfair discrimination, and the protection of human dignity. The constitutional protection of labour rights enhances the recognition and protection of the dignity and identity of the individual employee. Related to this is the social reality that a worker's employment is a significant part of his life that confers identity and measure of self-esteem.[46] Fourthly, it implies that the right to fair labour

[40]J. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights', *Human Rights Quarterly* (2008) p. 984.

[41]R.J. Grodin, 'Constitutional Values in the Private Sector Workplace', 13 *Industrial Relations LJ* (1991) p. 1.

[42]H. Collins, 'Theories of Rights as Justification for Labour Law' in G Davidov & B Langille (eds), *The Idea of Labour Law* (Oxford University Press, Oxford, 2011) p. 139.

[43]For the factors which must be taken into account in assessing whether the limitation is justifiable, *see* section 86(2) *(a) – (f)* of the Constitution.

[44]D. Cabrelli, 'Examining the Labour Law and Social Dimension of Human Rights: The UK and South Africa' in E. Reid & D. Visser, *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (Edinburgh University Press, Edinburgh,2014) pp. 391- 417.

[45]*See* D. Beatty, 'Constitutional Labour Rights: Pros and Cons', 14 *Industrial Law Journal* (1993) p. 1; I. Holloway, 'The Constitutionalisation of Employment Rights: A Comparative View', 14 *Berkeley Journal of Employment and Labour Law* (1993) p.113

[46]B. Hepple, *Equality: The New Legal Framework* (Hart Publishing, Oxford, 2011) pp. 14-16.

practices must be interpreted generously based on section 46 of the Constitution.[47] Fifthly, constitutionalisation prevents the use of ouster clauses in statutes such as the Labour Act, which unnecessarily limits the right. Lastly, constitutionalising the right to fair labour practices gives rise to constitutional remedies and a rights-based approach to litigation.[48] However, there is no direct reliance upon the right to fair labour practices. Where legislation has been enacted such as the Labour Act to give effect to constitutional labour rights, a litigant must rely on that legislation to give effect to the right in question or challenge that the existing law falls short of a constitutional standard before relying on the Constitution. Put differently, a litigant may not bypass legislation giving effect to a right and rely directly on the Constitution without challenging the legislation as falling short of the constitutional standard.[49] This largely implies that the court's interpretation of the right to fair labour practices plays a significant role in determining the scope and purpose of the right beyond its mere existence in the Constitution.

However, drawing from the knowledge of state attitudes towards the protection of workers' rights, it may be argued that such optimism may be misguided. Firstly, such optimism seems to have been misplaced because the right to fair labour practices that was being celebrated was provided for in a codified constitution which established the intent to limit State obligations to people, including its obligation to take proactive measures to protect labour rights. Indeed, since the turn to the 2013 Constitution, the State has done little to enact legislation giving effect to the broad right to fair labour practices. There was some attempt to align the existing Labour Act with the Constitution through the Labour (Amendment) Act 5 of 2015. However, this was hardly enough.

Secondly, optimism seems to have been misguided because the right to fair labour practices is based on, and retained, the problematic unfair labour practice approach adopted in labour legislation that predated the Constitution. And so, under the circumstances, consistent with experience in Zimbabwe, and further afield, it fell to the courts to resolve this issue. Encouraging though, courts were empowered to protect the Constitution which meant they could protect the right to fair labour practices based on constitutionalism without worrying about acting in a manner not consistent with the Constitution. Faced with this task, the Constitutional Court has arguably underperformed. A review of the case of *Greatermans Stores (1979) (Pvt) t/a Thomas Miekles Stores and Another* v. *The Minister of Public Service, Labour and Social Welfare* [50](the *Greatermans* case) demonstrates contempt of not only contemporary developments in statutory interpretation in Zimbabwe, but also for established principles of constitutionalism.

[47]*See* discussion under paragraph 1.3.2 above.
[48]G.E. Devenish *et al., Administrative Law* (LexisNexis, Durban, 2001) p. 6.
[49]For further discussion of the principle of subsidiarity and the doctrine of avoidance *see Magurure & Others* v. *Cargo Carriers International Haulers t/a SABOT* 2016 (2) ZLR 788 (C); *Mushapaidze* v. *St Anne's Hospital* CCZ 18/17; *Katsande* v. *IDBZ* 2017 (1) ZLR 670 (S).
[50]CCZ 2/18.

10.4 Interpreting the Constitutional Right to Fair Labour Practices: The *Greatermans case*

10.4.1 The Facts

In this case, the Constitutional Court set out to establish a general understanding of the scope of the right to fair labour practices and its relationship with the statutory concept of unfair labour practices. The court was petitioned to declare that the retrospective application of section 18 of the Labour (Amendment) Act 5 of 2015 read with section 12C of the Act was unconstitutional. The background to the case was that the Labour (Amendment) Act, 2015 gave retrospective effect to a new obligation on employers who terminated contracts of employment on notice. They were required to pay every employee whose services were terminated on three months' notice on or after the 17th of July 2015, a minimum retrenchment package of not less than one month's salary for every two years served.[51] The crux of the Applicant's case was that the retrospective application of the Labour (Amendment) Act, 2015 violated their right to equality, the right to fair labour practices, and the right not to be compulsorily deprived of property. In respect of the right to fair labour practices, it was argued that it was unfair for employers to be made to remunerate employees who had not rendered any services. Section 18 of the Labour (Amendment) Act, 2015 had the effect of advancing the interests of workers at the expense of employers. The court was therefore called upon to determine whether the retrospective effect of section 18 violated the right to fair labour practices or qualified as an unfair labour practice for purposes of section 65(1) of the Constitution.

The Constitutional Court held that there was no constitutional provision that prohibited the legislature from passing retrospective legislation to govern civil rights and obligations. Further, section 18 of the Labour (Amendment) Act, 2015 did not violate sections 56(1), 65(1), and 71(3) of the Constitution. The focus of this contribution is the finding of the Constitutional Court that the retrospective application of the Labour (Amendment) Act did not infringe the right to fair labour practices. Specifically, its interpretation of the scope and nature of the right to fair labour practices. The court took a simplistic positivist approach and held that for a person to allege a violation of the constitutional right to fair labour practices, the conduct complained of must constitute one of the acts or omissions listed by the Labour Act as an unfair labour practice. Put differently, the constitutional right to fair labour practices is limited by the unfair labour practice concept in the Labour Act.

The Constitutional Court maintained the interpretation of the concept of unfair labour practices adopted by the courts before the enactment of the 2013

[51]For a detailed discussion of the background to the Labour (Amendment) Act 5 of 2015 and its effect on employers right to terminate contracts of employment on notice *see* T.G. Kasuso & G. Manyatera, 'Termination of the Contract of Employment on Notice: A Critique of *Nyamande and Another* v. *Zuva Petroleum (Pvt) Ltd* SC 43/15', 2 *Midlands State University Law Review* (2015) pp.88-106.

Constitution. In laying down the requirements that must be satisfied before conduct can be held to be an unfair labour practice, the court stated as follows:

> "(i) The 'act or omission' must constitute a 'labour practice.' An 'act' or 'omission' may refer to either single act or a single inaction which may or may not have lasting consequence and having occurred during the subsistence of the employment relationship, that is, in the period between the conclusion of the contract of employment and its termination. The word 'practice' suggests that the employer must have actually done something or declined to do something.
>
> (ii) The unfair labour practice can arise only if the employer does something or refrains from doing something ('act or omission'). In Zimbabwe, the employer must have actually done something listed in Part III of the Act, which act or omission the employee claims the employer should have done or should have refrained from doing.
>
> (iii) The unfair labour practice must be between an employer and an employee. In Zimbabwe, however, the unfair labour practice may be between the employee and a trade union, a workers' committee or any other person for sexual conduct amounting to an unfair labour practice.
>
> (iv) The unfair labour practice must involve one of the practices specified, for our purposes listed in Part III of the Act or declared to be so in terms of any other provision of the Act; and
>
> (v) The act or omission complained of must be unfair.[52]

The court concluded that the conduct which the Applicants complained of was not an unfair labour practice specified in the Labour Act. As such, it was not an infringement of the constitutional right to fair labour practices. The court also held that the conduct complained of was not the conduct of the employer but the legislature. It was not a violation of the right to fair labour practices as an unfair labour practice could only arise if the employer did something or failed to do something. With due respect, the Constitutional Court took a conservative approach premised on a formal conception of the rule of law. As shall be demonstrated herein, there are several difficulties with the interpretation of the right to fair labour practices by the Constitutional Court. The approach is contrary to the Constitution and the interpretative framework of labour legislation. It failed to provide sufficient guidance on the nature of the right to fair labour practices and its interplay with the Labour Act. To fully appreciate how the court failed, it is necessary to examine the essential elements of the right to fair labour practices namely: every person (beneficiaries), labour practice, and fairness.

10.4.2 Every Person

Section 65(1) of the Constitution confers the right to fair labour practices on every person. This is a departure from Part III of the Labour Act which confers the right against unfair labour practices to specific beneficiaries. This is also different from

[52] *Greatermans case,* supra note 50, p.40.

section 65(2) - (7) of the Constitution which identifies beneficiaries of the rights entrenched therein as employees, employers, trade unions, and employer organisations. It can therefore be questioned whether section 65(1) has broadened the scope of the right beyond the employment relationship? In the *Greatermans* case, the Constitutional Court held that the reference to every person in section 65(1) indicates that the right to fair labour practices is claimable by an employee in an employment relationship.

It is submitted that the ambit of section 65(1) is caveated by the reference to labour practices. Commenting on section 23(1) of the Constitution of South Africa, 1996 which bestows the right to fair labour practices on everyone, Cheadle states that the term everyone must be interpreted with reference to 'labour practices.' He argues as follows:

> "Although the right to fair labour practices in subsection (1) appears to be accorded everyone, the boundaries of the right are circumscribed by the reference in subsection (1) to 'labour practices.' The focus of enquiry into the ambit should not be on the use of 'everyone' but the reference to 'labour practices.' Labour practices are the practices that arise from the relationship between workers, employers and their respective organisations. Accordingly, the right to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole".[53]

It follows, therefore, that every person for purposes of section 65(1) must be limited to an employment relationship or a relationship akin to that. This is the relationship between an individual employee and employer and their collective organs such as workers' committees, trade unions, and employer organisations. There is also room for extension of the right beyond the employment relationship. The statutory unfair labour practice concept can be committed by 'other persons' other than employers, trade unions, and workers committees. Also, it is a right available to prospective employees. Thus, the constitutional right is broad enough to go beyond the employment relationship to include other players in the labour market, including the State.

Since the constitutional right to fair labour practices is claimable by any person in an employment relationship it follows that employers, trade unions, workers' committees, and employer organisations can also be victims of unfair labour practices. Whilst unfair conduct against employers does not amount to an unfair labour practice under the Labour Act, it can amount to unfair conduct in terms of the Constitution. Acknowledging employer protection in South Africa based on section 23(1) of the Constitution of South Africa, 1996, the Labour Appeal Court in *National Educational Health and Allied Workers Union* v. *CCMA*[54] held that:

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[53]H. Cheadle, 'Labour Relations', in H. Cheadle *et al., South African Constitutional Law: The Bill of Rights* (Butterworth, Cape Town, 2006) p. 18-3; C. Cooper, 'Labour Relations', in M. Chaskalson *et a.l, Constitutional Law of South Africa* (Juta, Cape Town, 2007) p. 53-11; J. Grogan, 'Labour Relations', in I. Currie & J. De Waal (eds), *The Bill of Rights Handbook* (Juta, Cape Town, 2013) p. 475.

[54](2003) 24 *ILJ* 1223 (LAC); *NEWU* v. *CCMA* (2004) BLLR 165 (LC).

> "An employee may, in limited circumstances, commit conduct against an employer that may be lawful but unfair. An employer has the right to expect that in certain circumstances an employee will not merely comply with his or her rights in regard to the employer but will also act fairly. This conduct may, in my view, qualify as an unfair labour practice, that is, a practice that is contrary to that contemplated by s23 of the Constitution."

The employers' remedy in these circumstances lies directly with the Constitution and not the Labour Act. The statutory concept of unfair labour practices does not provide employers and employer organisations with a cause of action or remedy for unfair employee conduct. It is a concept that was introduced mainly to provide employees with protection as it was viewed that employers enjoy greater social and economic power than employees.[55] Whether the Labour Act must provide specific unfair labour practices by employees against employers is debatable. However, what is apparent from the foregoing is that the Constitutional Court took a narrow view of the beneficiaries of the right to fair labour practices. The inherently flexible and intentionally undefined concept of fair labour practices guarantees the equitable and unbiased protection of both employers and employees.[56]

10.4.3 Labour Practices

Labour practices are matters of mutual interest that arise from the employment relationship, that is, the relationship between employers, employees, and their collective organs.[57] It can therefore be questioned whether section 65(1) of the Constitution covers all labour practices including those not covered by the unfair labour practice definition in the Labour Act? It has been established that the Constitutional Court held that for a person to allege unfair conduct as a violation of section 65(1) of the Constitution, the conduct complained of must constitute one of the acts or omissions listed in Part III of the Labour Act as an unfair labour practice. It is submitted that section 65(1) of the Constitution must be viewed as a general or overarching unfair labour practice. This requires a purposive interpretation of the right inspired by constitutional principles and values. The right to fair labour practices does not seek to override or replace the rights provided for in the Labour Act. As a starting point, it must protect unfair labour practices codified in the Labour Act. If a practice is not specified as unfair in the Labour Act, it cannot be raised as an unfair labour practice under the Act but as an infringement of the constitutional right to fair labour practices.[58] A victim of such an unfair labour practice can raise an action based directly on the Constitution and not the Labour Act.

It must be emphasised that the role of developing further unfair labour practices based on section 65(1) of the Constitution lies with the judiciary. In giving content to the right, courts must be guided by domestic experiences reflected from

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[55] *See Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* (1996) 17 *ILJ* 821 (CC).
[56] Cohen, *supra* note 37, p. 483.
[57] Cooper, *supra* note 53, p. 206.
[58] Madhuku, *supra* note 24, p. 78.

the jurisprudence generated by the unfair labour practices provisions of the Labour Act. Further, they must seek guidance from international standards, foreign law, and overall objectives of the Labour Act. Any unfair labour practices developed by the courts must be fashioned in a manner that promotes values and principles that underlie a democratic society.[59] The notion of labour practices must embrace the protection against unfair conduct relating to work security and employment opportunities and underwrite minimum standards.

10.4.4 Fairness

The main purpose of section 65(1) of the Constitution is to protect employees by curbing unfair employer conduct. It is a check on employer unilateralism.[60] The Constitutional Court accepted that the operational principle of section 65(1) of the Constitution is the concept of fairness. However, it did not define it. Before the adoption of the 2013 Constitution, Zimbabwean courts employed the commercial rationale approach to determine the fairness of employer conduct. In *Tel One (Pvt) Ltd* v. *Communication and Allied Services Workers Union of Zimbabwe*,[61] employees were awarded a salary increment of 266% by an arbitrator. In setting aside the arbitral award, which the court described as unreasonable, it was held that the award had the effect of pushing the employer out of business as it would result in 130% of its overall income going to wages. The ability of the employer to pay the wage increment prevailed. The employer's commercial interest was the only consideration taken into account by the court to determine whether the 266% salary increment was fair.

In *Zimbabwe Posts (Pvt) Ltd* v. *Communication and Allied Services Workers Union of Zimbabwe*,[62] a salary increment of USD25.00 was set aside by the High Court. It was held that the increment had no commercial rationale as the wage bill was already gobbling sixty-seven per cent of the company's revenue.[63] This approach is restrictive in its focus. It is mainly concerned with reasonableness and employer interests at the expense of employees' interests. Gwisai attacks this approach on the basis that it does not take into account the constitutional standard of fairness which goes beyond reasonableness and addresses fairness and equity.[64] The question can therefore be raised, what is the constitutional standard of fairness?

Du Toit defines fairness in the context of labour law as a labour practice that is not 'capricious, arbitrary, or inconsistent.'[65] Grogan attempts to define the term by setting out criteria that can be regarded as the basis of unfair conduct. This includes the following: favouritism based on irrelevant criteria, arbitrary treatment, irrational treatment based on unproven views, and penalisation and denial of

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[59]T.G. Kasuso, 'Reflections on the Constitutional Protection and Regulation of Individual Labour Law and Employment Rights In Zimbabwe' (Unpublished LLD Thesis, UNISA, 2021) p. 141.
[60]J. Grogan, *Employment Rights* (Juta, Cape Town, 2010) p. 98.
[61]2007 (2) ZLR 262 (H).
[62]HH 60/14.
[63]*See also Chiremba & Others* v. *Reserve Bank of Zimbabwe* 2000 (2) ZLR 370 (S).
[64]Gwisai, *supra* note 21,p.1.
[65]D. Du Toit *et al, Labour Relations Law: A Comprehensive Guide* (LexisNexis, Durban, 2006) p. 481.

advantages without being afforded an opportunity to be heard.[66] Brassey defines fairness based on commercial rationale and legitimacy.[67] He starts from the premise that the employment relationship is commercial in that the employer intends to make a profit. It is this commercial rationale of profit-making that is the object of the employment relationship. Therefore, for an employer's or employee's conduct to be regarded as fair, it must bear a commercial rationale and must be legitimate in that it must be based on applicable labour legislation.[68] Bosch adopts the traditional view that an employment relationship is a relationship of inequality in that the employer has power over the employee.[69] Therefore, unfairness is when a party to the employment relationship abuses his power.

The constitutional right to fair labour practices 'is essentially about infusing into employment a degree of fairness not guaranteed by the common law.'[70] This as stated in the case of *Association of Professional Teachers* v. *Minister of Education*,[71] aligns with the values of the Constitution and the obligation that it places on courts to integrate and apply the unfair labour practice concept within a human rights culture. In defining the term fairness in the context of section 23(1) of the Constitution of South Africa, it was held that the focus of the right to fair labour practices is broadly speaking, "the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both."[72] While the Constitutional Court found that fairness depends on the circumstances of a particular case and involves a value judgment, it held that fairness required by the right to fair labour practices demands striking a balance between the competing interests of employers, employees, and society.[73] The concept is malleable and premised on the individual circumstances of a particular case and the conflicting and evolving rights and interests of employers and workers.[74] This approach is referred to by Cooper as the equivalence of interest approach.[75] It demands that the concept of fair labour practices recognises the rightful place of equity in the workplace. There can be no fairness where the interests of one party are advanced at the expense of the other. The concept must recognise that what is lawful may be unfair. Therefore, section 65(1) of the Constitution and the Labour Act must be construed in a manner that best promotes the principle of fairness. This requires a court to apply a moral or value judgment to established facts and have due regard to the objectives sought to be achieved by labour legislation.[76]

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[66]Grogan, *supra* note 60, p. 98.
[67]M. Brassey, *The New Labour Law: Strikes, Dismissals and Unfair Labour Practice in South African Law* (Juta, Cape Town, 1987) pp. 65-66.
[68]*Ibid*., p. 98.
[69]C. Bosch, 'The Implied Terms of Trust and Confidence in South African Labour Law', *Industrial Law Journal* (2006) pp. 28-52.
[70]Cohen, *supra* note 37.pp. 482-490.
[71](1995) 16 *ILJ* 1048 (IC) 1077.
[72]*NEHAWU* v. *University of Cape Town* (2003) 24 *ILJ* 95 (CC).
[73]*Ibid.*
[74]Cohen, *supra* note 37, p. 483.
[75]Cooper, *supra* note 53, p. 216.
[76] T. Poolman, *Principles of Unfair Labour Practices* (Juta, Cape Town, 1985) p. 11, summarises the position as follows: "The concept of unfair labour practice is an expression of the consciousness of modern society of the value of the rights, welfare, security and dignity of the individual groups of individuals in labour practices. The protection

It is common cause that the right to fair labour practices is given effect to by the Labour Act which provides a list of unfair labour practices. If a labour practice does not fall within this ambit, the Constitution requires the superior courts to develop the common law and give effect to the right 'to the extent that legislation does not give effect to that right.'[77] The court must identify conduct that is perceived to be unfair. Thereafter, a court must balance the competing interests of employees, employers, and the public before pronouncing on whether such conduct is an unfair labour practice. This broad approach is in line with a purposive interpretation of section 65(1) of the Constitution and the objectives underlying labour legislation. In Zimbabwe, a similar approach of balancing employees' interests, employers' interests, and public interest was adopted by the Labour Court in *Samanyau and 38 Others v Fleximail (Pvt) Ltd*.[78] This case involved quantification of damages in *lieu* of reinstatement in United States dollars after the dollarisation of the Zimbabwean economy in 2009. The employer had insisted on paying the damages in Zimbabwean dollars which had become moribund. Its argument was premised on the principle of currency nominalism. The court held that equity would demand a formula that ensures that the employees get adequate compensation which is not unduly harsh to the employer. There was a need to properly balance the interests of both parties. Further, it was held that the damages to be awarded should not be outrageous in their defiance of logic but had to take into account the relationship between the state of the economy, the capacity of the employer to pay, and employees' entitlement to adequate compensation.[79] However, this approach was not premised on section 65(1) of the Constitution.

10.5 Overview of Judicial Approach in Protecting Labour Rights

It has been established that the mere existence of the right to fair labour practices in a constitution is not enough. The scope and content of the right to fair labour practices is largely dependent on the interpretation of the right by the courts. A generous and purposive interpretative model is best suited for interpreting the constitutional right to fair labour practices. Experience from South Africa demonstrates that this approach has the potential of enhancing the job security of workers and give them more influence over their working lives. In this regard, South African courts have not hesitated to invoke the right to fair labour practices to invalidate laws, customs, conduct, and practices of labour policy that are arbitrary and unfair. For instance, in *Sidumo and Another* v. *Rustenburg Platinum Mines Ltd and*

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envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms. The law cannot anticipate the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance. Labour law practices draw their strength from the inherent flexibility of the concept 'fair'. This flexibility provides a means of giving effect to the demands of modern industrial society for the development of an equitable, systematized body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid."

[77]Cheadle, *supra* note 53,p. 6-11.

[78]LC/H/776/14. This decision followed a remittal of the matter to the Labour Court by the Supreme Court in *Fleximail (Pvt) Ltd v Samanyau& Others* SC 21/14.

[79]*See* also *Madhatter Mining Company* v.*Tapfuma* SC 51/14.

Others,[80] the Constitutional Court of South Africa invoked section 23(1) of the Constitution of South Africa to reject the common law reasonable employer test in determining the fairness of a dismissal. It held that the test advanced employer interests at the expense of the employees. In *SA National Defence Union* v. *Minister of Defence and Another,*[81] legislation prohibiting members of the South African Defence Force from joining trade unions was declared unconstitutional based on section 23 of the South African Constitution. The constitutional right to fair labour practices has also been relied upon to extend labour protections to vulnerable employees such as illegal migrant workers,[82] workers engaged in illegal work[83] , and employees *in utero*.[84]

Unlike their South African counterparts, Zimbabwean courts have been conservative in their approach. The *Greatermans Stores* case bears testimony to this fact. The judiciary has concretised the sanctity and supremacy of the common law in interpreting labour legislation by emphasising lawfulness and not fairness of employer conduct. It has underperformed in its role to protect labour rights. For example, in *Nyamande and Another*v.*Zuva Petroleum (Pvt) Ltd*,[85] the Supreme Court of Zimbabwe exalted the employers' common law right to terminate the contract of employment on notice at the expense of workers job security. The Supreme Court failed to consider the role now played by section 65(1) of the Constitution in ensuring workers access to social justice and democracy in the workplace and guarantee of their job security.[86] Separately, Zimbabwean courts have retained the reasonable employer test in assessing the fairness of a dismissal. This test is rooted in the common law and advances the interests and views of the employer at the expense of the employee thus tilting the scales of justice in favour of employers.[87]

The formalistic approach rooted in the common law has also been maintained in remedies for unlawful dismissal. In Zimbabwe, reinstatement is not a primary remedy and cannot be ordered as the sole remedy. It must be accompanied by an alternative order of damages in *lieu* of reinstatement and the option of whether to reinstate or pay damages lies with the employer and not the employee.[88] Madhuku argues, convincingly, that giving the employer a choice, in every case, to opt for damages as an alternative to reinstatement does not strike the required balance between the interests of the employer and those of the employee.[89] It is a pursuit of the employer's interests at the expense of the employee. Courts have also consistently and inexplicably accepted that worker's statutory rights can be

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[80][2007] 12 BLLR 1097 (CC).
[81](1999) 20 *ILJ* 2265 (CC).
[82]*Discovery Health* v. *CCMA & Others* (2008) 29 ILJ 1480 (LC).
[83]*Kylie* v. *CCMA & Others* (2010) 31 *ILJ* 1600 (LAC).
[84]*Wyeth SA (Pty) Ltd* v.*Manqele* [2005] 6 BLLR 523 (LAC).
[85]2015 (2) ZLR 157 (S).
[86]M.G. Gwanyanya,' Legal Formalism and the new Constitution: An Analysis of the Recent Zimbabwe Supreme Court Decision in *Nyamande and Another* v. *Zuva Petroleum'*, 16 *African Human Rights Law Journal*(2016) pp. 283-299.
[87]*See DHL International (Pvt) Ltd* v. *Tinofireyi* SC 80/14; *Toyota Zimbabwe* v. *Posi* SC 55/07.
[88]*See* the following cases *BHP Minerals (Pvt) Ltd* v. *Takawira* 1999 (2) ZLR 77 (S); *Farm Community Trust* v. *Chemhere* SC 22/13.
[89]Madhuku, *supra* note 24, pp. 248-249.

waived. For example, in *Magodora & Others* v. *Care International Zimbabwe*[90] employees signed contracts of employment in terms of which they agreed that renewal of their fixed-term contracts could not give rise to a legitimate expectation of further renewal. When they claimed unfair dismissal based on section 12B (3) *(b)* of the Labour Act, the Supreme Court held that the employees had waived their rights. They could not in the circumstances entertain any legitimate expectation to be re-engaged.[91] The judicial avoidance of substantive analysis and engagement of the right to fair labour practices by Zimbabwean courts is baffling.[92] It downplays the importance of the broad right to fair labour practices in section 65(1) of the Constitution.

Ultimately, the dominant impression created is that the progress that is celebrated is not translating to the protection of workers' rights. If there is any hope for Zimbabwe to defeat the biggest challenge to transformative constitutionalism, the culture and philosophy of the judiciary in interpreting labour rights has to change. The judiciary must come to terms with the transformative ethos of the new constitutional dispensation.

10.6 Conclusion

In conclusion, the entrenchment of the broad right to fair labour practices in the 2013 Constitution is critical to the development of a labour law jurisprudence based on the rule of law and supremacy of the Constitution. The key to greater protection of workers lies in the judiciary taking the lead in protecting labour rights based on tenets of constitutionalism which demand a purposive interpretation of labour rights. It has been demonstrated that the courts have through their interpretation mandate the ability to substantially increase the rights and freedoms of workers. Their role becomes bigger given their traditional judicial avoidance and obsession with positions and jurisprudence derived from the common law. Zimbabwean courts have shown remarkable slowness and reticence in allowing the right to fair labour practices and values of the 2013 Constitution to influence labour law. The judicial approach is steeped in liberal ideology and the attendant conservative legal culture that predominates private law.

Constitutionalisation of the right to fair labour practices requires a greater degree of fairness to be infused in the employment relationship to facilitate greater substantive fairness in the outcomes of labour disputes. This calls for an increased scope for the exercise of judicial discretion based on fairness, reasonableness, justice, and equality. Nevertheless, judges must be cautioned that the elevation of the right to fair labour practices to a constitutional right does not mean reading their own notions of policy into the Declaration of Rights, thus shifting the function of law

[90]SC 24/14.

[91]*See also UZ-UCSF Collaborative Research Programme in Women's Health* v. *Shamuyarira* 2010 (1) ZLR 127 (S).

[92]For a detailed analysis of the various reasons why judicial avoidance takes place *see* P. Kaseke, 'Towards Good Governance: Interpreting the Right to Administrative Justice in the Zimbabwean Constitution', (Unpublished PhD Thesis, University of the Witwatersrand, 2019) pp. 171-207.

reform from the legislature to the courts.[93] They should not effectively usurp the functions of the legislature but must ensure that labour legislation does not violate fundamental labour rights. This requires a balancing approach in interpreting labour rights and an interpretative approach that furthers the values and principles expressed in the Constitution. A balance must be struck between interventionism and abstentionism.

[93]O. Kahn-Freund, 'The Impact of Constitutions on Labour Law', *Camb LJ* (1976) p. 270; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); *NUMSA* v. *Bader Bop* (2003) 24 *ILJ* (CC) 307.

Chapter 11

Realisation of the Right to Administrative Justice in Zimbabwe: Prospects and Challenges

Walter. T. Chikwana*

11.1 Introduction

Section 68 of the Constitution[1] regulates and protects the broad right to administrative justice. The constitutionalisation of the right to administrative justice is a fairly new concept and heralds the dawn of a new era in Zimbabwe's administrative law which is now grounded on a rights-based model of constitutionalism. It has the potential of preventing the injudicious exercise of administrative discretion and deters administrative authorities from acting arbitrarily. In addition, the constitutionalisation of the right upholds the universal tenets of constitutional democracy and constitutionalism. It effectively affirms the supremacy of the Constitution in the field of administrative law. The constitutional right to administrative justice is given effect by the Administrative Justice Act.[2] This Act predates the Constitution with the effect that section 68 of the Constitution is a restatement of pre-existing rights. Section 68(3) of the Constitution provides that Parliament must enact legislation giving effect to the right to administrative justice. Although the AJA predates the Constitution it is one such Act that seeks to give effect to the rights entrenched in section 68. Therefore, there is no need for Parliament to enact a new Act that complies with section 68 of the Constitution. This necessarily carries with it the attendant difficulty of reconciling pre-existing legislation with the Constitution.

This contribution seeks to ascertain whether the current statutory framework on the right to administrative justice fully gives effect to the constitutional right in section 68. To do justice to the task at hand the contribution also examines the scope and nature of the right to administrative justice. Importantly, the article ascertains whether the limitations on the right to administrative justice imposed by the AJA are consistent with the Constitution. In

* LLB (MSU) (cum laude), LLM (UNISA), DPhil (Cand) UZ.

[1]Constitution of Zimbabwe Amendment (No.20) Act 2013 (hereafter "the Constitution")

[2][*Chapter 10:28*] (hereafter "the AJA").

view of the foregoing, the contribution commences with a brief overview of the right to administrative justice in international law. This is followed by a discussion of the constitutional right to administrative justice. The statutory framework giving effect to the right is then evaluated. Furthermore, the article analyses the limitations of the right to administrative justice in the AJA. It seeks to ascertain whether the limitations are constitutional. The contribution concludes by proffering recommendations on how the Zimbabwean framework on the right to administrative justice can be enhanced.

11.2 International law perspective on administrative justice

The existence of administrative justice is a fundamental requirement of a society based on the rule of law.[3] It signifies a commitment to the principle that the government, and its administration, must act within the scope of legal authority.[4] It also signifies the right of private persons to seek legal redress whenever their rights, liberties or interests are negatively affected when the public administration exercises its duties unlawfully or inappropriately.[5] In such cases, meaningful redress should be obtainable through the initiation of an administrative proceeding in a court or tribunal. The court or tribunal should have the power to exercise judicial review to determine the lawfulness or appropriateness of an administrative act, or both, and to adopt suitable measures that can be executed within a reasonable time.[6]

A balance should be struck between the legitimate interests of all parties, with a view to reviewing the complaint without delay, and efficient and effective public administration. Guaranteeing judicial review of administrative acts by a competent and independent court or tribunal that adheres to international and regional fair trial standards is fundamental to the protection of human rights and the rule of law.[7] It follows that administrative justice in any State ought to conform to international standards and best practices, subject to membership to the relevant international instruments. Administrative justice is governed by several international and regional law instruments which include, but are not limited to, the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976), African Charter on Human and People's Rights (1986) and the Charter of Fundamental Rights of the European Union (2000).

The present human rights regime owes a large part of its existence and development to the Universal Declaration of Human Rights.[8] This was in the wake of the Second World War. The Declaration provides for civil and political rights mainly because it aimed to address the horrors of the Second World War.

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[3]OSCE's Office for Democratic Institutions and Human Rights (ODIHR) and Folke Bernadotte Academy, *Handbook for Monitoring Administrative Justice*,(OSCE/ODIHR, 2013)p. 11, <fba.se/contentassets/dc864f5f60bb4847ad98fda5eafb7bbc/handbook-for-monitoring-administrative-justice-en.pdf> , on 21 June 2021.

[4]*Ibid*.

[5]*Ibid*.

[6]*Ibid*.

[7]*Ibid*.

[8]The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by General Assembly in resolution 217 A (III).

The Universal Declaration of Human Rights[9] makes provision for administrative justice in Articles 8,[10] 10[11] and 21.[12] The UDHR lays a basis for the development of administrative justice in various jurisdictions, Zimbabwe included. The African Charter on Human and People's Rights[13] also addresses administrative justice to some extent in Articles 7 (1)[14] and 13(3).[15] Other international instruments that address administrative justice are the International Covenant on Civil and Political Rights[16] in Articles 2 (3)[17] and 14 (1)[18] and the Charter of Fundamental Rights of the European Union in Article 41.[19]

11.3 The right to administrative justice in Zimbabwe

The evolution of administrative justice in Zimbabwe up to the constitutional incorporation of section 68 can best be described in three phases. The first phase is the pre-2004 period when administrative justice was applied through common law; the second phase is the period between 2004 and 2013, that is, after the promulgation of the AJA, and the third phase is the post-2013 period when section 68 of the Constitution was promulgated which brought about the right to administrative justice in this jurisdiction. The right to administrative justice in the Zimbabwean context is provided for in section 68 of the Constitution which states as follows:[20]

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[9]United Nations General Assembly, 10 December 1948.

[10]"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or law."

[11]"Everyone is entitled full equality to a fair and public hearing by an independent and partial tribunal, in the determination of his rights and obligations …"

[12]"Everyone has the right of equal access to public service in his country."

[13]African Charter (adopted 17 June 1981, entry into force 21 October 1986).

[14]"Every individual shall have the righty to have his cause heard. This comprises of:

a.) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by Conventions, laws, regulations and customs in force…"

[15]"Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

[16]The ICCPR was adopted 16 December 1966, entry into force 23 March 1976.

[17]"Each State party to the Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

[18]"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

[19]It provides that everyone has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions or bodies of the Union.

[20]Section 68 of the Constitution of Zimbabwe, 2013,

(1) "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct."

> "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
>
> (1) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct."

The provisions guarantee the right to administrative justice and further elevate and entrench the right from mere common-law rules and/or statutory provisions under the AJA to a constitutional right that is contained in the Bill of rights. This elevation is based on the concept of Supremacy of the Constitution which currently applies in Zimbabwe under section 2 thereof.

The provision of a right to administrative justice as part of the Bill of Rights means that all other laws and administrative conduct may not be inconsistent with the right. The concept of the supremacy of the Constitution was applied in the Lancaster House Constitution in section 3, but that Constitution did not provide for the right to administrative justice. This right therefore at that time was not part of the law that was considered supreme. The right only existed as a statutory right through the AJA and as such it could easily be amended, repealed, altered or limited.[21]

The recognition of administrative justice as a fundamental right has been rare in older constitutional democracies.[22] By legislating such a right in its Constitution, Zimbabwe was simply following international best practices. O'Regan commented on the significance of the right to administrative justice being captured in the Constitution of South Africa as follows:

> "Recognising that there is a right to administrative justice is the most important starting point in addressing all questions that arise in modern administrative law. It places actions at the heart of administrative law enquiries practices ensure that they are not forgotten when the importance of bureaucratic efficiency, cost-effectiveness or the proper democratic role of the judiciary […] is asserted."[23]

The implication is that the right is now part of the supreme law of the Country and cannot easily be done away with or be amended without following or complying with the necessary constitutional processes.[24] The regulation of public power is now done under the Constitution.[25]Mathonsi J (as he then was) classically captured this

[21]Section 328(b) (a)- (b) of the Constitution now requires that an amendment of any part of the bill of rights will only be effected on condition that, such an amendment is passed by two thirds majority of the parliament and approved by the majority voters in a national referendum.

[22]Countries like South Africa, Namibia, Kenya and Malawi have legislated this right in their Constitutions.

[23]O'Regan, 'Foreword', *Acta Juridica* VII (2006) pp. VII-VIII.

[24]An elaborate process to amend the Bill of Rights is provided in section 328 of the Constitution which requires amongst other things that this must be done by affirmative votes of two-thirds of the membership of each house.

[25]*See Marsh* v. *Registrar General of Citizenship* HH 703-18, *Mahachi* v. *Officer Commanding Matabeleland South Province & Anor* HB 146-16, *Zulfiqar & Anor* v. *Minister of Home Affairs & Anor* HH 695-17 where Mangota J had this to say; "It is stressed that the above cited provisions of the Constitution do not exist for cosmetic purposes. They impose a real duty on those who are in administration to adhere to them to the letter and spirit. Administrators in, and out of, Government should at all times act promptly, efficiently and fairly."

position in *Telecel Zimbabwe (Pvt) Ltd* v. *Postal and Telecommunications Regulatory Authority of Zimbabwe &Ors*[26] when he stated thus:

> "the concept of administrative justice is now embedded in Our Constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised"[27].

The constitutionalisation of administrative justice rights brought with it various fundamental developments in the application of the right in this jurisdiction. The first one is that since this is a fundamental right, the state has a duty to respect, promote, protect and fulfil the rights and freedoms set out in the Bill of Rights [28]and this includes the right to administrative justice. The second development is the relationship between common law and section 68. The legislation of section 68 meant that common law got assimilated into the constitutional provisions. The common law principles are now enforced through the Constitution; when one were to challenge the validity of the exercise of public power in the absence of the Act, this would be done in terms of section 68 because there could be no separate common law cause of action. In *In Re: Ex Parte President of the Republic of South Africa* [29], the court commented on the relationship between common law and section 33 of the Constitution of South Africa as follows:

> "Common law principles that previously provided grounds for judicial review of public power have been subsumed under the Constitution and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution."[30]

The other development which in effect is much more far reaching is that the AJA is required by the Constitution to operationalise the provisions of section 68. Section 68(3) of the Constitution provides that an Act of Parliament should operationalise and give effect to the rights provided for in sections 68 (1) and (2). The section states:

> "(3) An Act of Parliament must give effect to these rights, and must—
> (a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
> (b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration."

The import of this provision presupposes that at the time it was legislated no Act of Parliament provided for administrative justice in Zimbabwe and that an Act of Parliament should now be legislated to give effect to the rights stated. This,

[26]2015 (1) ZLR (H) 651.
[27]At 652E-F.
[28]*See* section 44 of the Constitution.
[29]2000 (2) SA 674 (CC).
[30]At para. 33.

however, is not the case because when section 68 was legislated in 2013, the AJA had long been in operation since 2004. In other words, the AJA preceded section 68 of the Constitution.[31]Mafusire J in *B (a Juvenile)* v. *Ministry of Primary and Secondary Education* [32] properly captures this scenario when he commented thus:

> "Section 68 of the Constitution provides for the right to administrative justice […].The section then behoves Parliament to enact legislation to give effect to these rights, even though the Administrative Justice Act [*Chapter 10:28*] predates the current constitution. In my view, it is one such Act of Parliament that seeks to give effect to the rights and freedoms enshrined in the constitution, the audi rule and its extension, legitimate expectation doctrine."

The way the provision is couched shows that the drafters of the Constitution were well aware of the fact that an Act of Parliament was already in existence but that they (the drafters of this subsection) were concerned that should the said Act of Parliament through its provisions not give adequate effect to the rights provided for in sections 68(1) and (2) of the Constitution, then the Act should be amended for that to happen. The implication of this provision, therefore, is that there is no need for Parliament to legislate a completely new Act that complies with section 68. It behoves Parliament to ensure that the present Act complies with the Constitution.

The argument makes sense if one compares this provision section 68 (3) with section 33(3) of the Constitution of South Africa.[33] At the time section, 33 (3) was legislated in 1996 the national legislation being envisaged was not yet in place. That is why the provision specifically requires that such national legislation must be promulgated. It was only in 2000 that the Promotion of Administrative Justice Act (PAJA) was promulgated in compliance with the requirements of section 33 (3) of the Constitution of South Africa. The realisation of administrative justice in Zimbabwe as provided in section 68 of the Constitution is therefore done through its operationalisation by the AJA. The Act is now the pathway to the enforcement of administrative justice in Zimbabwe. Malaba DCJ (as he then was) gave a classical exposition of the law on this issue in the case of *Zinyemba* v. *Minister of Lands and Rural Resettlement &Another*[34] when he stated as follows;

> "Once an Act of Parliament which gives effect to all the rights to just administrative conduct set out in subsection (1), (2) and (3) is enacted, s 68 of the Constitution takes a back seat. The question of whether any administrative conduct meets the requirements of administrative justice must be determined in accordance with the

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[31]This is however different from the situation in South Africa in which the Promotion of Administrative Justice Act Number 3 of 2000 (PAJA) was promulgated in 2000 in compliance with the provisions of section 33(3) of the South African Constitution which have the same contents with Zimbabwe's section 68(3).

[32]2014 (2) ZLR 341 (H) 350G–351A.

[33] It provides:

> "(3) National legislation must be enacted to give effect to these rights and must-
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration."

[34]2016 (1) ZLR (CC) 24.

> provisions of the Administrative Justice Act. Unless there is no Administrative Justice Act or the complaint is that the provisions of the Act do not give effect to the fundamental rights guaranteed under s 68(1) of the Constitution in the terms required by subs (3), s68 cannot found a complaint of its violation in terms of s 85 of the Constitution."[35]

This position of the law is also enunciated in South Africa on the relationship between PAJA and section 33 of the Constitution of South Africa. Curie and De Waal had this to say;

> "Since the commencement of PAJA judicial review of administrative conduct generally have a legislative basis. In other words, it is based on the rights, duties and remedies provided for in the Act itself. The rights to just administrative action in the constitution now play an indirect than a direct role in judicial review."[36]

Since the Act is already in existence, section 68 now takes a back seat and the enforcement of the rights stated in that section is now done through the Act. The only time when one relies on the Constitution directly ignoring the Act is when or where the provisions of the Act are in conflict with the Constitutional provisions.[37]

The other significant development made by section 68 to the administrative justice jurisprudence is the introduction of the term 'substantive fairness' as a ground of review. The term substantive fairness is a new phenomenon[38] in administrative justice in Zimbabwe. Section 68 (1) now requires that the administrative conduct must be both 'substantively' and 'procedurally' fair. The court referred to these two elements of fairness in *Musa and Ors* v. *The Commissioner General of Police & Ors*[39] when it stated as follows:

> "The constitutional issues raised serve to confirm the fatality of the summary dismissal without following the proper disciplinary procedures. In terms of s 68(1) of the constitution, every person has a right to administrative conduct that is both substantively and procedurally fair. Such fairness cannot be from denying applicants the right to be informed of the intended adverse administrative action and to be heard over the allegations."[40]

The inclusion of this term (substantive fairness) adds another dimension to administrative justice. It would appear that the courts are now required to consider not only the process/procedure but also the substantive fairness of the decision. Commenting on this development, Feltoe had this to say:

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[35]At page 26D-E.

[36]L. Curries and J. De Waal, *Bill of Rights Handbook*, (Juta Co 6th ed) p. 646. Juta and Company (PTY) LTD 2013

[37]*See Zinyemba* v. *Minister of Lands,supra* 2016 (1) ZLR (CC) 24) p. 26D.

[38]Section 68 (1) of the Constitution. Ordinarily administrative justice is concerned with procedural fairness.

[39]HH-843-17.

[40]In *Mutangadura* v. *Hodzi & Anor* HH 142-19, Zhou J was commenting on the arbitrary transfer made by the respondents on the applicant when he stated as follows; "Apart from the unlawfulness of the respondents' conduct arising out of the contraventions of the National Prosecuting Authority Act and the regulations as outlined above, the further illegality of the decision arises from contravention of s 68 (1) and (2) of the Constitution. The decision was not lawful; it was not fair, both *procedurally and substantively*. It was not procedurally fair because no reasons were given for it…it was not substantively fair because the applicant is in essence being demoted."

> "The old approach where the courts delved only into the manner by which the administrative decisions were taken and avoided dealing with the substantive merits of the decision has thus been largely swept away because now the courts will be obliged to examine the substantive fairness of the administrative action."[41]

The significance of this provision is that it now conjoins the two terms, procedural and substantive fairness and this has the effect of strengthening administrative justice as a whole in that the underlying principle that should be followed is that of fairness. The process must be fair and the result must reflect fairness.

The term 'substantive fairness' would refer to the merits of the matter. When a court looks at a substantive issue, it entails interrogating the real merits or demerits of that matter. In other words, the rehearing of a matter to deal with the substantive issues or merits is generally done on appeal rather than on review. There is a clear distinction between the appeal and review processes. An appeal is about determining the correctness of a decision through the assessment of its substantive merits.[42] Review on the other hand is a less exacting procedure in terms of which the court solely assesses the decision-making process to determine whether the outcome was arrived at in an acceptable fashion.[43] The inclusion of substantive fairness in section 68 (1) however is done in the context of judicial review and not appeal.[44] Since the advent of constitutional democracy with its emphasis on fairness and reasonableness, this bright line distinction between appeal and review is dimming as the review process now has a substantive element as well.[45] This wider form of review has encouraged a fundamental shift away from an all-or-nothing approach to judicial review to a more nuanced or variable approach that has as its focus a determination of what administrative justice demands in a given case.[46]Corder expressed the same sentiments in the following manner:

> "Secondly, we need openly to acknowledge that the old approach to distinguishing review from the appeal is no longer tenable. It is also not necessary, as our courts have now been expressly authorized to determine the reasonableness of administrative action, which must contain a merits-based substantive element. However, this is not an appeal and nor is it mere procedural review: perhaps it would be better to describe what is required now, in all honesty, as 'substantive' or 'wide' review. We must

[41]G. Feltoe, *A Guide to Administrative and Local Government Law in Zimbabwe* (Legal Resources Foundation, Harare, 2017) p. 26.

[42]*See* comments by Hungwe JA in *Robert S* v. *Maphosa v.* HH -323-13.

[43]L. Kohn and H. Corder, 'Judicial Regulation of Administrative Action in South African Monograph and Constitutional Law' in C. Murray and C. Kirkby (eds.), *Suppl. 108 International Encyclopaedia of Laws* (IEL) 2014) p.640. http://www.ielaws.com/

[44]*See* section 68 (3) (a) which provides as that an Act of Parliament must provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal.

[45]*Bato Star Fishing (Pty) Ltd* v. *Minister of Environmental Affairs* 2004 (4) SA 490 (CC) [45] p493 paragraph 42 at 511D – E. Ngcobo J noted that

> "Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[46]Kohn and Corder, *supra* note 43, p. 641.

> acknowledge, too, that the merits were inevitably referred to, even in the circumstances of 'procedural' or 'narrow' review, in our wicked past."[47]

Clearly, the new constitutional dispensation now demands a wider form of review that includes both procedural and substantive fairness. Through the inclusion of substantive fairness in section 68(1), the constitutional jurisprudence in Zimbabwe has moved in line and in conformity with the direction which is being followed in the new era of constitutional law. A person aggrieved by the substantive fairness of an administrative decision may now take it on review.

Various situations may arise in administrative law in which citizens may require protection that goes beyond procedural fairness that is when substantive fairness comes into being. Craig[48] provides some of the situations which may arise where substantive fairness may be called into application. These are (a) a general norm or policy choice which an individual has relied on has been replaced by a different policy (b) a general norm or policy choice had been departed from in the circumstances of a particular case (c) An individual representation has been made to a person which he has relied upon but then the public authority seeks to depart from this in light of a shift in general policy and (d) An individual representation has been made to a person which he has relied upon but the public authority then changes its mind and makes a decision in relation to that person which is inconsistent with the original representation.[49]

Having presented and discussed the international and constitutional perspective relating to administrative justice, the discussion now turns to some salient aspects of the AJA impacting on the section 68 right.

11.4 The Administrative Justice Act[50]

The legislation of the AJA was meant to codify[51] administrative justice, set out the basic duties of administrators and makes clear the protections that the law provided to the public.[52] The development marked the movement of the application of administrative justice to a higher level than what was done in terms of common law. Patel JA referred to the codification and relationship between the AJA, common law and the Constitution in *City of Harare* v. *Mushoriwa*[53]when he stated thus;

> "Insofar as concerns the exercise of any power or discretion conferred by any enactment, it is axiomatic that the functionary invested with the power to act or decide must comply with such rules of natural justice as are appropriate to the function to be performed as well as the time and circumstance in question. The two basic requirements in this regard enjoin the functionary concerned to decide without bias and to allow representations to be made before the decision is reached or any

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[47]H.Corder, 'Without deference, with respect: A response to Justice O'Regan', *SALJ* (2004) p. 443.
[48] P. Craig, *Administrative Law* (4th ed.)(Sweet and Maxwell, 1999) p.613.
[49]Feltoe, *supra* note 41, p. 76
[50]*[Chapter 10:28].*
[51]*See* comments by Makarau JP (as she then was) in *U-Tow Trailers* v. *City of Harare* 2009 (2) ZLR 259 (H) p.268B.
[52]Report Law *Development Commission of Zimbabwe* (No.62) Zimbabwe Ministry of Justice Legal and Parliamentary Affairs, [Harare] The Commission [1997] which made recommendations for the promulgation of the AJA.
[53]S-54-18.

