UNIVERSITY OF ZIMBABWE

IS THERE CONSTITUTIONALISM IN TAX MATTERS IN ZIMBABWE?

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DEDICATIONS

I dedicate this dissertation to all my children Kylie Madziya, Dennis Joseph Mashamba, Isheanesu Mashamba and Tinotenda Mashamba. My hope, my strength and will to survive.

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CHAPTER 1:

INTRODUCTION

Tax law is an important area of study in the Zimbabwean legal system. Tax disputes are inevitable in human affairs. Outside the human world, disputes are resolved by a possible approach of 'survival of the fittest". In the human world it is claimed that the best way of resolving disputes is by applying 'notions of justice and fairness'. This is what lies at the centre of a legal system, yet it is still possible to find within the legal systems a notion of 'survival of the fittest'. Tax law in view of its vital importance has attracted much attention among the investors, scholars, industrialists, economists, public at large all over the world, the legislature, the judiciary and especially the government. This study thus intends to examine and outline how the courts are handling tax issues in relation to the limitations of government powers brought about by the newly enacted Constitution of Zimbabwe[1]. The philosophy of the legal system as well as the role of judges in adjudicating tax matters will bring to light the whether or not there is constitutionalism when handling tax law issues.

1.1 BACKGROUND OF THE STUDY

1.1.1 Tax background

The beginning point is that a tax could be an obligatory levy forced by the State or other tax authorities. Meaning to say that it is not an optional payment. What makes a tax, a tax is its compulsory nature. Taxpayers have no option but to pay tax. As a result of its mandatory nature, the common law position was emphatic that there must always be express statutory authority before a tax can be imposed.

See: *Attorney General v Wiltshire United Dairies*[2].

See: *China Navigation Company Ltd v Attorney General*[3]

This common law position remains the law in almost every jurisdiction – "no parliament, no tax". There is no such thing as a common law tax. The constitution