> consequential action is taken. These basic tenets, as derived from the common law and embodied in the maxims *nemo debetesse judex in suaaut propria causa* and *audi alteram partem*, are now codified in s 3 of the Administrative Justice Act [*Chapter 10:28*] and reaffirmed in s 68 of the Constitution."[54]

The same effect was also felt in South Africa after the promulgation of the Promotion of Access to Administrative Act[55] (PAJA), with Curie and De Waal commenting that the PAJA provides a legislative basis for the review of certain classes of administrative actions and sets out procedures to be followed *by* administrators before certain decisions or rules are made.[56]Makarau JP (as she then was)in *U-Tow Trailers (Pvt) Ltd* v. *City of Harare*,[57]also dealt with the significance of the AJA when she remarked that the promulgation of the Act brings a new era in administrative law in this jurisdiction. She further stated that it can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law.

The AJA therefore before the new Constitution came into being was the most effective avenue for victims of maladministration to vindicate their rights but at the same time, it gave guidelines especially in section 3 to the administrators on how to comply with the dictates of the law before taking decisions that will have prejudicial effect to the public. After the promulgation of section 68 of the Constitution, the importance of the Act became even more profound as it is now the pathway to the application of the rights given in section 68.

11.4.1 Duty of administrative authorities in the AJA

Section 3 is one of the most important provisions of the AJA as it captures the elements of the right to administrative justice provided in section 68 (1) – (2) of the Constitution. The section in sub-sections (1) and (2) obliges administrative authorities to act lawfully, reasonably, procedurally fair and to provide reasons. Section 3 (1) provides as follows:

> **"3 Duty of administrative authority**
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
> (a) act lawfully, reasonably and in a fair manner; and
> (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
> (c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned."

[54]See also comments in *Telecel Zimbabwe (Pvt) Ltd* v. *Potraz and Ors* HH-446-15; *Maqele & Ors* v. *Vice Chancellor Professor NM Bhebhe N.O & Anor* HB-129-16.
[55]Act No 3 of 2000.
[56]I. Curie and J. De Waal, *The Bill of Rights Handbook*, (5th ed, Juta & Company (Pty) LTD South Africa2013) p. 644.
[57]2009 (2) ZLR 259 (H).

This provision satisfies the rights provided for in section 68(1) of the Constitution. What must however be noted is that section 3 (1) does not mention all the elements of the right stated in section 68 (1). Section 3 (1) (a) only refers to the following three elements that is 'lawfully', 'reasonably' and in a 'fair manner'. There are however elements that are stated in section 68 (1) but have not been captured in the Act. The following elements are not mentioned in the AJA; prompt, efficient, proportionate, impartial and substantive fairness.[58] As a rule of constitutionality, section 3 (1) of the AJA must provide for all the review grounds that are listed under the constitutional right to administrative justice. Whilst some of the elements are dealt with for example in terms of the common law,[59] it's a constitutional imperative that all these elements must be mentioned in section 3 (1). The absence of such brings the constitutionality of this provision into question. Section 3 must therefore be amended to give full effect to the constitutional right to administrative justice as stated in section 68 of the Constitution.

Section 3 (2) is more specific as it provides the mandatory core requirements for procedurally fair administrative conduct.[60] This subsection is meant to give effect and content to the element of the right to procedural fairness. The use of the word 'shall' is pertinent. It implies that the administrator has no discretion in complying with the core requirements. What is interesting about section 3 is that it gives guidelines to administrators on what is expected of them, it is proactive. The AJA ought to be an instrument of both pro-action, to prevent objectionable proposed administrative action and reaction to redress administration gaffes and to promote good administration as well.

Section 3 (1) requires an administrative authority to act in a fair manner. At the time the AJA was legislated reference was to procedural fairness which was also applied in terms of the common law. Now that the Constitution distinguishes fairness in two forms: is "procedural and substantive", the Act is expected to recognise the distinction by mentioning both forms of fairness in Section 3 (1) (a). Anything short of that may bring to question the constitutionality of section 3 (1) (a).

The impact of the act therefore in the development of administrative justice in this jurisdiction cannot be over-emphasised. The law became more certain and administrators stood guided. What however remained a challenge is that this law was applied at the whims and desires of politicians, the legislature. This is because it was treated like any other ordinary piece of legislation and could be amended at any time by politicians to meet their political objectives. That is why we have provisions like section 11[61] in the Act that excludes certain state institutions like security forces[62] from complying with the provisions of section 3. Such

[58]Substantive fairness will be discussed in greater detail later.

[59]The duty to act impartially is an integral part of common law principles of *nemo judex in sua causa* (rule against bias) .*See* also Feltoe, *supra* note 41, p.89.

[60]For administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), the administrative authority shall give adequate notice of the nature of the proposed action, an opportunity to make adequate representations and adequate notice of any right of review or appeal where applicable.

[61]Section 11 of AJA

[62]That is the Police, Prisons and Army.

provisions are not acceptable in a democratic society.[63] Administrative justice is important especially to the lives of the ordinary people of the country because daily decisions that affect them are made by public officials hence it's critical that these officials remain regulated and accountable to the law. Consequently, it also becomes important that such a law should be placed at a much higher level than an ordinary piece of legislation. This could only be done by upgrading it to a constitutional provision and make it part of the Bill of Rights. Such welcome development came about in 2013 when the new Constitution of Zimbabwe came into being and section 68 which provides for the right to administrative rights was legislated.

11.4.2 Locus standi in terms of the Act

The AJA provides *locus standi* only to persons that have sufficient personal interest in the matter concerned.[64]*Locus standi* refers to the eligibility of persons to approach and present a matter for adjudication before the court.[65] In terms of section 4 (1) of AJA, only persons who are aggrieved by the failure of an administrative authority to comply with the rights and duties under the Act may apply to the High Court for relief. There must be personal interest that must be affected for *locus standi* to arise; that is when the administrative action affects personal liberty, property or a legitimate expectation of a benefit.[66] Thus *locus standi* under the AJA is limited to persons that can demonstrate sufficient personal interest in the matter. This provision has the effect of limiting public interest litigation.

The old Constitution[67] did not provide as much sympathy to public participation as what is now provided by the new Constitution.[68] The Constitutional Court relying on the provisions of the old Constitution regarding the direct approach to the court by the public[69] took a narrow approach on the issue of *locus standi* to the public.[70] The courts were generally fearful of applying the *audi alteram partem* principle to the public too widely.

There has now been a fundamental shift of the law through the promulgation of section 68 which provides for the right to administrative justice. The founding values and principles of the Constitution talk to transparency, justice, accountability and responsiveness.[71] The promulgation of section 85[72] has also liberalised the question of *locus standi* to the public.

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[63]Feltoe, *supra* note 41, pp 38–39.

[64]*See* Feltoe, *supra* note 41, p.49 and section 4 (1) of AJA.

[65]Currie. I and J. De Waal, *supra* note 56, p.73.

[66] *See Stevenson* v. *Minister of local Government and National Housing* S-38-02 p.4.

[67]Constitution of Zimbabwe 1980, Schedule to the Zimbabwe Constitution Order 1979 (*S.I*. 1979/1600 of the United Kingdom.

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

[69]Direct approach to the court was provided for in section 24 of the Lancaster House Constitution.

[70]*See United Parties* v. *Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S); *Nyamandhlovu Farmers Association* v. *Min of Lands & Another* 2003 (1) ZLR 185 (H); *Law Society* v. *Minister of Justice* 2006 (2) ZLR 19 (S).

[71]Section 3 (2) (a) of the Constitution.

[72]Section 85 provides for the fundamental human rights and freedoms. The section provides for the list of persons who have the locus standi to approach a Court, alleging that a fundamental right or enshrined in this Chapter has been or is likely to be infringed. Appropriate relief or an award for compensation may be awarded for the infringement.

The provisions of section 85 (1) are specific in widening the concept of *locus standi* in general by allowing the public access to the Constitutional Court or any other competent court to vindicate violated constitutional rights. The initial deviation from the restrictive approach to *locus standi* was laid out in *Mawarire* v. *President of the Republic of Zimbabwe & Ors*;[73] when the court - commented as follows about the Lancaster House Constitution;

> "The objections by the second and fourth respondents to the applicant's right to approach this court for relief are based on a restrictive approach to locus standi in the pre-2009 period and a failure to appreciate that the 2009 Amendment No. 19 has thrown wide open the right to seek relief in terms of s 24(1) to any and every citizen who is affected by the failure of public officials to uphold the law… Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements."[74]

The AJA at the moment however does not have provisions that provide for public participation before a decision that affects the public is taken. This is the position that has been propagated by the courts within this jurisdiction and beyond[75] that, the rules of natural justice have no application to the public at large. This attitude is not only archaic but also not in sync with the developing jurisprudence on administrative justice in Africa and beyond. There is a need to widen the concept of *locus standi* in the Act so that it complies with the new Constitutional dispensation. The Act should have a provision that would extend the requirements of fairness to the public by prescribing to administrators the procedures to follow before an adverse decision to the public is taken. The benefits of such a provision are enunciated by Mass[76] in the following manner:

> "On the one hand, it is a helpful tool for the administration because it provides new information and exposes possible weaknesses in a planned administrative action. On the other hand, it alerts the public to the intention of the administration, allowing for early control and possibly, protest. Public participation can, at the same time, increase the general acceptance of the administrative action and it might be argued that providing for a 'surrogate political processes, increases the democratic legitimacy of the administrative action and helps to compensate for the fact that most administrative actions are not taken by democratically elected representatives."

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[73] 2013 (1) ZLR 469 (CC).

[74] *Mawarire*, *supra* note 73, paras. 476E - 477D.

[75] Botha JA expressed the attitude of the courts as follows in *Pretoria City Council* v. *Modimola*1966 (3) SA 250 (A):

> Where a public authority is authorized to take a decision prejudicially affecting the property or liberty of members of the whole community --- no principle of natural justice is violated by a decision taken under the statute without affording an opportunity to every individual member of the community be heard before a decision is taken.

[76] C. Mass ,'Section 4 of the PAJA and procedural fairness in Administrative Action Affecting the Public : A Comparative Perspective', in C. Lange and J. Wessels (eds.), *Right to Know : South Africa's Promotion of Administrative Justice and Access to Information Acts* (Siber Ink South Africa) (2002) p. 63. *See also* I. Currie *See also* Currie, I *The Promotion of Administrative Justice Act: A Commentary* 2nd ed. (Siber Ink South Africa, 2007) ,section 5.1.

In South Africa, following the promulgation of section 33 of the Constitution of South Africa, section 4 of PAJA was also legislated. This section sets out circumstances in which the public is entitled to procedural fairness. It places a duty on the administrator to hold a public inquiry, or to follow a notice and comment procedure. Provisions of similar nature[77]may be added to the Act so that the public's right to administrative justice is assured.

In view of the current situation, however, where the AJA does not provide for fairness to the public, the public may seek protection against administrators' maladministration conduct through section 85 (1) of the Constitution by making a direct application to the court.[78]This, however, should not be the case as vindication of the right must be through the AJA in line with the principle of subsidiarity as stated in the *Zinyemba* case.

11.4.3 Exceptions from requirements of fair procedure

Section 3 (3) of the AJA[79] permits an administrative authority to depart from any of the requirements referred to in subsections (1) and (2) where the enactment under which the decision is made expressly provides for such a departure or where under the circumstances it is reasonable and justifiable to do so.

Feltoe argues that the provisions of section 3 (3) are unconstitutional in that no administrative authority should be allowed to deviate from the provisions of section 3(1) and (2); that no law should provide for such deviation and that the provisions of section 3(3) are too wide and open to abuse as they simply refer to circumstances that are 'reasonable and justifiable'.[80]

The first justification that allows an administrator to deviate from the requirements of sections 3 (1) and (2) is straightforward that is, where the law under which the decision is made expressly provides for such a deviation. The provision implies that the administrator is guided by the law being applied at that time.

The provisions of sections 3 (1) and (2) are similarly provided for in sections 68 (1) and (2) of the Constitution. The concept of constitutional supremacy is such that any law, practice, custom or conduct inconsistent with the Constitution is invalid to the extent of the inconsistency. There can be no law or conduct that

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[77]Similar to those of section 4 of PAJA.

[78]*See* the comments of Malaba DCJ (as he then was) in *Zinyemba v. Minister of Lands*, *supra* note 34. p24.

[79]The section reads:

> (3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—
>
> (a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
>
> (b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including—
>
> (i) the objects of the applicable enactment or rule of common law;
>
> (ii) the likely effect of its action;
>
> (iii) the urgency of the matter or the urgency of acting thereon;
>
> (iv) the need to promote efficient administration and good governance;
>
> (v.) the need to promote the public interest.

[80]Feltoe, *supra* note 41, p.36.

should vary or allow deviation from the provisions of section 68 (1) and (2) of the Constitution. Section 3 (3) (a) is therefore unconstitutional where it allows the administrative authority to depart from the requirements of sections 3 (1) and (2) of AJA, which is similar to section 68 (1) and (2) of the Constitution.

The second justification to depart from procedural fairness is in section 3 (3) (b) when under the circumstances it is 'reasonable and justifiable' to do so. This may be problematic on the face of it because it would appear that too much discretion is being given to the administrator when deciding whether it is 'reasonable and justifiable' to deviate from the requirement of fairness. However, this is not the case because the discretion is strictly controlled by the Act itself and the Constitution. Section 3(b) (i)-(iv) provides the factors in which deviations from provisions of 3 (1) and (2) are permissible. The administrator is therefore restricted in the exercise of discretion in this context. It's therefore not an open-ended discretion. The circumstances which are 'reasonable and justifiable' should also be viewed in the same manner with reference to the provisions of section 86 (2) (a)-(f) of the Constitution, the limitation clause.[81] These provisions of the Act and the Constitution are couched in similar language. In light of the principle of supremacy of the Constitution,[82] section 3(3) (b) of the Act must be consistent with section 86 and the interpretation of that section should also show such consistency.

One could therefore contend that the provisions of section 3 (3) (b) are similar to those of section 86, hence there is nothing unconstitutional about them. They would pass the constitutional test. Section 3 (3) of the Act is also similar to section 3 (4) of PAJA.[83]Commenting on this section, De Villiers [84] had this to say:

> "The PAJA also recasts the procedures and tests for permissible deviations from procedural fairness. The PAJA allows its provisions to be excluded at the initiative of the administration in far different ways:
>
> (i) where the administrator has decided, in particular, circumstances and usually owing to urgency, to depart from the specific requirements of s 3(2);
> (ii) where the Minister has allowed an administrator to vary specific requirements in s 3(2) in order to advance administrative efficiency;
> (iii) where there is a provision empowering the administrator to follow a procedure which is fair but different from s 3(2) of the

[81]Section 86 (2) provides for limitations of rights and freedoms.

[82]Section 2 (1) of the Constitution.

[83]Promotion of Administrative Justice Act of South Africa. The section provides:

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v.) the need to promote an efficient administration and good governance.

[84]N. de Villiers, 'Social Grants and the Promotion of Administrative Justice Act,' 18:3 *South African Journal on Human Rights* (2002) pp.320-349.

PAJA, usually because that procedure applied before the commencement of the Act and is more suitable to the particular circumstances or is tried and tested; and

(iv) where the Minister has granted an exemption to administrative action or group or class of administrative actions, typically for executive reasons.

These exemptions are permitted if they are either 'reasonable and justifiable in the circumstances or 'fair' and thereby the PAJA simply restates the 1996 Constitution's standard for limitation of rights."[85]

The law relating to dealing with limitations of rights as enunciated in *Woods* v. *Minister of Justice & Ors* [86] when the court held:

> "What is reasonably justifiable in a democratic society is an elusive concept. It defies the definition by the courts. There is no legal yardstick… that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual."

In the *Nyambirai* v. *NSSA* Gubbay CJ (as he then was) commented as follows in the consideration of a limitation clause:[87]

> "In effect, the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:
>
> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
> (ii) the measures designed to meet the legislative objective are rationally connected to it; and
> (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

The issue is not the legality or otherwise of the limitation clauses because they are perfectly legal. The test is whether the limitation is 'reasonable and justifiable' in the circumstances of the case. If the limitation fails to pass that test as laid out in the *Nyambirai* case, then the conduct is unconstitutional hence illegal. It is therefore submitted that section 3 (3) is constitutional.

11.5 Constitutionality of the ouster clauses

The Administrative Justice Act contains several ouster clauses. The constitutionality of these ouster clauses is discussed here. An ouster clause is defined as a clause that seeks to exclude the jurisdiction of the courts.[88] It is a clause or provision

[85] *Ibid.,* p.331
[86] 1994 (2) ZLR 195 (S).
[87] 1995 (2) ZLR 2 (S) p13
[88] Oxford University Press (2021). Oxford Reference, 30 August 2021 <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100347172>

included in a piece of legislation by a legislative body to exclude judicial review of acts and decisions of the executive by stripping the courts of their supervisory judicial function. The approach has been that administrative officials are only permitted to act in terms of legislation and any ouster clause does not remove the jurisdiction of the courts to review action not taken in terms of legislation.[89]

11.5.1 Exclusion of certain decisions of the cabinet from review under AJA

In terms of section 11 (1), individuals affected by decisions of public officials listed under section 1 of part 1 of the schedule to AJA have no right to demand and receive written reasons for such decisions. The decisions listed under section 1 of part 1 of the schedule to AJA are those decisions made by the President and members of the cabinet when exercising their executive powers or functions. Executive powers and functions of the President and cabinet are provided for under section 110 of the new constitution. Such powers and functions include the authority to receive and accredit foreign diplomatic officials as well as developing and implementing national policy.

Of particular interest is the effect that section 11 (1) of AJA has on the powers of the court to review decisions made by the President or members of the cabinet when performing their executive functions in terms of the Constitution's section 110 (3)(d) power to implement national policy. Essentially under section 11 (1) of AJA, ministers and their deputies are exempted from AJA's duty to act procedurally fair and the duty to provide written reasons when they make decisions that are part of the process of implementing national policy irrespective of whether such decisions are of prejudicial effect to the aggrieved person or public. In other words, AJA allows them to proceed in such a manner with impunity and without being accountable. The constitutional validity of section 11 (1) of AJA may therefore be challenged on the basis that, it undermines the constitutional right to administrative justice, particularly the right to receive written reasons and the right to procedural fairness for persons that are adversely affected by the decisions of the President and the cabinet in implementing national policy. This provision is also in conflict with other Constitutional imperatives like the founding values and principles.[90]

Even though some may argue that decisions made by cabinet members can still be reviewed under the general principle of legality, administrative law review is more comprehensive than review under the broad principle of legality. While commenting on judicial review in South Africa, De Ville noted that review of executive action under the general principle of legality (sometimes referred to as the principle of the rule of law) is confined to inquiry into whether the functionary acted with *mala fid*e, misconstrued the nature of his or her powers and whether such functionary acted rationally.[91] This view is true of how to review under the

[89] *Natal Newspapers (Pty)* v. *State President of the Republic of South Africa* 1986 (4) SA 830 (A).

[90] Section 3 provides for founding values and principles which include good governance and rule of law.

[91] J. De Ville, *Judicial Review of Administrative Action in South Africa, (Revised* 1st ed,) (LexisNexis South Africa, 2005)p.60.

broad principle of legality is applied in Zimbabwe. In Zimbabwe, review under the principle of legality consists of a test of the rationality of the decision, which is essentially examining whether the decision is provided for by law and is consistent with the purpose of the law and is logically capable of achieving the objective of the law as well as reviewing the logic of the relationship between the decision and the purpose for which that decision has been taken.[92] As such, the principle of legality includes reason-giving but does not necessarily include the constitutional duty to act procedurally fairly unless where the specific enabling legislation requires a certain process to be followed when making the decision.

Contemporary public administration is bedevilled with such challenges as corruption and general abuse of power and these challenges are attributed to secretive decision-making tendencies by state officials.[93] Government decision-making processes in Zimbabwe are not free from this undesirable reality. As such, the duty to provide a fair hearing and general procedural fairness is a fundamental aspect of administrative justice that seeks to ensure that the public participates in decision-making processes to reduce social ills like corruption in the public administration system.[94] The effect of section 11(1) of AJA is that, even though the constitutional right to administrative justice requires public officials to act procedurally fair, section 11(1) of AJA exempts such public officials from that duty as long as they can argue that the impugned decisions were made by cabinet Ministers in the course of policy implementation. This is undesirable in view of the new Constitutional dispensation.

To avoid a scenario where individuals end up without recourse from violation of their administrative right to procedural fairness, section 11(1) of AJA must be struck off and be replaced with a provision that exempts only those decisions that are made by the cabinet and the President as part of exercising executive power that is directly derived from the Constitution. Exercise of executive authority as part of implementing legislation or any other national policy must be subjected to the duty to act procedurally fair and to supply written reasons. As it is, section 11(1) is too broad and may result in the right to procedural fairness concerning executive action being unenforceable.

The same argument applies *mutatis mutandis* to the decisions of the appointment of judicial officers. Section 68 of the Constitution requires the administrative authority to provide a person adversely affected by administrative conduct the right to be given promptly and in writing the reasons for the conduct. Section 180 of the Constitution provides for an expansive and clear public recruitment process for judges which include public interviews. Section 191 talks to fairness and transparency of proceedings of Judicial Service Commission and section 62 provides for every person including the media the right to access information.

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[92]*See Zambezi Proteins (Pty) Ltd* v. *Minister of Environment and Tourism* 1997 (1) ZLR 563 (S) p. 565H-567G. Also See definition of rationality in C. Hoexter, *Administrative Law in South Africa* (2nd ed.), (Juta & Company (PTY) LTD, South Africa, 2012) p. 340.

[93]Feltoe, *supra* note 41, p.31.

[94]*See* generally Hoexter, *supra* note 92, p.406. -. *et seq*.

In light of these new Constitutional provisions, it may now be problematic for the exclusion clause relating to the appointment of judges to remain in existence. This clause is no longer consistent with the new Constitutional provisions hence it may need to be done away with.

11.5.2 Ouster of the right to receive written reasons

In terms of section 11(2) of AJA, persons that are adversely affected by decisions that are made as part of disciplinary proceedings in terms of the Defence Act *[Chapter 11:02],* the Police Act *[Chapter 11:10]* and the Prisons Act *[Chapter 7:11]* are not entitled to the right to receive written reasons. The cumulative effect of section 11 (2) of AJA is that as a general rule, members of the military, the police and prison services who are negatively affected by decisions taken in disciplinary proceedings against them cannot invoke their constitutional right to be given written reasons unless they can prove to the court that there is no apparent public interest that is served by withholding the written reasons.[95]

Section 11 (2) is unconstitutional because it violates the constitutional right of the affected persons to be given written reasons concerning the decisions made against them. Section 68 (2) of the constitution gives any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct, the right to promptly receive written reasons. Disciplinary decisions taken in terms of the legislation are a form of administrative action as defined by AJA through section 2 (1). Just like every other individual in Zimbabwe, members of the police, the military and the prison services are therefore equally entitled to this section 68 (2) constitutional right in situations where their rights or interests are negatively affected by disciplinary decisions made against them. The Defence Act, Prisons Act and the Police Act do not provide for a right to receive written reasons in case of disciplinary proceedings that negatively affect one's interests and rights. To exclude the members of the military, the police and prison services from the constitutional right to be given such reasons constitutes unfair discrimination and directly contravenes such people's constitutional right to be given written reasons as provided under section 68(2) of the constitution. By virtue of excluding the members of the uniformed forces, from the right to be given written reasons, section 11 (2) of AJA is also inconsistent with section 56(1) which provides for the constitutional right to equality before the law and equal protection and benefit of the law.

11.5.3 The right to receive reasons: reverse onus

Furthermore, section 11 (3) of AJA allows the affected persons to receive written reasons if they can demonstrate to the court that there is no apparent public interest that is served by withholding the reasons. The section provides that, persons adversely affected by the decisions made as part of these disciplinary

[95]*See* section 11(3) of the AJA which authorizes affected persons to apply to the High Court compelling the administrative authority to supply written reasons on the basis that there is no apparent public interest that is served by withholding such reasons from the applicant.

proceedings may however approach the High court for an order to compel the decision-maker to supply written reasons provided such persons (the applicant) can demonstrate to the court that there is no apparent public interest that is served by withholding those reasons. Effectively this places the burden of proof on the affected person to show that the administrator has no good reason for withholding the reasons. This amounts to a limitation of a right.

By virtue of providing for the right to receive written reasons under the Bill of Rights, the constitution requires that any limitation of that right must comply with the requirements of the limitation clause in section 86(2) (a)-(f) of the constitution. In terms of section 86(2) of the Constitution, limitation of any of the fundamental rights provided for under the Bill of Rights can only be allowed if it is in terms of a law of general application and to the extent that such a limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. The cumulative effect of section 86(2) is that the person who wishes to limit a fundamental right must first and foremost demonstrate that such a limitation is consistent with the requirements of section 86(2). As such, if an administrative authority wishes to withhold written reasons, he or she bears the constitutional duty to demonstrate to the court that the action or limitation is consistent with section 86(2) of the Constitution. Thus, it is the administrative authority (and not the affected person) who in terms of the constitution must bear the onus to prove to the court that there is an apparent public interest that will be jeopardized if the reasons are disclosed to the person who is constitutionally entitled to receive those reasons. Thus section 11(3) is inconsistent with the constitution's section 86(2) limitation clause and is therefore unconstitutional

11.5.4 Minister's power to oust the High Court's jurisdiction to review a decision

In terms of section 11 (5) of AJA, where an adverse decision has been made as part of disciplinary proceedings in terms of the Defence Act, Police Act or Prisons Act, the High Court shall not make an order compelling the disclosure of written reasons if the responsible Minister provides the court with a certificate to the effect that disclosure of the reasons is contrary to the public interest as defined by AJA. Section 8 (3) (a)-(e) of AJA provides for a list of factors that constitute public interest and these factors include such vaguely defined factors as the proper functioning of government. Effectively, section 11 (5) of AJA allows a cabinet minister to exclude the jurisdiction of the court to review the concerned administrative action by issuing a certificate that claims that disclosure of reasons will disrupt the proper functioning of government. Thus, on that basis alone section 11 (5) is unconstitutional because it provides the Minister with the power to automatically exclude the jurisdiction of the court by simply providing the court with the certificate.

The new constitution embraces the doctrine of separation of powers as one of the nation's founding values.[96] In terms of this constitution, there is a

[96]Section 3(2) (e) of the Constitution.

separation of powers between the executive and the judiciary wherein in terms of section 110 (3) (c), the executive is responsible for implementing national policy and legislation while in terms of sections 165 (c) the judiciary is mandated with the power to enforce the law, safeguard fundamental rights and ensure that government policies are implemented in conformity with the constitution and the law. Therefore constitutionally, the court must determine the legitimacy and validity of the reasons outlined in the certificate by the minister for refusing to disclose the requested reasons. The constitution precludes the Minister from performing that duty but instead requires such a Minister to submit his or her justifications to the court for consideration. Contrary to this constitutional arrangement, section 11(5) allows the Minister to exclude the jurisdiction of the court to review action by merely providing the court with a certificate in which he or she determines that the reasons are legitimately and validly withheld for purposes of protecting the public interest. Section 11(5) therefore allows the Minister to usurp the constitutional authority of the judiciary and is inconsistent with the principle of separation of powers and the rule of law.

Furthermore, section 11 (5) of AJA is unconstitutional because it imposes a far less rigorous standard of limiting the fundamental right of the affected person to receive prompt written reasons. In terms of this provision, depositing such a ministerial certificate indicating that disclosure of reasons will disrupt a public interest, is sufficient to bar the court from hearing the application for relief by the affected person whose right to written reasons has been violated. Limitation of any of the fundamental rights under the Bill of Rights must comply with the comprehensive and strict requirements of section 86 (limitation clause) of the constitution. Section 86 requires the person wishing to limit a fundamental right to do much more than just depositing a certificate or an affidavit claiming that limitation of the concerned right is done for purposes of protecting public interest. Section 86 (2) requires the Minister wishing to limit the fundamental right of the affected person to receive written reasons, to prove such factors like reasonability and proportionality of the limitation. Thus, the requirements set by section 11 (5) to limit the fundamental right to receive written reasons is vague and far less comprehensive than the constitutionally required standard and as such, section 11 (5) is unconstitutional based on its inconsistency with the limitation clause under section 86 (2) (a)-(f) of the constitution.

11.5.5 Exemption of organs of the State from complying with AJA

Section 11 (6) of AJA, provides that where he or she deems it necessary or desirable in the public interest, the Minister of Justice may by way of a notice in a statutory instrument amend by adding or deleting any item in Part 1 or Part 2 of the schedule to AJA. Part 1 and 2 of that schedule lists decisions and organs of state that are exempted from the duty to comply with all or some of the obligations imposed upon administrative authorities by AJA. The effect of section 11(6) is such that the Minister of Justice may by statutory instrument exempt other administrative authorities (in addition to those already exempted) from the duty to act lawfully,

procedurally fair, efficiently, reasonably and to provide written reasons.[97] Thus through section 11(6), individuals may all of a sudden find themselves legally precluded from invoking the whole of or some of the elements of their constitutional right to administrative justice. As such, both section 11(6) and the resultant actions of the Minister may be unconstitutional because of their potential to frustrate the object of the constitutional right to administrative justice which is to protect the rights of an individual against being violated through abuse of power by administrative authorities.

11.6 Conclusion

This Chapter has highlighted the importance of the Constitution and the AJA in protecting the right to administrative justice for the citizens. The constitutionalisation of administrative justice in Zimbabwe is a milestone achievement as it ensures that the general populace is protected from abuse by the mighty State apparatus through acts of maladministration by public officials. This can only happen if the state complies with obligations imposed upon it by section 44 of the Constitution and when it also ensures that there is easy access to administrative justice to the citizenry. Furthermore, the right can only be fully realised if the provisions of the Act conform to the Constitution. The Act is the *sine qua non* on the application of administrative justice in this jurisdiction. It is therefore important that the provisions of the Act are both in nature and manner consistent with the Constitution.

Section 3 of the AJA which provides for the grounds of review must capture all the grounds as given in section 68 (1) and (2) of the Constitution. In this era of constitutionalism, it is inappropriate to have provisions in the Act that exempt certain conduct by public officials from the requirement to act lawfully and fairly[98], there cannot be a justifiable law that excludes certain government departments[99] from complying with the provisions of the Constitution. The provisions which allow such in the Act must be repealed. The liberalisation of the *locus standi* concept expressed in section 85 of the Constitution requires that section 4 (1) of the AJA be amended accordingly by giving legal standing to all the persons mentioned in section 85 (1). Section 85 (1) (d) and (e) clearly makes provision for public litigation. It recognises instances where the public may need the protection of their administrative rights. This recognition must also be extended to the AJA by ensuring it has provisions that protect the interests of the public and the public must be treated fairly before decisions that are prejudicial are made.

There is a need for realignment of the AJA so that the identified gaps brought to the fore in this article are addressed. All the provisions in the Act that are in conflict with the Constitution must also be repealed. Finally, there is further a need to add into the Act those provisions which are missing but are found in the Constitution to ensure that the AJA fully operationalises section 68. These are the challenges that

[97] *See* Feltoe, *supra* note 41,p.52.

[98] *See* section 3 (2) of the AJA.

[99] *See* the exclusion clauses in section 11 of the AJA.

currently frustrate the full realisation of the right to administrative justice and that must be attended to for this right to be fully realised in this jurisdiction.

Chapter 12

The Judiciary and Children's Rights in Zimbabwe

Admark Moyo*

12.1 Introduction

'Child law' and 'children's rights' are relatively new phrases in Zimbabwean legal terminology. This is partly because children are largely viewed as objects of parental care and state protection. Historically, the now defunct Lancaster House Constitution (LHC) of 1980 did not help at all in efforts made towards dismantling the idea that children are merely objects of social and parental control. This is because it shielded oppressive customary laws from constitutional provisions and therefore ensured the ongoing observance of traditional norms that violate children's rights.[1] The current Constitution – adopted in 2013 – calls for a change of perspective as it portrays children as ends entitled to protection, provision (socio-economic) and participation rights. More importantly, it is clear that the constitutionalisation of children's rights is a direct response to legal developments at the regional and international levels. This chapter analyses, in great detail, the scope and legal content of some of the rights enumerated in section 81(1)-(3) of the Constitution, at least from the perspective of court judgments. The selected rights are examined in the order in which they appear in the Constitution. This Chapter explores the courts' role in the protection, interpretation and enforcement of human rights as protected in the Zimbabwean Constitution.

Due to space constraints, the chapter places specific focus on rights about which courts have made landmark or far-reaching judgments. First, the Chapter begins with a general analysis of the functions and powers of the courts in the enforcement of children's rights, especially given the courts' role as upper guardians of all minors in Zimbabwe. Second, the chapter analyses how the courts have exercised their protective powers in advancing the child's right to protection from sexual exploitation and prohibition of child marriages. It is argued that the Constitutional Court of Zimbabwe made some ground-breaking pronouncements protecting children from sexual exploitation and exclusively conferring on adults the right to found a family. In the third section, the Chapter discusses the child's right to equal treatment before the law, including the right to be heard. The main

*LLB (University Fort Hare, South Africa); LLM & PhD (University of Cape Town, South Africa). Research Associate, University of South Africa. I am grateful to the anonymous reviewers for their feedback on an earlier draft of this chapter.

[1] *See* section 23 of the Lancaster House Constitution.

takeaway is that there have been some remarkable developments in upholding the constitutional prohibition of discrimination against children born out of wedlock. Further, it would seem that courts have warmed up to the need to recognise the evolving capacities of the child and to give due weight to children's views.

The fourth section locates the role of the courts in the enjoyment of children's socio-economic rights, particularly the rights to education, health care services, nutrition and shelter. Recent pronouncements from the Supreme Court of Zimbabwe on the child's right to shelter deserve an enquiry into the implications of the judgment for the broad enjoyment of socio-economic rights in the future. In the fifth section, the Chapter explores the courts' approach to the child's right not to be detained except as a measure of last resort and for the shortest period of time. It is argued that there are mixed messages to take from the judgments dealing with children's rights in the criminal justice system. While some judgments underline the centrality of the child's right not to be detained except as a measure of last resort, some judgments seem to prescribe imprisonment as a measure of first resort, in blatant violation of national, international and regional standards. Whilst there have also been far-reaching judicial decisions about children's right to freedom from violence, maltreatment or any form of abuse - particularly in the context of corporal punishment in all settings – this chapter does not delve into these areas for lack of space. The final section closes the discussion with recommendations for the judiciary to claim its rightful place in the interpretation and enforcement of children's rights.

12.2 The Child's Right to Adequate Protection by the Courts

In this section, the Chapter analyses the child's right to adequate protection by the courts, particularly the High Court as an upper guardian of all minors. It begins with an examination of the constitutional basis of the court's protective mandate and, using the child's rights to freedom from sexual exploitation as an example, proceeds to unpack the courts' understanding of their duty to protect children in all contexts

12.2.1 The constitutional basis of the court's child protection mandate

There is an indisputable correlation between the existence of an independent and impartial judiciary and the enjoyment of fundamental rights and civil liberties. Democratic political systems heavily rely on independent and impartial courts to foster democracy, the rule of law, good governance and fundamental rights and freedoms. To this end, the Constitution underscores the fact that "the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance".[2] Further, the relationship between judicial independence and the enjoyment of fundamental rights or freedoms is reiterated under the 'principles guiding the judiciary'. These include, among others, the principle that "the role of the courts is paramount in safeguarding human rights and

[2]Section 164(2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

freedoms and the rule of law".[3] Therefore, courts are constitutionally required to be mindful of their role in bridging the gap between the promise of the Declaration of Rights and the reality of poverty and degradation that confronts millions of people in Zimbabwe.

Apart from the principles guiding the judiciary, there are other provisions that are designed to ensure that the courts play a leading role in the enforcement of fundamental human rights and freedoms. First, the Constitution protects the principle of the supremacy of the Constitution as a founding value and a principle, thereby ensuring that there is a departure from the concept of parliamentary sovereignty and entrench the powers of the courts to review legislation and administrative conduct that infringes upon fundamental rights and freedoms, including children's rights. Accordingly, the Constitution provides that "[t]his 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".[4] The power to declare law or conduct, including the conduct of Parliament or the President, to be inconsistent with the Constitution is reinforced by other provisions of the Constitution.[5] For instance, section 175(6) of the Constitution provides that "[w]hen deciding a constitutional matter within its jurisdiction a court may declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency". The power to make declaratory and other orders to prevent infringements of rights is an important element of judicial independence and ensures that courts fashion appropriate remedies for peculiar infringements of rights.

In terms of section 81(3) of the Constitution, children have the right to adequate protection by the courts, particularly the High Court as their upper guardian. The child's right to adequate protection by the courts arises from a number of inter-related considerations: First, children's immaturity or lack of capacity for rational action and, second, the vulnerability that arises from this immaturity. Besides the vulnerability related to the general lack of capacity for rational action, the frailty and fragility of many children, particularly the very young, means that the majority of them are unable to physically defend themselves or take steps that are necessary to defend their legal rights. Even when they acquire the capacity to distinguish between right and wrong or to sense that their rights might have been unjustifiably infringed, the complexities of the legal processes to be followed to claim or enforce these rights often require that an adult enforce these rights on behalf of the affected child or children. Ultimately, the duty to stand on the side of the child to make a determination that the child's rights have been violated, vests in the judiciary as the state branch empowered to make decisions that bind both the state and private persons.

Finally, there has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of

[3] *Ibid*., Section 165(1)(c).
[4] *Ibid*., Section 2(1).
[5] *See* section 175(1) and (6) of the Constitution.

locus standi in Zimbabwe. The liberalisation of standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the very reason behind conferring entitlements upon the poor and the marginalised.[6] The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources, the knowledge and the legal space to drag powerful states, transnational corporations or rich individuals to court in the event that a violation of their rights occurs.[7] To address this problem, section 85(1) of the Constitution allows a broad range of persons, including any person acting in the public interest, to launch proceedings against alleged violators of human rights, including children's rights as protected in section 81 of the Constitution.[8]

With regards to the liberalisation of standing, the provisions allowing public interest litigation stand out as an important innovation under the new constitutional order. This is particularly important because the bulk of human rights violations negatively affect vulnerable groups such as children. Public interest litigation enables lawyers and non-governmental organisations to initiate legal proceedings to challenge impending or ongoing violations of children's rights even in cases where there is no identifiable or determinate group of children that has been directly negatively affected by the disputed legislation or conduct.[9] Public interest litigation allows courts to entertain child-related and other matters they would not entertain if they were to follow the technical rules and procedural formalities historically governing *locus standi*.

Another compelling factor for vesting the protection of children in the courts is that the persons often entrusted with parental responsibility over children sometimes grossly violate children's rights. Just like the very idea of children's rights, this consideration is linked to the collapse of the public/private divide. The public/private dichotomy 'assigns child care responsibilities to parents, and thereby avoids public responsibility for children'.[10] As a result of this divide, the state is not allowed to 'intervene in the private realm of the family, where children's needs and

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[6]*See* A. Moyo, 'Standing, access to justice and the rule of law in Zimbabwe' 18 *African Human Rights Law Journal* (2018) p. 267.

[7]*Ibid*.

[8]Section 85(1) states that:

> 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.

[9]*Mudzuru and Another* v. *Minister of Justice*,(Judgement No CCZ 12/2015) p. 12.

[10]M. Minnow, 'Rights for the next generation: A feminist approach to children's rights', 1 *Harvard Women's Law Journal* (1986) p.9.

interests are managed by their parents', caregivers or guardians.[11] Since parents are legally presumed to know what is best for their children and bear the obligation to determine and to do what is good for them;[12] there is no need for the state to enter into the private family home except in cases of extreme exploitation, abuse or neglect.[13]

Fortunately, our Constitution provides that "[p]arents and guardians of minor children …have the right to determine the moral and religious upbringing of children, provided they do not prejudice the rights to which children are entitled under the Constitution, including the rights to education, health, safety and welfare".[14] If the exercise of parental rights harms any of the child's rights and interests, it becomes subject to review and correction by the courts. Conferring the ultimate responsibility for protecting children on the courts, especially the High Court as upper guardian of all minors, is tantamount to making a claim that the state is aware that there are instances when the child's immediate caregivers – whether (foster) parents or relatives – violate the rights of the very children they are meant to protect. In such cases, it is important to allow the state through the courts to intervene in the family to protect the constitutional rights of the child.

12.3 Child protection in sexual exploitation cases – An example?

The child's right to adequate protection by the courts has been invoked in a number of domestic cases, especially in the context of freedom from sexual exploitation. The term sexual exploitation covers a multitude of situations or practices and a comprehensive range of acts which broadly fall within the broad offence of sexual exploitation of children.[15] Generally, the offence of sexual exploitation of a child is committed when a person unlawfully and intentionally engages the services of a child, with or without a child's consent, for financial or other reward, favour or compensation to either the child or a third person for purposes of engaging in a sexual act with the child, irrespective of whether the sexual act is committed or not;[16] or by committing a sexual act with the child.[17] This definition casts the net as wide as possible by including not only the actual commission of a particular sexual act under certain circumstances as punishable conduct, but also soliciting the services of a child merely for purposes of engaging in a sexual act with the child. The perpetrator or victim may either be male or female. In *S* v. *Ndlovu*,[18] the

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[11] *Ibid*.

[12] *See* J.J. Rousseau, *His educational theories selected from Emile, Julie and Other Writings*(Barron's Educational Series, Australia, Canada, United Kingdom, 1964) p. 92.

[13] *See generally* J. Goldstein, 'Medical care for the child at risk: On state supervision of parental autonomy', 86 *Yale Law Journal* (1977) p. 645.

[14] Section 60(3) of the Constitution.

[15] UNHCR *Abuse and Exploitation* (2001) p. 10.

[16] Section 17(1)(a) of the Sexual Offences Amendment Act.

[17] Section 17(1)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[18] HB-66-03, p. 3I. Section 7 of the Children's Act *[Chapter 5:07]* does not make specific reference to sexual abuse by parents or guardians. Under the Criminal Law Code there are various serious criminal offences to deal with such sexual abuse; these are rape, aggravated indecent assault, indecent assault.

Bulawayo High Court commented on sexual exploitation of children in the following terms:

> "Sexual abuse of children is viewed in a very serious light. This type of conduct is very common thus exposing children to untold trauma and incurable diseases. Contrary to the view held by the learned trial magistrate, the Sexual Offences Act protects children equally be they girls or boys. The definition of a young person in section 2 clearly states that this means a boy or girl under the age of sixteen. Some of the old cases give the impression that abusers of boys should be treated more leniently than abusers of girls. It is clear that in those days the abuse of boys was not as prevalent as that of girls. In this day and age, I do not find any legal basis for the distinction. Sexual abuse of all children is prevalent and should be viewed in a very serious light."

The courts have also cast child marriages as an example or manifestation of sexual exploitation of children, particularly girls. In *Mudzuru and Another v. Minister of Justice and Others*,[19] the Constitutional Court held that children are entitled to effective protection by the Court which is the upper guardian of the rights of children and whose duty it is to enforce the fundamental rights designed for their protection. It also held that the history of the struggle against child marriage sadly shows that there has been, for a long time, lack of common social consciousness on the problems of girls who became victims of early marriages.[20] Ultimately, the apex court would abolish child marriages on the basis that it violated sections 81(1) and 78(1) of the Constitution which, read together, stipulated that, persons below the age of majority cannot marry or found a family. In the process, the Court declared certain provisions of the Marriage Act, particularly section 22(1) thereof, to be invalid and unconstitutional.

Apart from declaring child marriage to be a violation of children's rights, domestic courts have also invoked their power to adequately protect children from sexual exploitation. In *S* v. *Banda, S* v.*Chakamoga*,[21] both accused were married mature adults, more than 30 years old, who had sexual intercourse with young girls aged 15 years, about half the accused persons' ages. They both impregnated the young girls. Both accused were charged with contravening section 70 of the Criminal Law Code, having sexual intercourse with a young person. Both were tried by the same magistrate, and sentenced to two years imprisonment of which one year was suspended for 5 years on the usual conditions for such cases, each remaining with one-year effective imprisonment. On review, the High Court took the opportunity to narrate, in broad terms, the role of judges in protecting children from sexual exploitation and advancing their best interests. The Court explicitly relied on, among others, section 81(3) of the Constitution in coming to the conclusion that the decision of the court *aquo* trivialised the rights of the child. Charehwa J, for the Court, held as follows:

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[19] *Mudzuru* case, *supra* note 9.
[20] *Ibid.*, p. 53.
[21] HH 47-16.

> "More particularly, the specific obligation placed on the courts, and the High Court in particular, by s 81 (3) made me consider that it may be high time that the courts had a serious relook at the sentencing regime for sexual offences so that the message is clearly sent that the courts, in the discharge of their protective mandate for young persons, find that it is totally unacceptable to sexually exploit young persons. This is especially pertinent for offences committed against those young victims aged between 12 and 16 who were directly or impliedly assumed to have "consented" to the sexual violations. The courts must be seen to apply the law in a manner that achieves the intended aim of the legislature in these cases: that is, to effectively protect children from predatory older persons and ensure the eradication, or seriously attempt to eradicate the problem".[22]

The Court further underlined that sentencing an old man over 30 years of age to an effective 12 months imprisonment for having sexual intercourse with a young person of 15 years of age can hardly be aimed at deterring other older men from preying on young and immature persons, who are swayed by the offer of USD1 or USD2, in these harsh economic times.[23] In the Court's view, the very fact that a young person 'agrees' to sexual intercourse with a much older men for such a paltry amount is clear evidence of her immaturity and incapacity to make an informed choice or decision. The age difference and the unequal power dynamics attendant to such a case would be considered as aggravating factors.[24] A promise to marry, or even eventual marriage of the child would, in the Court's view, not be mitigatory as it would effectively deprive the child of an opportunity for optimal development.[25]Charehwa J was at pains to reiterate that judicial officers should never look with favour on much older men who 'marry' or intend to marry these children for purposes of sentencing as this attitude from the bench would seem to be promoting child marriages, which the constitution and international instruments to which Zimbabwe is a party clearly frown on.[26] Finally, the Court held that;

> "It is up to judicial officers to show that the courts will not tolerate predatory older men who prey on young persons by handing down appropriately severe sentences. The prevalence of these types of offences, the consequential incalculable damage they cause in preventing young persons from attaining their full potential, the damage to the social fabric, coupled with its impact on national development and the need to conform to international standards in the protection of children ought to be additional grounds for handing down deterrent sentences".[27]

The cases discussed above revolve around the role of the courts in ensuring adequate protection of children from child marriages and sexual exploitation.

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[22] *Ibid*., p. 3.
[23] *Ibid*., p. 5.
[24] *Ibid*., p. 5. *See also,S* v.*Nare* 1983 (2) ZLR 135 (H) and *S* v. *Ncube* HH 335-13, p. 3:
[25] *Ibid*., p. 5. *See also, S* v. *Chigogo* HH 943-15 p. 2, where Tsanga J held '[t]he continued lenient attitude towards grown men who abuse young girls and then get off lightly with their offence on the basis of "intended marriage" of the complainant is not in consonance with the spirit of the constitution in discouraging marriage of girls below the age of 18'.
[26] *S* v. *Banda, S* v. *Chakamoga,* p. 6. In *S* v.*Girandi* HB 55/12, the need to send a signal to society that courts will descend heavily on child sexual abusers was emphasised, with the court exhorting that a sentence of not less than two years should be imposed.
[27] *S v Banda, S* v. *Chakamoga, supra* note 2, pp. 6-7.

However, the child's right to adequate protection by the courts covers all aspects of life, including protection from violence in the family home (this could require the abolition of corporal punishment in the family); protection from personal decisions that threaten the child's life; survival and development; protection in the child justice context; protection in the schools and health care facilities; protection from recruitment into armed forces of a particular country; protection from harmful social and cultural practices; protection from maltreatment, neglect or any form of abuse; and many other contexts. Like the principle of the best interests of the child, the child's right to adequate protection by the courts is implicated in all of the issues pertaining to the enjoyment by children of all their rights.

12.4 The rights to equal treatment before the law and to be heard

In terms of section 81(1) (a) of the Constitution, every child has the right to equal treatment before the law, including the right to be heard. To fully engage with what this provision entails, it is necessary to divide the right into two separate, but interrelated sections: the first dealing with the right to equal treatment before the law and the second unpacking the legal content of the right to be heard. Both sections track down what has been happening in the courts.

12.4.1 The right to equal treatment before the law

Every child has the right to equal treatment before the law. When it comes to equal treatment before the law, children should enjoy better protection than adults, especially in light of their vulnerability and limited capacity for rational decision-making. The child's right to equal treatment before and protection of the law came to the spotlight in *Bhila* v. *The Master of High Court and Others*.[28] In this case, the applicant as the surviving spouse was appointed as executrix of her husband's deceased estate. Upon processing the estate, the applicant who had advertised the estate got to know that her late husband had three (3) children born out of wedlock. The three children or their guardians then sought to inherit from their late father's estate. The first respondent (the Master) then appointed a neutral executor who subsequently prepared a distribution plan in terms of which the matrimonial property was awarded to the applicant as the surviving spouse. The rest of the property which included a Borrowdale house was then treated as free residue of the estate. Upset by this distribution plan the applicant raised an objection with the first respondent. However, the first respondent directed that the distribution plan as given by the second respondent be advertised and the surviving spouse made an application for this distribution plan to be set aside.

Mwayera J, for the Court, held that the common law position of excluding children born out of wedlock violated the constitutional rights to equal protection of the law and freedom from discrimination. Drawing inspiration from *Smyth* v. *Ushewokunze and Anor*,[29] the learned judge held that the provisions of the Constitution must be given a purposive interpretation so as not to strangle the right

[28]HH 549-15.
[29]1997 (2) ZLR 544.

that is being protected. With regards to the constitutional position on equality and non-discrimination, the Court held that-

> "To seek to discriminate the third to fifth respondents on basis of them being children born out of wedlock would not only be unfair and unjust but undemocratic for it would amount to punishing innocent children in an inhuman manner for an iniquity beyond their control. An "iniquity" by those who sired them at no request by the said children let alone their consultative input, would surely be discrimination which no civilised democracy would legally sanction."[30]

The Court was at pains to emphasise that the question whether or not children born out of wedlock can inherit *ab intestato* from the estate of their father; was sufficiently answered by the provisions of the Constitution. It then pointed out that section 56(3) of the Constitution explicitly provides for every person's right not to be treated in an unfairly discriminatory manner regardless of whether they were born in or out of wedlock. To the Court, it was patent that section 56(3) outlawed discrimination on the basis of being born out of wedlock and therefore the third to fifth respondents had a right to equality and non-discrimination.[31]Accordingly, excluding children or descendants of a deceased from inheriting from the estate of their father *ab intestato* on the basis that they were born out of wedlock is *ultra vires* the Constitution.[32] In perhaps some of the most important passages against discrimination based on prohibited grounds, the Court held that-

> "The current constitution outlaws any sort of discrimination against children on basis that they are born in or out of wedlock. The law is not static but dynamic going along with economic social and cultural values. If the law is construed in a narrow sense negating the social values on which the constitution which is the supreme law is anchored on then the law will not resonate with what is reasonable. It will cease to serve the purpose for which it is enacted and society will not have respect for the law thus leading to lawlessness and anarchy. In the present case one cannot give a blind eye to the values of the constitution in seeking to bridge the gap between children born in and out of wedlock. The reasoning where children born out of wedlock were viewed as "devils, bastard illegitimate" is unacceptable and has been overtaken by dynamics in culture, society and legal development. The constitutional provisions outlawing discrimination on basis of being born out of wedlock find support in international conventions and indeed reflect progressive development of the law in response to social and cultural development. Social and legal dictates clearly show that no child should be punished by virtue of not having been sired in a registered union or marriage. It is not in dispute third to fifth respondents are the late's children thus his descendants and beneficiaries to the estate. The fifth respondent is a juvenile and again well protected by the law, section 81 of the constitution clearly spells out the rights of children. The constitution outlaws rules, conduct, practice and law which is discriminatory. Hence the third-fifth respondents as off spring/descendants/ children/progeny albeit out of wedlock are also entitled to a share of the free residue just like the children/descendants or off springs born in wedlock. The first respondent directed for distribution plan to factor in the

[30]*Bhila , supra* note 28, p. 5.
[31]*Ibid*.
[32]*Ibid*., p. 6.

> factual position of the additional three children. That cannot be viewed as a directive not based on existing law given the constitutional and legislative provisions. The applicant's husband died intestate and hence estate must be administered accordingly".[33]

Violations of the child's right to equal treatment and non-discrimination have also arisen in the context of parents' custody and guardianship rights over children born out of wedlock. In *Sadiqi* v.*Muteswa*,[34] the applicant – the biological father of the child – challenged the common law position that the biological mother of a child born out of wedlock is the sole guardian and custodian of such child. After an extensive survey of the authorities,[35] the court observed that historically, the mother enjoyed exclusive guardianship and custody over a child born out of wedlock.[36] The Court further observed that this meant that the child could grow up without interacting with his or her biological father if the mother denied the father access to the child. The Court held that the common law rule conferring sole custody and guardianship on the mother violated the child's rights to equal treatment before the law and to not be treated in an unfairly discriminatory manner based on whether a child was born in or out of wedlock.[37] Zhou J, for the Court, held that 'it is unfair discrimination to deny a child the benefits of associating with his or her biological father, which is an aspect of parental care, on the mere ground of the marital status of the parents at the time that he or she was born'.[38] This analysis revolved around the child's right to family and parental care, as entrenched in section 81(1) (d) of the Constitution, as meaning the right to be cared for by both natural parents. It also emanated from a very broad definition of care, as providing money for the maintenance of the child and meaningful parenting, as having the opportunity to shape the child's life, character and development through spending quality time with the child and influencing choices about the child's life course. Drawing inspiration from domestic and foreign authorities in this area of law,[39] the Court recognised the need to promote gender equality by encouraging fathers to actively participate in the upbringing of their children and to avoid conferring on mothers automatic preferential rights of parental care on the basis of gender as this drives the harmful social stereotypes that portray the burden of child care as an

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[33]*Ibid*., pp. 6, 7 and 8.

[34]HH 249-20.

[35]The Court referred to, among others, *Cruth* v. *Manuel* 1999 (1) ZLR 7(SC) p. 10E-11D*; F* v. *L and Another* 1987 (4) SA 525, pp. 527D-E*; Douglas* v.*Mayers* 1987 1 SA 910 (Z) pp. 914-15; *Docrat* v.*Bhayat*1932 TPD 125, p. 127; and *Edwards* v. *Flemming*1909 TH p. 232.

[36]*Sadiqi* v. *Muteswa, supra* note 34, pp. 6-7.

[37]*See* sections 81(1) (a) and 56(1)-(3) of the Constitution.

[38]*Sadiqi* v. *Muteswa, supra* note 34, p. 7.

[39]I. Currie and J. de. Waal, *The Bill of Rights Handbook,* 5 edition (Juta Legal and Academic Publishers, South Africa, 2013) pp. 607-608. *See also Dangarembizi* v. *Hunda* HH 447 – 18. p. 7; where the Court held as follows:

> "There is considerable judicial opinion that deciding issues relating to guardianship, custody and access based on the birth status of the child belongs to a bygone era. The best interest of the child was the main criterion employed in disputes relating to the custody of children, to the exclusion of any rule of customary law. Therefore, the criterion, irrespective of the type of marriage contracted, and irrespective of whether or not the parents are unmarried, or lobola has been fully provided, applies to all disputes concerning children."

exclusive feminine responsibility. Accordingly, the Court made the following incisive remarks:

> "The approach urged here recognizes that parental roles do not reside in the biological make up of a person. The anatomical constitution of a person as a man or woman is an act of biology, of nature; yet the gender roles pertaining to the roles of mother and father in bringing up a child are social constructs which may and must be challenged in the light of the changing dynamics of our society. Gone are the days when the mother was expected to be carrying a heavy luggage with a baby strapped on her back while the father was carrying only his walking stick or knobkerrie. *For these reasons a rule that pretends that a child born of unwed parents has no father must be abolished as it violates the anti-discrimination provisions and values of the 2013 Constitution of Zimbabwe".*[40]

As shown in the judgment, the supremacy of the Constitution plays an important role in the enforcement of children's rights, including the twin rights to equality and non-discrimination. The fact that the Constitution trumps all legislation, practices, customs or conduct inconsistent with it, means that there is no legal barrier to conferring joint guardianship and custody on both parents. As the Court observed, the joint exercise of these rights would advance the best interests of the child and prevent the use of the child as a tool to resolve their differences.[41] Finally, the Court declared the common law rule that gives the mother of a child born out of wedlock exclusive guardianship and custody rights at the expense of the biological father to be inconsistent with the child's rights to equality and non-discrimination.[42]

Finally, the right to equal treatment before the law does not prevent parents, society and the state from treating children differently from adults or to treat different children differently. However, it is necessary to emphasise that when children of different ages or backgrounds are treated differently by state or non-state institutions, there must be a legitimate government purpose behind the differentiation otherwise the courts will declare the conduct of the relevant person or body invalid and unconstitutional for violating the twin principles of equality and non-discrimination.[43] Affirmative action measures or policies in favour of underprivileged individuals or groups are permissible in terms of section 56(6) of the Constitution, provided that they are meant to address circumstances of genuine need. The legitimate government purpose – helping the poor to escape abject poverty – would then immunise the affirmative action measure against the charge that it offends the non-discrimination clause.

12.4.2 The right to be heard

Section 81(1) (a) of the Constitution protects the child's right to be heard as part of the right to equal treatment before the law. This provision largely domesticates article 12(1) and (2) of the Convention on the Rights of the Child which protect the

[40] *Sadiqi* v. *Muteswa,supra* note 34, p. 8.
[41] *Ibid*., p. 9.
[42] *Ibid*., pp. 9-10.
[43] *See* section 56(1) and (3) of the Constitution.

child's right to express his or her views freely in all matters affecting the child and to be heard in judicial and administrative proceedings, either directly or through an appropriate body. Generally, section 81(1)(a) of the Constitution underscores the government's obligation to provide the child with an opportunity to participate in all proceedings affecting him or her.[44] It is the focal point of child participation rights, with other provisions reinforcing the child's right to take part in the decision-making process.

There have also been domestic developments in the area of child participation in decision-making. In *Hale* v. *Hale*,[45] the background facts of the case were that the parents had a dispute over the custody of three minor children aged 11, six and four years. The dispute was sparked by the temporary loss of custody by the applicant (wife) through a court order which granted the respondent (husband) full custody. This was mainly due to the applicant's alcohol abuse that necessitated a period of treatment at a rehabilitation clinic in South Africa. However, custody was later regained by the applicant, upon her return from rehabilitation, as a result of an Interim Access Agreement which was signed by both parties that gave the applicant custody over the children. The applicant was of the view that, by signing the 'Agreement', the respondent effectively abandoned the court order and also sought to shift the children to a school in proximity to where she resided. The respondent opposed the application since the 'Agreement' was obtained under undue pressure brought to bear upon him.

In its judgment, the Court made remarks about the centrality of children's rights to protection and participation in all cases involving children. The Court emphasised that it was important to give the children concerned an opportunity to be heard before making a final determination on whether the best interests of the child required a shift in the court-sanctioned custody arrangement. Tsanga J, for the Court, made the following remarks:

> "In any event it would also seem to me that this issue regarding the children's schooling cannot be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who are already at the boarding school in question. I say this because a particularly noteworthy aspect of the new Constitution is that it grants both parents and children rights…Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents as in this case, are not in agreement as to what is best for the child. Constitutionally, as of right, children are no more at the margins and periphery of decisions affecting them. They effectively have a right to be part of those decisions".[46]

These remarks were made in light of section 81(1)(a) of the Constitution which extends to children 'the right to be heard'.[47] This section provides that 'every child

[44]For comparative purposes, S. Detrick, *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, The Hague/Boston/London, 1999) pp. 219-20.
[45]HH 271-14.
[46]*Ibid*, pp.8-9.
[47]*Ibid*., p. 9.

has the right to equal treatment before the law, including the right to be heard'. According to the Court, section 81(1) (a) 'effectively gives a "voice" to children on matters that concern them' and commendably incorporates into our legal system the spirit of article 12 of the Convention on the Rights of the Child.[48] Accordingly, both the CRC and the Constitution advance the notion of child participation and inclusion in decision-making processes affecting children.[49]

The Court also observed that the best interests principle, which has traditionally been the ordinary criteria, used by our courts in matters concerning children, has not only been constitutionalised, but also exists amidst certain rights given to children by the Constitution. More importantly, however, the Court emphasised that the best interests principle cannot be interpreted in a vacuum, but derives its meaning from the rights set forth in the Constitution, including the right to be heard. To quote the Court:

> "Thus, the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution, is now also better placed to take its specific character and meaning from the rights that are accorded children by our Constitution. Pertaining to this case, *it is their best interests that they be heard, especially for the older children who are in boarding school and have an appreciation of the issue. Their views are necessary to obtain an order for the court to make an informed decision that takes into account their experiences with boarding school. My assumption here is that having already spent time at the boarding school they are able to comprehend the issue at stake and exercise their right to be heard on what they think is best for them. Given that participation has to be ageappropriate, in practice courts have often achieved participation through a judge or judicial officer speaking to the children themselves or where it is not practical through child welfare professionals giving their report*. The youngest child Oscar may not be able to exercise this right due to his age, thus a welfare report that is done in consultation with those at his nursery would fulfil the purpose (emphasis added)."[50]

There are two vital points from this and other paragraphs in the Court's judgment. First, the Court emphasises that gone are the days when adults would decide what is best for children without giving the very children an opportunity to be heard. At the heart of this observation is a subtle claim that even if the best interests of the child are viewed as a protective concept, then children cannot be better protected by marginalising them when decisions to protect them are made. More likely, however, the Court's merging of child participation rights and the best interests principle appears to be inspired by the indivisibility, independence and interrelatedness of human rights – a move away from an understanding of children's rights as discrete silos, towards a holistic perception of all the rights extended to children by the Declaration of Rights and international and regional human rights instruments. This argument about the Court's approach to children's rights is

[48] *Ibid.*, p. 9.
[49] Article 12(1) of the CRC, also cited in the judgment, 'a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of that child being given due weight in accordance with the age and maturity of the child'.
[50] *Hale* v. *Hale, supra* note 45, pp. 9-10.

buttressed by Tsanga J's idea that all the rights entrenched in section 81(1)-(3), including the right to be heard, provide the context against which the best interests principle ought to be interpreted.

When determining the child's best interests, the child concerned should be given opportunities to express their wishes and opinions and be shown that their views have been given serious consideration,[51] a factor which the Court took into account in handing down its judgment. It therefore suffices to say that the relevant constitutional provisions lay a solid foundation for the participation of children in matters affecting them in the country. The hope is that the spirit of involving children in decision-making processes as enshrined in the supreme law is crystallised in legislation, policy and child protection practice. Thus, the Court has taken a giant step in recognising child participation rights and giving children their fair share of attention from decision-makers.

The second vital point relates to the Court's enunciation of the concept of the evolving capacities of the child. Its observations that 'participation has to be age appropriate' and that 'the youngest child may not be able to exercise this right due to their age' formally import the concept of the evolving capacities of the child into the Zimbabwean legal system. The evolving capacities concept justifies near-autonomous decision-making by the child provided the child has competences to make the decision in question. It recognises that children experience rapid growth in their 'physical, cognitive, social and emotional functioning'; pass through zones of rational autonomy before attaining adulthood and vary in the ages at which they become capable of making particular decisions.[52]

12.5 Children's socio-economic rights

Socio-economic rights are fundamental rights that protect the dignity of individuals by way of securing and protecting the social, economic and cultural welfare and interests of human beings.[53] Accordingly, the state is bound to ensure that its citizens enjoy the full complement of socio-economic rights, thereby, further providing for domestic remedies for violations thereof.[54]Socio-economic rights are therefore at the core of the achievement of the constitutional objective to establish "a sustainable, just and democratic society in which people enjoy prosperous, happy and fulfilling lives".[55]The current Constitution responds appropriately to the historical anomaly of neglecting socio-economic rights.[56] Children's socio-economic rights are protected at two possibly three levels under the prevailing constitutional framework. First, they are provided for as part of the socio-economic rights that

[51]T. Hammarbeg, 'The principle of the best interests of the child-What it means and what it demands from adults' (Speech to the Council of Europe, Strasbourg, 2008) p. 5.

[52]For comparative purposes, *see* CRC General Comment 4, paras 1 and 7; and CRC General Comment 7, para 17.

[53]J. Mavedzenge and D. Coltart, *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic Human Rights* (ZIMRIGHTS, Harare, 2014) p. 32.

[54]N. Ndlovu, *Protection of Socio-Economic Rights in Zimbabwe. A Critical Assessment of the Domestic Framework under the 2013 Constitution of Zimbabwe* (Electronic Textbook, Anchor Academic Publishing, 2016) p. 7.

[55]Section 8 of the Constitution.

[56]*Ibid.Seealso* Chapter 4 of the 2013 Constitution which contains the Declaration Rights that entrenches, among others, socio-economic rights as justifiable rights.

are conferred on 'everyone', including children. Accordingly, the rights to an environment that is not harmful to every person's health or well-being,[57] to freedom from eviction,[58] to basic state-funded education,[59] to access to health care services,[60] to sufficient food and to safe, clean and potable water[61] belong to everyone and can be vindicated on behalf of children. At this level, the enjoyment of most of the socio-economic rights is subject to progressive realisation within the state's available resources.

Secondly, children's socio-economic rights are protected as part of the rights that are only extended to persons under the age of 18 years. Section 81(1)(f) of the Constitution provides that "[e]very child has the right to education, health care services, nutrition and shelter". At this level, the enjoyment by children of socio-economic rights is not, theoretically at least, subject to progressive realisation within available resources. Third, children's socio-economic rights are protected as part of the national objectives stipulated in section 19(1) – (3) of the Constitution. The legal status of national objectives remains questionable because they are not part of the justiciable Declaration of Rights entrenching directly enforceable entitlements. Nonetheless, the Constitution provides that courts must pay due regard to the national objectives when interpreting the rights protected in the Declaration of Rights.[62]

More recently, the courts clarified most of the outstanding constitutional issues relating to children's socio-economic rights. In *Zimbabwe Homeless People's Federation and Others* v. *Minister of Local Government and National Housing and Others,*[63]the Supreme Court of Zimbabwe had the opportunity to interpret and apply the child's right to shelter as protected in section 81 of the Constitution. To begin with, the Court observed that it is immediately apparent that the right to shelter imposes on the state the obligation to avail access to adequate shelter progressively within the limits of the resources available to it.[64] Drawing inspiration from *Government of the Republic of South Africa* v. *Grootboom*,[65] the Court emphasised that although socio-economic rights should be realised progressively within available resources, the State remains bound to move as expeditiously and effectively as possible towards the goal of full realisation of this right, with full use of the maximum resources available.[66]

More importantly, however, the Court emphasised that the State's obligation to provide shelter to children is not contingent upon the absence of parental care or other appropriate care under section 81(1) (d) of the Constitution. The obligation of the State in this respect is not negated or diluted by the primary

[57]*Ibid*., Section 73(1).
[58]*Ibid*.,Section 74.
[59]*Ibid*.,Section 75(1).
[60]*Ibid*.,Section 76(1).
[61]*Ibid*.,Section 77.
[62]*See* sections 8(2) and 46(1) (d) of the Constitution.
[63]SC 94/2020.
[64]*Ibid.*, p. 11.
[65]2001 (1) SA 46 (CC) para. 45.
[66]*Zimbabwe Homeless People's Federation and Others, supra* note 63, p. 11.

duty of care ordinarily imposed upon parents.[67] However, the Court did concede that under normal circumstances, where children are living with their parents, the parental duty of care proportionately reduces the State's correlative child care obligations. However, where the parents themselves are financially or otherwise incapacitated from fulfilling their parental obligations, it then becomes incumbent upon the State to intervene and perform its own obligation to ensure that the children's welfare is adequately addressed and safeguarded.[68] In Patel J's words, 'the primary duty of care reposed with parents in respect of their own children does not operate to absolutely absolve the State of its underlying obligation of care towards those children'.[69] These findings are ground-breaking in the sense that they portray 'parental care as a joint responsibility between parents and the state, thereby ensuring that even children who live with their parents get additional support in order to have access to the goods and services they need to live minimally decent lives.

12.6 The right not to be detained except as a measure of last resort and conditions governing detention of child offenders

This section investigates the scope of children's rights in the criminal justice context as provided for in the Constitution, at least from the perspective of court judgments. The focus is on the child offender's right not to be detained except as a means of last resort. In essence, the general rule is that no child offender should be caged. However, the law foresees circumstances when the demands of justice and fairness may call for the imprisonment of the child offender. When it becomes necessary to cage a child for committing a crime, the court should ensure that the conditions of detention comply with at least three explicitly stipulated constitutional requirements or standards. These requirements include the idea that the child offender should be detained for the shortest appropriate period, the child offender should be kept separately from adult offenders and the child offender should be treated in a manner and kept in conditions that take account of the child's age. The last two of these standards are not discussed further as there have not been significant developments in the courts in this area of the law.

12.6.1 The right not to be detained except as a measure of last resort

Section 81(1) (i) of the Constitution provides for the child's right not to be detained except as a means of last resort and, if detained, to be detained for the shortest appropriate period of time. It is vital to note that the Constitution does not prohibit the imprisonment of young offenders but requires that the courts consider other alternatives before imposing custodial sentences. Accordingly, the fact that a sentence of imprisonment should be imposed as a means of last resort implies that sometimes it is necessary to impose custodial sentences on youth offenders. The words 'as a measure of last resort' mean that juvenile offenders should be deprived

[67] *Ibid.*, p. 23.
[68] *Ibid*.
[69] *Ibid.*

of their liberty only if they have committed serious crimes or persist to commit serious offences.[70] It also implies that deprivation of liberty can only be imposed in cases where there is 'no other appropriate response' to the child's delinquent behaviour.[71]

In *S* v. *C (A Juvenile)*,[72] the Harare High Court correctly observed, in the context of rape trials, that generally speaking juveniles should not be sent to prison, but in cases where there are aggravating features – such as multiple counts, transmission of sexually transmitted diseases to the victim, serious psychological and or physical trauma, a high degree of violence or force used during the rape and the use of a weapon during the rape – effective imprisonment might be called for especially if the juvenile offender is between 16 and 18 years.[73] However, the Court was at pains to emphasise that the periods of imprisonment should vary according to the age and the moral blameworthiness of the offender.[74]

Even before the adoption of the current Constitution, there were indications that domestic courts were slowly moving away from imprisonment as a sentence for youth offenders who committed minor crimes. In *S* v. *CM (A Juvenile) and Another*,[75] the two cases (dealt with simultaneously) involved two youth offenders who had been convicted of theft after diverting different sums of money towards their own use without their employers' consent. In *S* v. *CM*, a child aged 16 years had been sentenced to 18 months imprisonment with ten months suspended on condition of restitution, and in *S* v. *ZD*, a 17-year-old had been sentenced to 24 months imprisonment with 18 months suspended on condition of restitution.

On review, Ndou J, for the Bulawayo High Court, held that in both cases the sentences were not individualised by carrying out meaningful pre-sentence investigations.[76] Given that the accused persons were both juvenile first offenders, the trial magistrate should have considered non-custodial sentences.[77] In the circumstances, the trial court appeared to have "paid lip service" to the well-established "principle that imprisonment is a severe and rigorous form of punishment which should be imposed only as a last resort and where no other form of punishment will do".[78] Given that the ultimate effective sentence was below 24 months, the Court should have sentenced both accused persons to community service.[79]

More importantly, the Court reiterated that there is no room for instinctive sentencing in our jurisdiction, and the sentence must fit the crime and

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[70]*See* Rule 17.1(c) of the Beijing Rules.
[71]*Ibid.*
[72] HH 718-14.
[73]*Ibid.*, p. 9.
[74]*Ibid.*
[75]Judgment No. 67/2003, Case No. HC 1546/2003 and Case No. HC 1547/2003.
[76]*Ibid.*, p. 2.
[77]*Ibid.*
[78]*Ibid.* In this respect, the Court referred to *S* v. *Kashiri* HH-174-94; *S* v. *Gumbo* 1995(1) ZLR 163 and *S* v. *Sikhunyane* 1994(1) SACR (TL).
[79]For this principle, *see S* v. *Sithole* HH-50-95 and *S* v. *Santana* HH-110-94.

the offender, be fair to both the state and the accused person and be blended with an acceptable measure of mercy.[80] Ultimately, the Court substantially reduced the imposed sentences and ordered that they be immediately released from prison. In *S* v. *TM (A Juvenile)*,[81] a 16-year-old was convicted of house breaking with intent to steal, theft, and escaping from lawful custody in contravention of the Criminal Procedure and Evidence Act.[82] The accused was convicted of both counts and sentenced to undergo prison terms of seven months and five months respectively. Of the total 12 months imprisonment, five months were suspended on condition of good behaviour. Ndou J stressed that he was "perturbed by the imprisonment of the 16-year-old juvenile first offender. It is trite that juveniles should not be sentenced to custodial sentences unless there is absolutely no alternative."[83] He then reduced the sentences for both counts to three months imprisonment and ruled that since the juvenile had served the sentences, the juvenile was entitled to immediate release.[84]

As such, every sentencing court dealing with youth offenders ought to be given discretion in sentencing them in order to give effect to the conditions of international law and the Constitution pertaining to the individualisation of sentences and the need for proportionality to be applied to the youth offender, the offence they would have committed and the circumstances surrounding the commission of the offence. This means that the court should start with 'a clean slate' when sentencing a child offender and not be required to impose the prescribed minimum sentence. Minimum sentences are inconsistent with the constitutional principle of 'detention as a last resort', especially where they are mandatory. This is precisely because the twin concepts of detention as a last resort and best interests of the child raise serious questions about the appropriateness of custodial sentences for child offenders.

12.6.2 Where imprisonment is strictly necessary, it should be for the 'shortest appropriate period' of time

The Constitution does not only regulate the circumstances under which incarceration as a sentencing option should be pursued, but also regulates the nature and duration of the incarceration. Section 81(1) (i) requires particular focus to be placed on the youth offender and their needs rather than on the rigid starting point of the statutorily ordained periods of imprisonment. The Constitution prescribes that when dealing with child offenders, the overriding goal should not be the infliction of pain and punishment on the child but their rehabilitation and reintegration into society. Section 81(1) (i) of the Constitution envisages that the

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[80] *S* v. *CM (A Juvenile) and Another, supra* note 75,p. 3.*See also S* v. *Sparks and Another* 1972 (3) SA 396 (A).

[81] Judgment No. HB 65/2003, Case No. HC 1472/2003 and CRB ZVI 313/02.

[82] *[Chapter 9:07]* of the Laws of Zimbabwe.

[83] *S* v. *TM (A Juvenile), supra* note 81,p. 3. The Court was following *S* v. *Ncube and Another* HB-9-87, p. 1, where Blackie J, for the same Court, held that "[o]ur courts have repeatedly said that teenage minors should not be sentenced to terms of imprisonment unless there is absolutely no alternative". *See also S* v. *Mbewe* HH-323-87, p. 2, where Sansole J held that "it is the policy of these courts to do as much as is reasonably practical to keep juvenile first offenders out of prison".

[84] *S* v. *TM (A Juvenile), supra* note 81, p. 4.

sentence imposed on a child offender should reflect the desirability of promoting the child's reintegration and assuming a constructive role in society. That is why the Constitution places restrictions on the circumstances under and period for which children can be deprived of their liberty.[85] However, these objectives should always be counter-balanced with public safety concerns and the enduring value of proportionality.

Clearly, there are circumstances in which the juvenile offender must at least be committed to a custodial institution (jail for instance), and what is left for discussion is the appropriate duration of custody. In cases of pre-meditated violent murder, for instance, what usually matters is not whether the child has been jailed 'as a last resort' but whether the duration of incarceration is the 'shortest appropriate' one for the crime. The central word in the relevant constitutional provisions seems to be 'shortest appropriate' because it emphasises not only the proportionality but also the suitability of a particular sentence in the circumstances.[86] In the case of juveniles, 'appropriate' should mean that the applicable law should preserve judicial discretion to justify especially downward departures from statutorily prescribed sentences in light of children's psychological immaturity and need for reintegration.[87]

There are indications that judges are prepared to review harsh sentences imposed on young offenders and to ensure that a convicted child offender is incarcerated for the shortest appropriate period of time. In *S* v. *Mtetwa*,[88] the accused, aged 17 years, was convicted of eight counts of unlawful entry into premises and eight counts of theft. For purposes of sentencing, the counts for both unlawful entry and those for theft were paired alongside into eight counts. The accused was sentenced to an effective nine years in prison. On review, the Harare High Court admitted that the Court *a quo* was indeed faced with an unrelenting offender who had the propensity to commit crimes. Tsanga J, for the Court, observed that while the convictions were proper, the sentence induced a profound sense of shock for a young offender.[89] Drawing inspiration from the Constitution, the Court held as follows:

> "The sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender. *Yet the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency as our courts have always emphasised. Our Constitution adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort* – an obligation that is found

[85] *Cf.* section 81(1)((i)(i) with Article 37(b) of the CRC and Rule 17(b) of the United Nations Standard Minimum Rules for the Administration of Justice (The Beijing Rules), adopted by General Assembly Resolution 40/33 of 29 November 1985.

[86] Rule 17.1(a) of the Beijing Rules states that the "reaction taken shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society".

[87] A. Moyo, 'Youth, Competence and Punishment: Reflections on South Africa's Minimum Sentencing Regime for Youth Offenders', 26:1 *SA Public Law* (2011) pp. 240–241.

[88] HH 112-15.

[89] *Ibid.*, p. 2.

> in international law as exemplified by article 37 (b) of the [CRC] to which we are a party. Section 81(h) (i) of the Constitution … provides that a person under 18 has the right "not to be detained except as a measure of last resort". Also, if detained he or she has the right to be detained for the shortest appropriate period. *Giving a 17-year-old an effective 9-year sentence runs contrary to the letter and spirit of this Constitutional imperative when it is considered that he had not committed any violent offences such as robbery, murder, or rape. From the point of view of children's rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences of prison.* The Constitution also places emphasis on the best interests of the child being paramount at all times in matters involving children (emphasis added)".[90]

Tsanga J thought, rightly so in my view, that with a nine year sentence the child offender would spend a substantial part of his youthful life in prison. Accordingly, the lengthy prison term meant that the child had been sentenced as an adult offender and lacked justification, especially in light of the child offender's home background (there were indications from the probation officer's report that family ties and lack of proper supervision might have predisposed the accused to anti-social behaviour).[91]Tsanga J insisted that "[r]ather than rushing to impose adult punishment in the form of a lengthy prison sentence that may merely accentuate his path to becoming a hardened criminal, it seems to me at 17, he could have been given a chance by being referred to an appropriate juvenile institution for rehabilitation".[92] In addition, the learned judge held that a prison sentence of nine years effectively removes the accused from society by locking him up and throwing away the keys for a very long time.

Ultimately, the Court sentenced the accused to three years imprisonment for all counts, of which one year was suspended for five years on condition that the accused did not during that time commit any offence involving unlawful entry for which he is sentenced to a term of imprisonment without the option of a fine.[93] Imprisonment for the shortest appropriate time requires sentencing courts to ensure that the child does not unnecessarily spend a good 'chunk' of their time serving prison terms. Although a strictly punitive approach to youth crime is undoubtedly outlawed by the Constitution, these instruments do not necessarily bind courts to sacrifice proportionality and public safety on the altar of reintegration, rehabilitation and restoration. If the sentences that are ordained by the sentencing statute range from a very short to a very long period of imprisonment, the Constitution requires the sentencing judge to impose the shortest custodial period possible on the child offender.

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[90] *Ibid.*, pp. 2–3. *See* section 81(2) of the Constitution. Clearly the magistrate did not fully take into account the Constitutional provisions which emphasise the duty to respect and protect children's rights in dealing with children under the age of 18.

[91] *Ibid.*, pp. 3 and 4.

[92] *Ibid.*, p. 4.

[93] *Ibid.*, p. 5.

12.7 Conclusion

This chapter showed that the Constitution places the judiciary at the centre of the enforcement of fundamental rights and freedoms, including the rights of vulnerable groups such as children, women and persons with disabilities. It achieved this noble goal by entrenching the supremacy of the Constitution which allows courts to overturn laws, customs and conduct for want of consistency with this fundamental law; protecting the independence, impartiality and integrity of the courts; expanding *locus standi* to allow a broad range of persons to bring violations of children's rights to the attention of the courts; and directly enshrining children's right to adequate protection by the courts, particularly the High Court as upper guardian of all minors. Many of the child rights related cases decided after the adoption of the current Constitution demonstrate that these powers have largely been exercised in a manner that advances children's rights and interests. This chapter demonstrated the manner in which courts have exercised their duty to protect children by analysing selected judgments relating to sexual exploitation and other forms of abuse and maltreatment. In this respect, courts have emphasised that they will not stand by the side lines while predators commit sexual offences against children.

Children have the right to equal treatment before the law, which includes the right not to be discriminated against on any basis in all contexts. In Zimbabwe, the child's right to be heard is protected as part of the broad right to equal treatment before the law. It has been shown that the courts have upheld the rights of children born out of wedlock – to be protected from discrimination – in the context of inheritance from the deceased estate of their biological fathers and to enjoy the benefits that materialise from joint parental custody and guardianship. In the latter case, the principle of non-discrimination has been interpreted to require the abolition of the common law rule that the mother of a child born out of wedlock is vested with the sole guardianship and custody of the child to the exclusion of the father. Similarly, courts have upheld that children born out of wedlock are entitled to inherit from the residue of their father's intestate estate despite protestations from the surviving spouse of such father. These are ground-breaking judgements that demonstrate the significance of progressive court judgments to the advancement of children's rights.

There is also an emerging line of judicial thinking that is tying best interests decision-making to the child's right to be heard, especially for mature minors who have an appreciation of the issues involved and the consequences of taking one decisional option over the other. From this line of thought, the views of the children affected are necessary for the courts to have a fuller picture of legal disputes that come before them and to make informed decisions that take into account children's experiences and give due weight to their views. This approach portrays children not just as objects of parental power or state control, but active social agents with the capacity to participate in or influence decisional processes and outcomes. From the limited number of cases referring to the child's right to be heard, it is patent that many judges may still be stuck in the old myth that children should be seen and not be heard, especially due to patriarchal notions of parental authority that still

pervade our culture, laws and communities. To achieve attitudinal change, it is imperative for policy makers, judicial officers, lawyers, social workers and communities to be trained on the demands of the duty to ensure that every child is heard and their views are given due weight in all matters affecting the child.

Recently, there have also been notable developments in the area of children's socio-economic rights. The Supreme Court of Zimbabwe has observed that despite the fact that these rights are to be realised progressively within the state's available resources, the government still remains bound to move as expeditiously and effectively as possible towards ensuring the enjoyment of socio-economic rights. Accordingly, the unavailability of resources is not a complete justification for administrative inaction as the state is under an obligation to make plans to ensure that these resources become available. Further, the Court insisted, in a very unprecedented manner, that the state's duty to provide goods and services to children is not necessarily contingent upon the absence of parental care. Accordingly, the state's duty of care is not diluted or limited by the parental duty of care and the state is always 'on notice' to complement the efforts of the parents to provide for the needs of children. This chapter has argued that this approach to children's socio-economic rights opens up a new way of looking at parenting as joint responsibility between the state and the family.

Finally, this chapter briefly discussed legal developments in the context of the child's right not to be detained except as a measure of last resort and, if detained, to be detained for the shortest appropriate time. It has been argued that the courts appear to be largely aware that custodial sentences are drastically damaging for child offenders in many ways and should therefore be considered only as a measure of last resort. Judges from superior courts have reiterated that there is no room for instinctive sentencing of juveniles in Zimbabwe and those sentences, while proportionate to the crime and the child offender, must be blended with a tolerable measure of leniency. Nonetheless, it has been shown that some judicial officers, especially in the lower courts, have at times imprisoned child offenders as a measure of first resort and not necessarily for the shortest appropriate time, in total disregard of constitutional requirements.

Going forward, it is imperative for the courts to 'stand tall' in performing their constitutional mandate of protecting children; recognise the vulnerability and immaturity that accompanies childhood; interpret children's rights as widely as possible; recognise that caging children takes away their childhood and can have a lifelong labelling effect; take cognisance of children's capacity for correction through non-custodial sanctions; and give even child offenders a second chance at life. In performing their interpretive functions, courts should always make decisions that advance the child's right to an open future that is full of multiple possibilities; stand in the corner of the child to give adequate protection to him or her; and promote the best (and not the overall) interests of the child. This requires some level of boldness and resolve to confront some of the worst cultural, administrative and legislative barriers that impede the full enjoyment by children of their rights. It also requires an informed level of awareness that the Constitution and other pieces of legislation provide for more than an adequate arsenal of provisions allowing them to advance children's rights by calling the political organs of the state to abide by their triadic duties to respect, protect and promote these rights.

Chapter 13

Interrogating the System of Referring Constitutional Matters from lower courts to the Constitutional Court in Zimbabwe

*Innocent Maja**

13.1 Introduction

Procedure is important in that it provides practical rules to use to enforce substantive rules rights, duties and remedies. Procedural rules provide a fair and just means of resolving disputes while also creating an efficient method of processing cases in a systematic, formal and effective manner. Procedures ensure compliance with the law, adherence to due process and foster procedural justice. Procedural rules can affect the outcome of a case. The absence of procedure renders a legal system inefficient, unfair and biased. This chapter seeks to unpack the framework for and procedure of referring constitutional matters from lower courts to the Constitutional Court in Zimbabwe. Conceptually, referrals ensure constitutional supremacy in that whenever laws are passed, interpreted or applied, and decisions are made or actions are taken they are subjected to constitutional values.[1]

The Chapter has four key sections. Section 1 outlines the framework for referring constitutional matters from lower courts to the Constitutional Court. Section 2 details the actual procedure. Section 3 discusses possible ways in which the procedure may be flexible. Section 4 concludes the discussion.

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*LLBs (Hons); LLM and LLD. Senior Lecturer, University of Zimbabwe, Faculty of Law.

[1] I. Currie and J. de Waal, 'Application of the Bill of Rights', in I. Currie and J. de Waal (eds.), *The Bill of Rights Handbook*(5th ed.), (Juta, Cape Town, 2005) p. 32. *See also* E. McWhinney (ed.), *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (5th ed.), (MartinusNijhoff, Dordrecht, The Netherlands, 1986) p. 114. *See also* W. K. Geck, 'Judicial Review of Statutes: A ComparativeSurvey of Present Institutions and Practices', 51 *Cornell Law Quarterly* (1996) p. 250.

13.2 The framework for referring constitutional matters from lower courts to the Constitutional Court

The framework for and procedure of referring constitutional matters from lower courts to the Constitutional Court is enshrined in section 175(4) of the Constitution, Rule 24 of the Constitutional Court Rules[2] and amplified in case law. Section 175(4) of the Constitution provides a framework for referral of Constitutional matter from lower courts to the Constitutional Court. It provides that:

> "If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious."

Three important nuggets can be gleaned from this section. First, lower courts can refer constitutional matters to the Constitutional Court. Section 332 of the Constitution defines a constitutional matter as a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution. In *Magurure and 63 Others* v. *Cargo Carriers International Hauliers (Pvt) Ltd*,[3] it was held that "[a] constitutional matter arises when there is an alleged infringement of a constitutional provision. It does not arise where the conduct the legality of which is challenged is covered by a law of general application the validity of which is not impugned."

Second, a constitutional matter must arise in *any proceedings* (legal process or matter) before a lower court for a referral to be made.[4] *Meda* v. *Sibanda*[5] described proceedings as "[t]hose in which there is *lis* between the parties one of whom seeks redress or the enforcement of rights against the other. "Proceedings commence at the time pleadings are initiated or an accused person is charged in a criminal matter and end when a determination is made. According to *Tsvangirai* v. *Mugabe and Another*,[6] proceedings refer to "[t]he action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute." A referral can therefore be made anytime after pleadings are issued (in civil cases) or an accused person is charged (in criminal matters) but before that matter is resolved or withdrawn.

Third and importantly, section 175(4) of the Constitution

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[2] *SI* 61 of 2016.

[3] CCZ 15/16 p.6.

[4] *Cold Chain (Pvt) Limited T/A Sea Harvest* v. *Makoni* SC 8/17 p.4 establishes that "[t]here ought to have been a need for the subordinate court to interpret, protect or enforce the Constitution in the resolution of the issue or issues raised by the parties." The constitutional matter should have been raised in pleadings (in civil matters) or in the defence outline (in criminal matters) in the lower court.

[5] CCZ 10/16 p.4.

[6] 2006 (1) ZLR 148 (S) p. 158E-F.

provides for two ways in which referrals can be made. The first scenario is when a referral from a lower court to the Constitutional Court is *initiated by a lower court at its own discretion*. This discretion can be gleaned from the use of the word *may* in section 175(4) of the Constitution. This usually occurs when a person presiding over a lower court realizes that a constitutional matter has arisen and its resolution impacts the continuance and or resolution of a matter before the presiding officer.

The second scenario is when *a party to the proceedings requests a referral* of a constitutional matter from a lower court to the Constitutional Court. In this case, section 175(4) makes it peremptory (as evidence by use of the word *'must'*) for the lower court to refer the matter to the Constitutional Court. The only time when this cannot be done is when the lower court considers the request frivolous or vexatious as will be discussed below.

13.3 The procedure for referring constitutional matters from lower courts to the Constitutional Court

The procedure for referring constitutional matters from a lower court to the Constitutional court is detailed in Rule 24 of the Constitutional Court Rules. The procedure can arguably be summarised under the following five broad categories:

13.2.1 There must be a referral

A constitutional matter that arises in the proceedings of the lower court must be brought to the Constitutional Court by way of a referral.[7] According to *Chihava and Others* v. *Principal Magistrate and Another*,[8] "any constitutional issue that arises during proceedings in a lower court ought to and must be brought to this court only upon referral in terms of s 175 (4) of the Constitution".

The referral can be *at the instance or discretion of the judicial officer* or *at the request of a party to the proceedings*. Rule 24(1) (a) and (b) provides for the procedure to be followed when a lower court at its instance and discretion refers a constitutional matter to the Constitutional Court. It provides as follows:

> "Where a person presiding over a subordinate court wishes to refer a matter to the Court mero motu in terms of subsection (4) of s 175 of the Constitution, he or she shall –
> (a) request the parties to make submissions on the constitutional issue or question to be referred for determination; and
> (b) state the specific constitutional issue or question he or she considers should be resolved by the Court".

[7] *See Captain Ngonidzashe Mugadza* v. *Minister of Defence & 3 Others* CCZ 23/17 para. 13, p 5.
[8] 2015 (2) ZLR 31 (CC) para 31F.

Rule 24(2) sets out the procedure that should be followed when a party to the proceedings in the lower court requests the lower court to refer a constitutional matter to the Constitutional Court. It provides that "[w]here the person presiding over a court of lesser jurisdiction is requested by a party to the proceedings to refer the matter to the Court and he or she is satisfied that the request is not frivolous or vexatious, he or she shall refer the matter to the Court."

A number of important issues arise from Rule 24(2). First, there must be a request from a party to the proceedings in the lower court. *Cold Chain (Pvt) Limited T/A Sea Harvest* v. *Makoni*[9] establishes that "[t]here ought to have been a need for the subordinate court to interpret, protect or enforce the Constitution in the resolution of the issue or issues raised by the parties."

Second, the format of the request is not specified in this Rule. This may mean that the request can be made either orally or in writing. In *Tomana and Another* v. *Judicial Service Commission and Another*[10] held that the request may be made either as an oral or a written application or in very rare cases, by way of action.

Third, *Nyagura Ncube N.O. and Others*[11] establishes that the request must specify the constitutional question for referral and that determination of the constitutional question should be necessary to resolve the matter before the lower court or the determination of the constitutional matter should be in the interests of justice.[12]

Fourth, the lower court must allow factual evidence to be led[13] and make a decision on the factual issues upon which the constitutional matter for referral is based. According to Malaba,[14]"[e]vidence led for the purpose of a referral must be aimed at establishing infringement of a right or interpretation, protection or enforcement of the Constitution."

Factual issues can be dealt with by either (a) parties filing a joint statement of facts in terms of the proviso to Rule 24(4) or (b) the lower court making a determination on factual disputes. According to Rule 24(4) "[w]here there are factual issues involved, the court seized with the matter shall hear evidence from the parties and determine factual issues: Provided that where there are no disputes of fact, the parties may prepare a statement of agreed facts."The Tomana case[15] held that the absence of

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[9]*Cold Chain (Pvt) Limited T/A Sea Harvest* v. *Makoni, supra* note 5, p.4.
[10]HH 281/16, p. 18.
[11]CCZ 7/19p. 9.
[12]See *Director of Public Prosecutions, Transvaal* v. *Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 p. 244B-C.
[13]This evidence must be subjected to cross examination and re-examination.
[14]L Malaba, *"The procedure of referral of constitutional matters from a subordinate court to the Constitutional Court in terms of section 175(5) of the Constitution of Zimbabwe",* (5 April 2019). A paper presented by the Zimbabwean Chief Justice at the end of first term 2019 Judges' Symposium at Troutbeck Inn Resort, Nyanga.
[15]*Tomana*case, *supra*note 10 p. 16.

oral evidence can be fatal to an application of this nature as it completely disables findings of fact to be made on the complaints raised. That is why the court made a finding that it was insufficient to make a statement from the bar (without leading any evidence) as the applicant's legal practitioner in that matter did in *Mwonzora and 31 Others* v. *The State*.[16]

A determination of facts serves two purposes. The lower court will rely on these facts to determine whether or not the request for a referral is frivolous or vexatious. Again, the Constitutional Court will have to rely on the findings of facts in the lower court to resolve the constitutional matter(s) referred to it and where necessary afford the appropriate relief. In the words of *S* v. *Banga*,[17]

> "I trust that I have made it clear that it is essential for an accused, who requests a referral to this court of an alleged contravention of the Declaration of Rights, to ensure that evidence is placed before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the […] Court hears argument and then decides if a fundamental right had been infringed."

Fifth, the presiding officer in a lower court should then make a determination on whether or not the request is frivolous or vexatious to warrant a referral. There are three scenarios that may arise. The first scenario occurs when the presiding officer finds that the request for a referral is frivolous or vexatious. In this case, the presiding officer should not grant the request. The second scenario is when the presiding judicial officer finds that the request is not frivolous or vexatious. In this case, the presiding officer is bound to refer the constitutional matter to the Constitutional Court. This is an exercise that the judicial officer has to undertake. However, a third scenario occurs when the presiding judicial officer finds that the request for referral is neither frivolous nor vexatious but still does not refer the constitutional matter to the Constitution Court. In this case, the presiding officer will be in violation of the Constitution. The aggrieved parties are entitled to approach the Constitutional Court directly using section 85(1) of the Constitution.[18]

A frivolous request is one which (a) lacks seriousness, (b) is manifestly groundless, (c) is utterly hopeless and without foundation in the facts on which it is purportedly based, (d) is inconsistent with logic and good sense, (e) is groundless and devoid of merit that a prudent person could not possibly expect to obtain relief from it.[19]

A vexatious request is one (a) where the question being put forward for the purpose of causing annoyance for the opposing party in

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[16]CCZ9/15 para 15. See also *Tomana* case, *supra* note 10 p. 16.
[17]1995 (2) ZLR 297 301D-G. *See also S* v.*Makaza and Another; S* v. *Gumbo and Another* CCZ 16/17.
[18]*See Matiashe* v. *The Honourable Magistrate Mahwe N.O and Another* 2014 (2) ZLR 799 (S) p. 805A-B.
[19]*See Tomana*, *supra*note 10 p 24.

the full appreciation that it cannot succeed, (b) which is not raised bona fide and (c) where a referral would be to permit the opponent to be vexed under a form of legal process that was baseless.[20]

In making the determination of whether a referral is frivolous or vexatious, Malaba noted that the judicial officer should consider from the facts whether there is a basis that a person's right has been infringed.[21] This makes a lot of sense. Otherwise, there will not be any point to consider the request for a referral.

Malaba further argues that judicial officers should be guided by principles of constitutional avoidance[22] and subsidiarity[23] in deciding whether a request is frivolous or vexatious.[24] The constitutional avoidance principle in this context essentially enjoins the presiding officer faced with a request to refer a constitutional matter to the Constitutional Court to deny the request as frivolous or vexatious in instances when the party seeking relief in the Constitutional Court can obtain a similar remedy in the lower court. The subsidiary principle in the context of this discussion encourages the judicial officer to deny a request for referral of a

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[20]*Ibid*. *See alsoYoung* v. *Haloway and Another* [1895] 87 pp. 90-91; *Dyson* v. *A-G* [1911] 1 KB 410 (CA) p. 418; *Norman* v. *Matthews* (1916)85 LJ KB 875 p. 859; *S* v. *Cooper and Others*1977 (3) 475 (T) p. 476 paras. D-G; *Fisheries Development Corporation of SA Ltd* v. *Jogensen and Another*1979 (3) SA 1331 (W) p. 1339 paras. E-F; *Martin* v. *A-G*1993 (1) ZLR 153 (S); *Williams and Another* v. *Msipha*2010 (2) ZLR 552 (S) p. 568 paras. C –G.

[21]Malaba, *supra* note 14 p. 35.

[22]In *S* v.*Mhlungu* 1995 7 BCLR 793 (1995 3 SA 867) (CC) para. 59, Kentridge AJ articulates the principle of constitutional avoidance as follows "[i] would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'' Constitutional Avoidance is the principal that, if possible, the Supreme Court should avoid ruling on constitutional issues, and resolve the cases before them on other (usually statutory) grounds. In practice, what this often means is that if the Supreme Court is faced with two possible interpretations of a statute, one of which is plainly constitutional, and the other of which is of questionable constitutionality, the court will interpret the statute as having the plainly constitutional meaning, to avoid the hard constitutional questions that would come with the other interpretation. The doctrine of constitutional avoidance was first applied in constitutional matters in Zimbabwe in the case of *Zinyemba* v.*Minister of Lands and Rural Settlement*, CCZ 3/16.

[23]In *Sports and Recreation Commission* v. *Sagittarius Wrestling Club and Another* 2001 (2) ZLR 501 (S) p. 505F-G, the court embraced constitutional avoidance as where "[c]ourts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights." *Chawira and Others* v. *Minister of Justice and Others* CCZ 3/17 explained the concept as follows-"Zimbabwe operates a self-correcting hierarchical judicial system where in the ordinary run of things cases start from the lower courts progressing to the highest court of the land. Generally speaking, higher courts are loathe to intervene in unterminated proceedings within the jurisdiction of the lower courts, tribunals or administrative authorities." Malaba, *supra* note 14, p.38 argues that '[t]he principle of subsidiarity states that a litigant who avers that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right. He can only do that if he wishes to attack the constitutional validity or efficacy of the legislation itself." L.M. Du Plessis, ''Subsidiarity": What's in the name for constitutional interpretation and adjudication?', 17:2 *Stellenbosch Law Review* (2006) pp.207-231, 207, defines 'subsidiarity' as a reading strategy whereby a court refrains from taking a decision that can be taken by a lower court or avoids a constitutional decision if the matter can be decided on a non-constitutional basis.

[24]Malaba, *supra* note 14, p 35.

constitutional matter from the lower courts to the Constitutional Court where a litigant directly relies only on a constitutional provision without relying on a legislation enacted to protect that right. However, the request can be granted if the litigant demonstrates that (s)he intends to attack the constitutional validity or efficacy of the legislation itself.

It is not the intention of this paper to discuss in depth the application of the principles of constitutional avoidance and subsidiarity. Whilst the two doctrines have been applied by Zimbabwean Courts, there are a number of problems associated with considering these doctrines when dealing with referrals of constitutional matters from lower courts to the Constitutional Court. The first problem is that the Constitution or the Constitutional Court Rules do not subject a referral to the principles of constitutional avoidance or subsidiarity. The second problem is that unlike in South Africa and United States of America, the principles of constitutional avoidance and subsidiarity are applied absolutely in Zimbabwe, with no exceptions. In the end, the doctrines are usually used to avoid hearing constitutional issues which would have arisen and which would have been brought to the Constitutional Court. This restriction is not encouraged in a country like Zimbabwe, which is yet to develop constitutional jurisprudence from the 2013 Constitution. The third problem is that an absolute application of the doctrines of constitutional avoidance and subsidiarity does not encourage the respect, protection, promotion and fulfilment of the rights and freedoms provided in Chapter IV of the Constitution. It essentially (to a degree) violates obligation placed by section 44 of the Constitution on state institutions to respect, protect, promote and fulfil the rights and freedoms in Chapter IV of the Constitution. The fourth problem is that the principles of constitutional avoidance and subsidiarity enable the Constitutional Court to shy away from awarding constitutional relief directly in circumstances where the constitutional obligations are violated. Courts should be vigilant to grant relief that enforces and protects rights provided for in the constitution.

13.2.2 The referral must be in the prescribed format

Rule 24(3) of the Constitutional Court Rules provides for the format that a referral should be follow. It states that "[a] referral under subrule (1) or (2) shall be in form CCZ 4 and be accompanied by a copy of the record of proceedings and affidavits or statements from the parties setting out the arguments the parties seek to make before the Court."

The referral must be in the following format: "

(a) Form CCZ 4 – The following information should be on form CCZ 4 (i) the case number; (ii) the parties; (iii) where the referral is coming from; (iv) date of referral; (v) the constitutional question referred; (vi) certification by the clerk or registrar and presiding officer that the record is a correct and accurate record and (vii) an index of attachments to the Form. As regards the constitutional questions, it

can be argued that Form CCZ4 requires that the person presiding over the lower court formulates the constitutional question[25] to be determined by the Constitutional Court. This is confirmed by case law. For instance, *Sibanda* v *The State*[26] established that the person presiding over proceedings in the lower court should clearly which question has been referred to the Constitutional Court.[27]

(b) A copy of the record of proceedings. Rule 24(5) states that "[t]he record of proceedings referred to in subrule (3) shall contain the evidence led by both sides and where applicable, specific findings of fact by the *person presiding over the court and the issue or question for determination by the Court*." Rule 24(6) states that "[w]here there is a statement of agreed facts in terms of the proviso to subrule (4), it shall suffice for the statement to be incorporated in the record in place of the evidence and specific findings of fact."

(c) Affidavits or statements from the parties setting out the arguments the parties seek to make before the Constitutional Court.

(d) A draft order in terms of Rule 24(7) of the Constitutional Court Rules.

13.2.3 The record of proceedings should be transmitted from lower court to the Constitutional Court

The presiding officer must direct the Clerk or Registrar to transmit the record to the Constitutional Court within 14 days of being directed to do so by the presiding judicial officer. Rule 24(7) provides that;

> "The person presiding over the court shall direct the clerk or registrar as the case may be to prepare and transmit the record so prepared to the Court within 14 days of the date such direction: Provided that, before transmission, the registrar or clerk of the referring court shall ensure and certify that the record is correct and accurate and in the case of a referral in terms of subrule (2), that it contains an appropriate draft order."

13.2.4 The Registrar of the Constitutional Court shall call upon parties to file heads of argument

Upon receipt of the referral, the Registrar of the Constitutional Court is obliged to call upon parties to file heads of argument. Rule 24(8) of the Constitutional Court Rules provides that "[w]here the Registrar receives a referral in terms of this rule, he or she shall call upon the parties to file their heads of argument. After the filing of the heads of argument, or should either party fail to file heads of argument, the Registrar shall set the matter down for hearing."

The time within which heads of argument should be filed is determined by Rule 39 of the Constitutional Court Rules. Rule 39(1) indicates that Rule 39 applies to referrals as well. The person who requested a referral (if represented by a Legal Practitioner) should file

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[25]Some constitutional questions can be gleaned from the Tomana case,*supra* note 10, pp.8-10 and *In re Chinamasa* 2000 (2) ZLR 322 (S).

[26]CCZ 4/17.

[27]*See S* v. *Williams and Others* CCZ 14/17 pp. 8-9.

heads 15 days after receiving a notification from the Registrar of the Constitutional Court in terms of Rule 39(2) or a longer period if a Judge sees good cause in terms of Rule 39(3). If the Registrar does not receive heads of argument within the said 15 days, Rule 39(5) requires that the referral be deemed as having been abandoned. Such a referral can only be reinstated on good cause being shown to a judge in Chambers.

In terms of Rule 39(4) of the Constitutional Court Rules, the Respondent who is legally represented should file heads of argument within 10 days after receiving the Applicant's heads of argument. If the Respondent does not file heads of argument within 10 days after receiving the Applicant's heads of argument, Rule 39(7) requires that the Respondent be barred. The court or judge will then proceed to hear the matter on merits.

13.2.5 The Constitutional Court will hear and determine the matter

Rule 24(8) of the Constitutional Court Rules states that "[a]fter the filing of the heads of argument, or should either party fail to file heads of argument, the Registrar shall set the matter down for hearing." In terms of Rule 41(2), the referral hearing may be heard in chambers or in open court at a time as the court or judge may determine. At the hearing, each party will present oral arguments for 20 minutes and will be allowed 5 minutes to address the court in reply,[28] presented and the court or judge will make a decision. However, this period may be extended on good cause shown.

13.3 Possible flexibility of the procedure

A close reading of the Constitution, the rules and jurisprudence seems to suggest that the Constitutional Court can, in the interests of justice, depart from the rigid application of the procedure highlighted in section 3 above. For instance, Section 85(3) of the Constitution[29] provides that:

> "The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that—
> (a) the right to approach the court under subsection (1) is fully facilitated;
> (b) formalities relating to the proceedings, including their commencement, are kept to a minimum;
> (c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities […].

This resonates with rule 5 of the Constitutional Court Rules that provides that:

[28] *See* Rule 41(3) of the Constitutional Court Rules.
[29] *See also* Rule 4C of the Rules of the High Court and Rule 4 of the Rules of the Supreme Court.

"5. Departure from rules and directions as to procedure

(1) The court or a judge may, in relation to any particular case before it or him or her, as the case may be –

(a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he or she, as the case may be, is satisfied that the departure is required in the interests of justice;

(b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him or her, as the case may be, to be just and expedient.

(2) The court or the Chief Justice or a judge may –

(a) of its, his or her own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules;

(b) give such directions in relation to matters of practice or procedure or the disposal of any appeal, application or other matter as the court or the Chief Justice or judge may consider just and expedient."

This flexibility is very important in ensuring that that substantive justice prevails over strict adherence to procedure or over reliance on technicalities. In *Githere* v. *Kimungu*,[30] the Court made the following pertinent observation:

> "[t]he relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case."

This approach will enable the Zimbabwean Constitutional Court hear a number of constitutional matters on the merits. This will potentially give the Constitutional Court a plethora of opportunities to develop constitutional jurisprudence to a fairly new Zimbabwean Constitution.

[30]1976-1985 EA 101.

13.4 Conclusion

Two major conclusions can be drawn from the above discourse. First, referrals of constitutional matters from lower courts to the Constitutional Court can be done either at the instance and discretion of a lower court or when a party to the proceedings requests for a referral. Second, the procedure for referrals can be summarized under the following five broad categories (a) there must be a referral; (b) the referral must be in the prescribed format; (c) The record of proceedings should be transmitted from lower court to the Constitutional Court; (d) the Applicant should file heads of arguments within 15 days after receiving a notice to file heads of argument by the Registrar of the Constitutional Court and by the Respondent 10 days after receiving the Applicant's heads of argument and (e) The Constitutional Court will hear and determine the matter.

Chapter 14

Judicial Interpretation of Sexual and Reproductive Health Rights in Zimbabwe: A Comparative Analysis[1]

Linet Sithole[2]

14.1 Introduction and Background

Reproductive health is defined as a state of complete physical, mental and social well-being in all matters relating to the reproductive system and to its functions.[3] This implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.[4] Reproductive health and rights remain vital to people's well-being and survival, and ultimately the realisation of wider socio-economic development goals.[5] The importance of reproductive health services is anchored in various international treaties and policies to which Zimbabwe is a state party. The treaties include but are not limited to the following: Covenant on Economic, Social and Cultural Rights;[6] Convention on the Elimination of all forms of Discrimination against Women;[7] the African Charter on Human and

[1]This chapter is part of my PhD project conducted with the University of Cape Town. I am greatly indebted to my Supervisor, Dr Amanda Barratt. I attribute the results of this work to her expertise, professional integrity, patience and astute guidance throughout my academic journey.My deepest appreciation also goes to the University of Cape Town's Faculty of Law for offering me the Faculty Tuition Scholarship and Completion Grant. Without this funding, it would have been impossible to complete this journey.

[2]Law Lecturer at Midlands State University in Zimbabwe.

[3]United Nations, *Report of the International Conference on Population and Development* (1994). *Cairo, 5-13 September 1994*, A/CONF.171/13/Rev.1.

[4]*Ibid*.

[5]A.M. Starrs, A.C. Ezeh & G. Barker *et al.,* 'Accelerate progress—sexual and reproductive health and rights for all: report of the Guttmacher–Lancet Commission', 2018 *The Lancet*.

[6]International Covenant on Economic, Social and Cultural Rights, Adopted United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976.

[7]Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by United Nations General Assembly Resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

Peoples' Rights;[8] African Charter on the Rights and Welfare of the Child;[9] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[10] Likewise, development policies including the Millennium Development Goals (MDGs) and the 17 Sustainable Development Goals (SDGs) that replaced MDGs upon their expiry in 2015 direct nations in promoting and protecting reproductive health and rights. In light of the SDGs and the mentioned treaties, it is imperative to assess the strides made by the Government through the judiciary in complying with its international obligations and therefore proffer recommendations for a richer jurisprudence on women's reproductive rights in Zimbabwe.

Besides being a State Party to international law and policy framework, the Zimbabwean government has made some efforts in addressing reproductive health services. Notably, Zimbabwe promulgated a progressive Constitution Amendment (No.20) Act of 2013 (hereinafter referred to as the Constitution). The Constitution is hailed for its potential to regard the reproductive rights of women as inalienable, interdependent, universal and indivisible. This is unlike Zimbabwe's former flawed and inadequate Constitution which did not provide for the right to health, let alone the right to access reproductive health services. The inadequacies of the Lancaster House Constitution are dealt with in Section 76(1) of the current Constitution of Zimbabwe which provides for 'the right to have access to basic health-care services, including reproductive health-care services.' The Constitution of 2013 and other laws enacted before it such as the Termination of Pregnancy Act[11] and the Domestic Violence Act[12] work to protect reproductive health rights. Varied aspects of reproductive health rights in Zimbabwe are well documented.[13]

Despite the evident importance of sexual and reproductive health and rights (SRHR) and their entrenchment in the Constitution as well as their protection in international human rights treaties, there have been a limited number of cases in which the right of access to reproductive health care services has been invoked.[14] Consequently, there is a relative paucity

[8]African Charter on Human and Peoples' Rights adopted by the then Organization of African Unity (OAU) on 27 June 1981 and came into force on 21 October 1986.
[9]African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49. Entered into force on 29 November 1999.
[10]Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.
[11]*[Chapter 15:10].*
[12]*[Chapter 5:16].*
[13]N.Z. Choguya, 'Traditional and Skilled Birth Attendants in Zimbabwe: A Situational Analysis and Some Policy Considerations', *Journal of Anthropology* (2015) pp.1-11; C. Esser, 'Neither bad luck nor chance: the health crisis in Zimbabwe in the context of human rights', *Menschenrechte und Gesundheit / Amnesty-Aktionsnetz Heilberufe (2011) Jg. 1*; C. Ferguson, *Reproductive rights and citizenship: Family planning in Zimbabwe* (Published PhD thesis, University of London, 1999); L. Muchabaiwa & J. Mbonigaba, 'Impact of the adolescent and youth sexual and reproductive health strategy on service utilisation and health outcomes in Zimbabwe', 14:6 *PLOS ONE* (2019) pp.1-19.
[14]*Mudzuru & Another* v. *Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others* (CC 12-15)

of judicial authority in Zimbabwe on the interpretation of SRHR.[15] The scarcity of cases implies that SRHR have not been judicially interpreted or developed. The courts therefore still have an opportunity to develop the SRHR jurisprudence by conceptualising them and determining the nature of obligations of the state and non-state actors.

In their quest to developing SRHR jurisprudence, Zimbabwean courts can draw lessons on how these rights have been interpreted in other jurisdictions. The purpose of this Chapter therefore is to analyse how the judiciary in Zimbabwe has interpreted SRHR in the few cases that have been presented before them since the 2013 constitutional amendment to date. The best international standards as stipulated in key UN and African Union human rights system will be used as analytical tools and yardsticks for conducting the constitutional analysis. A comparative analysis with jurisdictions that have rich jurisprudence on SRHR such as South Africa, Kenya and Uganda will also be done in order to draw lessons on how to contextually conceptualise these rights. This will assist in ensuring that reproductive rights are understood, recognized and realised in accordance with international human rights standards in Zimbabwe. This is significant for legislative and policy change as judgments from courts also provide jurisprudence that can be used in continuous lobbying and advocacy for the long-term realisation of women's SRHR in Zimbabwe.

This Chapter consists of six sections, with this introduction and background being the first. The second section is the conceptualisation of reproductive health rights. In the third section, the Chapter discusses the Constitution and reproductive rights. It highlights the provisions relevant to reproductive health rights, assessing whether they implement international treaty provisions. It also briefly discusses policy and institutional framework that show how Zimbabwe is in compliance with its international obligations on SRHR. The fourth section presents the role and significance of the courts and discusses the judicial interpretation of reproductive health rights in Zimbabwe. Section five gives a comparative analysis with South African, Kenyan and Ugandan jurisprudence on sexual and reproductive health rights. The choice of the selected jurisdictions is because of their rich jurisprudence on sexual and reproductive health rights. It also presents Southern African regional jurisprudence which is alive to the grounded realities of implementing such rights in Southern African jurisprudence. The last section is the conclusion which concludes the Chapter and proffers recommendations.

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[15]The dearth of cases can be attributed to the patriarchal nature of our society – that embraces many cultural practices 'that effectively operate against the dignity, welfare or interests of women and undermine their status.' Such control restricts women's ability to decide for themselves about their bodies, family planning, pregnancy and antenatal care. Owing to such subordination, and culture of silence, women do not speak up or come forward with cases of reproductive health rights violations. *See also,* M. Ssenyonjo 'Culture and the Human Rights of Women in Africa: Between Light and Shadow', 51:1 *Journal of African Law* (2007) p.1.

14.2 Conceptualisation of reproductive health rights

The idea of reproductive rights as human rights is not really new. It is a necessary component of long established and internationally recognized human rights.[16] Even though reproductive health rights are grounded upon other existing human rights, there is no conventional definition of the term.[17] The explicit recognition of women's reproductive rights as human rights emerged as a high priority in the international human rights arena as a result of the United Nations International Conference on Population and Development (ICPD) 1994, which defines reproductive health as follows:

> "Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant".[18]

The ICPD further defines reproductive healthcare as a constellation of methods, techniques and services that contribute to reproductive health which include;[19]

a) Family planning services;
b) Access to contraception, counselling and information;
c) Antenatal, postnatal and delivery care, health care for infants;

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[16]L. Gable, 'Reproductive Health as a Human Right', 60:4 *Case Western Reserve Law Review* (2010). *See for instance* Article16 of the Universal Declaration of Human Rights which provides for the right to marry and found a family as well as the right to consent to marriage; Article 12 of the International Covenant on Economic, Social and Cultural Rights which provides for the right to health, expanded by General Comment 14 of the Committee on Economic, Social and Cultural Rights to include important elements of reproductive rights such as 'the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference such as the right to be free from torture, non-consensual medical treatment and experimentation.' Article 12 and 16 of the Convention on the Elimination of all forms of Discrimination against Women, Article 14 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, and Article 14 of the African Charter on the Rights and Welfare of the Child, make provision for women's reproductive health rights.

[17]UNFPA, *Integrating Reproductive Rights into the work of National Human Rights Institutions of the Asia Pacific Region: A Preliminary Chapter of current views and practices, challenges opportunities* (2011).

[18]United Nations, *Report of the International Conference on Population and Development (Cairo, 5-13 September 1994),* A/CONF.171/13/Rev.1.

[19]*Ibid*., Paras. 7.2 and 7.6.

d) Treatment for reproductive tract infections and sexually transmitted diseases (including HIV/AIDS);
e) Safe abortion services where legal[20] and management of abortion-related complications;
f) Prevention and appropriate treatment for infertility,
g) Information, education and counselling on human sexuality, reproductive health and responsible parenting and discouragement of harmful practices.

Consequently, reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.[21]

14.3 The Constitution and Reproductive Health Rights

Domestic constitutions, as rightly argued by Pizzarossa and Perehudoff, are 'the most vital expressions of government responsibility and individual entitlements, and therefore one of the channels best suited to endorse states' commitments to human rights.'[22] Zimbabwe, like many other States, has also incorporated socio-economic rights in the 2013 Constitution, which replaced the previous Lancaster House Constitution. The 2013 Constitution of Zimbabwe thus ushered in a new era by expressly providing for the right to have access to healthcare services and reproductive health services. Section 76 (1) provides that:

> "Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services", *including reproductive health-care services*.[23]

The explicit provision of the right to have access to reproductive healthcare in the Declaration of Rights in the Constitution is commendable – it presents an opportunity that did not exist in Zimbabwe's previous Lancaster House Constitution. Enshrining the right to have access to

[20]Under the Zimbabwe Termination of Pregnancy Act, section 5, abortion is legally permitted only in the following circumstances: to save the life of the pregnant woman, if the continuation of the pregnancy endangers her life; if the pregnancy is a serious threat to the pregnant woman's physical health and could cause permanent damage; if there is a serious risk that, if the child is born, it will suffer from a physical or mental defect that will cause the child to be severely handicapped; where the pregnancy is as a result of unlawful intercourse.
[21]Paragraph 7.3 of the ICPD.
[22]L.B. Pizzarossa & K. Perehudoff, 'Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights'.19:2 *Health and Human Rights Journal* (2017).
[23]Added emphasis.

reproductive health in a Declaration of Rights identifies[24]it as 'fundamental and places it beyond the depredations of a transient electoral majority.'[25] A justiciable Declaration of Rights makes it possible for aggrieved parties to sue the government for a breach thereof. The 2013 Constitution is therefore a good foundation upon which citizens can pursue the implementation of its provisions, particularly those in the Declaration of Rights.Suffice it to say that by including the right to have access to reproductive health services in the Constitution, Zimbabwe is putting into domestic law, rules which enable it to abide by its treaty obligations under international law.[26]Accordingly, this shows that Zimbabwe has domesticated provisions relevant to its obligation to protect and promote women's right to have access to reproductive health care services. However, even with such domestication of international provisions, implementation of such provisions remains a challenge – for instance, newspapers are awash with stories of mothers and babies being detained at the country's main hospitals over the non-payment of maternity fees,[27] conduct which defeats the right to access reproductive health care services.[28]The practice of detaining women in hospital for non-payment of medical bills arising from maternal service provision,[29] deters them from using healthcare, and is a denial of the right to access to health care, including reproductive health care.[30]

Another provision of the Constitution relevant to women's reproductive health rights is Section 52. Section 52 safeguards the right to 'bodily and psychological integrity' which includes freedoms 'from all forms of violence from *public or private sources*' and the freedom to 'make decisions concerning reproduction'.[31] Under Section 52(1)(a), the Constitution of Zimbabwe provides for the freedom 'from all forms of violence from public or private sources' which denotes that women should

[24]N.W. Barbe, 'Why Entrench?', 14:2 *International Journal of Constitutional Law* (2016). Barber defines entrenchment as a 'constitutional tool that renders legal change more difficult.'
[25]E. Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution', 8 *South African Law Journal* (1992) p.464.
[26]Article 12 of the ICESCR, Article 12 of CEDAW and Article 14 of the African Women's Protocol.
[27]'MPs concerned over 'hospital detentions', *Newsday,*3 June 2014, <www.newsday.co.zw/2014/06/03/mps-concerned-hospital-detentions/>, visited on 19 April 2016; The 'Hospitals Detain Mothers over Maternity Fees', *The Chronicle*, 22 January 2013, <www.chronicle.co.zw/hospitals-detain-mothers-over-maternity-fees/>, visited on 19 April 2016; 'Mothers, babies detained at Mpilo for non-payment', *The Zimbabwean*, 22 February 2012 at <reliefweb.int/report/zimbabwe/mothers-babies-detained-mpilo-non-payment>, visited on 19 April 2016).
[28]This amounts to false imprisonment which is a violation of section 49(1) of the Constitution on the right to personal liberty, which includes the right not to be deprived of liberty arbitrarily or without just cause.
[29]Unaffordability of services is itself a barrier to women's right to access reproductive services.
[30]R. Yates, T. Brookes & E. Whitaker, 'Hospital Detentions for Non-payment of Fees: A Denial of Rights and Dignity',www.chathamhouse.org/sites/default/files/publications/research/2017-12-06-hospital-detentions-non-payment-yates-brookes-whitaker.pdf, visited 4 on July 2021.
[31]Section 52(b) of the Constitution.

be able to make reproductive decisions, such as, choice of a spouse or partner, without any interference by the state or other parties.

The freedom to make decisions concerning reproduction encompasses a variety of issues which include, among others, decisions on whether to use birth control, the type of contraception to use, whether to terminate a pregnancy, or the number and spacing of children. Inclusion of the right to bodily integrity is in compliance with Zimbabwe's obligation to protect women's right to access reproductive health services as provided for under Article 12 of the ICESCR, Article 14 of the African Women's Protocol and Article 24 of the CRC. These provisions, as explained under paragraph 42 of CESCR general comment 22 and paragraph IV A of CRC Committee General Comment 15, enjoin State Parties to ensure that women have access to reproductive health care services free from any third-party interference. It is therefore submitted that the Constitution does incorporate international standards on sexual and reproductive health rights.

Prior to the 2013 Constitution, non-discrimination did not include pregnancy as one of the prohibited grounds of discrimination. As a result of widespread campaigns by women organisations, who advocated for a reproductive and gender sensitive Constitution, section 56 (3) of the Constitution included pregnancy as a prohibited ground for discrimination. The Constitution now expressly prohibits discrimination on the grounds of pregnancy, sex, gender, marital status and age among others. The inclusion of such issues as prohibited grounds of discrimination is laudable as these are the areas in which women face unfair discrimination when attempting to access reproductive health care services.[32] This is in line with Article 12 of CEDAW which compels member states to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

There are other rights enshrined in the Constitution that empower individuals in making reproductive health decisions and help promote sexual and reproductive health rights. These include *inter alia*, the right to found a family as provided for in Section 78 (1) and (2) which states that 'every person who has attained the age of eighteen years has the right to found a family' and that 'no person may be compelled to enter into marriage against their will'; and Section 80 (3) which outlaws cultural practices that infringe on women's rights by providing that 'all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.'[33] These provisions serve as a reminder to the State and its institutions of the

[32]O.A. Savage-Oyekunle, *Female Adolescents' Reproductive Rights: Access to Contraceptive Information and Services in Nigeria and South Africa* (Unpublished PhD Thesis, University of Pretoria) 2014.p.141.
[33]Section 80 (3) of the Constitution.

need to reach out to rural women for the realisation of reproductive health rights. This remains important considering the vulnerability of rural women to harmful religious and traditional practices,[34] such as child betrothal, early and forced marriage and early pregnancy, which put their health and other rights at risk. This is in line with provisions of the Article 14 of the African Women's Protocol which compels states to ensure that women freely exercise their reproductive rights by deciding when to found a family or what contraceptives to use; as well as Article 14 of CEDAW which requires states to take into cognisance the unique challenges that rural women face in accessing reproductive health services.

Furthermore, section 29 of the Constitution, which forms part of the National Objectives, requires the State to provide for health services under the national objectives. Although not *strictosensu* justiciable, it has been argued that national objectives are crucial supportive mechanisms in the landscape of human rights adjudication.[35] It has further been argued that 'under this approach, the full realisation and promotion of human rights can be furthered by giving more weight to the national objectives provided for in Chapter 2 of the Constitution.'[36] Section 29(1) mandates that '[t]he State must take all practical measures to ensure the provision of basic, accessible and adequate health services throughout Zimbabwe'. Commendably, the provision reinforces the need by the state to expand health service to all parts of the country. This is important for women and their reproductive health, as women in rural areas often have their rights infringed because of inaccessibility. Of particular importance about section 29(1) is its mention of 'accessibility', which is a significant aspect for the protection of reproductive health rights as is provided for under international human rights instruments.[37]This therefore shows that Zimbabwe's Constitution incorporates international provisions on women's right to access reproductive health care services.

The aforementioned constitutional provisions are significant as they, for the first time in Zimbabwe's constitutional history, protect women's sexual and reproductive health rights. In a way, the constitutionalisation of reproductive rights asserts women's ability to claim[38] their rights and further reduces women's vulnerability to sexual health problems including HIV and AIDS. It is submitted that such

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[34]L. Sithole & C. Dziva, 'Eliminating harmful practices against women in Zimbabwe: Implementing Article 5 of the Maputo Protocol', 19:2*African Human Rights Law Journal* (2019) pp.568-590.

[35]P. Singh, 'Judicial Socialism and Promises of Liberation: Myth and Truth', 28 *Journal of the Indian Institute* (1986) p. 338. Singh argues that the functions of the court are not strictly restricted to interpretation of the law but court can also make law "by sharing the passion of the Constitution for social justice."

[36]A. Moyo 'Zimbabwe's Constitutional Values, National Objectives and the Declaration of Rights' in A. Moyo (ed.), *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019) (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2019) p.42.

[37]Article 12 of the ICESCR, Article 14 of the African Women's Protocol and Article 12 of CEDAW.

[38]The different ways that rural women can use to claim their rights is discussed in detail in Chapter Five.

provisions show how Zimbabwe is implementing treaty provisions in the ICESCR, CEDAW, African Women's Protocol,[39] and uphold, to some extent, government's commitment to the health of its citizens.

14.3.1 Policies and institutions in place that indicate Zimbabwe's compliance

The preceding discussion has shown how Zimbabwe has implemented various treaty provisions into its Constitution. Acknowledging that treaty implementation is different from treaty compliance, this section briefly discusses the policies and institutions in place that show that Zimbabwe is in compliance with its obligations imposed by the various treaties that it is a party to.

14.3.1.1 Policies

The *2016-2020 National Health Strategy*,[40] which builds on the 2009-2013 strategy[41] and its extension in 2014-15 is the key policy that informs the national health framework in Zimbabwe. The 2016-2020 Health Strategy has three main goals and 21 objectives. Goal number 1 on strengthening priority health programmes has 10 objectives and four priority areas. Reproductive health falls under objective number one as priority number three. The objectives under the reproductive health priority include; reducing maternal mortality ratio from 614 per 100,000 live births in 2014, to 300 per 100,000 live births by 2020; reducing Neonatal Mortality Rate from 29 to 20 deaths per 1,000 live births; reducing the under-five mortality rate from 75 to 50 deaths per 1,000 live births; and reducing mortality and morbidity due to malnutrition by 50 per cent.

The CEDAW Committee general recommendation 24, has explained that the obligations under Article 12(2) requires states to report on maternal mortality rates affecting vulnerable groups of women, and the measures taken to enhance access to safe motherhood services aimed at tackling maternal mortality. Thus, Zimbabwe's inclusion of reproductive health in the National Health Strategy is commendable as it allows the Government to set targets that should be complied with in accordance with treaty obligations under Article 12(2) of CEDAW.

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[39]*See* O.R.Young, *Compliance and Public Authority: A Theory with Internation Applications* (Baltimore: Johns Hopkins Univ. Press,2013) p.172. Treaty implementation, as opposed to compliance, refers to the adoption of domestic rules or regulations that facilitate, but do not in themselves constitute compliance with international agreements. Compliance on the other hand '…can be said to occur when the actual behaviour of a given subject conforms to prescribed behaviour, and non-compliance or violation occurs when actual behaviour departs significantly from prescribed behaviour.'

[40]Ministry of Health and Child Care, *The National Health Strategy for Zimbabwe (2016–2020), Equity and Quality in Health: Leaving No one Behind* (2016).

[41]Ministry of Health and Child Care ,*The National Health Strategy for Zimbabwe (2009–2013) Equity and Quality in Health: A People's Right'* (2010), whose aim is to provide a framework for immediate resuscitation of the health sector (Health System Strengthening), and secondly, to put Zimbabwe back on track towards achieving the Millennium Development Goals.

Other relevant policies include the *Zimbabwe National Family Planning Policy 2016-2020* whose aim is to improve on efficiency and effectiveness in the provision of integrated family planning services. The policy acknowledges the significance of family planning by stating that:

> "Increased access to integrated FP has many essential benefits for individuals, families, societies and the nation at large. By ensuring universal access to integrated FP and related SRHR services we can reduce the levels of maternal mortality, infant mortality, teenage pregnancies and the resulting unsafe abortions".

The *National Adolescent and Youth Sexual and Reproductive Health Strategy II: 2016-2020*[42] on the other handhas the goal of addressing sexual and reproductive health challenges among adolescents and young people between ages of 10-24 years in Zimbabwe. Although specific to adolescents, the government is commended for launching a policy that directly speaks to reproductive health in line with State obligations in Article 10(h), Article 16 of the CEDAW and Article 14 of the ACRWC among others.

14.3.1.2 Maternity Waiting Homes

The World Health Organisation (WHO) defines MWHs as residential facilities located proximate a qualified medical facility, where women, often those at high risk of complications, can await their delivery.[43] WHO highlights the purpose of MWHs as:

> "These strategies are typically designed for inaccessible areas to facilitate the timely movement from home to health facility by diminishing barriers that inhibit access to care such as distance, geography, seasonal barriers or the time of day, infrastructure, and transport, the cost of transport or communication between referral points".[44]

In Zimbabwe, the concept of MWHs was introduced after independence in 1980 and all rural district hospitals in Zimbabwe

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[42]Ministry of Health and Child Care, *National adolescent and youth sexual and reproductive health strategy (ASRH) II: 2016-2020.* The 2016-2020 ASRH Strategy II represents the second generation results-based strategy to aim to address SRH challenges among adolescents and young people between ages of 10-24 years in Zimbabwe. The strategy incorporates lessons learned in implementing the first generation strategy and changes in the national and global context with regards ASRH.

[43]World Health Organisation, *Maternity Waiting Homes: A review of experiences* (1996), <apps.who.int/iris/bitstream/handle/10665/63432/WHO_RHT_MSM_96.21.pdf;jsessionid=08EFC506FF8A4DBE615CF223442F1660?sequence=1>, accessed on 14 April 2020.

[44]World Health Organisation*, Recommendation on establishment of maternity waiting homes (MWHs),<extranet.who.int/rhl/topics/improving-health-system-performance/who-recommendation-establishment-maternity-waiting-homes-mwhs>,*accessed on 14 April 2020.

have a MWH.[45] However, since 2007 most MWHs were dilapidated resulting in underutilization or disuse. To revitalise the dilapidated MWHs, the Government, through the Ministry of Health and Child Welfare[46] established the Maternity Waiting Homes Operational Guidelines in 2010. The objective of the guidelines was to renew MWHs[47] as a practical strategy and intervention designed to improve access to health institutions, increasing institutional deliveries, improving access to skilled attendance at birth and thus reducing maternal mortality.[48] Some of the key activities outlined in the MWH Operational Guidelines established in 2010 are:

> "1. Renovation and refurbishment of 105 MWHs according to specific needs of each MWH. This is aimed at increasing the utilization of MWHs thereby contributing to addressing the 2nd delay as it is expected to promote institutional deliveries through bringing pregnant women closer to the health facility.
> 2. Procurement and distribution of 62 ambulances suited for rough terrain to strengthen referral services at district level (one ambulance for each district hospital). This will help reduce maternal deaths caused by delays in referrals.
> 3. Procurement and distribution of commodities including food items for nutritional support to women staying at the MWHs.
> 4. Training of 800 service providers in emergency obstetric and new born care (EmONC) to strengthen their capacity to manage obstetric complications that are responsible for most maternal deaths. This contributes to addressing the 3rd delay. Health workers will also be trained on how to run MWHs to ensure standardization and compliance with the MWH operational guidelines."

This is a good document which, if effectively executed, has the potential role of easing women's access to maternal health services. For instance, the benefits of revitalising the MWHs and capacity building was reported

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[45] United Nations Population Fund, *Maternity Waiting Homes: Promoting Institutional Delivery and Pregnant Women's Access to Skilled Care,*<zimbabwe.unfpa.org/sites/default/files/pub-pdf/MATERNITYWAITINGHOMES.SUMMARY.pdf>, accessed 21 March 2020.

[46]The Ministry of Health and Child Care is the government ministry responsible for health in Zimbabwe whose purpose is to promote the health and quality of life of the people of Zimbabwe.

[47]Maternity waiting homes are homes that provide a setting where high risk women can be accommodated during the final weeks of their pregnancy near a hospital with essential obstetric facilities.

[48]UNPF, *Maternity Waiting Homes, supra* note 45. *See also* W.Holmes & E. Kennedy, *Reaching emergency obstetric care: overcoming the 'second delay* (Burnett Institute: Melbourne, Australia, 2010) who argued that strategies typically designed for inaccessible areas, like maternity waiting homes, aim to facilitate the timely movement of women from home to health facility by diminishing barriers that inhibit access to care such as distance, geography, seasonal barriers or the time of day. The interventions relate to improving infrastructure or transport, addressing the cost of transport or enabling communication between referral points; Loveday Penn-Kekana *et al*., 'Understanding the implementation of maternity waiting homes in low- and middle-income countries: a qualitative thematic synthesis', 17 *BMC Pregnancy and Childbirth* (2017) p.269.

in the 2015 Zimbabwe Demographic Health Survey, which states that 71 percent of rural births were assisted by a skilled provider compared to 66 per cent in 2011.[49] Increased assisted delivery in 2015, therefore, shows significant improvement in access to maternal health care services and a reduction in the maternal mortality ratio (MMR).[50] This is commendable as these efforts comply with Zimbabwe's obligation in Article 12 of CEDAW, Article 14 of the African Women's Protocol and Article 12 of the ICESCR, which require State Parties to put in place measures to ensure accessibility of reproductive health care services.

Nonetheless, failure to effectively execute the MWHs Programme activities can defeat the objective of reducing maternal mortality as women will be forced to deliver at home. Home deliveries, although cost effective, have some dangers for the women and their unborn children. The risks associated with home deliveries include deliveries without skilled staff, equipment, medicines and conditions that are not safe or conducive for deliveries.[51] The 2015 Zimbabwe Demographic Health Survey Report revealed that 20 per cent of women had given birth at home in the 2 years preceding the survey.[52] Although commendable, 20 percent is still a high number. Therefore, Zimbabwe should put more effort to ensure that women do not give birth at their homes as this will be in direct violation of its obligations.

14.3.1.3 Community Health WorkersCommunity Health Workers (CHWs) are individuals who either volunteer or are chosen by the community and trained by the Government through the Ministry of Health and Child Care to assist in provision of primary health care within their communities.[53] The concept of CHWs became popular worldwide after the 1978 Alma Ata Health for All Declaration.[54] Highlighting the role of CHWs in primary health care, the Alma-Ata Declaration states that:

> "Primary health care relies, at local and referral levels, on health workers, including physicians, nurses, midwives, auxiliaries and community workers as applicable, as well as traditional practitioners as needed, suitably trained socially and technically to

[49]Zimbabwe National Statistics Agency and ICF International, *Zimbabwe Demographic and Health Survey 2015: Final Report* (2016).
[50]Zimbabwe National Statistics Agency, *Maternal Health: 2015 Key Findings* (2016).
[51]O.M.R. Campbell & W.J. Graham, 'Strategies for reducing maternal mortality: getting on with what works', *Lancet* (2006)*;* L.S. Blum, T. Sharmin& C. Ronsmans, 'Attending home vs clinic-based deliveries: perspectives of skilled birth attendants in Matlab, Bangladesh', 14 *Reproductive Health Matters* (2006) pp.51–60.
[52]Zimbabwe National Statistics Agency, *Zimbabwe Demographic Health Survey Report, supra* note 49.
[53]L.Nkonki, J. Cliff &D. Sanders, 'Lay health worker attrition: important but often ignored', 89:12*Bulletin of the World Health Organ* (2011).
[54]World Health Organization, *Declaration of Alma-Ata* (1978) <www.who.int/publications/almaata_declaration_en.pdf>, accessed on 12 April 2020.

work as a health team and to respond to the expressed health needs of the community".[55]

The significance of CHWs cannot be emphasised. Tulenko*et al*[56] succinctly summarise the reasons why CHWs are important as follows:

1. "They are properly trained, equipped and supported can take on a range of tasks that oth-erwise depend on mid-level health workers.
2. They extend care to underserved communities, where they enhance access to health services and promote people's trust, demand and use of such services.
3. They who speak the local language and identify with the local community convey health messages more effectively.
4. Their training and service contribute to capacity for community leadership.
5. They can help service users avoid trips to health facilities, which translates into saved transportation costs and time.
6. They can meet some of the needs of homebound patients."

The values and principles set down at Alma-Ata continue to be relevant in Zimbabwe today as CHW are still offering services to the underserviced communities. This is a good initiative which has the potential role of assisting Zimbabwe to meet its obligations of providing access to healthcare services to the hard-to-reach areas as provided for under Article 12 of the CEDAW, Article 14 of the African Women's Protocol and Article 12 of the ICESCR. However, the CHW program has faced a number of challenges in its implementation. These challenges are mainly centred on non-payment of the CHW as well as inadequate and inconsistent supply of resources needed by CHWs to execute their duties.[57] Failure to effectively implement the CHW programme leads to inadequate access of health services which in turn leads to a violation of women's right to access reproductive health services.

14.4 Role and significance of the courts

The constitutionalisation of women's reproductive rights under the Declaration of Rights provides domestic accountability for obligations that Zimbabwe has already undertaken through its ratification of numerous international and regional human rights treaties. The courts play a crucial role in holding the State accountable through the judicial pronouncement of human rights in general, and the right to reproductive health in

[55] *Ibid.*

[56] K. Tulenko, S. Møgedal&M.A. Muhammad, 'Community health workers for universal health-care coverage: from fragmentation to synergy', (2013) *Bulletin of the World Health Organization* (2013) pp.847-852.

[57] O. Gore, F. Mukanangana & C. Muza, 'The role of Village Health Workers and Challenges Faced in Providing Primary Health Care in Mutoko and Mudzi Districts in Zimbabwe', 4:1*Global Journal of Biology, Agriculture and Health Sciences* (2015) pp. 129-135.

particular. This provides an opportunity for the realisation of women's right to access reproductive health care because justiciability of these rights strengthens accountability and ensures that women can approach the courts of law for determination and relief when their rights have been violated.[58] The courts therefore have the task of upholding constitutional values and rights.[59] That is, where the right to reproductive health is constitutionalised, courts have the duty to enforce the protection, vindication and advancement of that right. More broadly, the justiciability of economic, social and cultural rights 'offers the best opportunity to develop a jurisprudence which engages seriously *with the content* of these rights and the nature and scope of the obligations they impose.'[60]

While it is agreed that reproductive health rights are justiciable, their justiciability means little without domestic legal systems that afford access to effective remedies for rights violations.[61] Section 85 of the Constitution gives courts wide remedial powers by providing that 'the court may grant appropriate relief including a declaration of rights and an award of compensation…' Section 85 further gives everyone *locus standi*

> "[T]o 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…'[62]

Consequently, anyone can approach the courts where there has been an infringement of a right enshrined in the Declaration of Rights, and the court can grant an appropriate relief.[63] Similarly, in *Fose* v. *Minister of Safety and*

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[58]The courts give can more weight to the national objectives provided for inChapter 2 of the Constitution to demand state compliance and thus ensure the full realisation and promotion of human rights.

[59]J.R. May & E. Daly, *Global Judicial Handbook on Environmental Constitutionalism* (3 ed.), (2017) p.5.

[60]N. Ndlovu, *Protection of socio-economic rights in Zimbabwe: A critical assessment of the domestic framework under the 2013 Constitution of Zimbabwe* (2016).

[61]E. Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law', 22:1*American University International Law Review* (2006) pp.35-64.

[62]Section 85(1) provides as follows:

> "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.

[63]Malaba DCJ (as he then was) held in *Mudzuru & Anor* v. *Minister of Justice, Legal and Parliamentary Affairs & Ors* that 'Section 85 (1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights in the event of proven infringement. The right to a remedy provided for under s 85 (1) of the Constitution is one of the most fundamental and essential rights for the effective protection of all other fundamental rights and freedoms enshrined

Security,[64] the Constitutional Court of South Africa, in explaining the court's remedial powers as provided for in Section 7(4) (*a*) of the interim Constitution of South Africa,[65] stated that:

> "It is left to the courts to decide what would be appropriate relief in any particular case […].Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection of these all-important rights".

Section 46 of the Constitution further enjoins the courts, when interpreting the Declaration of Rights, to give full effect to the rights and freedoms in the Declaration of Human Rights and must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom. Section 46 of the Constitution requires the courts, when protecting the Declaration of Rights, to observe the following:

> "46 Interpretation of Chapter 4 (1) When interpreting this Chapter, a court, tribunal, forum or body— (a) must give full effect to the rights and freedoms enshrined in this Chapter; (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3; (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party; (d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and (e) may consider relevant foreign law".

Thus, section 46(1) (c) of the Constitution is of significance to this Chapter. It imposes a duty on courts to rely on international law when interpreting the provisions in the Declaration of Rights. This means that the relevant provisions in the Zimbabwean Constitution can be 'given meaning' by interpreting them through the international treaties that Zimbabwe is a party to. Armed with the section 46(1)(c) of the Constitution and other legal provisions supporting women's health, the courts are poised to

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in Chapter 4. The right to a remedy enshrined in s 85 (1) constitutes a constitutional obligation inherent in Chapter 4 as a whole.

[64]1997 (3) SA 786 (CC).

[65]Constitution of South Africa of 1996. Section 7(4)(a) of the South African Constitution, which has provisions similar to section 85 of the Zimbabwean Constitution, provides as follows: "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

effectively play a crucial role in safeguarding women's health rights, by relying on both national and international human rights law to produce enforceable judgments that can be used by litigants for the realisation of their rights. Such judgements provide jurisprudence that can be used in continuous awareness raising, lobbying and advocacy for the long-term realisation of women's reproductive health rights.

14.4.1 *Judicial interpretation of reproductive health rights*

This section seeks to analyse cases on reproductive health rights that have been dealt with by the Zimbabwean courts. This was a very challenging task because unlike other economic, social and cultural rights, (for instance the right to water and the right to adequate shelter) where cases have been brought before the courts and judgements delivered, there has been a very limited number of cases in which reproductive health rights been invoked. Thus, Zimbabwean constitutional jurisprudence on health care is not as well-developed as in other African countries such as South Africa.[66] Accordingly, this Chapter's discussion of the judicial interpretation of reproductive health rights will be comparatively brief because it is still largely speculative. A comparative analysis will be made with reference to case law from South Africa since the constitutional provisions on the right to access health including reproductive healthcare are similar in Zimbabwe and South Africa, and the South African jurisprudence should provide useful guidance to the Zimbabwean courts.[67]

Perhaps the first case worth discussing is that of *Mildred Mapinguare* v. *The Minister of Health and Others* SC 22/14 (hereinafter called *Mapingure*). *Mapingure* is considered the first reproductive health right case dealt with by the courts in Zimbabwe since the promulgation of the 2013 Constitution. The case has made a significant contribution to Zimbabwean jurisprudence. In this case, Mildred Mapingure, who had been raped by robbers, sought access to services for the termination of her pregnancy in terms of the Termination of Pregnancy Act.[68]

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[66]The Zimbabwean Constitutional Court has heard 108 cases to date while the South African Constitutional Court has heard 808 cases.

[67]The South African Constitution has, in section (27)(a), entrenched the right of access to health care services, including reproductive health care services. Section 27(2) obliges the state "to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation" of, among others, health care rights. Section 27(3) provides that no-one "may be refused emergency medical treatment".

[68]*[Chapter 15:10].* Section 5 of the Termination of Pregnancy Act provides for conditions of termination of pregnancy as follows: "1. Subject to section seven, a pregnancy may only be terminated by a medical practitioner in a designated institution with the permission in writing of the superintendent thereof. 2. In the case of the termination of a pregnancy on the grounds referred to in paragraph (a) or (b) of section four, the superintendent shall not give the permission referred to in subsection (1) unless he is satisfied that— a) the medical practitioner referred to in subsection (1) and one other medical practitioner; or b) any two medical practitioners; who are not members of the same medical partnership or otherwise involved in the same medical practice have certified in the prescribed form that in their opinion the circumstances referred to in paragraph (a) or (b) of section four exist and that, in the case of the circumstances referred to in paragraph (b) of that section, any prescribed

Mapingure brought an action against the following respondents: Minister of Health and Child Care; Minister of Justice, Legal and Parliamentary Affairs as well as the Minister of Home Affairs, for pain and suffering endured as a result of the respondents' employees' negligence in their failure to prevent or facilitate the termination of her pregnancy. The case was therefore based on the law of delict and the court, applying the test for negligence, found that the doctor and the police who attended to Mapingure had been negligent in their failure to take reasonable steps to prevent the pregnancy and for failing to act timeously in accompanying Mapingure to the hospital for the termination of her pregnancy, respectively. This was in breach of their duties as outlined in section 5(4) of the Termination of Pregnancy Act.

Having found the respondents negligent, the court also took the opportunity to comment on the provision of Section 5(4) of the Termination of Pregnancy Act – which provides for restrictive conditions under which a woman can legally terminate pregnancy. The court stated that:

> "I think it necessary to comment on the formulation of the statutory provision under consideration. *It is apparent from the foregoing that s 5(4) of the Act is ineptly framed and lacks sufficient clarity as to what exactly a victim of rape or other unlawful intercourse is required to do when confronted with an unwanted pregnancy. The subsection obviously needs to be amended.* In particular, it is necessary to specifically identify the "authorities" that are referred to in the provision and to delineate their obligations with adequate precision".[69]

This judgment is commendable as the court clearly criticized the ambiguity of the law on termination of pregnancy. However, apart from the attack on the ambiguity of section 5 of the Termination of Pregnancy Act, the court did not comment on the right to abortion and what it entails as provided for in international provisions and the Constitution of Zimbabwe.

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investigation, scientific or otherwise, has been carried out. 3. In the case of the termination of a pregnancy on the grounds referred to in paragraph (*c*) of section *our*, the superintendent shall give the permission referred to in subsection (1) on the production to him of the appropriate certificate in terms of subsection (4). 4. A pregnancy may only be terminated on the grounds referred to in paragraph (*c*) of section *four* by a medical practitioner after a certificate has been issued by a magistrate of a court in the jurisdiction of which the pregnancy is terminated to the effect that— a) he has satisfied himself— (i) that a complaint relating to the alleged unlawful intercourse in question has been lodged with the authorities; and (ii) after an examination of any relevant documents submitted to him by the authorities and after such interrogation of the woman concerned or any other person as he may consider necessary, that, on a balance of probabilities, unlawful intercourse with the woman concerned has taken place and there is a reasonable possibility that the pregnancy is the result of such degree to the person with whom she is alleged to have had incest; and b) in the case of alleged rape or incest, the woman concerned has alleged in an affidavit submitted to the magistrate or in a statement made under oath to the magistrate that the pregnancy could be the result of that rape or incest, as the case may be."

[69]Emphasis supplied.

The court ought to have explained the import of the limited circumstances when a woman can legally terminate her pregnancy on her reproductive health rights as provided for in the Constitution and international human rights instruments. The stringent circumstances provided for by the law effectively restrict women's access to reproductive health care, in violation of section 76 of the Constitution. Ngwena argues that the grounds for abortion under the Zimbabwean Termination of Pregnancy Act are more restrictive than those provided for in the African Women's Protocol.[70] Such limitations go against Zimbabwe's responsibility not to enact restrictive laws, or fail to align restrictive laws, thus violating its obligation to respect the right to access reproductive healthcare services.

This case provided an opportunity for the courts to elaborate the principles underlying the reproductive health right to terminate pregnancies in terms of the Termination of Pregnancy Act. Although the basis of this application was the law of delict, the court missed an opportunity to make a determination based on human rights norms relating to women's reproductive rights in Zimbabwe and made its determination entirely on the basis of the law of medical negligence. This was an opportunity to interpret Section 76 which provides for the right access health care services, *including reproductive health care services* – alongside section 52 which safeguards the right to 'bodily and psychological integrity,' including the freedom to 'make decisions concerning reproduction'.[71]

The court could have seized the opportunity presented before it to interpret reproductive health rights. Indeed, the court took judicial notice of Article 14 of CEDAW which obligates States Parties to respect and promote the rights of women "to control their fertility […] to decide whether to have children, the number of children and the spacing of children [and] […] to choose any method of contraception,' – as well as Article 14(2)(c) of the Maputo Protocol which calls upon States Parties to take appropriate measures to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest […].' However, this was not applied to interpret the parameters of the right to access reproductive health services, which includes abortion services.

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[70]C.G. Ngwena, 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa', 32:4 *Human Rights Quarterly* (2010) p.835.

[71]Section 52(b) of the Constitution. *See also* M. Nussbaum, *Women and Human Development: The Capabilities Approach (*2000) p.78. She defines bodily integrity as being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction. The significance of such a capability to women's reproductive health cannot be overemphasised. This is aptly described by L. Pyles, 'The capabilities approach and violence against women: Implications for social development', 51 *International Social Work* (2008) pp. 31–38 as follows: "[t]he reason for setting forth this capability is to recognize the community's responsibility to provide the social conditions (laws, interventions, etc.) that enable this capability in the case of women who experience lack of bodily integrity as a capability deprivation. This is crucial, as bodily integrity is an important freedom in its own right as well as a means to further freedoms and economic opportunities".

Kangaude bemoans the African national courts' conduct of perfunctorily paying attention to the issue of reproductive rights – he correctly argues that "in order to address the challenges that women face in Africa, there is need to build strong jurisprudence to hold governments accountable for respect, protection and fulfilment of the reproductive rights of women in Africa."[72] Therefore, the court should have clearly defined what the right to have legal abortion entails, establishing the responsibilities of state and non-state actors in the realisation of the right.

Mudzuru & Another v. *Ministry of Justice, Legal & Parliamentary Affairs (NO) & Others* [73] is another case which provides significantjurisprudence on reproductive health rights in Zimbabwe – particularly the girl child's reproductive right to decide when to found a family. In this case, the applicants made an application to the Constitutional Court asking the Court to interpret and apply constitutional provisions to the law on marriage. Their argument was that Section 78(1), as read with Section 81(1) of the Constitution, should be interpreted to mean that a person below the age of 18 years cannot marry under any law – and that the Customary Marriages Act *[Chapter 5:07]* which does not provide for a minimum age limit of 18 years; and section 22 of the Marriage Act, which sets 16 years as the marriageable age, be declared unconstitutional.

In interpreting and applying the meaning of Section 78(1) as read with Section 81(1) of the Constitution, the Court took into consideration Zimbabwe's obligations under various international human rights treaties and conventions.[74] Of particular importance was Article 21(2) of the African Charter on the Rights and Welfare of the Child which enjoins State Parties to abolish child marriages by taking through legislation that specifies the age of 18 years as the minimum age for marriage. Section 78(1) of the Constitution as follows:

> "Section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under article 21(2) of the ACRWC to specify by legislation 18 years as the minimum age for marriage and abolish child marriage. A literal interpretation of s 78(1) would be absurd. It would mean that a family is not founded on marriage; that persons who have attained 18 years have a right to found a family but no right to marry; and that whilst persons under 18 years would have the right to marry, they would not have the right to found a family. A literal interpretation would not give the fundamental right guaranteed and protected under s 78(1) the full measure of protection it deserves. Only a broad, generous and purposive interpretation would give full effect to the right to found a family. For the persons who have attained the age of 18 to enjoy the

[72]G.D. Kangaude (ed.), *Legal Grounds III: Reproductive and Sexual Rights in Sub-Saharan African Courts* (2017).
[73]CC 12-15) [2015] ZWCC 12 (20 January 2016).
[74]The Convention on the Rights of the Child, the African Charter on the Rights and the Welfare of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

> right to enter into marriage freely and with full consent as intending spouses, they must first have the right to enter into marriage".

The Court, relying on section 78 of the Constitution, declared section 22 of the Marriage Act*[Chapter 5:11],* which allowed a girl under the age of 16 to enter into a civil marriage, unconstitutional and thus outlawing child marriages. The Court declared that:

> "Section 22(1) of the Marriage Act *[Chapter 5:11]* or any law, practice or custom authorising a person under eighteen years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency. The law is hereby struck down; and (3) With effect from 20 January 2016, no person, male or female, may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of eighteen (18) years".[75]

This judgement is laudable as it promises to protect the reproductive health and life of many potential victims of child and forced marriages in accordance with best international norms, in which adults above 18 years enter into relationships of their choice. The significance of the Mudzuru case cannot be overemphasised – 'it exonerated the girl child from the arduous under age marriage.'[76]While it is acknowledged that the case was based on Section 78 of the Constitution and not Section 76 of the same, the court ought to have drawn the link between the 2 provisions by indicating how child marriages impact access to reproductive health care services.

It is important to note that in the two cases discussed, none of them were based on section 76 and thus, the courts cannot be entirely put at fault for not discussing SRHR provided for in section 76. That said, apart from the two cases discussed above, the Chapter noted the absence of other cases of reproductive health rights that have been litigated in the Zimbabwean courts of law. Effectively, the *Mudzuru* and *Mapingure* cases are the only cases that have been dealt with by the Zimbabwean judiciary that directly address reproductive health rights. This may be because such cases largely depend on interested parties, despite the wide parameters defining *locus standi* to instigate litigation in Section 85 of the Constitution.

Another reason for the dearth of jurisprudence on reproductive health rights cases in Zimbabwe maybe a result of limited awareness on

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[75]It is important to note that despite the 2016 *Mudzuru* judgement, the offending provisions of the Marriage Act *[Chapter 5:11]* remain in place causing confusion.

[76]T.M. Gombiro, 'Abolition Of Child Marriages: Celebrating The Protection Of The Minor Female In Zimbabwe - The Case Of *Mudzuru And Another* v. *The Ministry Of Justice, Legal And Parliamentary Affairs And 2 Others* CCZ-12-15', www.mondaq.com/family-law/894988/abolition-of-child-marriages-celebrating-the-protection-of-the-minor-female-in-zimbabwe--the-case-of-mudzuru-and-another-v-the-ministry-of-justice-legal-and-parliamentary-affairs-and-2-others-ccz-12-15, accessed 11 July 2021.BCVB

the part of society in general, and women in particular, about reproductive health and rights, and the court judgements on the same. This is especially the case in most rural communities in Zimbabwe, where the majority of people are not aware of their rights and available mechanisms for redress.[77] Lack of knowledge is a barrier to women's access to reproductive health care services. Because of limited knowledge on sexual and reproductive health rights, women have no way of knowing if these rights are being respected, protected or enforced. Awareness and acceptance of human rights norms among the general public is therefore significant as it is an essential pre-requisite for women to hold the Government accountable for any reproductive health rights abuses and violations. Flowers argues that:

> "[…] education in human rights is itself a fundamental human right and also a responsibility: People who do not know their rights are more vulnerable to having them abused and often lack the language and conceptual framework to effectively advocate for them."[78]

Zimbabwe, therefore, has a long way to go to effectively litigate SRHR in accordance with regional and national human rights standards.

14.5 Comparative analysis

In contrast to the Zimbabwean scarcity of judicial authority on the interpretation of the right to healthcare services, South African jurisprudence has been hailed for providing progressive judicial authority on the interpretation of the content and scope of the right. In *Minister of Health* v. *Treatment Action Campaign (TAC)*,[79] the TAC instituted action against the Government for its refusal to make *nevirapine* [80] accessible to the public where medically indicated. TAC contended that the policy restricting the availability of the drug was unreasonable, and accordingly that the State was in breach of its obligation to take 'reasonable legislative and other measures' to progressively realise the right to have access to health care services under section 27(1) (a) read with section 27(2) of the Constitution of South Africa, which provide as follows:

> "27(1) Everyone has the right to have access to – (a) health care services, including reproductive health care… (2) The state must take reasonable legislative and other measures, within its available

[77]Zimbabwe Human Rights Commission (ZHRC), *A baseline survey on perception, attitudes and understanding on human rights in Zimbabwe (*ZHRC, Harare, 2015).
[78]N. Flowers (ed.), *Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights* (1998).
[79]2002 10 BCLR 1033 (CC).
[80]Nevirapine is an antiretroviral drug used for the prevention of mother to child transmission of HIV/AIDS.

> resources, to achieve the progressive realisation of each of these rights."

In determining the reasonableness of the policy on confining nevirapine to research and training sites, the court relied on the case of *Government of the Republic of South Africa and Others* v.*Grootboom and Others*[81] where it was stated that:

> "[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right".

The court therefore found that the policy of confining nevirapine to research and training sites

> "[…] fails to address the needs of mothers and their new born children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites".[82]

In 2016, the Constitutional Court of South Africa interpreted the right to 'physical and psychological integrity', in particular the right to 'make decisions concerning reproduction' as enshrined in section 12(2)(a) of the Constitution of South Africa. In the case of *AB and Another* v. *Minister of Social Development*,[83] the court was faced with the following question: whether a legal provision that prohibits surrogacy, if there is no biological or genetic link between the commissioning parent/s and the child, violates the commissioning parent/s' right to reproductive autonomy. The Court stated that the exercise of autonomy is a 'necessary, but socially embedded, part of the value of freedom',[84] which broadly protects 'morally autonomous human beings [and their ability] independently . . . to form opinions and act on them.'[85]

The aforementioned cases show the development of SRHR adjudication in the South African Constitutional Court. Zimbabwe, whose constitutional jurisprudence on SRHR is still young as compared to South Africa, can take a leaf from these South African cases on access to reproductive health services, in its future adjudication of socio-economic rights.

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[81][2000] ZACC 19; 2001 (1) SA 46 (CC). This case provides jurisprudential guidance only, as it was on the right to housing and not access to reproductive health.
[82]*TAC* case, *supra* note, para .67.
[83]CCT155/15 [2016] ZACC 43.
[84]At p.51.
[85]At p.50.

In some other Southern African counties, courts have made progress in handing down decisions on reproductive health rights. For instance, in the case of *Centre for Health, Human Rights and Development & 3 Others* v. *Attorney General*,[86] families of two women who died during childbirth claimed that the government failed to provide maternal health services in governmental hospitals and health facilities, and thus violated the right to health under Objectives XIV (b) XX, XV and Article 8A of the Ugandan Constitution, the right to 28 life under Article 22, the rights of women under article 33, and the rights of children under Article 34. The Ugandan High Court affirmed that failure of the government to adequately provide for maternal health care and emergency obstetric care in public facilities was in violation of the rights to health and life. The decision highlights the need for states to address the reproductive health rights/needs of women from marginalised communities or rural areas.

Similarly, the Kenyan Courts passed a landmark ruling on access to maternal health care services in the case of *Millicent AwuorOmuya alias MaimunaAwuor & Another* v. *The Attorney General & 4 Others* (2015), Petition No. 562 of 2012. The petitioners, who had been detained at hospital for non-payment of medical bills at a maternity hospital, premised their application on the right to health, including reproductive health care, under Article 43 of the Kenyan Constitution, and the right to non-discrimination and equality before the law under Article 27. The court held that the detention of the women by the Maternity Hospital because of their inability to pay their medical bills was arbitrary, unlawful, and unconstitutional.

14.6 Conclusion

It is important that Zimbabwe gave reproductive health and rights the recognition they deserve by constitutionalising them. Indeed, reproductive rights are justiciable as they are enshrined in the Declaration of Rights of the 2013 Constitution. Despite such constitutionalisation, it emerged that the Zimbabwean jurisprudence on reproductive health rights is still fairly new as only a few cases have been decided by the courts. It was noted that from the few cases on SRHR decided by the Zimbabwean courts, guidance on the interpretation of the scope and content of the rights as well as the meaning of state obligations, was, and can continue to be sought from the South African jurisprudence. This is significant for Zimbabwean courts as they grow their own jurisprudence.

The Chapter also revealed the dearth of jurisprudence on reproductive health rights due to the patriarchal nature of the Zimbabwean society which thrives on the insubordination of women to men, thus making it hard for women to bring cases before the courts.

[86][2015] UGSC 69.

Another factor identified for the scarce reproductive health rights cases decided by the courts is lack of knowledge of SRHR by the rights holders.

In light of the above, it is recommended that the State prioritises capacitation of health workers to act and to disseminate information on reproductive health and rights to ensure that women are equipped with human rights knowledge required to make decisions about their bodies, health, and lives; negotiate healthy sexual and social relationships and to defend their rights. It is also recommended that judgements pronounced by courts be simplified and disseminated to alert all levels of courts and communities on the developing jurisprudence around reproductive health rights.

Chapter 15

Judicial Interpretation of the Right to Water and the Right to Health under the 2013 Constitution of Zimbabwe

PaidamwoyoMukumbiri*

15.1 Introduction

The recognition of socio-economic rights in Zimbabwe in an enforceable bill of rights was a huge development in ensuring the justiciability of these rights. Zimbabwe's first constitution, the Lancaster House Constitution[1] only provided for civil and political rights. The Lancaster House Constitution was imposed at the Lancaster House Conference in 1980by the former colonisers. It was a compromise document that was accepted in a bid to cease the raging war in the then Rhodesia which is the present Zimbabwe.

Chapter 4 of the 2013 Constitution of Zimbabwe[2]has a bill of rights that provides for social and economic rights which include among others, the right to education[3], right to clean, safe and potable water[4]and the right to health care.[5] Section 44 of the Constitution obligates everyone including individuals and state institutions to respect, protect, promote and fulfil the rights and freedoms set out in the Constitution. The Constitution further affords *locus standi* to anyone whose rights have been violated or are about to be violated to approach the court for relief in section 85.

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*Paidamwoyo Mukumbiri, LLB(Hons UZ), LLM (UZ) LLM (UP), Legal practitioner, Rubaya-Chinuwo Law Chambers.

[1]Constitution of Zimbabwe 1980.

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

[3]*Ibid*., Section 75.

[4]*Ibid*., Section 77(a).

[5]*Ibid.,* Section 76. Some of the socio-economic rights provided in the Constitution include the right to education in section 75, the right to property in section 71, the right to participate in the cultural life of choice in section 63(b) and the right to found a family in section 78.

Socio-economic rights are subject to progressive realisation by their nature.[6] The implementation of social and economic rights requires resources more than civil and political rights. The executive is the arm of government that makes decisions on resource allocation. As such, resource allocation to the fulfilment of social and economic rights is not within the purview of the judiciary. The judiciary however has the power to interrogate the state's failure to take measures towards the fulfilment of social and economic rights. A court has the power to interrogate the adequacy of the measures taken towards the realisation of social and economic rights and make judicial pronouncements that should result in change of policies.

This chapter interrogates the interpretation of the socio-economic rights by the judiciary under the 2013 Constitution. It evaluates judgements delivered on socio economic rights with particular reference to the right to water and the right to health. Since the coming in of the new Constitution in 2013, a number of cases have been brought before the High Court and the Constitutional Court regarding the implementation of social and economic rights on the right to water and the right to health. From the cases analysed in this chapter, it is concluded that our courts have failed to fully engage the reasonable test or the minimum core approach in interrogating executive decisions in implementing social and economic rights and opted to deal with the matters on other technical areas of the law. The chapter concludes that judicial pronouncements are very important in the realisation of social and economic rights particularly in a developing country like Zimbabwe that has a failing economy. The courts' duty is to safeguard against regression of human rights and to make determinations on the ways and means to work towards progressive implementation of social and economic rights.

15.2 Role of the judiciary in interpreting social and economic rights from the human rights instruments

Human rights scholars were for some time not in agreement on whether social and economic rights can be competently adjudicated upon by the courts. The debates on the justiciability of social, economic and cultural rights have been based on three main arguments. Firstly it was argued that judges cannot interfere in executive decisions of allocating resources.[7] Doing so would be a violation of the doctrine of separation of powers as social and economic rights involve a review of executive decisions on budgets as such courts in adjudicating over such matters will end up

[6]Article 2 of the International Covenant on Economic Social and Cultural Rights (ICESCR). The ICESCR was adopted by the United Nations General Assembly on 16 December 1966. It entered into force on the 3rd of January 1976.

[7]M. Pieterse, 'Coming to terms with Judicial Enforcement of Social Rights', 20 *South African. Journal on Human Rights* (2004) pp. 386–391 at p.383.

usurping executive powers.[8]This is so because the enforcement of social and economic rights by the judiciary takes away the power of elected representatives to make decisions on resources.[9] Secondly, it has been argued that elected representatives are alive to the needs and realities of the community more than the judges.

Thirdly, the other argument against judicial intervention on social and economic issues is based on the supposition that the judiciary is not adequately equipped to deal with such policy issues on allocation of state resources.[10] They are not experts in government decision making on resource allocation.[11]

Some scholars have however argued that claims that question the judiciary's ability to adjudicate social and economic issues are invalid on the basis that there are accountability measures that are in place.[12] Yusuf argues that the judiciary is very much capable of adjudicating over social and economic issues without contravening the separation of powers doctrine.[13] The accountability measures include the fact that hearings are conducted in public, the judges are appointed in a transparent process, and also they use judicial precedence which is binding.[14]The South African jurisprudence has already highlighted that courts are hesitant to interfere with the doctrine of separation of powers. In the case of *Minister of Health & Others* v. *Treatment Action Campaign & Others* (*TA C*case),[15] the South African Constitutional Court held that the:

> "Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance." [16]

The Zimbabwean case of *Combined Harare Residents Association and Passenger Association of Zimbabwe* v. *The Minister of Health and Child Care*

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[8]*Ibid*.

[9]S. Yusuf, 'The Rise of Judicially Enforced Economic, Social, and Cultural Rights—Refocusing Perspectives', 10:2.3 *Seattle Journal for Social Justice* (2012) p. 760.

[10]*Ibid.* p.763.

[11]*Ibid*.

[12]*Ibid*., p.761.

[13]*Ibid.* The same can be said of the Zimbabwean judiciary. It is capable of adjudicating over social and economic rights without interfering in the executive powers.

[14]Yusuf, *supra* note 9. *See also* A. Harel, 'Rights based Judicial Review: A Democratic Justification,' 22 *L. & HIL* (2003) pp. 258. The same can be said about the judiciary system in Zimbabwe. Members of the public are invited to make nominations on prospective judges and interviews are conducted in public. The Constitution in section 164 further guarantees the independence of the judiciary. It is also standard practice in the Zimbabwean courts for court hearings to held in public.

[15]2002 10 BCLR 1033 (CC) para. 38.

[16]*Ibid*., para.38.

N.O and Others[17] also demonstrates that the judiciary is fully aware of the need to exercise caution to avoid unnecessary encroaching on the separation of powers principle. Zhou J stated that:

> "the judiciary cannot legislate for the executive unless there is a lacuna in the law to deal with a specific problem which existing laws do not cater for. The court can strike out an ultra vires or inconsistent law with the constitution to the extent of the inconsistency. The court cannot amend or suspend the operation of a valid law." [18]

Human rights instruments such as the Universal Declaration of Human Rights (UDHR),[19] International Covenant on Civil and Political Rights (ICCPR),[20] European Convention for the Protection of Human Rights and Fundamental Freedoms,[21]American Convention of Human Rights,[22] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) provide for the right to the protection of the law and the right to an effective remedy.[23] Article 8 of the UDHR provides that, "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." This implies that persons aggrieved with the violation of Economic Social and Cultural Rights (ESCR) or impending violation can approach the court for a remedy.

The African Charter on Human and Peoples' Rights (The African Charter) does not expressly provide for the right to an effective remedy but has provisions that guarantee an individual's right to a recourse in the event of rights violation. Article 7 of the African Charter provides that "every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force." Article 26 of the African Charter further provides that states should guarantee the independence of judges and establish institutions that promote and protect rights provided in the Charter.

Unlike other instruments that specifically provide for the right to an effective remedy, the International Covenant on Economic Social and

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[17]HH 642-20.

[18]*Ibid*., p.15.

[19]Article 8 of the UDHR. The UDHR was adopted by the United Nations General Assembly on the 10 December 1948.Though the UDHR is not a treaty, it has been widely accepted and recognised as part of customary international law.

[20]The ICCPR was adopted by the United Nations General Assembly on 16 December 1966. It entered into force 23 March 1976. Article 14.

[21]Article 13. The Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950. It entered into force in 1953.

[22]Article 25. Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica was adopted on 22 November 1969. It entered into force in 1978.

[23]Article 25(a). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in 2003. It entered into force in 2005.

Cultural Rights (ICESCR) does not have a provision that expressly guarantee the right to an effective remedy. The United Nations Committee on the ICESCR stipulated in its general comment number 3 on the general nature of states obligations in respect to article 2 of the ICESCR that the obligation to protect ESCR includes the provision of judicial remedies in legal system where the rights are recognised.[24] These remedies should be provided without discrimination.[25]

The Committee also noted in its general comment number 9 that human rights standards should operate within the national legal system so that individuals seek their enforcement.[26]The committee also elaborated on the role of legal remedies in general comment number 9. It stated that even though the right to an effective remedy may not necessarily mean judicial remedies only because administrative measures can also rectify the violation, judicial remedies remain a necessity particularly the right to appeal against an administrative decision.[27]

Principle 19 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights also stipulate that States should provide effective remedies including judicial remedies where appropriate.[28]Reporting guidelines under the African Charter obligates states to report on the judicial remedies available to victims of violations of social and economic rights.[29] Similarly under the ICESCR the Guidelines on treaty-specific documents to be submitted by states parties under articles 16 and 17 of the ICESCR requires states provide information on "the judicial and other appropriate remedies in place enabling victims to obtain redress in case their covenant rights have been violated."[30]

The Maastricht guidelines on Violations of Economic, Social and Cultural Rights[31] also stipulates that "any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and

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[24]ICESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) available at Para 5. GC adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 para 5.

[25]*Ibid*.

[26]UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998 para4.

[27]*Ibid*., para 9.

[28]Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights clarify the nature of states obligations under the ICESCR. These principles were compiled by a group of experts in Maastricht and adopted in 1986. Though not binding, the principle have gained recognition for their clarification of state obligations under the ICESCR.

[29]Guideline 2(d).The African Charter state party reporting guidelines for economic, social and cultural rights in the African Charter on Human and Peoples' Rights (Tunis reporting guidelines).

[30]Guideline 3. Guidelines on treaty -specific documents to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural rights.

[31]The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were adopted in 1997. The Maastricht guidelines are a further elaboration of the Limburg principles. They provide clarity on what constitute a violation of ESCR. The Committee on ICESCR has made reference to these guidelines in its general comment.

international levels."[32] The guidelines further provide that victims of violation of social and economic rights are entitled to adequate remedies.[33] These remedies include restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.[34]

In emphasising the need for judicial remedies, the committee on IESCR places a huge task on State parties that fail to provide judicial remedies. It stated that:

> "the Committee considers that "a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means', within the terms of article 2, paragraph 1 [...] or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies."[35]

In interpreting social and economic rights, the judiciary should consider international human rights instruments in the adjudication of cases.[36] In cases where domestic legislation contravenes the state obligations under the convention the judiciary is urged to adopt an interpretation that does not result in the violation of states obligation under the ratified instrument.[37] The judiciary's role is therefore critical in the enforcement of social and economic rights. In the *Hopcik Investment (Pvt) Ltd* v. *Minister of Environment, Water & Climate & Anor* case,[38] the High court of Zimbabwe acknowledged the role of the judiciary in enforcing and interpreting social and economic rights. The High court stated that "litigation concerning the realisation of constitutional rights makes government and other responsible authorities accountable for their actions."[39] Therefore, the jurisprudence of the judiciary has the effect of guiding adoption and implementation of policies on socio-economic rights.[40]

15.3 Models of interpretation of social and economic rights

The judiciary's role is to interpret and apply the law through the exercise of either inherent, review or appellate jurisdiction. This interpretative power enables the judiciary to participate in policy enforcement and

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[32]Guideline 22.
[33]Guideline 23.
[34]*Ibid*.
[35]UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, para 3.
[36]*Ibid*.
[37]*Ibid*.
[38]HH 336-16.
[39]*Ibid*.
[40]S. Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty', 6:2 *Law Democracy & Dev.* (2002) p.160.

decision making relating to social and economic rights in particular through review. As highlighted above, courts have the capacity to interpret states obligations on social economic rights. Three approaches have been adopted in the interpretation of state obligations in the realisation of social and economic rights. These are the reasonableness test, the minimum core approach and the combined approach.

ESCR are subject to progressive realisation by their nature in terms of article 2 of the ICESCR. The concept of progressive realisation acknowledges the fact that resources may not be available immediately. As such there is recognition that the rights will not be realised within the shortest period. States should therefore take targeted steps towards the fulfilment of rights. The Committee on ICESCR has interpreted the progressive realisation of rights to mean taking expeditious action towards their fulfilment.[41] The concept of progressive realisation also prohibits non-retrogression in terms of implementation.[42] It is within the framework of progressive realisation that states are expected to comply with the minimum core obligations in fulfilling social and economic rights.

The judiciary's scrutiny of the alleged violations of social and economic rights requires that it examines actions taken by states to progressively implement the rights. The models of interpretation of social and economic rights therefore assist in highlighting state obligations in light of the duty to progressively realise rights.

15.3.1 The minimum core approach

The minimum core approach is concerned with the essential threshold of state obligations in fulfilling social and economic rights. This is the "absolute minimum needed, without which the right would be unrecognizable or meaningless."[43] The rationale for the minimum core approach is to offer a minimum legal content for social and economic rights.[44] The United Nations committee on ESCR defined the minimum core content of social and economic rights as follows:

> "States have minimum core obligations under the Covenant to ensure a basic level of enjoyment of each economic, social and cultural right... the Committee are of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is

[41]UN Committee on Economic Social and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990.
[42]*Ibid*.
[43]International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability,' 2 *Human Rights and Rule of Law Series* (2008) p. 23.
[44]J. Chowdhury, 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective,' *Cornell Law School Inter-University Graduate Student Conference Papers. Paper* 27 (2009).

> deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être." [45]

Minimum core obligations should be perceived as the initial steps towards the implementation of social and economic rights and not the end.[46] As such Principle 21 of the Limburg Principles enunciates that States are required to move as expeditiously as possible towards the realization of the rights. Further states can only attribute the failure to fulfil the minimum core obligations due to lack of resources if they can prove that all efforts have been undertaken to fulfil at least the minimum obligations and that the few resources have been prioritised to achieve that.[47] Prioritising the fulfilment of the minimum obligations has also been recommended even in situation of economic recession or other natural disasters that cause financial strain.[48] The minimum core obligation in situations of financial stress would mean giving priority to the protection of vulnerable members of the society by providing the relevant safety nets.[49]

In the *TAC* case, the Constitutional Court of South Africa stated that the minimum core contents imply the negative obligation of states not to interfere with the enjoyment of rights.[50] Similarly in the Certification of the Constitution of the Republic of South Africa Judgment, the court also implied that minimum core obligations of states amount to non-invasion of rights. [51]Yeshane argues that the minimum core obligations include the following elements:

> a) the negative obligations of non-interference and non-discrimination.
> b) the duty to lay down a legal and policy framework for the realisation of rights, at least part of the duty to protect from the breach of rights by third parties.
> c) the duty to prioritise those in urgent and desperate need.[52]

In the *Social and Economic Rights Action Centre & Another* v. *Nigeria (SERAC)* case,[53] the African Commission on Human and Peoples' Rights (The African Commission) used the minimum core approach to determine the violation of the right to shelter and the right to food. It defined the

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[45]General Comment number 3, *supra* note 41, para. 10.
[46]*Ibid.*
[47]*Ibid,*. para.10.
[48]*Ibid*. para.12.
[49]*Ibid*.
[50]*Treatment Action Campaign and Another* v. *Rath and Others* (2008) 4 All SA 360.para 78.
[51]*Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC.
[52]S. A. Yeshane, 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' 11*African Human Rights Law Journal* (2011) pp. 321-322.
[53]*Social and Economic Rights Action Centre & Another v. Nigeria* (2001) AHRLR 60 (ACHPR 2001).

minimum core content in terms of negative obligation for governments not to interfere with the right to shelter. The Commission also stated that the duty to protect citizens from violation of human rights by third parties also constitute the minimum content.[54]

What can be discerned from the SERAC case is that the minimum content imposes a negative obligation on states. The minimum content also includes the duty to protect citizens from violation of social and economic rights by third parties.

The UN Committee on ICESCR General Comment 14 stated that the following elements constitute minimum core of the right to health:[55]

1. "Non-discrimination on access to health services.
2. Access to basic nutritious food that protects from hunger.
3. Basic shelter, housing, sanitation and adequate supply of safe water.
4. Provision of essential drugs as prescribed by the World Health Organisation.
5. Equitable distribution of health facilities and services.
6. Adoption of periodic national public health strategy and plan of action."

In relation to the right to water, the UN Committee on ICESCR General Comment 15 outlines the minimum content of the right to include the following:

a) "Access to water that is sufficient for personal and domestic use.
b) No-discrimination in accessing water facilities.
c) Ensuring physical access to water facilities.
d) Ensuring that personal security is not threatened when one is accessing water.
e) Equitable distribution of water facilities and services.
f) Adoption of strategies and plans of action on water.
g) Monitoring the extent of the realisation of the right to water.
h) Adoption of low-cost programmes on water in order to ensure access even to the vulnerable and marginalised members of the society.
i) To adopt measures to prevent, treat and control diseases linked to water."

Even though general comments have highlighted what constitutes the minimum content of the right to water and the right to health, the minimum core approach still has challenges in getting consensus on what

[54] *Ibid*.,para.30.
[55] United Nations Committee ICESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) para. 43.

is it that is considered the minimum in a given context. Can there be consensus on what elements are considered minimum given the fact that what might be considered basic to others may be insufficient to some? Further, some duties emanating from states obligations are "polycentric and ranking them as core and non-core is near impossible."[56]

Consequently, the reasonableness approach remains a viable model in interrogating the positive obligations of States. It is argued so because the minimum approach does not have a one size fit all requirements of what constitutes minimum. As such using the minimum approach in examining the adequacy of executive decisions in fulfilling social and economic rights might be problematic.

15.3.2 Reasonableness approach

According to Yeshane, the reasonableness approach adheres to the principle of separation of powers as it allows the executive to make decisions on implementing social and economic rights. The judiciary will not dictate the minimum conduct expected of the government. The approach allows "the scrutiny of government programmes for reasonableness without dictation or pre-emption of policy choices and by giving appropriate deference to the executive and legislative branches." [57]

The reasonableness test has been adopted in the South African Case of Government of the *Republic of South Africa and Others* v. *Grootboom and others* (*The Grootboo*m case).[58] In this case the court reasoned that when examining the reasonableness of a government action consideration should be made to the fact that the constitution creates different levels of government and the roles thereof. [59] These institutions have roles and responsibilities and are mandated to cooperate in the fulfilling of social and economic rights.[60]As such a reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.[61]

The *Grootboom* case further held that "a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures adopted are reasonable."[62] The court's decision indicates that the reasonable approach respects the doctrine of separation of powers.

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[56]Chowdry, *supra* note 44.
[57]Yeshane, *supra* note 52, p. 326.
[58]2001 (1) SA 46 2000.
[59]*Ibid*. para.39.
[60]*Ibid*.
[61]*Ibid*.
[62]At para 41.

One of the ways of scrutinising the reasonability of the government action is to consider the interdependence of rights in the Constitution.[63]Government's actions should not be interpreted in silos. The court in the *Grootboom* case held that reasonableness 'must not be interpreted separately but should be taken in the context of the bill of rights as a whole.'[64] This is because rights are related, indivisible and some are a pre-requisite for the realisation of another. Reasonable measures should also take into account the vulnerable members of the society. They should not merely focus on statistics of what has been achieved. Hence measures taken by the state may fail the reasonableness test despite the high statistics presented of how many people have been assisted.[65]

According to Liebenberg the following principles that defines reasonableness can be distilled from the *Grootboom* judgement;[66]

> "a) The programme under review should be comprehensive and coordinated. It should ensure that financial resources are availed to each government department.
> b) The programme "must be capable of facilitating the realisation of the right" progressively.
> c) The programme must take into account the short, medium and long-term needs
> d) The programme must in part focus on the urgent needs of the most vulnerable groups in society."

In the *TAC* case the court rejected the minimum core approach in favour of the reasonableness approach.[67] It stated that the "socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them."[68] The court stated that the minimum core approach should not be perceived as creating standalone rights.[69] Similarly the Constitutional Court in Grootboom rejected the minimum core approach on the basis that it was difficult to quantify the minimum core in light of the fact that people have different needs.[70] The reasonableness approach has also been used in the American and European jurisdictions.[71]

The reasonableness approach also has its fair share of criticism. It has been argued that the approach is too subjective.[72] Liebenberg argues

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[63]At para.44.
[64]*Ibid*.
[65]*Ibid*., para.39.
[66]Liebenberg, *supra* note 40, p. 171.
[67]*TAC* case, *supra* note 50.
[68]*Ibid.*
[69]*Ibid*., para.34.
[70]*Grootboom* case, *supra* note 58, para. 33.
[71]*See* the American case *of Olmstead* v. *LC* 527 US 581 (1999) and the European case of *European Federation of National Organisations Working with the Homeless (FEANTSA)* v. *France* Complaint No. 39/2006.
[72]M. Pieterse, 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience', 26 *Human. Rights Quarterly* (2004) p. 897; S. Liebenberg, 'South Africa's

that the approach is onerous to the litigants as it throws the burden of proof in determining the reasonableness of state programs on the litigants without addressing the content of the right.[73] Currie further argues that the reasonableness approach is not an obligation to provide anything of substance but is rather limited to an evaluative reasonableness of the action taken by the state.[74]

15.3.3 A combined approach

Given the weakness of the two approaches a combined approach of the two models has the potential to provide clarity on the content of the rights and at the same time subjecting the executive decisions to scrutiny for reasonableness by the judiciary. Chowdhury summarises the benefits of a combined approach as follows:

> "A combination approach does seem desirable. Through minimum core a combined approach endows rights with clarity, while maintaining the reasonableness approach allows a margin of appreciation which provides the executive the necessary flexibility in executing court orders and attempts to balance individual and community needs against government constraints." [75]

The UN Committee on ESCR has embraced the combined approach. In the Optional Protocol to the ICESCR[76], the committee stated that in considering communications it will take into account the reasonableness of the steps taken by states to fulfil social and economic rights. Article 8(4) of the Optional Protocol to ICESCR provides that:

> "When examining a communication under the present Protocol, the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned."

The approach by the Committee in the Optional Protocol can be said to be a departure from the general comment number 3 on the nature of

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Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?', *Law Democracy and Development* (2002) p.168; D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence', 19 *South African Journal of Human rights* (2003) p. 6.

[73]S. Liebenberg 'Enforcing positive socio-economic rights claims: The South African model of reasonableness review', in J. Squires, M. Langford and B. Thiele (eds.) , *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights (*Australian Human Rights Centre, The University of New South Wales Press, Sydney, 2005)p. 308.

[74]I. Currie, 'Bill of Rights Jurisprudence,' 36: 72 *Annual Survey of South African Law* (2002) p.72.

[75]J.Chowdhury, 'Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights – A Comparative Perspective', 27 *Cornell Law School, Inter-University Graduate Student Conference Papers* (2009) p. 18.

[76]Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted on 10 December 2008. It entered into force on 5 May 2013.

states parties' obligations which seem to have placed emphasis on the minimum core approach.

15.4 Judicial interpretation of social and economic rights in Zimbabwe

Declaration of Rights is in part 4 of the 2013 Constitution of Zimbabwe. Section 46 of the Constitution is quite instructive in as far as the interpretation of the bill of rights is concerned.

It stipulates that:

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

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

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

(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;

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

(e) may consider relevant foreign law;

in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

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

The Constitution places emphasis on the need to promote national objectives, values and principles upon which the country is based when interpreting the bill of rights. Judges' independence to interpret the Constitution is guaranteed in the Constitution.[77] Courts are empowered to apply the law without fear or favour.[78] The constitution further provides that the decisions of the court are binding on all persons including the state and they should be obeyed. [79]This constitutional provision empowers the judiciary to carry out its interpretative role of social and economic rights without fear and with the constitutional assurance that courts' judgement will be respected.

Judges are also mandated to enhance their knowledge and skills in interpreting the Declaration of Rights. Section 165(7) of the Constitution implores the members of the judiciary to "take reasonable steps to

[77]Section 164(1) of the Constitution.
[78]*Ibid*.
[79]*Ibid*., Section 164(3).

maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law." Section 165 implies that judges must familiarise themselves with contemporary human rights standards and interpretation by regional and international tribunals. They are under an obligation to take steps to increase their knowledge.

The courts in Zimbabwe had numerous opportunities to interpret state obligations on the implementation of social and economic rights. In the majority of the cases presented before the courts, the judges have made reference to Zimbabwe's human rights obligations under the international and regional instruments that the country ratified.

15.4.1 The right to water

There are four key cases worth noting regarding the right to water in Zimbabwe. Firstly, in the case of *Farai Mushoriwa* v. *City of Harare,*[80] the court upheld the claim that the City of Harare's act of disconnecting water bill without a court order was a violation of the right to water. In this case, the Applicant had disputed a water bill that was furnished by the local authority. The city of Harare went on to disconnect water without court order on the basis that the section 8 of the City of Harare's water by-laws in Statutory Instrument (SI) 164 of 1913 as read with s 198 (3) and s 69 of the third Schedule to the Urban Councils Act gave the Council unfettered discretion to disconnect water supplies to a citizen at will without recourse to the courts of law.[81] The court upheld the claim that the council's action violated the right to water. Bhunu J stated that:

> "It is a basic principle of our legal policy that law should serve the public interest. As we have already seen, every person has a fundamental right to water. It is therefore, clearly not in the public interest that a city council can deny its citizens water at all without recourse to the law and the courts. While the City Council has a right to collect its debts it cannot be so by resorting to unlawful mean for every person including the City Council is subject to the law."[82]

The Supreme Court however overturned the High Court decision in the Mushoriwa case. It held that there can only be a violation of the right to water if the authorities either fail to provide water or provide dirty and unsafe water to drink and not when it disconnects on the basis of an unpaid bill.[83] The court therefore ruled that the city council's power to disconnect water supply is reasonable and in line with section 77 of the Constitution. The court reasoned that "bearing in mind the enormous economic and budgetary considerations that would ordinarily arise in the provision of safe

[80]2014 (1) ZLR.
[81]*Ibid.*
[82]*Mushoriwa* case, *supra* note 80, p. 515.
[83]SC 54/2018 p. 28.

and clean water to a large populace, it cannot be said that the disconnection of water supply by reason of non-payment for water consumed in any specific instance constitutes an infringement of the constitutional right to water." [84]

The Supreme Court used the reasonable approach in interpreting the right to water. The court held that the power of the City Council to disconnect water for non-payment was reasonable and not a violation of the right to water. It reasoned the rights could have been violated had the Council failed to provide water at all or provided dirty water not when it disconnected a defaulting customer.

Secondly in *Hopcik*, the court found a violation of the right to water and dismissed the Respondent's explanation for the failure to supply water to the Applicant's neighbourhood whilst supplying in other areas as unreasonable.[85] In this case, the Applicant had failed to receive any water supplies for three years. This was despite the fact that other areas in the same town were receiving water. He then sought an order compelling the Minister of Environment, Water and Climate Change to supply 15 000 litres of potable water per week to his premises. He claimed that his right to water as guaranteed in section 77 of the Constitution of Zimbabwe was being violated. The application was opposed mainly on the basis that the respondents being the city of Harare and the Minister of Environment, Water and Climate lacked resources. The court placed emphasis on the interdependence of rights. It reasoned that the right to water is central to all other rights. The court further dismissed the argument that the terrain at Applicant's place had posed challenges in supplying water. The court stated that the Respondent could have used other technical means to supply water to the respondents. The court found that the respondent's action to selectively supply water to other residents was unreasonable. It held that the respondents were not doing enough to ensure that water which is a scarce commodity is being shared fairly and equitably.[86]

Thirdly, the Zimbabwean courts also used the reasonableness approach test in the case of *Bothwell Property Co (Private) Limited* v. *City of Harare and Tendai Mahachi N.O (The Town Clerk*).[87] In this case Chigumba J asked two pertinent questions with regards to the realisation of social and economic rights namely: "is the right to water which is enshrined in the Constitution subject to limitations in a democratic society? Is there a converse right of a body that administers the availability, potability, consumption, and distribution of this precious resource to collect revenue

[84] *Ibid*. 28.
[85] HH336-16.
[86] *Ibid*.,p.7, *See also Bothwell Property Co (Private) Limited* v. *City of Harare and Tendai Mahachi N.O (The Town Clerk)* HH 360-16 where the court highlighted the connection between the right to water and the right to administrative justice.
[87] *Bothwell Property Co (Private) Limited, supra* note 86.

from consumers if such revenue is vital to their operations?" [88] The court held that City council by laws that allowed disconnection of water without notice to water users was not a "reasonable legislative measure calculated to bring about a progressive realisation of the right to safe, clean and potable water which is enshrined in s 77 of the Constitution."[89] The court held that Section 198 (3) of the Urban Councils Act which authorised the city council to disconnect water even if the water bill is in dispute is inconsistent with the constitution since it violates the right to administrative justice.

Fourthly, in *Forbes & Thompson (Bulawayo) (Pvt) Ltd* v. *The Zimbabwe National Water Authority and Timothy Kadyamusuma,* the court also followed the *Mushoriwa* High Court judgement and granted an interdict on a respondent who had disconnected water supply on a mine without a lawful court order. [90] The court held that "the disconnection of water supplies led to the creation of a possible health hazard and is in direct violation of the fundamental right to clean, safe and portable water as provided under section 77 of the Constitution."[91] However, the *Forbes* and *Bothwell* judgements were decided before the *Mushoriwa* Supreme court decision which ruled that disconnecting water for payment defaulters was reasonable and not a violation of the right to water.

15.4.2 The right to health in Zimbabwe

The right to health is provided under section 76 of the Zimbabwean Constitution which stipulates that;

> 1. "1. Every citizen and permanent resident in Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services.
> 2. Every person living with a chronic illness has the right to have access to basic healthcare services for the illness.
> 3. No person may be refused emergency medical treatment in any health-care institution
> 4. The state must take reasonable legislative and other measures, within the limits of the resources available to it to achieve the progressive realisation of the rights set out in this section."

Regarding the right to health, *Allan Norman Markham and Mfundo Mlilo* v. *Minister of Health and Child Care and Others*[92] dealt with the reasonableness of state action in relation to the right to health. In this case, Applicants were seeking an order that the Respondents pass regulations that provide for emergency relief in the form of food and cash hand-outs and water

[88] *Ibid*.
[89] *Ibid*. p. 13.
[90] *Forbes & Thompson (Bulawayo) (Pvt) Ltd* v. *The Zimbabwe National Water Authority and Timothy Kadyamusum*a HB 147/17 p. 7.
[91] *Ibid*.
[92] HH263/20.

deliveries to vulnerable families during the Covid-19 induced national lockdown. The Application raised important questions on the reasonableness of government's conduct to provide safety nets during the national lockdown necessitated by the Covid-19 pandemic. However, the case was dismissed on the basis of failing to cite the relevant minister. It seems the judge was avoiding to deal with the reasonableness of the action taken by the government of Zimbabwe in relation to protection of the right to health. The High Court rules provide that the failure to cite a party is not fatal to the application. Rule 87 of the High Court Rules 1971 allows the court to make an order to join any person whose presence is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely dealt with. The judge could have made an order to join the relevant Minister. An opportunity to develop the jurisprudence was therefore missed.

Furthermore, in *Allan Norman Markham*,[93] the court accepted on face value the argument by the state that it was rolling out electronic cash payments to vulnerable members of the society and that homeless persons had been taken to places of safety. Further the court relied on the submission by the Minister of Local Government, Rural and Urban Development that he had made a press conference as evidence that the government was providing safety nets that ensures that the right to health is protected. A press conference on its own does not prove that the government had actually implemented the social welfare programme.

In *Zimbabwe Chamber for Informal Workers and Passenger Association of Zimbabwe and Constantine Chaza* v. *Minister of Health and Child Welfare and Others,*[94] the Applicants challenged the monopoly of the Zimbabwe United Passenger Company (ZUPCO) to be the sole transport provider during the COVID-19 induced lockdown period. They sought the amendment of the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order 2020 published under Statutory Instrument 83 of 2020 to allow the operation of registered transporters and other operators to ferry passengers on their licensed routes subject to compliance with relevant lockdown conditions such as social distancing, temperature testing and the use of sanitizers. They also sought the opening of informal businesses subject to compliance with lockdown measures. They argued that the majority of citizens earn a living through the informal market and these were hit the hardest by the lockdown measures and poverty. The case also highlighted the threat to the right to health that was posed by the monopoly of using ZUPCO Bus Company as the sole transporter. It was clear that the company did not have the capacity to provide transport and did not have adequate measures to protect its passengers from contracting Covid 19. The buses

[93] *Ibid.,* p.2.
[94] HH 334-20.

were overloading and did not provide sanitisers to passengers. Further the Applicant contended that the measures to open formal markets only violated numerous rights including the right to equal protection and benefit of the law, the right to health, the right to life and the right to freedom of profession, trade and occupation.

The court observed that the regulations indeed restricted the enjoyment of rights complained of. The court ruled that the limitations of rights complained of are compatible with the objects and purposes of protecting public health. The court considered that the limitations have no effect of completely taking away the enjoyment of these rights but the restrictions of rights at the time were pursued for a legitimate aim.[95] The court further held that the restrictions imposed by the Government are rational, reasonable and justifiable.[96] However, the conclusion on reasonability of the government's action was made without putting the government's action to allow one operator which had no capacity to test. The issue of whether or not the government's directive to allow one bus operator paused a threat to the right to health was not discussed. There was no query on how many buses were deployed per area. Neither was there an enquiry on the adequacy to ferry passengers without violating the right to health. Neither was the issue of provision of safety nets that the Applicants were complaining of queried. The court simply adopted a carpet-bombing approach without questioning the reasonability of the limitation of rights and the measures taken to minimise harm by the state. In *Combined Harare Residents Association and Passenger Association of Zimbabwe* v. *the Minister of Health and Child Care N.O and Others,*[97] the court dismissed the request to suspend regulations that imposed the lockdown on the basis that they violate the right to life and the right to health. The Applicants sought an order declaring section 4 (2) of the Public Health, (COVID-19 Prevention Containment and Treatment) National Lockdown Order, 2020 Statutory Instrument 83/2020 to be in violation of the right to life protected under s 48 of the Constitution and the right to health provided under section 76 of the Constitution. In their supporting affidavits the Applicants argued that after the suspension of all other public transports providers in terms of section 4(2) of the regulations, the sole designated transporter provider (ZUPCO) had not increased the buses to accommodate the numbers of people that use the buses. They complained about the unhygienic conditions of the buses. The Applicant also averred that the sole monopoly of ZUPCO buses had resulted in the shortage of buses. As a result, illegal transport operators who were not complying with COVID-19 guidelines exposing members of the public to the risk of contracting the Covid-19 virus emerged. The applicants also complained

[95] *Ibid*.. para.52.
[96] *Ibid*., para.62.
[97] HH 642-20.

that the transport situation had exposed women to sexual violence as they board the buses. The court found that the regulations actually protected the right to life. The court held that the Applicant had not established reasonable grounds that warranted interference with executive function.[98] It reasoned that the invitation of other transport providers apart from ZUPCO buses was already done as such the Applicants were complaining of something that had already been remedied. The court further stated that:

> "[T]he judiciary cannot legislate for the executive unless there is a lacuna in the law to deal with a specific problem which existing laws do not cater for. The court can strike out an ultra vires or inconsistent law with the constitution to the extent of the inconsistency. The court cannot amend or suspend the operation of a valid law." [99]

Similarly, in *Zimbabwe Chamber for Informal Workers and Passenger Association of Zimbabwe vs Constantine Chaza,* the court again missed the opportunity to test the reasonability of government's action with regards to the exercise of allowing single bus operator and its impact on the right to health.

In *Roger Dean Stringer* v. *the Minister of Health and Child Care and another,*[100] the High court also dismissed the Applicant's claim that his right to a healthy environment would be violated as a result of the setting up of a hospital dedicated to the isolation and quarantine of Covid-19 patients near his house.

The Applicant complaint that his right to an environment that is not harmful to his health would be violated if the hospital is to operate as a centre for Covid-19 patients. He argued that due to the proximity of the hospital to his house, he stands exposed to the virus. The court struck a balance between the protections of the individual right to a healthy environment and the protection of the public's right to health. The court held that the welfare of the public takes precedence over an individual interest.[101] The court invoked section 86(1) and (2) of the Constitution which allows limitation of rights in the interests of the public. The court used the reasonable approach in weighing the importance of establishing a hospital for the public and the protection of an individual right to health. The court correctly found the action of the state to be a reasonable limitation of the Applicant's individual right as the ultimate aim was to save lives of the majority of the people from the COVID- 19 pandemic.

In *Gumai Makoka* v. *Minister of Health and Child Care and Others,*[102] the Applicant approached the High Court seeking an order compelling the

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[98] *Ibid.,* p.15.
[99] *Ibid.,* p.15.
[100] HH 259/20.
[101] *Ibid.* p.10.
[102] HH 414-20.

Ministry of Health and Child Care and others to provide safety nets in the form of cash hand-outs, food and portable water during the period in which a declaration of COVID-19. The Applicant claimed that he is indigent and is therefore entitled to relief under the Social Welfare Assistance Act. He stated that he had submitted his name to the Ministry of Social Welfare for assistance but he did not receive any. The Court dismissed the application on the basis that his remedy lies with compelling the Director of Social Welfare to provide him with social welfare assistance instead of seeking the promulgation of regulations to provide safety nets.

The court further held that the Applicant had not furnished any proof that he applied for social assistance. The court was dismayed with the fact the Applicant's claim was a regurgitation of the *Allan Norman Markham case*[103] which had been dismissed by the court for failure to cite the Minister of Labour and Social Welfare. The court noted that parts of the affidavit in this case were a copy and paste of the facts in the case of *Allan Norman Markham* case. While the legal practitioners failed to exercise due diligence in drafting the court application, the court's reluctance to question the state's social welfare response in light of the Covid 19 is notable. In this case the court did not examine the reasonableness of state's social welfare programme. The court did not enquire on how the state is providing safety nets, the number of people that have been assisted and the nature of the assistance. Similarly, in the *Allan Norman Markham* case, the court avoided scrutiny of the reasonability of state measures to protect, promote and fulfil the social and economic rights of its citizens during the Covid pandemic. The court did not outline the minimum obligations of a government in emergency situations such as the COVID-19 pandemic.

The case of *Combined Harare Residents Association and Passenger Association of Zimbabwe* and others was also dismissed on the basis that the Applicant sough an order to struck off a statutory instrument when the remedy they sought was already in place.[104] The facts of the case clearly indicated that the situation on the ground resulted in the violation of the right to health as the sole transport provider sanctioned by the government lacked the capacity. People's source of live hoods was eroded as a result of the lockdown regulations. If such case had been presented well, it would have been an opportunity to subject the government's response to Covid-19 to scrutiny on whether or not it promotes social and economic rights.

A lot of opportunities in interpreting social and economic rights obligations were created by litigation on the right to health as a result of the Covid-19 pandemic. However, some of the cases as discussed above were dismissed on technicalities that included the wrong or failure to cite

[103]*Allan Norman Markham* case, *supra* note 92.
[104]*Combined Harare Residents Association* case, *supra* note 97.

parties, failure to use correct forms and lack of clarity on the claim sought. As such opportunities to interpret social and economic rights were lost as the litigants were ill-prepared. It also seems that courts also avoided dealing with such cases which had a direct impact on the government's inadequate response to the Covid 19 pandemic.

There is limited application of the three approaches to judicial interpretation of social and economic rights by the Zimbabwean courts. The cases discussed on the right to water and the right to health have not outlined the minimum core content of the rights. In the cases of *Allan Norman Markham, Zimbabwe Chamber for Informal Workers and Passenger Association of Zimbabwe*, and *Combined Harare Residents Association and Passenger Association of Zimbabwe*, the courts did not ask for the statistics on the number of buses provided by the ZUPCO to justify the monopoly. Neither was there a critique of the government's action plan on the provision of safety nets and the protection of the right to health. The measures adopted by the state to protect the right to health apart from imposing a lockdown were not examined to find the adequacy of such measures. The reasonableness approach has been utilised in some cases but however in a limited manner. In the *Grootboom* case, the Constitutional Court outlined factors of what should be taken in evaluating the reasonableness of the government policy. Such factors include the inter-dependence of rights, the coordination of government plans towards the implementation of the rights and lastly whether the programmes respond to the urgent needs. The cases examined in this paper have not gone to that extent in putting the government measures on protecting the right to health to a subjective test as outlined in the *Grootboom* case. The cases did not interpret the independence of rights for instance the right to health, right to life and the right to work.

15.5 Conclusion

The judiciary plays a central in the enforcement of social and economic rights in Zimbabwe through its interpretative role. The judicial precedent creates opportunity for policy review and enactment of legislation that protect the rights. This chapter discussed the three approaches to judicial interpretation namely; the minimum core approach, the reasonableness approach and the combination of the two approaches. Whilst the courts have drawn inspiration from the international human rights and judgements from other jurisdictions in interpreting social and economic rights obligations of Zimbabwe, the application of the minimum content of the right has been lacking. The reasonableness approach has been adopted in the cases on the right to water and the right to health but in a limited manner without subjecting government actions to implement the rights to a vigorous test. The combined approach has not been utilised at all.

Chapter 16

Judicial Interpretation and Application of the Human Rights to Food and Water

Elizabeth Rutsate[1]

16.1 Introduction

The ushering in of a new Constitution in Zimbabwe in 2013,[2] brought to prominence economic, social and cultural rights, (ESC rights, hereinafter "socio-economic rights") which erstwhile had been largely missing from the 1980 Lancaster Constitution that preceded it. Similar to most African former colonies; at independence, Zimbabwe adopted a constitution dominated by civil and political rights provisions, viewed then as superior and first generational. Notwithstanding the fact that it is now eight years since a new Constitution came into effect in 2013, the adjudication of socio-economic rights such as food and water is relatively still a new phenomenon in Zimbabwe. Jurisprudence on the interpretation of such rights is still developing and the courts in Zimbabwe currently rely more on international and foreign law to deconstruct the normative content of such rights as provided for under the interpretive section 46 of the Constitution.

As drawn from the foregoing assertions, the key question responded to in this Chapter relates to the Zimbabwean national courts' judicial treatment of the right to food and water as protected under section 77 of the Constitution. The Chapter starts by interrogating the normative content of the right to food and the right to water from the international perspective before interpreting it from the domestic level perspective using the Constitution and the enabling Statutes where they exist. The next step is to give an outline of the court structure after which the route litigants, both individuals and juristic persona in Zimbabwe take in enforcing their rights to food and water where violated, is mapped out. Thereafter, the Chapter seeks to identify and discuss the options open to the courts in their application of the law vis-à-vis the two socio-economic rights.

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[1]Senior Lecturer, Faculty of Law, University of Zimbabwe.

[2]Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (hereinafter "the Constitution").

Lastly, the Chapter looks at how the courts in Zimbabwe have dealt with cases concerning the rights to food and water. It is pertinent to note at this stage that while section 77 of the Constitution combines the two socio-economic rights, in the few cases in which litigants have sought relief in the courts, they have brought action to enforce either of the two rights and not both simultaneously. Hence, in this Chapter, the two socio-economic rights are referred to independently of each other at times, as is the case internationally, and then as combined when the discussion revolves around the prevailing domestic situation.

16.2 A Brief Historical overview of Socio-economic rights in the Zimbabwean Constitution

As indicated earlier, the old Zimbabwe Constitution of 1980 predominantly contained civil and political rights, a colonial legacy in line with the prevailing discourse preceding the end of the Cold War era around 1989.[3] It came as no surprise then that, local jurisprudence on human rights was characterised mostly by cases on the enforcement of citizenship, freedom of expression and freedom to disseminate information and political participation.[4] Post 2013 saw a steady increase in the matters brought to court relating to socio-economic rights particularly water in instances where municipalities, particularly the City of Harare, were disconnecting water supplies to some residents for non-payment of water bills. In addition, the persistent economic recession Zimbabwe is experiencing which has adversely affected most economic and social activities, has also triggered litigation against state institutions from prison inmates who have sought to hold the State accountable to its obligation to respect, protect and fulfil the right to adequate food, water and sanitation within prison facilities.

With the recent advent of the covid-19 pandemic and the resultant national lockdowns, communities have also brought action against state institutions and agencies responsible for the supply of adequate, clean and safe water, for the uninterrupted supply of such during the national lockdowns considering how good hygiene practices play a central role in reducing the risk of infection.

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[3]As characterized by the fall of the Berlin Wall and disintegration of the former Union of Soviet Socialist Republics. Zimbabwe's former colonizer, the UK as an ally of the US, had prioritized civil and political rights as a policy.

[4]*See for example, Rattigan and Others*v.*Chief Immigration Officer, Zimbabwe, and Others* 1995 (2) SA 182 (ZS)in the Zimbabwe Supreme Court as per Gubbay CJ (as he then was) <www.refworld.org/cases,ZWE_SC,3ae6b6d62c.html>, visited on 08 October 2021. *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development(on behalf of Andrew Barclay Meldrum)* v. *Republic of Zimbabwe* [2009] App. No. 294/04(an appeal to the African Commission on the unconstitutional deportation of Meldrum, a journalist), <africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2009/98>, visited on 10 October 2021.

16.3 Legal and Policy Framework: Socio-Economic Rights to food and water as framedat International and Domestic levels

16.3.1 The normative content of the right to food at international level

As a general overview, the Committee on Economic, Social and Cultural Rights (hereinafter "the CESCR") in its General Comment No. 12 on Article 11 of the International Covenant on Economic, Social and Cultural Rights (hereinafter "the ICESCR")[5] on the right to adequate food acknowledges that;

> "[The] right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all".[6]

The CESCR in the same General Comment also stated that;

> "The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense, which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters."[7]

Hence, in accordance with the CESCR, 'the core content of the right to adequate food implies;'

> "The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights".[8]

In summary, the key elements to be satisfied in order for an individual to realize the right to food as interpreted at international level relate to (i) to the food being safe and free from contamination; (ii) cultural or consumer acceptability; (iii) its availability; (iv) its economic and physical accessibility.

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[5]*See* Article 11 of the International Covenant on Economic, Social and Cultural Rights, Office of the High Commissioner for Human Rights (OHCHR) publications, <www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, visited on 12 October 2021.
[6]OHCHR CESCR General Comment No. 12 on the Right to Adequate Food (Art. 11), 1999, para. 4 <www.refworld.org/pdfid/4538838c11.pdf>visited on 08 October 2021.
[7]*Ibid*. para. 6.
[8]*Ibid*. para. 8.

While physical accessibility relates to the affordability of the food, physical accessibility relates to capacity to have physical access to food.[9]

16.3.2 The normative content of the right to water at international level

As a follow-up to General Comment No. 12 of 1999, the CESCR in 2002 came up with General Comment No. 15 on Articles 11 and 12 of the ICESCR, which sought to conceptualize the normative content of the right to water.[10] In the CESCR's view, the right to water was implicitly embedded within Articles 11 and 12of the ICESCR, implying that easily accessible water in sufficient quantities and of a potable quality is essential for the realization of the rights in those two articles. The CESCR indicated that, the right to water is satisfied when it is 'adequate for human dignity, life and health, in accordance with Article 11, paragraph 1, and Article 12 of the Covenant.' Under Article 12, States Parties "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." While differences may arise vis-à-vis the context under which rights holders may access water; this should never be allowed to inhibit the latter's full enjoyment of the right.

The CESCR emphasised on the following requirements for the full enjoyment of the right:[11] Firtsly, the water supply should be readily available in terms of sufficiency and regularity "for personal and domestic uses that include drinking, personal and household hygiene and food preparation".[12] Secondly, the water should be of good quality, that is, "safe, free from micro-organisms, chemical substances and radiological hazards that constitute a threat to health. It should be of an acceptable colour, odour and taste".[13] Thirdly, the water should be readily accessible based on "four overlapping dimensions" namely; physical, economic and information accessibility as well as accessibility on a non-discriminatory basis.[14]

It is important to note that the rights to food and water are well protected under the international and regional framework with a Special Rapporteur on the Right to Food. Outside the ICESCR, the rights to food and water are also protected in other group specific human rights

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[9]This is in acknowledgement of the fact that vulnerable groups such as pregnant women, children, people with disability, the poor, the terminally ill, indigenous persons, IDPs in times of natural disaster and people living in disaster prone areas may face challenges in accessing food and hence need to be prioritized by duty bearers.

[10]*See* General Comment No. 15 of 2002 on the Right to Water, paras. 10 – 12at OHCHR, <www.refworld.org/pdfid/4538838d11.pdf>, visited on 08 October 2021.

[11]*Ibid.,* para. 12.

[12]*See* the CESCR General Comment No. 15 on the Right to water at para. 12 (a) on water availability.

[13]*Ibid.,* para 12 (b) on water quality.

[14]*Ibid.,* para 12 (c) on water accessibility.

instruments, key being the following: the Universal Declaration of Human Rights (hereinafter "the UDHR");[15]UN Convention on the Elimination of all forms of Discrimination Against Women (hereinafter "the CEDAW");[16] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "the Maputo Protocol");[17] UN Convention on the Rights of the Child (hereinafter "the CRC");[18] The African Charter on the Rights and Welfare of the Child (hereinafter "the ACRWC")[19] and UN Convention on the Rights of Persons with Disability (hereinafter "the CRPD").[20]

The above human rights protection of the two socio-economic rights also extends to international humanitarian law for example provisions within the Geneva Conventions.

16.3.1 The right to food and water at domestic level

16. 3.3.1 The 2013 Zimbabwe Constitution

Recognition of the rights to food and/or water in national constitutions globally has usually fallen into three categories. These are:

> "(i) [E]xplicit recognition, as a human right in itself or as part of another, broader human right;
> (ii) [R]ecognition as a directive principle of state policy; and
> (iii) [I]mplicit recognition, through broad interpretation of other human rights."[21]

Zimbabwe as a nation has taken the first approach in the recognition of the rights to food and water that is explicit recognition as combined rights. Section 77 of the Constitution states that;

> "Every person has the right to— (a) safe, clean and potable water; and (b) sufficient food; and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right."

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[15] United Nations, Universal Declaration of Human Rights, was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) (UDHR (1948).

[16]UN Convention on the Elimination of all forms of Discrimination Against Women (hereinafter "the CEDAW"), adopted in 1979 by the UN General Assembly.

[17]Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "the Maputo Protocol"), adopted on 11 July 2003.

[18]UN Convention on the Rights of the Child (hereinafter "the CRC"). Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

[19] AU, The African Charter on the Rights and Welfare of the Child ("ACRWC'), OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

[20] UN Convention on the Rights of Persons with Disability ("CRPD"), adopted in 2006 and come into effect in 2008.

[21]B.B. Dubravka, "The Right to food: Guide on Legislating for the right to food", *FAO* (2009), available at <www.fao.org/3/i0815e/i0815e00.pdf>, visited on 08 October 2021.

The Zimbabwean approach is similar to how the South African and Bolivian Constitutions are framed. The 2009 Bolivia Constitution [22] in Article 16, states;

> "Every person has the right to water and food. The State has the obligation to guarantee food security for all through a healthy, adequate and sufficient food."

On the other hand, Article 27 of the Constitution of South Africa[23] provides that;

> "Everyone has the right to have access to [...] b. sufficient food and water; and c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. 2. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights."

Hence, the way the right to food and water is framed within the 2013 Zimbabwe Constitution is in line with international best practices.

16.3.3.2 Enabling Statutes and Policies

There is no enabling Act for the right to food in Zimbabwe. There is therefore a gap. It is only in respect of water that there is an enabling Act entitled the Water Act.[24]While the Water Act defines primary and environmental water uses, most of the clauses in the Act relate to the management of water for commercial use.[25] The Act still requires alignment of its provisions to the Constitution using the 'rights language.' It simply refers to the use of water for 'primary purposes' in section 32(1);

> "Subject to section thirty-three and Part IX, any person may abstract water for primary purposes: Provided that this subsection shall not be construed as conferring on any person a right, which he would not otherwise possess, to enter or occupy any land for the purpose of abstracting the water".
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> Section 33(1) provides that;
> "Notwithstanding anything contained in this Act, a catchment council may, if it thinks it necessary in the public interest to ensure the equitable distribution and use of water, by notice in the Gazette-

[22]Constitute Project, *Bolivia (Plurinational State of)'s Constitution of 2009 (*Oxford University Press, Translated by Max Planck Institute, 2021).

[23]Constitution of the Republic of South Africa*,* 1996.

[24]Water Act *[Chapter 20:24].*

[25]H. Makurira and N. Viriri, 'Project Country Report: Water Permit Systems, Policy Reforms and Implications for Equity in Zimbabwe', Project Country Report (2017), *Pegasys, IWMI & Reach*, p. 3, <Water-Permitting-Zimbabwe-Country-Report-PI_IWMI-March-2017.pdf (cgiar.org)>, visited on 06 October 2021.

(a) limit the quantity of water which may be abstracted for primary purposes by any person or class of persons within any area from any source of water;
(b) Specify the maximum number of livestock an individual owner is entitled to water for the primary purposes".

The Water Act defines 'water for primary purposes' in the Interpretation Section 2 as follows;

"primary purposes,' in relation to the use of water, means the reasonable use of water —
(a) for basic domestic human needs in or about the area of residential premises; or
(b) for the support of animal life, other than fish in fish farms or animals or poultry in feedlots;
(c) for the making of bricks for the private use of the owner, lessee or occupier of the land concerned; or
(d) for dip tanks"

Section 33(2) as read with section 34(1) of the Act criminalises the abstraction of water "for any purposes other than primary purposes," except if the person does so in terms of a water permit. Section 3 of the Water Act *[Chapter 20:24]* Water (Permits) Regulations, Statutory Instrument 206 of 2001 (as amended by SI 52 of 2020) gives the maximum cut off point of water for primary purposes as five thousand (5 000) cubic metres or five (5) mega litres. Any persons who use more water than the maximum allowed for basic use face prosecution and if convicted, may be imprisoned for up to six months or alternatively have to pay fines or both the jail term and fine.

It is clear from the way in which the above provisions are framed that this water for primary purposes is meant for persons living in rural communities and this is exactly how water institutions such as the Zimbabwe National Water Authority have interpreted the said provisions as they estimate water use in relation to the crop and acreage under irrigation.[26] The above assertions are also supported by the fact that the National Water Policy of 2012[27]seems more inclined towards urban water users. Nevertheless, the National Water Policy's provisions are more aligned to the 2013 Constitution than the Water Act. The National Water Policy discusses what the right to 'water for primary needs' entails where it states;

"Water required to meet basic human needs, termed 'Primary Water', shall be given the first and highest priority in the provision of WSS services. It includes water for direct personal consumption, personal household hygiene, food preparation and for household productive

[26]*See* Water (Permits) Regulations, 2001, Statutory Instrument206 of 2001.
27Government of Zimbabwe, National Water Policy (2012), <National-Water-Policy.pdf (ncuwash.org),> visited on 09 October 2021.

> purposes such as gardening and household stock watering, not for commercial purposes".
>
> "In urban settings, because water treatment, transmission, storage and distribution through networks is expensive, primary water needs are based on lifeline tariffs and only in cases where people cannot afford to pay, can free lifesaving water per household of ten cubic metres per month be supplied. Given the administrative difficulty of determining who cannot pay, the option to provide ten cubic metres per month of free or cheaper water to all, accompanied with a two or three stage rising block tariff regime will be examined. This option permits poorer consumers to manage their consumption so that they stay within an allocation they can afford."[28]

In summary the 'water for primary purposes' framework as outlined in the Water Act *[Chapter 20:24]* has always been there even during the colonial era under the 'water rights' legal regime where such fall under the 'property rights' regime. Water rights, normally regulated under a commercial framework, have no relationship with the human right to water framework aimed at ensuring that everyone accesses a basic minimum of water per day for household needs that encompass personal and hygiene uses. Unlike the human right to water framework that demands that everyone has a right to water by virtue of being human, water rights are usually derived from statutory law and are either land based or use-based or both.

16.4 Court Structure in Zimbabwe

Courts in Zimbabwe derive their judicial authority from section 162 of the 2013 Zimbabwe Constitution. Listed in order of superiority starting with the highest court, these are (1) the Constitutional Court, (2) Supreme Court, (3) High Court, (4) Labour Court, (5) Administrative Court, (6) Magistrates' Courts, (7) Customary Law Courts and (8) other special courts established by or under an Act of Parliament.

The Constitutional Court is the highest court of the land dealing primarily with Constitutional matters or related issues. Its decisions bind all the other courts.[29] The next court in hierarchy is the Supreme Court, which 'is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction.'[30] Sections 170 and 171 describe the role and functions of the High Court, which is a court of first instance despite the superior role it plays. Immediately falling under the High Court, are specialized courts namely the Labour and Administrative courts.[31] Magistrates courts are the next in hierarchy with the Magistrates

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28See para. 6.7 of the National Water Policy on "Water for primary needs".

[29]*See* the Constitutionat sections 166 and 167(1) (a) for a description of the court's functions.

[30]*Ibid.,* Sections 168 and 169.

[31]*Ibid.,* Sections 172 and 173 describing the two courts respectively.

Court Act *[Chapter 7:10]* governing their establishment. Section 174 of the Constitution describes the magistrates' courts, followed by customary law courts. Further described under the same section are other courts subordinate to the High Court and tribunals for arbitration, mediation and other forms of alternative dispute resolution.

It is important to note at this stage that the protection and enforcement of human rights and in particular socio-economic rights in Zimbabwe is not restricted to the judiciary, legislature and the executive only. Rather, Chapter 12 of the 2013 Constitution provides for national human rights institutions in the form of independent commissions tasked with supporting constitutional democracy. The key ones concerning the safeguarding of the right to food and water would be the Zimbabwe Human Rights Commission (hereinafter "the ZHRC") and the Zimbabwe Gender Commission (hereinafter "the ZGC"). The main functions of the ZHRC as laid down in section 243 are particularly pertinent. In that regard, the ZHRC wields power to at any time require any person, institution or agency, state or otherwise, to report to the Commission on what measures they have taken to protect and fulfil the rights in the Declaration of Rights.[32]Further to that, the ZHRC may require any actor to compile a report relating to their human rights compliance to be submitted to any regional or international treaty monitoring body to which Zimbabwe is a party.[33] As South African scholars have noted in the past however, in contrast with the courts, decisions of a Human Rights Commission are not legally binding, and could be termed, a "soft" enforcement mechanism. It nevertheless has the potential to play a significant role.[34]

16.5 Who has *locus standi*?[35]

Section 56 of the Constitution on 'equality and non-discrimination' guarantees everyone equality before the law, proceeding to state that, "all persons are equal before the law and have the right to equal protection and benefit of the law."[36] In section 68(1) on the 'right to administrative justice,' the following guarantees are made;

> "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

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[32]*Ibid.,* section 244(1)(a). *See also* T. Kondo, 'Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence', *African Human Rights Law Journal* (2017) pp. 163-193, at p. 177.
[33]*Ibid.*
[34]*See* C. Heyns and D. Brand, 'Introduction to socio-economic rights in the South African Constitution', 2:2 *Law, Democracy and Development* (1998) pp.153-167.
[35]English Law Dictionary, <www.lexico.com/definition/locus_standi>, visited on 08 October 2021.This maxim means 'the right or capacity to bring an action or to appear in a court."
[36]Section 56(1) of the Constitution.

Lastly, when it comes to the enforcement of Constitutional rights, section 85on the 'enforcement of fundamental human rights and freedoms,' lays out the following framework;

"(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).

(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that—

(a) the right to approach the court under subsection (1) is fully facilitated;

(b) formalities relating to the proceedings, including their commencement,are kept to a minimum;

(c) the court, while observing the rules of natural justice,is not unreasonably restricted by procedural technicalities;and

(d) a person with particular expertise may, with leave of the court, appear as a friend of the court.

(4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court."

In summary, in Zimbabwe, the law especially the Constitution provides individuals and/or juristic persons (without discrimination on any of the prohibited grounds) with the space to claim their socio-economic rights either as self-actors, as representative of others or as being represented by others.

16.6 Application of the law by Zimbabwean Courts in respect of the right to food and water

Rights holders in Zimbabwe have managed to enforce their socio-economic rights inclusive of the right to food and water through the courts where the latter have used vertical, horizontal, indirect and direct

application of the rights.[37] Outlined below is a brief explanation of the four approaches further discussed in the next section vis-à-vis some cases which Zimbabwean courts have adjudicated upon;

16. 6.1 Vertical, horizontal, indirect and direct application of socio-economic rights

The nature of international human rights obligations is vertical that is the State as duty bearer having an obligation to respect, protect and fulfil a rights holder's human rights, in this case the right to food and water. According to the International Commission of Jurists (hereinafter "the ICJ"), "Vertical application of ESC rights entails private individuals seeking the enforcement of certain ESC rights against the State," while the horizontal enforcement of human rights involves "a private individual [enforcing] his or her ESC right against another private individual." Further, the ICJ explains the direct and indirect application of socio-economic rights as follows;

> "ESC rights can be directly enforced through the Direct Application of the Declaration of Rights. Direct Application of the Declaration of Rights happens when individuals directly invoke the provisions of the Declaration of Rights to enforce their rights… ESC rights can also be applied indirectly, which means enforcing the rights by means of invoking the relevant provisions of the enabling legislation that is enacted to give effect to those constitutional ESC rights. However, where the enacted legislation sets standards that are below or otherwise inconsistent with the standards set by the Constitution, the court is allowed to bypass such legislation and directly apply the Declaration of Rights".[38]

Lane has also referred to the use of the terms 'direct horizontal effect' and 'indirect horizontal effect' in the fields of constitutional law and private law, particularly within the European context.[39] She states;

> "Direct horizontal effect of human rights treaties would 'la[y] duties directly upon a private body to abide by its provisions and mak[e] breach of these duties directly actionable at the instance of an aggrieved party'. In other words, it would place non-State actors under direct and explicit obligations to respect, protect and/or fulfil human rights. Direct horizontal effect is sometimes discussed from the perspective of a victim of a human rights violation, in which case it is considered to have two components – substantive and procedural. Substantive horizontal effect would enable individuals to claim

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[37]*See* ICJ, *A Guide for the litigation of Economic, Social and Cultural Rights in Zimbabwe* (2015) pp. 197-200,<www.icj.org/wp-content/uploads/2016/09/Zimbabwe-Guide-ESCR-web-Publications-Thematic-Report-2015-ENG.pdf>,visited on 06 October 2021

[38]*Ibid*.

[39]See L. Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies', 5 *European Journal of Comparative Law and Governance*(2018) pp. 5-88 at p. 15.

> violations of rights owed to them by non-State actors, whilst procedural horizontal effect would allow an individual to 'enforce his fundamental rights against another individual".[40]

It is interesting to note from the analysis by Lane as quoted above how the different applications of human rights may intersect to create an entirely different scenario from where, either there is only one application for example the horizontal or the vertical application of human rights.

16.7 Adjudication of Socio-economic rights cases in Zimbabwe post the 2013 Constitution

Section 46 as read with section 326 of the 2013 Constitution are central in guiding Zimbabwean courts on how to adjudicate cases involving alleged violations of citizens' socio-economic rights. It is important to note that even from the time the old 1980 Lancaster Constitution was in place; the judiciary in Zimbabwe has always sought to refer to customary international law and foreign law in the absence of any appropriate local provisions to fill in the gap. Section 46, the interpretative section within the 'Declaration of Rights' states that;

> "(1) When interpreting this Chapter, a court, tribunal, forum or body—
> (a) Must give full effect to the rights and freedoms enshrined in this Chapter;
> (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section3;
> (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
> (d) Must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter2; and
> (e) may consider relevant foreign law;
>
> In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.
>
> (2) When interpreting an enactment,and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter."

The above Constitutional provision would mean that where there is a gap in terms of national law, the court could refer to international law to which Zimbabwe is a party or foreign law such as South African Law, which shares a common history with Zimbabwean Law *vis-à-vis* Roman-Dutch Common Law. A good example is the non-existence of an Act that enables the right to food within section 77 of the Constitution. In that case, the

[40] *Ibid.,* p. 16.

court would refer to the normative content of the right to food as conceptualized by the CESCR in General Comment No. 12 considering that Zimbabwe is party to the ICESCR.

Section 326 of the 2013 Constitution on Customary International Law states as follows;

> "(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.
> (2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law".

As drawn from the above Constitutional provision, in the absence of appropriate national law on the right to food and water; the court is at liberty to use customary international law. A good example would be the Universal Declaration of Human Rights[41] in Article 25 on everyone's right 'to a standard of living adequate for their health and well-being and that of their family, including food, clothing, housing, medical care etc. Nevertheless, since the right to food is already ensconced within the Zimbabwe Constitution's Bill of Rights, the courts have simply applied the provision directly to cases brought before them.

Section 2 and section 80(2) of the Constitution is also very significant in the realisation of the socio-economic rights to food and water in Zimbabwe because they invalidate any norms, laws and past practices that are inconsistent with the provisions of the Constitution to the extent of the inconsistency. Hence, in the *Mudzuru* case,[42] the Constitutional Court declared child marriage to be unconstitutional. For example, some past cultural practices that declare that girl children and women should not eat liver, eggs and milk as they are a preserve for the men and boy children would be declared invalid to the extent that they violate the former's right to food.

16.7.1 A Selection of Cases on Socio-economic rights

In this section is a brief discussion of the approaches taken by the Zimbabwean courts when dealing with some cases involving the enforcement of socio-economic rights. The selected cases include, (1) *Farai Mushoriwa* v.*City of Harare,*[43] (2) *City of Harare* v. *Farai Mushoriwa,*[44]

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[41]*See* the UDHR ,*supra note 15*

[42]*See Mudzuru and Tsopodzi* v. *The Minister of Justice, Legal & Parliamentary Affairs (NO) &Others.*(Const Application 79/14) [2015] ZWCC.

[43]HH 195-14; HC 4266/13.

[44]2014 (1) ZLR 515 (H).

(3) *Bothwell Property Company* v. *City of Harare*,[45] (4) *Hove* v. *City of Harare,*[46] (5) *Hopcik Investment Pvt* Ltd v. *Minister of Environment Water and Climate & Anor,* [47](6) *Taurai Dodzo and Zimbabwe Human rights NGO Forum* v. *Commissioner General of Prisons & Correctional Services (ZPCS) and Others,* [48] (7) *Combined Harare Residents Association (CHRA)* v. *The City of Harare (NO) & Others.*[49]

16.7.1.1 *Farai Mushoriwa* v. *City of Harare* 1

In May 2013, Applicant having incurred a bill amounting to ZWL or USD 1,700 for water services rendered, which was disputed, the respondent disconnected the applicant's water supply. The High Court found that the relevant legislation governing water supplies divested the respondent of any unfettered discretion to disconnect water supplies. In any case, where the respondent sought to do so for any alleged failure to pay, it could only disconnect upon proof that the consumer in question had failed to pay the charges due. Moreover, the respondent could not arrogate to itself the right to determine when payment is due without the requisite proof secured by due process or recourse to a court of law.

In adjudicating upon the *Farai Mushoriwa* case, the High Court referred to Section 77 of the Constitution on the right to food and water and declared Section 8 of the City of Harare by-law 164 of 1913 on arbitrary water disconnections to be unconstitutional. Justice Bhunu stated that;

> "It is a basic principle of our legal policy that law should serve the public interest. As we have already seen, every person has a fundamental right to water. It is therefore, clearly not in the public interest that a city council can deny its citizens water at will without recourse to the law and the courts".

In arriving at its decision, the court opined that the right to potable water is enshrined in the Constitution and that the respondent, being a public body, cannot deny water to any citizen without just cause. Furthermore, the relevant by-law relied upon by the respondent was not only unconstitutional but also ultra vires its parent legislation, the Urban Councils Act because it conferred sole jurisdiction upon the respondent to determine any disputed bill without recourse to the courts. The court thereafter granted applicant interim relief, pending the final determination

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[45]*Bothwell Property Company* v. *City of Harare* HH 360-16 HC 4446/15.

[46]2016 (1) 274 (H).

[47]2016 (1) ZLR 274 (H).

[48]*Taurai Dodzo and Zimbabwe Human rights NGO Forum* v. *Commissioner General of Prisons & Correctional Services (ZPCS) & Another,* Case No.HC6726/20(Unreported judgment)

[49]Unreported 2020 urgent High Court application.

of the matter, ordering the respondent to immediately restore water supply to the applicant's rented premises and to refrain from interfering with the applicant's peaceful possession of the premises by terminating his water supply. The final order sought in the provisional order contained an interdict prohibiting the respondent from interfering with, disrupting or terminating the respondent's water supply without the authority of a court order.

In my view, the honourable court's decision was accurate in so far as it forbade self-help on the part of the respondent. The only argument raised against this judgment, is the assumption that a bulk water meter could be said to supply water to satisfy the human right to water. This case once again involves commercial water, which should be paid for accordingly and timeously as this involves business on the part of the respondent. If the Water Act *[Chapter 20:24]* can criminalize the unlawful free use of water above the permitted five megalitres without a permit for rural residents, what more of urban users whose liability status vis-a-vis 'primary water rights', the National Water Policy discusses in Paragraph 6.7.[50] The Policy makers acknowledge that there is need for a two or three stage rising block tariff regime to cater for affordability by all even the poor because the right to water does not mean access to free water. Rather it entitles a rights holder to water that is affordable, of a good quality and regularly supplied as discussed by the CESCR in General Comment No. 15 on the right to water.[51] However, in cases of extreme poverty, "access to safe drinking water and sanitation might have to be provided free of charge if the person or household is unable to pay for it".[52]

16.7.1.2 *City of Harare* v. *Farai Mushoriwa II*

The City of Harare lodged an appeal in the Supreme Court against the High Court judgment, which appeal the former decided in 2018. The Supreme Court dealt at length with (i) the reasonableness of delegated legislation; (ii) whether by-laws are ultra vires the enabling act; and (iii) whether by-laws are unconstitutional. It is on the last point that Patel JA opined on the framing of Section 77 of the Constitution of Zimbabwe as compared to section 27 of the South African Constitution as well as the approach the South African Court had taken in the *Lindiwe Mazibuko* case.[53]

In the ultimate Patel JA with Uchena JA and Ziyambi AJA concurring, partially allowed the appeal and set aside the provisional order granted by the court a quo. In summary, the 1913 City of Harare Water

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[50]*See supra* note 28.

[51]*See supra* note 10.

[52]OHCHR, UN Habitat & WHO, The Right to Water Fact Sheet No. 35 at pp. 11-12 available at: <www.ohchr.org/documents/publications/factsheet35en.pdf> visited on 06 October 2021.

[53]*Mazibuko and* Others v. *City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

By-laws were found not to be incompatible with the right to water as enshrined in section 77 of the Constitution. The appellant's power to disconnect water supplies for non-payment of water accounts was held to be both statutorily and constitutionally unimpeachable, provided it was reasonably applied and enforced, and exercised in strict compliance with the conditions prescribed in the by-laws.

It is submitted on the appeal outcome of *City of Harare* v. *Farai Mushoriwa* II that it runs counter to Section 2 as read with Section 46 of the Constitution of Zimbabwe. This is because the Constitution provides for equality before the law in Section 56 such that no one should be above the law. In any dispute, both parties should be heard and the law does not allow self-help. Section 2 states;

> "(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".

Secondly, it is to be noted that the 1913 by-laws were enacted more than a century ago before the advent of human rights jurisprudence in general let alone that relating to socio-economic rights. In the colonial era, jurisprudence on equality and non-discrimination including equality before the law, right to administrative justice and the right to a fair hearing as represented by the right to be heard (the *audi alteram partem* rule),[54] was non-existent such that local authorities could arbitrarily disconnect even poor members in society without adequate notice. The City of Harare known then as the City of Salisbury had no provision and even up to now does not provide for a basic minimum core content to cater for vulnerable members of society. While the court in the above case made reference to Section 86(1) of the 2013 Constitution, it did not take into account Section 86(2) and (3) stating respectively that;

> "(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."

> "(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them— (a) the right to life, except to the extent specified in section 48; (b) the right to human dignity;…(e) the right to a fair trial [..]."

[54]These are also protected under sections 56, 68 and 69(3) of the Zimbabwe Constitution.

By ruling that the 1913 by-Laws allowing for arbitrary water disconnections were not *ultra-vires* the Constitution, the Supreme Court has given more life to the by-laws which remain un-repealed. Arbitrary water disconnections have been causing a lot of misery to the poor residing in low-income suburbs who are not allowed the twenty (20) litres per person per day in line with international best practices. As long as the Supreme Court judgment remains in place and is not overturned by the Constitutional Court to the extent that it allows local authorities to disconnect water without a court order, the process will remain prone to abuse.

The human right to water is an enabling right facilitating the enjoyment of the right to life, health education and many others including the right to human dignity. In Justice Patel's own words;

> "In the context of a constitutional framework within which the right to water is not explicitly articulated, the right is often subsumed under the broader rubric of the fundamental right to a clean and healthy environment and sustainable development implicit in the right to life."[55]

Arbitrary disconnection of water supplies subjects the rights holder to the erosion of their human dignity. In making the following declarations as regards section 77 of the Zimbabwe Constitution, *City of Harare* v. *Farai Mushoriwa II*, the court *has* perpetuated the devaluation of socio-economic rights when compared to civil and political rights and yet they are interconnected and indivisible. This is despite the common understanding that, '[w]hen faced with human indignity, the human rights that protect socio-economic interests resonate more deeply, and can be conceptualized more clearly.'[56] In the Mushoriwa case, Patel JA stated as follows:

> "The first point to note about s 77 of the Constitution is that it is a fundamental human right enshrined in Part 2 of the Declaration of Rights. As such, it is directly enforceable in terms of s 85 of the Constitution if it has been, is being or is likely to be infringed.Nevertheless, being in the nature of a social right, I do not think that it is susceptible to unqualified application and enforcement…In light of the relatively inchoate and somewhat nebulous scope of the rights conferred and the concomitant obligations imposed, I am inclined to regard s 77 as being essentially policy-oriented and hortatory in nature. This is not to render the provision entirely nugatory but rather to recognise that the extent of

[55]*Supra* note 44, p. 22.

[56]*See* M. Langford and B. Thiele, 'Introduction: The Road to a Remedy,' in J. Squires *et al*. (eds.), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (UNSW Press, 2005 p. 1.

> its practical enforceability is not necessarily self-evident in every circumstance".[57]

The *Farai Mushoriwa* case laid the groundwork for the development of the human right to water jurisprudence in Zimbabwe.

16.7.1.3 *Bothwell Property Company* v. *City of Harare* In *Bothwell Property Company,* which preceded the appeal in the *Farai Mushoriwa*, Chigumba J discussed at length the human right to water as viewed against water disconnections and the 'Supremacy of the Constitution'.[58] She stated;

> "If the Legislature's intention is to confer unfettered discretion on the first respondent to disconnect water supplies where the quantum of liability is disputed, then in my view it is up to the Legislature to expressly say so, when the Urban Council's Act is aligned with the new Constitution, to avoid confusion. In the interim we hold that 1st respondent does not have such unfettered discretion where the quantum of liability is disputed in general, and more particularly in the circumstances of this case. There must be judicial review of administrative action in order for the public to maintain its confidence in the actions of administrative bodies who after all are funded by taxpayers and ought to be accountable to them. Is it lawful, reasonable or fair to disconnect water supplies to a consumer where the sum deemed due is disputed?"[59]

The City of Harare and all of its employees and assigns were ordered to refrain from disconnecting applicant's water supplies without a court order, expressly authorizing it to do so.

It is important to note however, that this case as well as the one concerning *Farai Mushoriw*a do not strictly fall under the 'human right to water' regime but rather water rights of a commercial nature because this was water used in large volumes for commercial enterprises. The normative content of the rights to food and water as conceptualized by the CESCR relate to food and water for basic personal and household needs and to a certain extent for food production. Of much concern are many poor families in low-income suburbs who have had their water disconnected by the City of Harare on numerous occasions based on the 1913 Water By-laws against them after the latter won the appeal in *Mushoriwa*. This is a clear indication of non-compliance by the State as primary duty bearer on its obligation to respect, protect and fulfil the right to water.

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[57]As per Patel JA *supra* note 44,p. 27.

[58]Section 2 of the 2013 Constitution.

[59]*Supra* note 45,p. 14.

The State currently has delegated its authority to the City of Harare with the former having an obligation that its agent, the City of Harare refrains from interfering with the enjoyment of the right to water by the rights holders, with a focus on vulnerable groups. There is need for the courts to enforce the direct vertical application of socio-economic rights of the poor and vulnerable members of society as a priority.

16.7.1.4 *Hove* v.*City of Harare*

This was an application to interdict the respondent from disconnecting water supplies from the applicant's property without a court order and from charging commercial rates for the use of water on the said property. The applicant submitted that the respondent was infringing on their right to water as provided in section 77(a) of the Constitution. In interpreting the right to water, the court found that the right empowers local authorities to levy rates to raise revenue for service provision and does not prohibit disconnections of water services for non-payment. Additionally, the court held that the right to water contains the protection against arbitrary and illegal disconnections. Consequently, when a bill is genuinely disputed there should be recourse to the court before disconnection as per Section 69 (3) of the Constitution and the holding in *Mushoriwa* v.*City of Harare* was referred to. However, the court held that while the applicant had proved his right to water, he had failed to prove the genuineness of his claim, since he did not provide as proof letters of complaint disputing the bills. This also had a negative bearing on the grant of the interdict order.

The court also found that the applicant converted domestic premises for use as commercial premises and was not entitled to be charged domestic rates. It was also noted that the applicant failed to give adequate information which would show that the respondent did not follow the correct procedure in zoning and rating it.Accordingly, the application was dismissed with costs.

It is submitted that this case was correctly decided since it involves the supply of commercial water to a law firm's premises rather than a violation of the human right to water as correctly conceptualised.

16.7.1.5 *Hopcik Investment (Pvt) (Ltd)* v.
Minister of Environment Water and Climate and Anor

The applicant the owner of a property in an upmarket suburb lodged a case against the first respondent, the Minister responsible for the administration of the Water Act *[Chapter 20:24],* who also has the responsibility to regulate the supply of water by the second respondent. The second respondent is the local authority established in terms of s 183 of the Urban Councils Act *[Chapter 29:15].* Its mandate is to provide and maintain a supply of water within or outside the council. The applicant

averred that there had been no supply of water to his property and the whole community around him for approximately three years. The applicant submitted that other properties in Harare were receiving a regular supply of water. The applicant claimed therefore that the Government and the City of Harare had infringed its right to water, protected by section 77 of the Constitution of Zimbabwe, through their failure to provide and maintain an adequate supply of water to it. The respondents opposed the application on the sole basis that they lacked the resources. The applicant contended that the second respondent was not taking its responsibility seriously and had not done enough to ensure an adequate supply of water to residents. The applicant prayed for an order compelling the respondents to supply up to fifteen thousand (15000) litres of potable water to the applicant's premises on a weekly basis.

The High Court held that it was held that the failure of the State to ensure a minimum supply of safe, clean and potable water constituted a breach of the applicant's right under Section 77 of the Constitution of Zimbabwe. It was further held that the obligation on the State and local authorities to provide and maintain adequate supplies of water does not require them to do what is beyond their means but means that they must take reasonable steps such as rationing water and distributing it fairly. The court also held that the State may only be absolved from its obligations in this regard if it gives good and sufficient reasons for its failure.

While the court did well to directly apply the Constitutional provisions to this case; it is still argued that it was misplaced having been given in favour of a rights holder who had the means to arrange for his own private supplies of water. It is a well-known fact that residents of this upmarket area have private boreholes while others buy water in bulk from private sellers. If this judgment had been in favour of the residents of poor low income suburbs that have had to face cholera outbreaks in the past due to non-supply of affordable clean water for basic needs, I submit this would have been a landmark case.

The court's approach is also progressive to the extent to which it applied foreign law as it put into consideration South African cases such as *Lindiwe Mazibuko*.[60] It is interesting to note however that the cited case involving Lindiwe Mazibuko concerned poor residents of a poor suburb of Johannesburg. In enforcing socio-economic rights, priority is given to vulnerable groups as cited earlier in the CESCR's conceptualization of vulnerable people. In the court's favour is the fact that apart from applying the Constitutional provisions in section 77, it considered international human rights instruments to which Zimbabwe is party including the CESR's General Comment No. 15 and the UN General Assembly Resolution 64/292 of July 28, 2010.

[60] *Supra* note 53.

16.7.1.6 *Taurai Dodzo and Zimbabwe Human rights NGO Forum* v. *Commissioner General of Prisons & Correctional Services (ZPCS) and Others*

The Zimbabwe Human Rights NGO Forum and a serving prisoner, Taurai Dodzo filed an urgent chamber application complaining about the critical water shortages and outbreak of diarrhea at the Chikurubi Maximum Prison in Harare. The application was lodged against The Commissioner General of Prisons and Correctional Services (ZPCS), The Minister of Justice, Legal and Parliamentary Affairs, The Minister responsible for Water and The Minister of Finance. In the order granted by the High Court, the Minister of Finance was ordered by the court to release funds for the purchase of water containers and payment of the water's deliveries to the heavily congested prison. The presiding judge also ordered the Commissioner General of Prisons and Correctional Services, The Minister of Justice, The Minister of Water, and The Minister of Finance to take temporary measures for the daily supply of at least sixty litres of potable water to each prisoner at Chikurubi Maximum Prison. The general view is that this was a correctly decided case on the right to water.

16.7.1.7 *Combined Harare Residents Association (CHRA)* v. *The City of Harare (NO) and Others.*

In this matter, the applicant, CHRA brought an action to ensure the protection of several socio-economic rights of vulnerable groups particularly women and children during Zimbabwe's first national lockdown in March 2020. The rights covered the right to life as protected under section 48 of the Constitution, in light of lack of physical distancing and hand sanitization at communal water-points in poor neighbourhoods. Secondly, protection of vulnerable groups' right to healthcare services and thirdly, on the right to food and water as protected under section 77 of the Constitution. The applicant sought the protection of the right to safe, clean and portable water since the Respondents' failure to implement the measures prayed for would escalate to a violation of the right to life. Lastly, the applicant sought protection of the right to equality and non-discrimination as provided for in section 56 of the Constitution. Due to women and girls' socially ascribed gender roles which included, fetching water at over-crowded communal boreholes in Harare and other urban centres, there was need to take urgent action so as to protect their right to equality and non-discrimination. According to the applicant, the effect of failing to implement the preventive measures prayed for would put women and girls at greater risk than their male counterparts, thereby violating their right to equality and non-discrimination.

The High Court granted the relief sought by consent as outlined below;[61]

1. The first Respondent shall, during the duration of the lockdown, procure water from bulk water suppliers and supply the water in the forty-six (46) wards of the City of Harare from moving tanks to avoid the convergence of crowds at the watering points.
2. The first Respondent shall purchase adequate water treatment chemicals to increase its water supply to the residents of Harare to five hundred (500) mega litres.
3. The first Respondent shall provide Marshalls to ensure that the people accessing water at communal water points do so in orderly fashion and adhere to the social distancing guidelines.
4. The second and third Respondents shall provide oversight over the implementation of this order by the first Respondent and;
5. The fourth Respondent shall avail the funds to implement the measures specified in this order

The above case involving several socio-economic rights including the rights to food and water has contributed to Zimbabwe's jurisprudence on the adjudication of socio-economic rights. This is the only case where the right to food was adjudicated upon.

16.8 Concluding remarks

The jurisprudence on section 77 of the 2013 Zimbabwe Constitution on the socio-economic rights to food and water is steadily progressing although there is more litigation in respect of the right to water than the right to food. Nevertheless, the foundation has been set for the continued development of jurisprudence in Zimbabwe as drawn from the various cases launched for or against the City of Harare and Government Ministries as well as independent Commissions, an example being *Taurai Dodzo* on the right to water in prisons. The applicant did not mention the right to adequate food but that is one area, which is a challenge in prisons. One recommendation made is that judicial officers receive more training on the normative core content of the socio-economic rights to food and water. This will ensure that the courts are not hoodwinked by affluent litigants seeking to file cases to compel a local authority to regularly supply bulk water to their upmarket homes for the sole purpose of filling up their swimming pools or watering their garden lawns. The socio-economic rights to food and water are meant to ensure "a standard of living adequate for the health and well-being of everyone and their families." This entails access to food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond their control.[62] It is not about luxury but the enjoyment of basic services that guarantee minimum basic standards of a quality life.

[61] *See supra* note 49.
[62] Article 25 of UDHR

Chapter 17

A Normative Framework for Access to Justice for Refugees in Zimbabwe: Towards a Judicial Approach

Sindiso Nozitha Nkomo
and Michelle Rufaro Maziwisa[1]

17.1 Introduction

The world faces a huge global migration crisis which has not been witnessed since the Second World War.[2] This increased movement of people across borders is said to be driven by the search for greener pastures, as well as escaping rights violations and persecution in their conflict-ridden home countries.[3] Refugees have been the subject of much research over the past decades since the formation of the United Nations. Before then, many of the inquiries focused on the effects of war on individuals and combatants.[4] It was only after the Holocaust that some scholars shifted focus and paid attention to survivors of war including refugees.[5] In Zimbabwe, refugee studies have focused mostly on the mental, physical and social consequences of war on refugees.[6] There appears to be no published academic literature that speaks to refugees' access to justice in Zimbabwe. Most attention seems to be directed towards providing refugees with humanitarian services such as food, health services, accommodation, income-generating projects, agricultural inputs, primary and secondary education, refugee status, and nutritional

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[1]Sindiso N. Nkomo, Human Rights Officer in Charge, Zimbabwe Human Rights Commission Southern Region Office. LLD Candidate University of the Western Cape. Michelle R. Maziwisa, Postdoctoral Research Fellow, Dullah Omar Institute, University of the Western Cape.

[2]C. Ntungwerisho, 'Leaving nobody behind: The access-to-justice challenges of refugees in Uganda', 20 *ESR Review*(2019) p 9.

[3]*Ibid.,* p.9.

[4]E. Govere, *Exploring the perceptions of refugees and asylum seekers regarding access to mental health services in Zimbabwe: A case study of Tongogara Refugee Camp* (Unpublished thesis, University of Witwatersrand, 2017) p. 2.

[5]*Ibid.,* p.2.

[6]*Ibid*.

supplements provided by non-governmental organisations (NGOs) such as Christian Care, inter alia.[7] Moreover, very few cases involving refugees have come before the courts, such that the judiciary has not adequately or comprehensively dealt with refugee access to justice in Zimbabwe. Consequently, there is no adequate jurisprudence from the courts about access to justice for refugees, and there is thus no legal normative framework for the courts to follow, or adopt in the interpretation of access to justice for refugees. In light of this major gap in jurisprudence, this Chapter discusses the legal normative framework that must guide the judiciary when these issues come before them.

The chapter describes the legal framework for access to justice, the strengths and weaknesses of the law, how the judiciary have treated these issues in the few cases that have come before them. The chapter also draws selected best practices from foreign jurisdictions for illustrative purposes.

This chapter is divided into five sections. The first section is the introduction, the second focuses on conceptualising refugees and access to justice and the third section focuses on the international and regional human rights framework that ought to guide the judiciary in matters pertaining to refugee access to justice. The fourth section unpacks the laws and institutions established in Zimbabwe towards refugees' protection of their right of access to justice to guide the judiciary on the necessary interplay between the judiciary and other institutions. This section will explore the legal normative framework within the national sphere and highlight opportunities and challenges for the judiciary in interpreting and applying national laws pertaining to access to justice in Zimbabwe. The fifth and last section will draw conclusions and provide recommendations.

17.2 Conceptualisation of refugees and access to justice

The Convention on the Status of Refugees defines a refugee as "a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him— or herself of the protection of that country, or to return there, for fear of persecution."[8]
In Zimbabwe, the past decades have been marked by a significant influx of asylum seekers and refugees into the country from other parts of the continent such as Burundi, Mozambique, Sudan, the Democratic Republic

[7] *Ibid*.

[8] United Nations Convention Relating to the Status of Refugees (1951), 189 UNTS 137 (Refugee Convention) art.1 A (2), - <www.refworld.org/docid/3be01b964.html>, visited on 4 February 2021.

of the Congo (DRC), Congo Brazzaville, Rwanda, Ethiopia and Somalia.[9] Thus, in response to the growing influx of refugees and asylum seekers, the Government of Zimbabwe (GoZ) established a refugee camp called Tongogara Refugee Camp which is located in Chipinge District, Manicaland Province which is about 488km southeast of Harare.[10] The camp was named after the late Josiah Magama Tongogara, who was the Commander of the Zimbabwe African National Liberation Army (ZANLA) during Zimbabwe's liberation struggle.[11] The camp, which was originally designed to cater for a maximum of 3,000[12] people is the only surviving refugee camp in Zimbabwe and now houses 14 683 people.[13] While the majority of its residents came into the country as a result of the civil unrest in Mozambique,[14] the rest who came from other African countries such as Sudan, Rwanda, Burundi, Somalia and the DRC fled their countries due to armed conflict, persecution, torture, sexual violence and children experiencing the death of their parents.[15]

As the refugees are staying in the Tongogara Refugee Camp, the GoZ is compelled under international law to protect them from violation of their rights and to uphold their dignity.[16] However, it has been noted that when people flee their homes and seek refuge in foreign countries, they become highly vulnerable to poverty and marginalisation *inter alia*. Although there is a vast number of human rights (and in fact all human rights),[17] in this chapter we restrict ourselves to the right to access to justice. The judiciary plays an especially important role in promoting access to justice for refugees by providing recourse that is legally enforceable. Indeed outside of alternative dispute resolution, and institutions that adjudicate on refugee matters, the judiciary is both an end and a means to an end, the judiciary both promotes access to justice

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[9]Govere., *supra* note 4, p. 1. *See* Zimbabwe Human Rights Commission, *Follow-up Monitoring and Inspection visit to Tongogara Camp Report* (2019) (ZHR Report). According to the Report, in 2019 the majority of the population in the camp were those from DRC (9 834 people) followed by Mozambique (1 437 people), Burundi (843 people) and Rwanda (804 people).

[10]Govere, *supra* note 4., p.2.

[11]*Ibid.,* p.1.

[12]World Vision, 'World Vision assists with COVID-19 preparedness at Tongogara Refugee Camp in Chipinge, Zimbabwe', <*https://www.wvi.org/stories/zimbabwe/world-vision-assists-covid-19-preparedness-tongogara-refugee-camp-chipinge*>, visited on 14 January 2021.

[13] Zimbabwe Human Rights Commission Report, *Follow up Monitoring and Inspection visit to Tongogara Refugee Camp* (2020).

[14]World Vision, *supra* note 12.

[15]*See* ZHRC Report*supra* note 9. *See* also J. Mhlanga and R.M. Zengeya, 'Social work with refugees in Zimbabwe', 6:1 *African Journal of Social Work* (2016) p. 24.

[16] United Nations Universal Declaration of Human Rights (adopted 10 December 1948 by UNGA Res 217 A (III)) (UDHR) art.1, <https://www.un.org/en/universal-declaration-human-rights/>, visited 4 February 2021.

[17]Ntungwerisho, *supra* note 2, p. 10.

and fulfils access to justice. Moreover, courts are the apex bodies that adjudicate on legal issues pertaining to refugees.

Access to justice has been defined by the United Nations as 'a process which enables people to claim and obtain justice remedies through formal or informal institutions of justice in conformity with human rights standards.'[18] Access to justice can be further understood as the ability for people to seek and obtain a remedy through formal (courts and tribunals) or informal institutions of justice for grievances in compliance with human rights standards (mediation through community leadership).[19] Thus, access to justice can be broken down into the following elements:[20] access to a proper forum where their grievances are heard; physical and financial access to the courts; expeditious handling of their issues; access to legal representation when it is required and; effective remedies to their grievances.

In a narrow sense, access to justice includes the right to a fair hearing, access to legal aid and access to an impartial and competent court.

It is of paramount importance to highlight that access to justice is more than improving an individual's access to courts or guaranteeing legal representation but it also includes providing people with information or knowledge of rights and how to claim them. Thus, ensuring that the justice system is physically and financially accessible and not alien to ordinary people such as refugees is critical.[21] Moreover, unless every citizen, including those who cannot afford legal representation, has access to legal advice and 'equality of arms,'[22] it cannot be said that access to justice for all is achieved because there is a necessary continuum between access to legal services and access to justice.[23]

The situation of refugees across the world is precarious due to the various risks they face in terms of security. As noted by Cappelletti and Garth, 'effective access to justice is 'the most basic human right' and the most basic requirement of a legal system seeking to guarantee and not merely proclaim the right to access to justice'.[24] We argue that not only is access to justice central to human rights, but also that the judiciary has a special duty to promote and fulfil refugee access to justice.

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[18]*Ibid*.

[19] Zimbabwe Human Rights NGO Forum, 'Access to justice', 83*Human Rights Bulletin* (2013) p. 1.

[20]*Ibid*., p.1.

[21]*Ibid*.

[22]This is a principle which means that during either a civil or a criminal trial, both sides must have equal access to the court and neither side should be procedurally disadvantaged.

[23]L.Greenbaum, 'Access to justice for all: A reality or unfulfilled expectations?' *De Jure* (2020) p. 250.

[24]M. Cappelletti and B. Garth, 'Access to justice: The worldwide movement to make rights effective', in M. Cappelletti and B. Garth (eds.), *Access to Justice: A World Survey* (Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, Milano,[The Florence Access to Justice Project], 1978) p. 8.

The concept of access to justice defined above, has developed over time and is embedded in the 'international bill of rights', which encompasses the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Although these instruments do not specifically mention the right to 'access to justice' in these words, the concept of access to justice is embedded in their text as will be shown in this article. For instance, key elements forming the cornerstone of access to justice such as equality before the law and equal protection of the law,[25] the right not to be subjected to arbitrary arrest, detention or exile,[26] access to courts and the right to a fair trial,[27] and the right to an effective remedy,[28] are recognised and protected in the international bill of human rights. As already mentioned above, this chapter provides guidance to the judiciary on refugee access to justice for when such matters may appear before the judiciary.

17.3 Regional and international frameworks governing refugees' access to justice

This section focuses on the international and regional legislative normative frameworks that the judiciary should be guided by in relation to the rights of refugees and more specifically, the right of refugees to access to justice.

17.3.1 *United Nations Convention on the Status of Refugees, 1951*

One of the first instruments recognising refugees was the United Nations Convention Relating to the Status of Refugees (1951 Convention),[29] which was concluded with the victims of the Second World War in mind. Zimbabwe has ratified this Convention, albeit subject to reservations in Articles 17 and 26 relating to freedom of movement and employment respectively. However, Zimbabwe has not ratified the Protocol Relating to the Status of Refugees.[30] The fact that Zimbabwe has not ratified the 1951 Convention constrains the judiciary owing to the dualistic legal system that requires translation of international law into domestic law. Nonetheless, the 1951 Convention sought to define refugees in the context of the Second World War, and to extend various protections to them. Article 1 of the 1951 Convention evidences this in its definition of refugees as persons defined as such under the 12 May 1926 and 30 June

[25]Article 7 of the UDHR.

[26]*Ibid.*, Article 9. *See also* articles 9, 14 and 15 of the ICESCR.

[27]Article 10 of the UDHR and Article 2 of the ICESCR.

[28]Article 8 of the UDHR and Article 2 (b) of the ICESCR.

[29]United Nations Convention Relating to the Status of Refugees (1951), 189 UNTS, p.137 (Refugee Convention).

[30]United Nations Protocol Relating to the Status of Refugees (1967), 606 UNTS, p.267,<www.refworld.org/docid/3ae6b3ae4.html>, visited 4 February 2021.

1928 arrangement or persons who due to events that happened prior to 01 January 1951, have a well-founded fear due to their race, religion, nationality, or membership of particular social groups and are consequently outside their country of nationality and unable to benefit from the protection of that country.

However, the events occurring before 1 January 1951, are mostly tied to Europe and particularly the Second World War, and are thus not necessarily relevant to refugees in Africa today. Nonetheless, Article 16 of the 1951 Convention secures the right of refugees to free access to courts in the territory where they have found refuge and are habitually resident and the same treatment in this regard as residents of the territory, as well as free access to courts in foreign jurisdictions with the same treatment as residents of the territory where the refugee is resident in relation to the foreign jurisdiction. Indeed this provision assumes that the host country (and foreign countries) will have sufficient resources to provide 'free' access to courts and thereby subsidise refugees, clearly overlooking the present reality that most countries are strained for resources to provide legal services. Article 16 however, is stated broadly enough to include free access to courts in civil, criminal and administrative matters. Practice has shown that access to courts is not free. In most jurisdictions, to access free legal services, there is a multitude of checks to determine 'need' and the legal aid is often of a poor quality, not because it is performed by unqualified or unmotivated persons, but rather because they are so inundated, under-resourced (both financially and materially) and often short staffed. The judiciary would be well advised to take cognisance of the plight of refugees and intersectional vulnerabilities that may prevent them from obtaining legal representation, especially in civil matters, and to not view the courtroom as strictly 'adversarial', but rather to assist unrepresented refugees (as it would citizens).

Article 26 of the 1951 Convention is of particular importance to refugee access to justice and it relates to the freedom of movement. Article 26 requires each contracting state to accord to refugees lawfully in its territory, the 'right to choose their place of residence and to move freely within its territory'. This is an important right as it can facilitate access to courts. There is undoubtedly greater ease of access to courts when one is not residing in a camp. There would be no need to complete administrative paperwork in order to get out of the camp and it would be relatively easier to travel or commute to a court in an environment which one is familiar with because of free movement in the area (as opposed to an environment which one must discover when they need to approach court because they have spent most of their time sheltered in the closed environment of a camp). However, this right is made subject to regulations applying to 'aliens' generally in the same circumstances,

which can be interpreted to mean that less protection can be afforded to refugees provided the provision applies across the board. This clawback erodes refugee protection broadly, and specifically refugee access to justice. Courts should therefore make an enquiry into the particular circumstances of refugee parties when making determinations that require court attendance, and postponements, in order to factor in the additional cost, time and travel burden that would be experienced by the said refugee. Although one could argue that refugees travel a long distance, the same as any party coming from a remote area, yet in those circumstances, the courts tend to be quick to recognise that a party has travelled from a remote area to attend the hearing for locals, but may be oblivious regarding refugees.

17.3.2 *International Covenant on Civil and Political Rights (ICCPR), 1966*

Although this section focuses on access to justice in the ICCPR, references will also be made to the UDHR where most of the provisions in the ICCPR were adopted from. The UDHR stipulates that everyone has the right as a person before the law,[31] and that all are equal before the law and entitled without any discrimination to equal protection of the law.[32] Moreover, Article 2(1) of the ICCPR stipulates that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 14(1) in the ICCPR goes further and grants equality before the law in the specific context of what constitutes 'a fair trial' and more specifically in the context of criminal proceedings. General Comment 32 of the Human Rights Committee (HRC) has clarified that where persons are prevented or otherwise barred from instituting legal action for grounds listed in Article 2(1) would amount to a violation of Article 14(1) of the ICCPR.[33] Similar to General Comment 32, the Guidelines on Fair Trials[34] render discrimination on similar grounds to be a violation of the African Charter.

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[31]Article 6 of the UDHR.

[32]Article 7 UDHR.

[33]UN Human Rights Committee, *General comment no. 32, Article 14Right to equality before courts and tribunals and to fair trial* (23 August 2007), CCPR/C/GC/32 (General Comment 32),<www.refworld.org/docid/478b2b2f2.html>, visited 05 February 2021.

[34]African Union, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, (2003) (AU Principles and Guidelines on Right to Fair Trial, 2003).

Article 10 of the UDHR guarantees access to courts by stipulating that everyone is entitled in full equality to a 'fair and public hearing by an independent and impartial tribunal.' Of particular importance for refugees is the right (in criminal proceedings against them) to be brought promptly before a judge and to have a trial or be released within a reasonable time. This necessitates a well organised and well-resourced judiciary, which is not inundated with backlogs, and in the event of circuit courts, these must not be spaced too far apart, and the location should be easily accessible to the communities in those remote areas, including refugees. This must be coupled with competent prosecutors who do not delay and perpetually postpone hearings. It also requires legal representatives with an attitude of wanting to serve their refugee clients, translating to allocating adequate time to prepare their cases at the expense of billable hours, and therefore state subsidy for such work may be necessary, despite the hope that lawyers are noble and in the profession to serve. The ICCPR stipulates that anyone who is deprived of his liberty by arrest or detention is entitled to take the proceedings before a court in order to decide on the lawfulness of the arrest, or the delay in proceedings, and that victims of unlawful arrest or detention have an enforceable right to compensation. Article 14 is therefore especially important for refugees who tend to face arbitrary arrests and detention because of their status or lack of status. Although Article 14 ICCPR relates to criminal proceedings, General Comment 32 of the HRC has noted that some aspects are also relevant for civil and administrative matters.[35]

The judiciary must not only be sensitised to the limited freedom of movement enjoyed by refugees, but also to the fact that despite a robust legal framework for access to courts, various barriers to refugee access to courts persist, including language, lack of information on laws and institutions in the host country, lack of education, illiteracy, freedom of movement and distance to courts. The right to freedom of movement is especially important for refugee access to courts. Article 14 UDHR guarantees the right to freedom of movement within the borders of a country. This provision is especially important for refugees, especially where freedom of movement is curtailed by the use of refugee camps, and where such curtailment prevents refugees from access courts, judicial services, or complaints mechanisms, and thereby undermining their enjoyment of rights. The right to freedom of movement is stated in Article 12(1) of the ICCPR as follows: 'everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'. However, there is an immediate clawback, seemingly in the interests of state security. Article 12(3) of the ICCPR provides that the right to freedom of movement may

[35]Human Rights Committee 'General Comment No. 32', Article 14: Right to Equality before the Courts and Tribunals and to a Fair Trial', UN Doc CCPR/C/GC/32 (2007) para 12.

be subject to laws necessary to 'protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others' inter alia. These present additional leeway for countries to evade the protection of the right to freedom of movement. For example, matters of national security cannot be determined externally by another state or organisation, and further, they need not even be disclosed. This can make it more difficult to persuade states to protect the right to freedom of movement, and can leave minority groups such as refugees more vulnerable.

Furthermore,the protections in the UDHR pertaining to criminal law encapsulate the rights to be presumed innocent until proven guilty and the right to not be convicted of a crime that did not exist at the time of conduct, and not be sentenced in terms of a sentence that did not exist at the time of commission of the crime.[36] Article 14 of the ICCPR expounds on the right to a fair trial by detailing some of the elements that are necessary for a fair trial in criminal matters including equality before the courts, discussed above, the right to be presumed innocent, a fair and public hearing by a competent, independent and impartial tribunal established by law, trial without delay, time to prepare his case, to be informed of the right to legal representation, a free interpreter, and the right not to testify against one's self, or plead guilty.

In contrast the African Charter says very little about the right to a fair trial. It guarantees the right to have one's cause heard, which can be interpreted to mean it includes both criminal and civil matters. However, with specific regard to criminal matters, Article 7 secures the right to be presumed innocent, the right to defence, and the right to be tried within a reasonable time, without stating what counts as a reasonable time, or what circumstances to take into account when determining a reasonable time. The African Charter, having come short of properly protecting the right to access to justice in particular with reference to the right to a fair trial, cured this shortcoming by adopting the African Principles, which incorporates the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa and establishing a Working Group on Fair Trials.[37]

Indeed some of the common barriers to fair trials for refugees are equality, and access to resources which further exclude refugees from being able to access legal representation. Refugees are often on an unequal footing as they are precluded from employment in many jurisdictions. This often means that in criminal matters, they are forced to rely on state sponsored legal aid or legal assistance, and in civil matters it is often harder for refugees to secure legal aid or legal assistance as states do not always provide this service, and when they do, the service

[36]Article 11 of the UDHR.

[37]African Commission on Human and People's Rights Resolution on the Right to Fair Trial and Legal Aid in Africa (15 November 1999)- ACHPR/Res.41(XXVI)99.

is often quite limited. Legal aid includes legal advice, assistance and representation for accused persons, and for victims and witnesses at no cost if they cannot afford it.[38]Article 1 of the Lilongwe Declaration on accessing legal aid expands the reach of legal aid to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include various stakeholders including community-based and religious organisation, charitable organisations, professional bodies and academic institutions in the provision of legal aid.[39] This is quite an ambitious definition which is not necessarily justiciable as one cannot hold academia accountable for the non-fulfilment of the right to legal aid, for example.

Article 14 of the ICCPR stipulates that everyone has the right to a fair trial which includes time to prepare one's case as well as to be informed of the right to legal representation. Article 14(3)(d) of the ICCPR secures the right of everyone: to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

This provision thus incorporates legal representation as a core element of a fair trial. The UN Principles on Fair Trial note that legal aid is essential for a 'fair, humane and efficient' criminal justice system, and is the foundation for the enjoyment of the right to a fair trial.[40] General Comment 13 elaborates on this by stating that when an accused does not want to defend himself in person, he should have recourse to a lawyer and that lawyers should be able to counsel and represent their clients professionally, and without undue interference.[41] The accused must also be given adequate time to go through court documents and consult with his lawyer.[42] Indeed this provision must be stressed especially in lower courts as there have been instances where the judicial officer has failed or neglected to warn the accused as required by law. This can have adverse effects on refugees, especially if their assigned legal

[38]UN Principles and Guidelines on Fair Trial, 2003.

[39]Penal Reform International, 'The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa',*Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers andother Service Providers in Africa Lilongwe*, (Malawi November 22-24, 2004), <cdn.penalreform.org/wp-content/uploads/2013/06/rep-2004-lilongwe-declaration-en.pdf>.

[40]United Nations, Annex to the Principles and Guidelines on Access to Legal Aidin Criminal Justice Systems Resolution (adopted by the General Assembly on the report of the Third Committee (A/67/458), art.1.

[41]UN Human Rights Committee ICCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, (13 April 1984) para.9, <www.refworld.org/docid/453883f90.html>, visited 5 February 2021 (General Comment 13).

[42]General Comment 13, para 9.

representative does not represent them whole heartedly, as they can fall through the cracks.

17.3.3 African Charter on Human and People's Rights (ACHPR/ Banjul Charter), 1961

The African Charter (Article 3) specifically states that everyone is equal before the law and that everyone is entitled to equal protection of the law. However, equality before the law, does not equate to identical treatment. The African Commission held in *Avocats sans Frontières (on behalf of Bwampanye)* v.*Burundi*,[43] that equal treatment means each party has the right to argue his or her case on an equal footing, so-called 'equal arms'.

Equality before the law and equal treatment of the law is integral to access to courts as has been held in case law. In *Bahamond*e v. *Equatorial Guinea*, the HRC held that

> The notion of equality before the courts and tribunals encompasses the very access to the courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances … runs counter to the guarantees of [Article 14(1) ICCPR].[44]

Judicial officers should therefore not put unnecessary hurdles that make it unnecessarily difficult for refugees enjoy equal protection of the law, and all biases that may exist towards refugees must be put aside. In light of this, there is need for substantive equality. It is argued that the judiciary ought to take into cognisance that for example, the 'reasonable person' may act differently if exposed to extreme conditions of conflict. For example, a refugee coming from a corrupt environment where the integrity of the police perceived compromised may not easily report incidents to the police, or an adolescent refugee may not easily report an incidence of sexual abuse if they have been separated from their closest relatives through war or death, and therefore the courts have to consider the specific circumstances of the refugee party as opposed to applying a blanket approach, or a universal 'reasonable person test'. However, caution must be taken to remain impartial, and therefore a delicate balancing act is required.

It is also important to highlight that the AU Guidelines recommend states to ensure that they have efficient procedures and mechanisms to enable all persons within their territory to have equal access to legal representation without discrimination in both civil and

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[43]*Avocats Sans Frontières (on behalf of Bwampanye)* v. *Burundi*, Merits, Comm no 231/99, 28th ordinary session (23 October-6 November 2000), (2000) AHRLR 48.

[44]African Commission Communication No. 468/1991, *Bahamonde* v. *Equatorial Guinea* (1993) U.N. Doc. CCPR/C/49/D/468/1991, para 9.4.

criminal matters.[45] The AU Guidelines also require that all persons within the state's territory who cannot afford legal representation (legal aid and legal assistance), be provided such representation for free in both civil and criminal matters in the interest of justice through trained lawyers and paralegals.[46] Unfortunately, the reality of the lack of resources makes it quite difficult for several states to provide access to legal aid and legal assistance which often means that legal aid offices are overwhelmed with cases, and underpaid which can impact on the quality of service, and the number of persons they can attend to. The judiciary must therefore take cognisance of the country's economic context when interpreting and applying the law.

17.3.4 Convention Governing the Specific Aspects of Refugee Problems in Africa[47]

The judiciary must be adequately trained in matters of international and regional law, and refugee law specifically, in addition to their ordinary legal qualifications. This section considers the regional protection of refugees. The OAU Convention seems to make up for the shortcoming in the definition of refugees found in the 1951 Convention, by defining refugees more broadly as:

> 'every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside 'the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.
>
> In addition, the OAU Convention also recognises refugees as:
>
> 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.

The OAU Convention thus departs from the exclusionary language of the 1951 Convention, rendering the OAU Convention more relevant for refugees in Africa today. However, the OAU Convention is itself quite dated, and the language of the Convention describes refugees as 'problems' for the host country, which is problematic. At the time of drafting the OAU Convention, the forced colonial territorial boundaries

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[45] AU Principles and Guidelines on Right to Fair Trial, *supra* note 34, para G.

[46] AU Guidelines, para H.

[47] Organisation for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

between states and colonial domination forced many to flee their countries of nationality to go to independent states or to flee conflict.[48] There were also risks of harbouring rebel groups or otherwise political actors planning insurgencies while in the territory of the host country under the guise of being refugees, such as the Lost Boys at Kakuma camp on the Kenya and then Sudan border, or the Dadaab refugee camp on the Kenya and Somalia border.[49] However, although the language of the text has not changed, the thinking seems to have evolved, and the region increasingly recognises refugees as vulnerable persons in need of protection, which is a much preferred approach.

In the interests of protecting state sovereignty, a common feature of the OAU which is in line with international standards, is that the OAU Convention leaves it to the refugee receiving state to determine through its own domestic legislative frameworks how to receive and settle refugees in its territory.[50] This has resulted in a diversified approach to receiving refugees, and settling them, with several countries, such as Zimbabwe and Kenya relegating refugees to refugee camps, and refusing to assimilate refugees into society subject to exceptional circumstances. As there is a paucity of jurisprudence on refugees in Zimbabwe (as will be shown below), the judiciary must be prepared to exercise judicial activism to fill the gaps left by the OAU Convention and create precedent of the promotion of the right of access to justice for refugees, in order to shape the development of refugee rights jurisprudence in Zimbabwe.

In terms of the movement of refugees, Article VI of the OAU Convention requires member states to provide travel documents (including temporary travel documents) to refugees to travel outside the country. However, it fails to address what seems to be a big challenge for refugees in many African countries, which is freedom of movement within the receiving country. This is evidenced by refugee camps dotted all around Africa, including in Zimbabwe.

However, the protection of refugees in the Convention is inadequate as the OAU Convention does not place an explicit obligation on member states to respect, protect, promote and fulfil the human rights of refugees. The only mention is the reference to the United Nations (UN) Charter, and the United Nations Declaration of Human

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[48]M.R.K. Rwelamira, 'Some reflections on the OAU Convention on Refugees: Some Pending Issues', 16:2 *The Comparative and International Law Journal of Southern Africa* (1983) p. 155.

[49]B.J. Jansen, 'The refugee camp as warscape: Violent cosmologies, 'rebelization', and humanitarian governance in Kakuma, Kenya', 7:3 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* (2016) p. 429. *See* also Presidential Press Service, 'Kenya not at war with Somalia', *Daily Nation Newspaper*, 28 October 2011, p. 1 <nation.africa/kenya/news/kenya-not-at-war-with-somalia--788370>, visited 05 February 2021.

[50]Article II OAU of the Convention.

Rights (UDHR),[51] in the Preamble, bearing in mind that the UN Charter and the UDHR have affirmed the principle that all human beings shall enjoy fundamental rights and freedoms without discrimination. The language used is so weak as to imply that this is merely an acknowledgment of a known set of principles without necessarily ascribing to it.

Further, the non-discrimination clause in Article IV of the OAU Convention, merely requires member states to apply the provisions of the Convention to all refugees without discrimination in terms of race, religion and nationality, but it fails to require non-discrimination between the treatment of persons holding a refugee status and nationals, especially in terms of human rights, and specifically access to justice. This gap is likely the result of member states' unwillingness to give away parts of their sovereignty, and to protect domestic policy space in areas such as the labour market.

17.3.5 Kampala Declaration

Keeping in mind the inadequacies of the OAU Convention, it is worth considering other regional agreements regulating refugee protection and draw best practices from those instruments. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)[52] is one such instrument which can provide guidance. The Kampala Declaration does not speak to refugees specifically, but rather focuses on internally displaced persons, meaning persons who have fled their homes due to conflict, violence, natural and man-made disasters, but have remained within their country of nationality. This instrument therefore provides useful insights on the treatment of persons who have had to flee their homes but remained in the country, and can provide guidance on the treatment of persons who have fled their homes but left the country.

The Kampala Convention demonstrates a shift in the region's thinking and language pertaining to migration as a result of conflict or natural disasters through the lens of 'protection of vulnerable groups', as opposed to 'refugee problems' as seen in the earlier OAU Convention.[53] For example, Article 3(1)(d) of the Kampala Convention requires states

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[51]UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR) <www.refworld.org/docid/3ae6b3712c.html>, visited 04February 2021.

[52]Zimbabwe signed on 23 October 2009 and ratified on 22 July 2013.*See* list of countries which have signed, ratified/acceded to the African Union Convention For The Protection And Assistance Of Internally Displaced Persons In Africa (adopted 23 October 2009, Kampala, Uganda) (Kampala Convention),<au.int/sites/default/files/treaties/36846-sl-AFRICAN%20UNION%20CONVENTION%20FOR%20THE%20PROTECTION%20AND%20ASSISTANCE%20OF%20INTERNALLY%20DISPLACED%20PERSONS%20IN%20AFRICA%20%28KAMPALA%20CONVENTION%29.pdf>, visited 30 January 2021.

[53]The Kampala Convention, *supra* note 52, art.2.

to respect and protect the human rights of internally displaced persons (IDPs) and to give them equal treatment before the law. Article 3(1)(k) encourages states to enable IDPs to become self-reliant. Moreover, Article 14 of the Kampala Convention requires the establishment of a monitoring body to monitor compliance with the Kampala Convention.

In the same spirit, the IGAD Region comprising of Djibouti, Ethiopia, Kenya, Somalia, South Sudan and Uganda adopted the Kampala Declaration on Jobs, Livelihoods and Self-Reliance for Refugees, Returnees and Host Communities in the IGAD Region, and this instrument provides some guidance.[54] While Zimbabwe is not part of the IGAD region, the Kampala Declaration provides valuable insights for the economic participation of refugees in the host country, and integration into the host community. The IGAD region agrees in the Kampala Declaration to 'advance livelihood opportunities and economic inclusion to improve self-reliance of refugees, returnees and host communities' and sets out an Action Plan in order to see this through.[55] The IGAD region further commits to review national legislative frameworks to strengthen the free movement of refugees within their countries of asylum, simplify procedures for refugees to be able to find gainful employment in the country of asylum, and improve access to justice for refugees, inter alia.

Although it is not yet clear to what extent the IGAD region has implemented these ideals, the text provides best practices that ought to be taken into consideration when considering domestic regulation of refugees.

Finally, although international and regional instruments are phrased in normative language that seems to imply a duty on every state to do everything in these instruments without fail, while this is a noble goal, in reality, many states fall short of this ideal, and due to state sovereignty, and resource capacity, inter alia, several factors can influence the ability of states to respect, protect, promote and fulfil the rights in these international and regional legislative instruments. It is therefore necessary to analyse the legislative provisions and institutions on access to justice for refugees within the national system to determine whether there is in fact congruence.

17.4 Legal and institutional frameworks for refugees' protection in Zimbabwe

This section will discuss the laws and institutions that have been put in place by the GoZ in compliance with its regional and international obligations. This section will show that although Zimbabwe has put in place laws and institutions in compliance with its human rights obligations,

[54]Adopted 28 March 2019, Kampala, Uganda (Kampala Declaration).

[55]Kampala Declaration, art. 1.

there are challenges, opportunities, and gaps for the judiciary. This section will also highlight the barriers to access courts and legal aid despite the presence of legislation and institutions set up to deal with issues of access to justice.

17.4.1 The Constitution of Zimbabwe[56]

The Constitution of Zimbabwe, which is the supreme law of Zimbabwe entrenches some provisions on access to courts, right to a fair trial and the right to equal protection of the law which are in line with some provisions of regional and international human instruments discussed above. It is important to highlight that the right of access to courts is constitutionally protected as part of the broad right to a fair hearing/ trial which is entrenched in Section 69 of the Constitution.[57] The right implies that all persons should have inherent access to the courts and tribunals, including access to effective remedies and reparations.[58] This is in line with Article 26 of the UN Convention on the Status of Refugees which provides for the right to freedom of movement which is a guarantee in facilitating one's ability to access courts. However, although judges could draw interpretation from international law, their hands are tied in some respects. For example, as noted above, Zimbabwe has reservations to this provision, such that refugees' freedom of movement is limited and they must reside at the sole refugee camp in the country, in remote Chipinge at Tongogara Refugee Camp (subject to few exceptions, such as self-sufficient refugees).

The normative content of the right to a fair hearing implies that fairness of the hearing goes includes the requirement of independence and impartiality of the judiciary and entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever cause.[59]

Section 69 of the Constitution states that:

> '(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
>
> (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.'

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[56] Amendment No. 20 of 2013.

[57] A. Moyo, 'Standing, access to justice and the rule of law in Zimbabwe',18 *African Human Rights Law Journal* (2018) p. 268.

[58] *Ibid.*, p.269.

[59] *Ibid.*

The provisions of Section 69 of the Constitution resonate with Article 14(1) of the ICCPR which grants equality before the law in the specific context of what constitutes 'a fair trial' and more specifically in the context of criminal proceedings.

The Constitution of Zimbabwe in section 86 (3) explicitly states that the right of access to an impartial court and to a fair trial is non-derogable.[60] The Government of Zimbabwe can be commended for having such a provision in its supreme law, given that the aim of the right of access to court is to ensure the proper administration of justice.[61] With regards to the right to a fair trial, the identification of this right as illimitable implies that its suspension cannot directly assist in the usual objective of protecting the life of the nation, access to justice and the rule of law.[62] It is important to state that the fact that the right to a fair trial is illimitable underlines the importance of among other factors the review powers of the court.[63]

Although section 86(3) explicitly guarantees the right of access to an impartial court and to a fair trial as a non-derogable right, in reality there are many barriers that prevent access to courts and fair trial in Zimbabwe, especially for refugees. One such challenge is Zimbabwe's exception to Articles 17 and 26 of the UN Convention on Refugees which speaks to the paid employment of refugees in jobs in the host country and freedom of movement respectively. Indeed it must be understood within the context of Article 14 of the ICCPR as interpreted by the HRC that preventing any person from bringing a lawsuit against another on the basis of nationality, inter alia violates Article 14(1) of the ICCPR. Although the letter of the law of Zimbabwe allows refugees access to courts, and enables them to institute legal action against other persons, the fact that they are relegated to the Tongogara Camp, several kilometers away from city centers, and consequently several kilometers away from superior courts, constitutes a barrier to their access to justice.

Furthermore, for individuals to access a court physically or procedurally, they must have *locus standi*.[64]*Locus standi* which is also referred to as 'standing to sue' or 'title to sue' can be described as 'the right of an individual to have a court adjudicate a dispute taken before it and instituted by the individual or group.'[65] Taking into consideration the geographical location of the camp (the camp is said to be located in a

[60]*See* Section 86 of the Constitution of Zimbabwe.

[61]Moyo, *supra* note 55, p. 271.

[62]*Ibid*.

[63]*Ibid.,* p.272.

[64]Stevens and Eberechi, *supra* note 25, p. 174.

[65]*Ibid*., p.174..

secluded area and takes form of a desperately overcrowded village),[66] the question remains whether refugees in practice have legal standing in Zimbabwe since the *locus standi* principle also has much to do with physical access to the courts for the resolution of disputes and not with the legal rules and principles which regulate how disputes ought to be resolved.[67] The issue of unaccompanied minors is one such area where legal standing can be difficult to establish.

Although state sovereignty requires that each country decide what is acceptable or not in its territory, the fact that the right to freedom of movement is curtailed in Zimbabwe, poses major challenges for refugees. As noted above, the majority of Zimbabwe's refugee population resides at the Tongogara Camp, far removed from vibrant city life and incumbent economic activity, and also far removed from important state institutions such as the courts, courts of appeal, and legal aid centres. Courts are simultaneously denied the opportunity to adequately serve the community of refugees living at Tongogara Camp. Although international donor organizations such as the UN are doing remarkable work and providing humanitarian assistance at the Tongogara camp, it is not the primary duty of civil society organizations to provide legal services to refugees, and the state should not eschew its responsibilities.

There must be freedom of movement to enable persons to seek the assistance of the court, but currently, the encampment policy exacerbates the plight of refugees by denying them not only the right to participate in economic activity in the country, and relegating them to farming in a an arid area, but it also precludes or presents barriers to poor refugees accessing other courts such as appeal courts in big cities. Additionally, the distance and costs of travelling is also prohibitive. It is also expensive to obtain legal representation, and sometimes pro bono representation is of a poorer quality as some lawyers do not take it seriously. The judiciary should take all of these factors into account in their application of the law to matters involving refugees. Additionally, it has been argued that refugees tend to be exposed to prejudice in legal matters, wherein the judges and magistrates assume that the refugee will flee the country while awaiting trial and therefore bail is often denied, and refugees perceived as flight risks. Such bias should be avoided.

Furthermore, the right to access justice is entrenched in Section 56 of the Constitution (also known as the equality clause) which speaks to equality before the law and equal protection of the law. Section 56 (1) states that "everyone is equal before the law and has the right to equal protection and benefit of the law."[68] Commenting on the content of this

[66]Govere, *supra* note 4, p. 2.

[67]Stevens and Eberechi, *supra* note 25, p. 171.

[68]Section 56 (1) of the Constitution of Zimbabwe.

provision, the court in *S* v. *Mashayamombe*[69]stated that "this provision should be given broad, substantive content in order to ensure that substantive rather than merely formal equality is realised." Therefore, this means that equality before the law should entail entitling everyone to equal treatment by courts of law or equality in the legal process. The normative content of Section 56 (1) of the Constitution is in line with Article 14(1) and Article 26 of the ICCPR which provides for people to be treated equally before the law and to be granted equal protection of the law regardless of factors such as their status. Furthermore, Section 56(1) of the Constitution is also in line with Article 7 of the UDHR which provides for everyone's right to equality before the law and equal protection of the law without discrimination. This provision is also in line with Article 3 of ACHPR which specifically states that everyone is equal before the law and that everyone is entitled to equal protection of the law.

In the case of *Samuel Sipepa Nkomo* v. *Minister of Local Government, Rural and Urban Development and others,*[70] the court stated that Section 56 (1) of the Constitution envisages a law which provides equal protection and benefit for the persons affected by it. According to the court,[71] this includes the right not to be subjected to treatment to which others in a similar position are not subjected. This provision is very important in ensuring that refugees in Zimbabwe are afforded the same treatment as Zimbabwean citizens when it comes to issues such as instituting court proceedings or claiming their rights when they are violated or when they are found to have breached the law.

17.4.2 Legal Aid Act[72]

Greenbaum postulates that "legal aid, by its very nature, is concerned with law and poverty, and as such, constitutes a corollary for access to justice."[73] Thus in order to ensure that the impoverished access justice in Zimbabwe, the Government of Zimbabwe in 1997 under the Ministry of Justice Legal and Parliamentary Affairs established a Legal Aid Directorate (LAD) which is seen as a primary source of legal services provision for persons who cannot afford private legal services.[74] Section 3 of the LAD requires the state to establish a Legal Aid Directorate and to set up

[69]HH-596-15.

[70]CCZ 6/2016.

[71]*Ibid*.

[72]*[Chapter 7:16].*

[73]Greenbaum, *supra* note 22, p. 251.

[74]A. Hedlund, *The right to justice: providing legal aid services in Zimbabwe: A qualitative analysis of the legal frameworks that treat the provision of legal aid services and the realities of their implementation* (Upublished thesis, Lund University, 2014) p.37. The LAD assists men, women and children in civil, criminal and labour matters.

branches of this directorate. Furthermore, Section 3(2) of the Act provides the functions of the LAD as follows:

> 'Subject to this Act, the functions of the Legal Aid Directorate shall be— (a) to provide legal aid to persons who are eligible for such aid in connection with any criminal, civil or other related matter; (b) to do all things necessary to promote the provision of legal aid under this Act; (c) to do any other thing that the Legal Aid Directorate may be required or permitted to do by or under this Act or any other enactment'.[75]

The provisions of this Act are in line with Article 14 (3) (d) of the ICCPR which makes it a right for anyone tried in a criminal matter or anyone pursuing a civil matter to be assigned legal assistance in any case where the interests of justice so require, and without payment in any such case if the person does not have sufficient means to pay for it.

Although the Act mandates this department to provide legal assistance to the marginalised, it is important to highlight that this government department is under-resourced and does not have the capacity to provide legal aid to its under privileged citizens.[76] Given the challenges faced by LAD, it is within this context that legal aid organisations such as the Legal Resources Foundation (LRF) and Zimbabwe Women Lawyers Association (ZWLA) come into picture in order to compliment the work of the state in providing legal aid services to those who cannot afford private lawyers.[77] Furthermore, in most African jurisdictions including Zimbabwe, the current practice is that legal assistance also known as legal aid is made available to perpetrators who cannot afford to employ the services of a legal practitioner for their defence in criminal cases which is usually provided by the Government in the interest of fair hearing.[78] However, there are no documented criminal cases where a victim is given a legal assistance by the Government especially in criminal cases except for the preparation of the victim as a prosecution witness.[79] Therefore, when judges dealing with cases concerning refugees, they must be alive to the fact that in cases where refugees are able to attend court and judges are impartial, refugees might still not fully enjoy their right to access justice when they do not have legal representation.

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[75]Section 3 Legal Aid Act.

[76]Chagadama. F, *'A critical examination of the use of mediation as a tool for the realisation of women's access to justice in property cases in the legal aid sector, Zimbabwe'* (Unpublished thesis, University of Zimbabwe, 2014) p.11.

[77]Murinda. P, *'Access to legal aid for indigent women: An analysis of the services offered by the Legal Aid Directorate in Harare, Zimbabwe'* (Unpublished thesis, University of Zimbabwe, 2008) p.8.

[78] Section 69 of the Constitution.

[79] Stevens and Eberechi, *supra* note 25, p. 178.

17.4.3 Judiciary

The judiciary is the third arm of Government responsible for the settlement of disputes between different parties.[80] The Judiciary comprises judicial officers from all the formal courts that is, the Labour Court, the Magistrates Court, the High Court, the Supreme Court and the Constitutional Court which are under the administration of the Judicial Services Commission.[81] For justice to be maintained in the country, there is need for the separation of powers that is, the judiciary must be independent from the executive and the legislature.[82] This requirement for the judiciary to be impartial and independent as stipulated by Section 164 of the Constitution of Zimbabwe is in line with Article 14 (1) of the ICCPR which entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law. Furthermore, there also has to be an adherence of the decisions made by these courts in order for rule of law to prevail.[83] In *S* v. *Musindo*[84] the court reiterated the need for judicial officers to treat the prosecutor and unrepresented accused equally and even-handedly. Following this approach aids in ensuring that justice is served.

When it comes to refugees in Zimbabwe, the courts in their decisions have shown impartiality and non-discrimination. For example, in the case of *Attorney General* v. *Bombo and Others*,[85] where all the accused persons were Congolese refugees who were alleged to have interfered with a witness who had reported a case of child abuse against a fellow refugee were granted bail. However, while investigations were still in progress the accused allegedly teamed up and approached the witness at her residence where they threatened her with unspecified action should she persist to implicate their friend. Owing to the alleged threats the witness was said to be living in fear and was now uncooperative with the police. Based on these facts, the State opposed the bail application that had been previously granted and gave convincing reasons for such. The state argued that the Magistrate had dealt with the application in the most perfunctory manner without carrying out a proper enquiry to enable him to make a just and informed decision. This case therefore, shows that in upholding the appeal against the granting of bail to the accused, the court had applied its mind and taken into consideration the factors for bail application that would have applied to any Zimbabwean citizen.

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[80] Zimbabwe Human Rights NGO Forum, *supra* note 19, p. 2.

[81] *Ibid*.

[82] *See* section 164 of the Constitution.

[83] Zimbabwe Human Rights NGO Forum, *supra* note 19, p. 2.

[84] 1997 (1) ZLR 395 (H).

[85] (CRB 2316-23/09) [2009] ZWHHC 48.

Furthermore, the courts have shown impartiality in dealing with the cases of refugees. A case in point is *S* v. *Mulumba,*[86] where under the umbrella of exorcising demons, a nine year old was strangled to death by a fellow refugee at the Tongogara Refugee Camp. In deciding the case, the court followed procedures that would have been followed had the case involved Zimbabwean citizens. For example, before reaching its decision, the court ordered that the accused's mental capacity at the time of committing the crime be ascertained by an expert. After ascertaining that the accused did not have *mens rea* at the time of committing the crime, the court found the accused not guilty of murder. The procedures taken by the court would have been taken if the case had involved Zimbabwean citizens. In view of future litigation, courts ought to remain open to class action on behalf of refugees in order to give them voice and agency. Class action is an existing aspect of Zimbabwean law, as demonstrated in earlier cases such as the *Mudzuru* case.

In order to show the challenges faced by refugees in accessing justice, the court in *Attorney General* v. *Bombo and Others* stated that:

> 'It is trite that the onus in a bail application rests with the applicant to prove on a balance of probabilities that he is a good candidate for bail. In this case, the onus rested with the respondents but they were severely handicapped in that they were in captivity in a foreign land without legal representation'.[87]

What the court stated is one of the many challenges faced by refugees in accessing justice despite the presence of legislation providing for their access to courts.

The judiciary plays an important role in the *triaspolitika*, as an independent body mandated to interpret and apply the law without partiality, however, in many instances, refugees do not get the chance to even appear before the courts to obtain justice. The courts are there to promote constitutional objectives, safeguard and enforce human rights, and promote the constitutional agenda, inter alia. They also play an important oversight role through their interpretation of the law and judicial determinations. However, the paucity of case law pertaining to refugees in Zimbabwe seems to suggest that there are very few cases involving refugees that are making their way to courts. This makes it quite difficult to determine how courts have interpreted various provisions relating to refugees and how the legal framework is applied to refugees in Zimbabwe. The courts could play a significant role in refugee matters by adjudicating in a way that promotes the constitutional agenda and safeguard the rights of refugees in Zimbabwe, but the judiciary is not necessarily afforded this opportunity. Another reason for the paucity of

[86](HMT 18-18, CRB 32/18) ZWMTHC 18.

[87]*Attorney General* v. *Bombo and Others, supra* note 82.

cases could be that the matters involving refugees are mostly heard at the magistrates' court in which no records of proceedings are kept save for court process filed of record. This again renders it difficult to monitor the adjudication of matters involving refugees. Moreover, as refugees are required to live in the Tongogara Camp primarily, among other refugees, some of whom come from similar cultural backgrounds and ideologies, it is highly likely that many disputes are in fact resolved out of court through alternative dispute resolution mechanisms including traditional practices. It would be naïve to assume that in a refugee camp of this size that there would be no criminal conduct arising. Indeed there have been reports of sexual abuse, but these are not translating to court records available to the general public. This makes it extremely difficult to monitor the legal protection of refugees in Zimbabwe, especially when most reports on refugees are only relating to humanitarian issues of food and shelter primarily.

17.4.4 Zimbabwe Human Rights Commission (ZHRC)

The ZHRC (also known as one of the Chapter 12 Independent Commissions) is the National Human Rights Institution (NHRI) of Zimbabwe with a mandate to protect, promote and enforce human rights at all levels of society in Zimbabwe.[88] The functions of the ZHRC are outlined in Section 243 of the Constitution of Zimbabwe. Section 243 (1) (k) (i) mandates the ZHRC to visit and inspect prisons, places of detention, refugee camps and related facilities.[89] In line with this function, the ZHRC has conducted monitoring and inspection visits as well as follow up monitoring and inspections visits to Tongogara Refugee Camp. The purpose of the monitoring visits will be to strengthen the enjoyment of human rights by refugees in Zimbabwe by assessing whether the standards at the camp comply with regional and international standards on the protection of refugees.[90] The purpose of the follow up monitoring visits will be to strengthen the enjoyment of human rights by refugees in Zimbabwe through tracking implementation of recommendations made in the ZHRC's 2017 monitoring and inspections mission to the camp.[91] It has been noted that the ZHRC in both its monitoring visits and follow up monitoring visits overlooked the issue of access to courts and legal aid by refugees at Tongogara Refugee Camp. The reports focused on issues such as access to water and sanitation, access to food, access to health facilities, interaction with the outside world among other issues.[92] However, despite this oversight, it is important to state that the ZHRC

[88]Section 242 of the Constitution and the Zimbabwe Human Rights Commission Act *[Chapter 10:30].*

[89]Section 243 (1)(k)(i) of the Constitution.

[90]*See* ZHRC Report on Monitoring and Inspection Visit to Tongogara Refugee Camp (2017).

[91]ZHRC Report, *supra* note 9.

[92]*See* the ZHRC Report, *supra* note 9, *et seq* 13 and 78.

plays a crucial role in ensuring access to justice by refugees in the Tongogara Refugee Camp by giving recommendations to relevant stakeholders after its monitoring visits and tracking the implementation of those recommendations. The judiciary can rely on the work of the ZHRC to understand the refugees' prevailing circumstances and this can influence their decisions when dealing with cases brought before them that involve refugees.

17.5 Conclusion and recommendations

This chapter has highlighted that Zimbabwe is a signatory to a plethora of regional and international human rights instruments that entrench provisions on access to courts and legal assistance to everyone including refugees.[93] It has also shown that in compliance with its regional and international obligations on the protection of refugees' rights, more specifically access to courts and legal assistance, Zimbabwe enacted legislation such as the Constitution and the Legal Aid Act as well as set up institutions such as the Judiciary and the Zimbabwe Human Rights Commission (ZHRC). The chapter has also shown how these normative frameworks can be an aid to the judiciary when dealing with refugee cases. The chapter has also shown that despite these legal initiatives, refugees seem to have limited access to justice because of a lot of barriers/ factors such as their vulnerability to poverty, lack of knowledge on laws of their host country, failure to afford legal representation, issue of distance among other factors.

The writers observed that there is not enough jurisprudence that exists on the matter and there is a dearth of academic literature on access to courts by refugees in Zimbabwe. This makes it difficult to determine whether refugees in Zimbabwe are accessing justice or not. Furthermore, the available court decisions are outdated and do not portray the current status of enjoyment of fair trial rights, access to courts and legal aid by refugees in Zimbabwe. In addition, the lack of published statistics by LAD and other organisations such as ZWLA and LRF that offer legal aid to refugees makes it difficult to ascertain what role the judiciary is currently playing in practice. The writers had to rely on oral evidence from organisations such as LAD and ZWLA offices in Chipinge who stated that they have not assisted refugees with legal representation. LAD stated that they only assisted one refugee with legal advice. Reasons for not using the LAD services are perhaps attributed to the fact that it is new in the area and refugees are not aware of their existence.

It is recommended that the JSC starts a mobile court system targeting refugees at the Tongogara Refugee Camp. There is need for the ZHRC to provide training on refugee matters to the judiciary, and for the

[93]Zimbabwe is a party to the International Covenant on Civil and Political Rights (ICCPR), African Charter on Human and People's Rights (ACHPR) and the UN Convention on the Status of Refugees.

LAD and other organisations to raise awareness at Tongogara Refugee Camp regarding legal aid and other services they offer, and for LAD to conduct mobile legal clinics to the refugee camp in order to assist clients and raise awareness on their existence and the services they offer, especially by using the languages of the refugees to make it more accessible. Finally, the ZHRC in its future monitoring visits should look into the issues of access to courts and legal aid by refugees at the camp in order to give recommendations to the relevant stakeholders and follow up on those recommendations.

Finally, although the encampment policy is part of Zimbabwe's current policy framework, this policy must be tested against the Constitution to determine its validity, and the judiciary ought to be open to class action in this regard from civil society organisations that may be better resourced and capacitated than individual refugees, and the judiciary must be alive to their role in judicial activism to transform the policy framework to comply with the Constitution or to direct Parliament to make necessary changes if any are so determined.

Chapter 18

Environmental courts and tribunals (ECTs) in the implementation of constitutional environmental rights in Zimbabwe

Chantelle Gloria Moyo*

"(L)egal recognition of a right is useless if it cannot be translated into a victory in the field".[1]

18.1 Introduction

Without a clean, healthy environment, the survival of man would not be possible. A clean environment has been noted to serve as a 'basis for man's full attainment of his livelihood'.[2] This is the reason why, as far back as 1972, during the Stockholm Conference it was observed that man is at the epicenter of the environment.[3] It is because of this interaction between man and nature that many constitutions have given effect to the right of a clean, safe environment. As of 2017, 148 Constitutions across the globe had environmental rights embedded in them,[4] and Zimbabwe was among them. To give effect to environmental rights, several mechanisms have been implemented in various jurisdictions. One of them has been a robust

* LL.B, LL.M (Environmental Law) (University of KwaZulu-Natal, Pietermaritzburg, South Africa), PhD Researcher (North West University, Potchefstroom, South Africa). Remove space between footnotes.

[1] A.G.M. La Vina, 'Right to a balanced and healthful ecology: The odyssey of a constitutional policy', 69 *Philadelphia Law Journal* (1994) p. 156.

[2] United Nations General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994,
<www.refworld.org/docid/3b00f1c840.html>, visited 8 December 2020.

[3] Principle 1 of the Stockholm Declaration fully reference states that man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth …can only do this if it is a direct quote and no need for omission if it is a parphrased sentence Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself.

[4] R. O'Gorman, 'Environmental Constitutionalism: A comparative study', *Transnational Environmental Law* (2017) p. 2.

judicial system.[5] The term 'judiciary' is multidimensional and refers to a system of courts of law and the judges presiding in these courts.[6] Where environmental governance is concerned, the judiciary function is not to rewrite the law but to interpret and apply it according to enabling legislation. As such, the judiciary is a guarantor of the protective benefits of environmental law, and one of these benefits is the attainment of human rights for present and future generations.[7] Markowitz and Gerardu[8] postulate that the crucial role played by the judiciary in environmental governance entails balancing environmental and development considerations in decision-making, thereby providing an impetus for the promotion of the implementation of global and regional environmental conventions consolidating the hand of the executive in enforcing environmental regulations.

In Zimbabwe, the judiciary has been criticised, as shown in this chapter, for not unpacking environmental rights or even taking a firm stand in environmental cases. One of the arguments advanced for this is that many judges are not well-vexed in environmental law.[9] Thus, this chapter proposes establishing environmental courts and tribunals (ECTs) to address this challenge. Specialist courts are not a new phenomenon. There has been a proliferation of various types of specialist courts adjudicating over different justice issues like mental health, drugs, racial abuse, domestic violence, labour-related issues and anti-social behaviours.[10] The advent of specialist courts has primarily been attributed to factors that include the push towards delivering "a particular type of judicial expertise or a particular process of judicial adjudication".[11] Generally, these specialist settings have resulted in positive outcomes by affording specific jurisdictions with increased levels of judicial specialism.[12] The adjudication of environmental cases is particularly well suited to a specialist court model.[13] This is because courts hearing environmental issues are usually confronted with challenging issues, requiring unique environmental decision-making methodologies in a discipline layered with internationally

[5] C. Mulenga, 'Judicial Mandate in safeguarding environmental rights from the adverse effects of mining activities in Zambia', 22 *Potchefstroom Electronic Law Journal* (2019) p. 11.
[6] Merriam Webster Dictionary,<www.merriam-webster.com/dictionary/judiciary>, visited 22 November 2020.
[7] Mulenga, *supra* note 5, p. 11. *See* also J.K Bosek, 'Implementing environmental rights in Kenya's new Constitutional order: Prospects and potential challenges', *African Human Rights Law Journal* (2014) p. 500.
[8] K.J Markowitz and J.J.A Gerardu, 'The Importance of the judiciary in environmental compliance and enforcement', *Pace Environmental Law Review* (2012) p. 543.
[9] B.C Soyapi, 'The Judiciary and Environmental Protection in Zimbabwe', in M. Addaney and A.O Jegede (eds.), *Human Rights and the Environment under African Union Law* (Palgrave MacMillan, Switzerland, 2020) p. 367
[10] A. Freiberg, 'Problem-oriented courts: An Update', 14:4 *Journal of Judicial Administration* (2005) p. 196.
[11] M. Moore, 'The role of specialist courts: An Australian perspective', *Federal Judicial Scholarship* (2001) p. 2.
[12] *Ibid.*
[13] M. Figg, 'Protecting third party rights of appeal, protecting the environment: A Tasmanian case study', 31:4 *Environmental and Planning Law Journal* (2014) p. 214.

recognised concepts and principles.[14] Additionally, the legal processes of environmental legislation and guiding principles are notoriously complex and require an advanced level of technical insight of the discipline.[15] Existing literature has underscored the role that specialist ECTs play in addressing most, if not all of these challenges.[16]

This chapter will consider the role that ECTs could play in the implementation of constitutional environmental rights. It builds upon current scholarship that argues that the Zimbabwean judiciary has done very little to advance the right to a healthy environment, although the right has constitutional protection. Before case law that has been brought before courts is analysed, this chapter will unpack what environmental constitutionalism entails. Thereafter, it will consider the emerging role of ECTs and draw examples from jurisdictions like India, Kenya and provide an analysis of the case of South Africa, which has a rich jurisprudence in environmental law despite having the Regional Environmental Court shut down in 2007. After that, case law that has been adjudicated in the country will then be analysed. The final part of the chapter will discuss whether the establishment of ECTs in Zimbabwe could resolve the challenges identified in the case analysis.

18.2 Understanding environmental constitutionalism

May and Daly [17] observe that constitutional environmental protection affords the highest rank among the legal norm, thereby subordinating all statutes, administrative rules or court decisions. Bruch *et al.*[18] define environmental constitutionalism as a 'safety net' for addressing environmental issues. The insertion of environmental protection in the constitution sets the standard for acceptable behaviour for legislators and policymakers. This is because the constitution, a representation of the country's priorities, sets minimum standards of protection afforded citizens.[19] Therefore, constitutions are the very structure upon which environmental protection can be built.[20]However, for environmental constitutionalism to be effective, it still requires a legislative boost from subsidiary laws and regulations, which are essential in advancing the implementation of the rights.[21] In unpacking the concept of environmental

[14] D. Fisher, *Australian Environmental Laws: Norms, principles and rules* (Thomson Reuters, 2014) p. 292.
[15] D. Uhlmann, 'Environmental crime comes of age: The evolution of criminal enforcement in the environmental regulatory scheme', 4 *Utah Law Review* (2009) p. 1231.
[16] *Ibid*. *See* also E. Hamman, R Walters & R Maguire, 'Environmental crime and specialist courts: The case for a one-stop (judicial) shop', 27:1 *Queensland: Current Issues in Criminal Justice* (2015) p.60.
[17] J.R May and E. Daly, *Global Environmental Constitutionalism* (CUP, place of publication?2015) pp. 20-21.
[18] C.E Bruch *et al*., 'Constitutional environmental law: Giving force to fundamental principles in Africa', 26:1 *Columbia Journal of Environmental Law* (2001) p. 134.
[19] D.R Boyd, *The environmental rights revolution: A global study of constitutions, human rights, and the environment* (University of British Columbia Press,place? 2011) p. 4.
[20] M.A Tigre, 'Implementing constitutional environmental rights in the amazon rainforest', p. 61. Is this a book or article? Not clear because there is missing information.
[21] *Ibid*.

constitutionalism, Kotzé[22] frames it in broad terms and observes in instances where environmental 'care' is conveyed in constitutional language, it establishes environmental constitutionalism. He amply defines the idea of 'constitutionalism' as one that:

> "creates the foundation that legitimizes and guides governance, be it private or public; it sets out those basic universal values which a legal community is deemed to hold dear and which the legal order seeks to protect; and it provides checks and balances for the exercise of executive, legislative and judicial authority in the day-to-day task of governing".[23]

This definition views environmental provisions in a constitution as a means to outline the content of laws, establish moral and ethical obligations where environmental considerations are concerned and establishing legal authority that requires the actual performance of said obligations.[24] The value of this definition in understanding environmental constitutionalism is that it goes further than a mere focus on specific rights to perceiving the articulation of environmental concerns in a constitution as having a possible influence on a broader range of private and public exchange.[25] Tigre [26] observes that constitutional environmental rights come about differently and typically qualify the right with adjectives asserting to establish environmental quality, namely the right to a healthful environment, clean, safe, adequate, harmonious balanced or otherwise desirable.[27] However, critics have argued that such language is vague and leads to uncertainty on the level of environmental quality that must be protected.[28] Since there is a lack of guidance on the acceptable threshold, environmental constitutionalism obliges an expansive interpretation of the text, encouraging judges to decide what constitutes a right to a quality environment, who it applies to, and how it can be remedied once a violation occurs.[29] While other scholars view this vagueness as a negative, Boyd[30] argues that it is intentional to allow constitutional interpretation to advance over time. Therefore, the language and the right to be protected can be moulded by the social, legal, political and cultural context of a specific nation, thus being dynamic and evolving with societal norms and values.

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[22] L.J Kotzé, 'Arguing global environmental constitutionalism', 1:1 *Transnational Environmental Law* (2012) p. 208.
[23] Kotzé, *supra* note 22, p. 207.
[24] Kotzé, *supra* note 22, p. 210.
[25] O'Gorman, *supra* note 4, p. 2.
[26] Tigre, *supra* note 20.
[27] E. Daly, 'Constitutional protection for environmental rights: The benefits of environmental process', 71 *International Journal of Peace Studies* (2012) 71.
[28] Boyd, *supra* note 19, p. - 33.
[29] May and Daly, *supra* note 17, p. 91.
[30] Boyd, *supra* note 19, p. 33.

There are three components of constitutional environmentalism: environmental rights, environmental duties, and environmental principles.[31] These will be discussed in turn with the object to provide a holistic consideration of environmental constitutionalism.

18.2.1 Environmental Rights

Hayward describes environmental rights as a set of responses to problems that emanate from human interaction with non-human nature.[32] Rodriguez-Rivera [33] posits that the concept 'environmental rights' encompasses three elements which include: (i) environmental procedural rights; (ii) the right of the environment; and (iii) the right to environment. Environmental procedural rights are associated with participation in decision-making, access to justice and access to information.[34]

The most controversial environmental right is the environment's right, which values the environment beyond how it benefits human beings. It suggests that the environment must be regarded as a good without minimising it to human benefit, and as such, it should be given its rights and protection on that basis.[35] This argument is premised upon the stance that it is:

> 'Arbitrary to restrict justice and rights exclusively to inter-human relationships and to tolerate a situation in which interested parties are deprived of essential values in the distributive process on the basis of morally irrelevant factors – such as their not being human'.[36]

In the Constitution of Zimbabwe[37] (hereafter referred to as the Constitution), environmental rights are articulated in section 73. It states that every person has the right to an environment that is not harmful to their health or well-being[38] and to have the environment protected for the benefit of present and future generations.[39] This right is anthropocentric

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[31] *Ibid*.

[32] T. Hayward, 'Constitutional environmental rights: A case for political analysis', 48 *Political Studies* (2000) p. 559.

[33] L. Rodriguez-Rivera, 'Is the human right to environment recognized under International law? It depends on the Source', 12:1 *Colorado Journal of International Environmental Law and Policy* (2001) pp. 9-15.

[34] E. Daly, 'Constitutional protection for environmental rights: The benefits of environmental process', 17:2 *International Journal of Peace Studies* (2012) p. 72. See also A. Boyle, 'Human rights and the environment: Where next?', 23:3 *European Journal of International Law* (2012) pp. 613–642 who points out that in international law, these procedural rights constitute arguably the most accepted tenet of environmental rights, having been codified by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) provide full information on this.

[35] C. D Stone, 'Should trees have standing? Toward legal rights for natural objects', 45 *South California Law Review* (1972) p. 451.

[36] J. Nash, 'The case for biotic rights', 18:1 *Yale Journal of International Law* (1993) p. 238.

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

[38] Section 73 (1) (a) of the Constitution.

[39] Section 73 (1) (b) of the Constitution.

as it applies to everyone without discrimination. Procedural fairness in decision-making is provided for in section 62 (2) of the Constitution to ensure meaningful public participation in environmental decision-making to enforce this right.

18.2.2 Environmental Duties

In some constitutions, the relationship between the environment, State and citizens is based on duties rather than rights.[40] The specifics of these duties and how they are enforced varies between countries.[41] Where these duties are cast on the State, they are framed in broad terms.[42] Furthermore, in some jurisdictions, environmental duties may include obligations to improve the prevailing condition of the environment[43] or to raise awareness of environmental issues among the State's population.[44] Duties for citizens are usually framed as a general requirement that calls on all citizens to respect the environment,[45] or applying specifically to the actions of individuals,[46] or obligations where violations have occurred, for example, to make reparation when one commits environmental damage.[47]

In the Constitution, duties imposed include having the environment protected from pollution and ecological degradation, promoting conservation, and securing ecologically sustainable development and the use of natural resources while promoting economic and social development.[48] Section 73 (2) mandates the State to take reasonable legislative and other measures within the limits of the resources available to it to achieve the progressive realisation of environmental rights.[49]

18.2.3 Environmental Principles

These are treated as dissimilar from duties on the State. In the former, the Constitution dictates that environmental concerns must be reflected in the general principles of governance, which the State must adhere to.[50] Although the Constitution does not outline the environmental principles that guide environmental management, the Environmental Management

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[40] O'Gorman, *supra* note 4, p. 6.
[41] C. Bruch, W. Corker and C. van Arsdale, 'Constitutional environmental law: Giving force to fundamental principles in Africa', 26:1 *Columbia Journal of Environmental Law* (2001) p. 158.
[42] O'Gorman, *supra* note 4, p. 6.
[43] Article 21 of the Constitution of the Kingdom of the Netherlands, 22 September 2008.
[44] Article 35 (5) of the Constitution of the Republic of Nepal, 2015.
[45] Article 35 of the Constitution of Estonia of 1992.
[46] Article 35 (3) of the Charter of Fundamental Rights and Freedoms of the Czech Republic.
[47] Article 54 (2) of the Constitution of Democratic Republic of Congo of 2005.
[48] Section 73 (1) (b) (i)-(iii) of the Constitution.
[49] For an in depth discussion on what the progressive realisation of environmental rights entails see C. G Moyo, 'Complacency in the State's progressive realisation of the right to water: *Hopcik Investment (Pvt) Limited* v *Minister of Environment, Water and Climate and City of Harare'*, 1 *Midlands State University Law Review* (2018) p. 39.
[50] E. Brandl and H. Bungert, 'Constitutional entrenchment of environmental protection: A comparative analysis of experiences abroad', 16:1 *Harvard Environmental Law Review* (1992) p. 16.

Act[51] does so. These principles include the preventative principle,[52] polluter pays principle,[53] and the Act also acknowledges that global and international responsibilities relating to the environment must be discharged in the nation's interests.[54]

It is one thing to provide the constitutional right to a healthy environment, but this right might not be worth the paper it is written on if it cannot be enforced. A robust, active and well-informed judicial system is paramount if environmental rights are to be taken seriously. This is especially true in advocating for establishing environmental courts and tribunals (ECTs) in the effective enforcement of environmental rights.

18.3 The emerging role of environmental courts and tribunals (ECTs)

It is generally accepted that one of the most challenging issues, not limited to a particular jurisdiction, is the preservation, protection and sustainable development of our environment.[55] As part of the recognition to protect and conserve the environment, there has been a steady growth of specialist environmental frameworks that often establish ECTs in developed and developing countries.[56] White[57] observes that the development of ECTs is ascribed to the "continual (pressure) worldwide for effective resolution of environmental conflicts and expanding recognition of the need for procedural and substantive justice vis-à-vis environmental matters".[58] Describing the emergence of ECTs as an - 'explosion' with over 1200 ECTs in 44 countries from 2000-2016, Pring and Pring [59] attribute this growth to the development of environmental law and principles, both internationally and nationally, due to the link between human rights and environmental protection as well as public dissatisfaction with existing general judicial forums in addressing environmental issues.

Environmental courts (ECs) can be defined as ranging from "fully developed, independent judicial branch bodies with highly trained staffs and large budgets to simple, underfunded village ECs that handle environmental cases one day a month with rotating judges".[60] Environmental tribunals (ETs), on the other hand, range from 'complex administrative-branch bodies chaired by ex-Supreme Court justices, with law judges and science-economics-engineering PhDs, to local community

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[51] [*Chapter 20:27*].
[52] Section 4 (2) (f) of the Environmental Management Act.
[53] Section 4 (2) (g) of the Environmental Management Act.
[54] Section 4 (2) (h) of the Environmental Management Act.
[55] Hamman, Walters & Maguire, *supra* note 16, p. 59.
[56] *Ibid.*
[57] R. White, 'Environmental crime and problem-solving courts', 59:3 *Crime, Law and Social Change* (2013) p. 269.
[58] *Ibid.*
[59] G. Pring & C. Pring, *Environmental courts and tribunals: A guide for policy makers* United Nations Environment Programme, New York, 2016) p. iv.
[60] Pring & Pring, *supra* note 57, p. 1.

land use planning boards with no law judges".[61] Both the definitions reflect the complete dedication to matters concerning the preservation and protection of environmental rights by ECTs.

Successful ECTs share certain practices and procedures. In their comprehensive report on ECTs, Pring and Pring[62] identified '12 building blocks' or 'design decisions' that are imperative to establishing an ECT. Although this chapter will not analyse all 12 blocks, it will discuss a few considerations in making a case for the establishment of ECTs. One of those is the consideration of *locus standi* permitted for public members to bring an enforcement action or file a complaint. Liberal *locus standi* provisions can contribute significantly to building public trust and accountability and lead to law reform.[63]

Another is the geographical reach of the court (municipal, regional, provincial or national) and the extent of the resources available to cater to the jurisdiction.[64] It has been observed that a comprehensive jurisdiction draws high-calibre appointments of persons who are usually 'environmentally literate' and possess considerable expertise in investigating human activities that impact the environment.[65] There are several reasons why the appointment of environmentally literate judges improves upon the adjudication of environmental cases, and these include: (i) they add a basic level of sophistication, and ecological insight to the court's decision; (ii) their adjudication of environmental cases boasts of academic credibility; and (iii) they improve consistency in judicial decision-making cases relating to the environment.[66]

Furthermore, the establishment of ECTs ensures the centralisation of environmental cases.[67] This is important for the effective administration of the court because it results lin the timely accessibility of information on cases in the development of jurisprudence, which would possibly be a mammoth task to achieve in instances where there is a dissipation of environmental cases throughout different courts in a country.[68] Moreover, this centralisation improves transparency and data flow in decision-making, thereby allowing the court to be both the collector and disseminator of information rather than a government

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[61] D.C Smith, 'Environmental courts and tribunals: changing environmental and natural resources law around the globe', 36:2 *Journal of Energy and Natural Resources Law* (2018) p.139.

[62] G. Pring & C. Pring, 'Greening justice, creating and improving environmental courts and tribunals', *The Access Initiative World Resources Institute* (2009) p. 28.

[63] Hamman, Walters and Maguire, *supra* note 16, p.61.

[64] Pring and Pring, *supra* note 60, pp. 30-31.

[65] B. Preston, 'Characteristics of successful environmental courts and tribunals' Paper presented at the *Eco Forum Global Annual Conference: The 3rd Environmental Justice Seminar,* 19–21 July 2013, Guiyang, Guizhou, China.

[66] *Ibid.*

[67] Hamman, Walters and Maguire, *supra* note 16, p. 62.

[68] *Ibid.*

agency, which is often a party to the proceedings and in a conflicted position.[69]

The establishment and functions of ECTs are not merely conceptual, but there are specialist courts that are considered to be success stories in environmental protection and conservation. In India, the National Green Tribunal (NGT) was established in 2010 to hear civil cases concerning environmental protection and conservation of forests and other natural resources and the enforcement of any legal rights associated with the environment.[70] The tribunal, according to the National Green Treaty Act[71] has jurisdiction over all civil cases, where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved, and such question arises out of the implementation of the enactments specified in Schedule I.[72]

Although there has been a lack of studies carried out to assess the functioning and effectiveness of the NGT, by 2016, it had delivered 2051 judgments.[73] These cases all related to the environment with a broad perspective. However, there is still a need to understand the dominant areas of the environment, such as air, waste, water or environmental compensation, which were brought before the NGT.[74] In discussing environmental justice in India, Gill[75] argues that the functioning of the NGT ensures the involvement of technical experts in decision-making, resulting in informed environmental decisions and notes that because of the effective functioning of NGT, the country is regarded as a progressive jurisdiction in environmental matters.

In Kenya, the Constitution explicitly establishes specialised courts.[76] These courts include the Environment and Land Court, whose jurisdiction is specific to issues related to the "environment and the use and occupation of, title to, land"[77] and the Industrial Court, which presides over employment and labour matters.[78] There are numerous distinct tribunals, each with clearly defined jurisdictions under their founding statutes. For instance, the National Environment Tribunal (NET) has jurisdiction under several laws, including the Forests Act[79] and

[69] Hamman, Walters and Maguire, *supra* note 16, p. 62.
[70] S. Rengarajan *et al*, 'National Green Tribunal of India-an observation from environmental judgements' 25 *Environmental Science and Pollution Research*- (2018) p. 11313.
[71] National Green Tribunal Act of 2010.
[72] Legislation included under Schedule I include The Water (Prevention and Control of Pollution) Act of 1974, the Water (Prevention and Control of Pollution) Cess Act of 1977, The Forest (Conservation) Act of 1980, The Air (Prevention and Control of Pollution) Act of 1981, The Environment (Protection) Act of 1986, The Public Liability Insurance Act of 1991 and The Biological diversity Act of 2002.
[73] Rengarajan *et al, supra* note 68, p. 11314.
[74] *Ibid*.
[75] G.N Gill, 'Environmental justice in India: the National Green Tribunal and expert members', 5:1*Transnational Environmental Law* (2016) p. 185.
[76] Article 162 (2) of the Constitution of Kenya, 2010.
[77] Environment and Land Court Act 9 of 2011.
[78] Industrial Court Act 20 of 2011.
[79] Section 63 of the Forests Act 7 of 2005.

Environment Management and Coordination Act.[80] The Environment and Land Court is also permitted to adjudicate and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution of Kenya.

Such specialist courts have resulted in a rich jurisprudence of environmental law in Kenya, which brings to bear national and international principles for the protection of the environment. In *Joseph Leboo and 2 Others* v. *Director Kenya Forest Services and Another*,[81] the issue of *locus standi* in the environmental case was unpacked by the court. It held that litigation aimed at protecting the environment cannot be 'shackled' by a narrow application of the *locus standi* rule, but any person without the need to demonstrate personal injury has the right and capacity to institute legal proceedings. In *Peter K. Waweru* v. *Republic*,[82] even though it was in the pre-Constitution era, it was held that any environmental crime must be punished severely for the simple reason that environmental restoration is a mammoth task for every man and woman. In *Patrick Musimba* v. *National Land Commission and 4 Others*,[83] the court observed that although the State is mandated to ensure physical development so that other guaranteed rights and freedoms, it should do so within a Constitutional and statutory framework that ensures that the environment is protected and thrives.

South Africa is an interesting case when it comes to the establishment of ECTs. The country had The Regional (Environmental) Court for the Region of the Cape, held at Hermanus (ECH). The ECH was established in 2003 to combat abalone poaching and came into existence after the government formed a policy based on the TURF (territorial user rights fishery) policy.[84] The shell of the abalone is used to make ornaments. The foot of the abalone is viewed as a delicacy.[85] According to Moolla,[86] the ECH was formed for four reasons:

> 'First, the normal magistrates courts were overburdened by more "serious" crimes such as murder, rape and so forth. Second, environmental crimes were not considered as "important" as other crimes by the overburdened magistracy. Third, a specialised environmental crimes court would be able to deal with poaching crimes efficiently and expeditiously and a clear message could be

[80] Sections 125-138 of the Environment Management and Coordination Act 8 of 1999.
[81] 2013 eKLR, Environment and Land 273 of 2013.
[82] 2006 eKLR, Misc. Civ. Applic. No. 118 of 2004.
[83] 2016 eKLR51.
[84] M. Moolla, 'Contextualising illegal, unregulated and unreported fishing of marine resources in South African waters',<www.feike.co.za/web/news/AbaloneISS%20Paper.pdf>, visited 12 October 2020.
[85] Encyclopaedia Britannica Online 'abalone'<www.britannica.com/EBchecked/topic/376/abalone>, visited 12 October 2020.
[86] Moola, supra note 82, p. 12. *See* also P.J Snijman, 'Hermanus' Environmental Court: Does it protect the environment?', *December News and Views for Magistrates*, (2005) p. 2

> sent to poachers and their bosses. Fourthly, the environmental crimes court would be staffed with properly trained judicial and prosecutorial officers who were experts in environmental law'.

The ECH immediately proved effective, with a 70- per cent conviction rate in its first year of existence and followed by 80 per cent over the 30 months of its existence.[87] There are several reasons that were advanced to justify the success of the ECH, even though its existence was short-lived. Firstly, evidence was handled with the utmost professionalism, thereby significantly reducing instances of accused persons escaping liability through technicalities.[88] Secondly, public awareness, as a significant factor in environmental compliance, was increased.[89] Thirdly, the court was not a stand-alone enforcement and compliance body, but it complemented other strategies that were in place to combat abalone poaching.[90] Fourthly, by using criminal sanctions, deterrence was achieved as some accused persons would testify against others to garner leniency during sentencing.[91] This, in itself, reveals that even the accused themselves knew the efficacy of this court and the high probability of being convicted in the ECH. Finally, although the establishment of the court intended to combat abalone poaching, the ECH heard abalone cases and other environmental law cases such as pollution offences.[92]

Despite the courts' best efforts, it was closed in 2007.[93] In a report published in 2015, the then Department of Justice stated that it was not cost-effective to run this regional court because 95 per cent of the cases were classified as 'not serious'.[94] This suggests that the court's closure was motivated by financial factors as the cases heard by the court were not significant enough to warrant the existence of the court. However, so much has changed in the South African environmental law landscape, and although the country is rich in jurisprudence with cases addressing pertinent issues like climate change and energy,[95] the re-establishment of ECTs, from the ECH experience, can only make South Africa environmental law even richer.

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[87] *Ibid.*
[88] Snijman, *supra* note 84, p. 2.
[89] *Ibid.*
[90] *Ibid.*
[91] Snijman, *supra* note 84, p. 3.
[92] *Ibid.*
[93] Parliamentary Monitoring Group Hearing on the report of the Auditor-General on a performance audit of the handling of confiscated abalone by Department of Environmental Affairs & Tourism, 6 October 2009, -<www.pmg.org.za/report/20091007-hearing-report-auditor-general-performance-audit-handlingconfiscated>, visited 6 October 2020.
[94] M. Gosling, 'Downgrading green court seen as setback' *IOL* 16 November 2005, -</www.iol.co.za/news/south-africa/downgrading-green-court-seenassetback1.258911?ot=inmsa.ArticlePrintPageLayout.ot>, visited 17 November 2020.
[95] 2017 2 All SA 519 (GP).

18.4 Litigation on environmental issues in Zimbabwe

As already alluded to, section 73 of the Constitution provides that everyone has a right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures. This constitutional provision and s 4 (1) of the Environmental Management Act are the backbone for adjudication of environmental cases heard in the country. This chapter will not consider the structure of the judicial system in terms of the hierarchy of courts, as this has already been addressed in earlier chapters, but will examine environmental cases that have come before the courts and how these have been decided.

The earliest cases to be heard in Zimbabwe which concerned the right to a healthy environment in the early 2000s, and these focused on pollution of freshwater sources. In a 2003 case of *Manyame Park Residents* v. *Chitungwiza Municipality*,[96] an environmental non-governmental organization, the Zimbabwe Environmental Law Association (ZELA), sought an order to compel the Chitungwiza Municipality to construct proper sewage systems. The court granted the order, but the municipality pleaded that it did not have the requisite resources to either build appropriate, functional sewage treatment plants or rehabilitate the polluted land. Similarly, two years later, in *Dora Community* v. *Mutare City Council*,[97] the same organisation approached the courts for an interdict to stop the Mutare City Council from depositing partially treated waste into the river. After the sitting Councilors admitted to the pollution and agreed to remediate the damage done, ZELA obtained a judgment by consent. However, the Minister of Local Government dissolved the council and replaced it with a Commission that refused to acknowledge the council's admission, thereby rendering the court's judgment ineffective. To date, there is no record of any attempts to have the judgment enforced.

Another area that has seen significant litigation is the enforcement of environmental rights is mining areas. In *Zimbabwe Environmental Law Association & Others* v. *Anjin Investments (Private) Limited and Marange Resources (Private) Limited and Diamond Mining Company (Private) Limited*,[98] the applicant approached the court seeking an order to stop the respondents that were discharging untreated waste in the form of metals, chemicals, raw sewage and effluent into Odzi, Save and Chingwizi rivers. The court granted the order, 3 years after the matter was initially heard. In *Marange Development Trust* v. *Zimbabwe Consolidated Diamond Company (Private) Limited and Environmental Management Agency*,[99] ZELA, acting on behalf of the applicants, sought an order to halt mining activities until an

[96] HC-11552-03.
[97] HC-1312-05.
[98] - HC-9451-12.
[99] - HC-902-17.

Environmental Impact Assessment had been obtained from the Environmental Management Agency. After a tussle on the *locus standi* issue, the court subsequently granted the interdict and mining operations were stopped until an EIA certificate was issued. Although both these cases raise complex issues like balancing the need for development against environmental protection and conservation, the courts choose to not dwell on these. These cases were an opportunity to shine a light and take a stand on environmental issues and fundamental concepts that underpin the subject like sustainable development, the polluter-pays principle and the preventative principle. However, the courts elected not to engage in the discussion of these.

Another contentious issue in environmental protection and conservation which the courts have had to decide on in Zimbabwe is the destruction of wetlands. This is primarily a concern in Harare, where residential, commercial and most recently, religious structures are constructed on wetlands. In *Augar Investments OU* v. *Minister of Water and Climate and the Environmental Management Agency*,[100] the court had to decide whether the Minister of Environment, Water and Climate could declare a piece of land a wetland or whether the Minister's powers only pertained to declaring existing wetlands to being ecologically sensitive areas.[101] The court held that the Minister had acted *ultra vires* in unilaterally declaring the area a wetland. In this case, the court gave effect to environmental rights enshrined in the Constitution and concluded that:

> 'It is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment'.[102]

More recently, in *Harare Wetlands Trust* v. *Life Covenant Church and Others*,[103] the courts had a perfect opportunity to denounce the widespread destruction of wetlands in Harare but opted not to. In this case, the applicants were Trusts, whose objective is advocating for the protection and preservation of wetlands within Harare, whilst the first respondent, the owner of 18962 Boundary Road, Harare, was building superstructures on an area that is a wetland.[104] The court heard that the initial EIA for the development of the land was rejected, but in 2016, a partial certificate was issued and limited the development of the property to 0.81169 hectares of land. In 2018, a full certificate was given with conditions to be met. The respondents opposed the application asserting

[100] HC-1017-14.
[101] *Augar Investments OU, supra* note 98, p. 1.
[102] *Augar Investments OU, supra* note 98, p. 5.
[103] HH-819-19.
[104] *Harare Wetlands Trust, supra* note 101, p. 2.

that it had obtained the necessary development permit.[105] The court held that the development was unlawful, and that development should be halted and all machinery removed from the area until all the permits required for the development.[106] There was no discussion of the importance of wetlands in the judgment, how land gets designated a wetland, or even why an EIA is an indispensable tool in ensuring sustainable development. More could have come from the bench on why there is a proliferation of developments on wetlands and why this practice needs to be stopped as tracks. Moreover, the court erroneously relied on the old Constitution in discussing the *locus standi* issue, thereby completely negating to discuss section 85 of the Constitution. While the decision reached by the court was a favourable one, this time around, there is no general sense of how the court perceives the destruction of wetlands through developments such as the one that Life Covenant Church was erecting.

18.5 Towards the establishment of ECTs in Zimbabwe

The courts are still to comprehensively unpack the right to a healthy environment in Zimbabwe. These sentiments are echoed Soyapi[107] who observes that although Zimbabwe makes provision for the right to a healthy environment through EMA and the Constitution, the courts' contribution to the development of this right has been lacking. He further notes that an analysis of case law on the environment reveals that no court has taken the time to unpack the meaning of the right in the Zimbabwean context.[108] From the discussion above, it is only in the *Augar Investments OU* case where the court mentions, although briefly, the pressing need for environmental protection. Even in the most recent case of *Harare Wetlands Trust*, it can be noted that although the destruction of wetlands is a challenge in Zimbabwe, the court did not even dedicate a paragraph to caution against this practice for the sake of the environment. One of the reasons advanced for establishing ECTs is that experts in the field can adjudicate over such matters. It could be that judges are not well-vexed in the discipline to comment fully on the issues brought before them, which could be addressed by establishing ECTs in Zimbabwe.

Another reason for the establishment of ECTs is that they raises awareness of environmental rights and their importance to the citizens of a country. This rationale could solve the problem of the scarcity of environmental cases in Zimbabwean courts. Dhliwayo[109] argues that citizens are not sufficiently educated or aware of their environmental rights

[105] *Harare Wetlands Trust, supra* note 101, p. 3.
[106] *Harare Wetlands Trust, supra* note 101, p. 14.
[107] Soyapi, *supra* note 9, p. 370.
[108] *Ibid.*
[109] M. Dhliwayo, 'A Critical Examination of the Scope, Content and Extent of Environmental Rights in the Constitution of Zimbabwe' (Unpublished Thesis, Midlands State University, 2016) p. 2.

or the power they carry in the enforcement of other rights. If this is the case, then it explains why, while in neighbouring jurisdictions such as South Africa, cases concerning pressing emerging issues such as climate change have been prosecuted, while Zimbabwean environmental case-law remains paper-thin.

Since there are no ECTs in Zimbabwe, there is no central repository of environmental cases. The cases are spread across High Courts, and even then, they are not classified as environmental cases. This lack of a centralized repository causes several challenges. Firstly, there is no easy access to these cases. Like the Dora Community case, some of them are not available online and have to be obtained from the legal teams that argued it. This creates challenges in preparing heads of arguments in future cases as there is no ease of reference to legal practitioners. Secondly, there is no central environmental repository, making it challenging to trace developments in environmental law. Finally, it makes it difficult to have consistency in judicial decision-making in environmental matters. The establishment of ECTs in Zimbabwe has the potential to do away with these challenges.

Another challenge with the current judicial system in adjudicating environmental cases is that it takes a long time to resolve cases.[110] For example, it took three years for judgment to be handed down in - *Anjin Investments* - case. On this issue, it also comes as no surprise that most of the cases that have been brought before the courts are by non-governmental organisations (NGOs), on behalf of communities, because the financial repercussions associated with a matter that takes three years to resolve might be impossible to bear on individual citizens. ECTs, dedicated and mandated to resolve environmental cases, as with Kenya's Environment and Land Court, could reduce the time it takes an ordinary court hearing all matters to hear environmental cases.

As already alluded to, the fact that the Constitution recognises environmental rights does not mean much if the judiciary fails to enforce these rights. Although the cases heard before Zimbabwean courts have been decided in a manner that upholds this right, the *ratio decidenti* of the cases is far divorced from the interpretation and the development of section 73. Zimbabwe is no stranger to specialised courts[111] and the establishment of ECTs has the real potential to redress shortcomings in the adjudication of environmental cases.

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[110] N.A Robinson, 'Ensuring access to justice through environmental courts', *Pace Environmental Law Review*, (2012) p. 379.

[111] Sections 172-174 of the Constitution which make provision for the establishment of the Labour Court, the Administrative Court and other courts and tribunals.

18.6 Conclusion

This chapter has shown that the current system of adjudicating environmental cases does little to develop jurisprudence or, at the least, interpret what the environmental rights encompassed in the Constitution mean for the citizens of Zimbabwe. It is well and good that the country keeps up with best practices in ensuring the maximum protection of environmental rights, but its effectiveness is limited if the judiciary constantly fails to interpret and translate these rights into a reality. This chapter has also discussed the emerging role of ECTs and how in jurisdictions like India and Kenya, these have and continue to yield intended results in the application and protection of environmental rights. Therefore, this chapter concludes by advocating for the establishment of ECTs in Zimbabwe to redress existing shortcomings. The establishment of ECTs will potentially develop a robust jurisprudence in environmental law.

Chapter 19

Conclusion

Julie Stewart*[1] *and James Tsabora

The 2013 Zimbabwe Constitution is now approximately nine years old, which is not a long enough period for all the opportunities for beneficial constitutional reform to be realized. However, it is enough time to make a preliminary assessment of a burgeoning constitutional jurisprudence in Zimbabwe.

Be that as it may, this book was not designed to facilitate the development of a score card for assessment of judicial performance in relation to the 2013 Constitution – it was meant to create a platform for engagement with the judiciary, at all levels, in promoting the development of a constitutional jurisprudence based in and around the provisions of the Constitution. Unlike judicial officers, academic lawyers and those in practice and in other law related occupations, are not bound by the parameters of the matters before them but are free to explore an entire legal or human rights field, and to comment freely on the development of the law. There is thus an important and necessary symbiosis between the judiciary and legal commentators in the process of developing law, its interpretation and its implementation.

Judicial officers, as explored in the chapters in this book, are pivotal in the application, interpretation and development of the law, especially so when there is a new constitutional dispensation in place which requires assessment of its capacity to improve the general lot of persons, institutions and governance frameworks. Judicial officers can pronounce, encourage, comment and advise on constitutional compliance, but they cannot enforce their judgements; they are reliant on the executive and the legislature to give effect to their judgements and recommendations.

As argued throughout, the doctrine of separation of powers inevitably creates a contradictory scenario - each branch of government carrying out its own specific functions, but reliant on the other branches for the State to be effective and functional. Finding the balance between mutual support, regulation and protection especially of human rights, although not always specifically referenced, is what lies at the heart of this book. Various chapters in the book probe the trajectory of law reform

[1]Professor Julie Stewart is a retired Professor of Law of the University of Zimbabwe. She is also the former Director of Southern and Eastern African Regional Centre for Women's Law, a division at the Faculty of Law of the University.

and interpretation of law in the light of the multiple mandates laid down in the Constitution. What is sought by the authors is an indication of what that trajectory might be in relation to their subject area of interest.

One approach that can be used in making such an assessment is to recognize that along with other countries in Southern Africa, the current phase of judicial development of an informed jurisprudence is largely exploratory and that the evolving patterns emerging in developing approaches to the various aspects of the Constitution are mixed. As discussed throughout the book, courts may take shelter in technicalities to avoid engaging in what may be regarded as controversial or politically delicate matters. For example, election petitions, are frequently, but not always, either dismissed on the basis of a procedural technicality or quietly shelved until they expire by effluxion of time.

One puzzling feature of the judicial process in relation to application and interpretation of the Declaration of Rights (Chapter 4 of the 2013 Constitution) has been the failure of the Constitutional Court to openly embrace the liberal provisions on *locus standi* set out in s85 of the Constitution. Although there have been a number of landmark determinations where these liberal provisions have been used to expand the range of those who may bring matters covered by Chapter 4, the overall approach of the court remains conservative.

Whereas one might critique the somewhat cautious approach of the Constitutional Court in particular, this conservatism is perhaps a reflection of the need to develop the interpretation of the 2013 Constitution with care and based on clear and definable issues so as not to pre-empt or inadvertently limit future interpretations and developments of the law. Although some provisions in the Declaration of Rights are quite explicit and well developed such as section 50 on the rights of arrested and detained persons, other provisions are very broadly and briefly stated and require significant development. Thus, a court interpreting these provisions, many of them "one liners" is justified in being circumspect about broad generalizations.

Nonetheless, there are noticeable areas of intervention where the courts have been bold in their interpretations of the provisions of the Declaration of Rights and other chapters of the 2013 Constitution. An example are those provisions related to the rights of women, children's rights, labour law issues and devolution but, responses to the need for law reform and active implementation of those provisions has been slow or selectively addressed by either the executive or legislative branches of government. In such situations, all that the courts can do is to use every opportunity available during subsequent litigation to re-emphasize their call for law reform. Such opportunities do provide spaces for publicity of the issues and bringing public attention to the need for active reforms or more vigorous implementation of the law being considered.

Significantly authors note the willingness of the judiciary to embrace international instruments in the interpretation process and to look to other jurisdictions for guidance and inspiration as contemplated in the Constitution. It can be argued that the courts in Zimbabwe are contributing to a growing international and regional body of jurisprudence on relatively newly formulated progressive constitutional positions.

This book has set out the fundamental themes and perspectives that have shaped and continue to shape the judiciary in Zimbabwe. Apart from setting out the constitutional context, which essentially is the guiding normative framework, the book has delved into several perspectives, in so doing, deepening the jurisprudence on the judicial sector in Zimbabwe. The book has also initiated what is hoped to be an ongoing critical analysis of the role of the judiciary in interpreting and implementing the provisions of what is, on paper, a progressive and potentially transformative framework designed to effect social, legal, economic, environmental, political change and to facilitate active departure from a previously parochial constitutional dispensation on matters of human rights.

Notwithstanding the multiple perspectives shared in the book, there is no doubt that the work of the judiciary in the interpretation of the Constitution has just begun. Many themes, theoretical and methodological positions in the Constitution have not been tested, interpreted or applied by the courts. Those areas that have been tackled by the judiciary, and the authors, provide more hope and promise than despondency. The Constitution has been lauded by many as a progressive document, and as illustrated in the chapters of this book, proactive judicial officers applying its recommendations and analytical approaches should find that the book as a whole,is instructive, progressive and facilitates judicial activism.Similarly, in relation to the constitutional imperatives,the law reform and law development agenda for the Legislature is clearly defined but so far, as noted in a number of chapters, the law reform processes have been slow and tentative. Yet the Constitution provides adequate guidance to the law makers in their task of law-making. Unquestionably, the doctrine of constitutional supremacy requires all laws, extant and being made, to be consistent with the Constitution. To that extent, the progressive norms and principles in the Constitution, comprehensively canvassed in this book, must find expression in Acts of Parliament and proactive Executive compliance, support and implementation by the various agencies within the government realms.

Throughout this book, a constant theme is the role of the Executive in constitutional implementation, and the possible influence of the Executive in shaping the responses to law reform and its implementation by its attempts to reshape and re-orient the personnel and the jurisprudential direction of the judicial sector. It was argued that the Executive plays a crucial role in constitutional implementation, the

quest for a constitutional state and the promotion of the rule of law. However, with the extensive power it wields over the other two arms of state, the inescapable fear is that the Executive may countermand the progressive norms in the Constitution using administrative constrictions, pushing reforms of those constitutional provisions that are not strongly entrenched and potentially adversely affecting the role and capacity of the judiciary to carry out its all-important review and constitutional compliance monitoring functions. Further supporting affirmative action related constitutional amendments. The analysis provided in the various chapters of the book demonstrate that the judiciary has been given all the necessary powers to review compliance with the Constitution, to interpret and apply its provisions without undue interference from the Executive.

The diverse chapters in this book have unpacked how constitutional provisions should be understood, interpreted and applied in the spirit of constitutionalism and to achieve a 'democratic society based on openness, justice, human dignity, equality and freedom'. All three branches of government should benefit from the insights provided by the authors of the various chapters as to how they can more effectively interpret, develop and implement constitutional provisions. Accordingly, all the three arms of state have much to gain from the perspectives shared in this book.

A final word is necessary on the perspectives comprehensively discussed in this book. The Constitution, in section 46, demands the development of customary and common law when the judiciary is interpreting legislation. Further, the Constitution demands its interpretation to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom. What this means is that the age old, celebrated common law principles no longer claim their celebrity status when interpreting both ordinary legislation and provisions of the Constitution. The Constitution holds sway. The various chapters in this book have demonstrated how the judiciary, in particular, can break free from the constraints of both common law and customary law retrogressive interpretative ideologies in giving meaning to constitutional provisions. The chapters represent methodologies as to how to unpack the literal meaning of the words of the Constitution by adopting the clear path to reform and social and economic development laid down by the Constitution.

The judiciary is similarly liberated, and several judgements interrogated in this book have positively reflected this 'freedom'. Respectfully, this approach has value and must be followed; the Constitution can only transform society when it is applied on its own terms. Legislative interpretation has to defer to the values and principles

in the Constitution. The judiciary stands at an important juncture in making this happen, and this book is built upon this point – the authors look to the future and offer both critical analysis of adjudication on constitutional issues thus far and on progressive interpretive and compliance measures for the future.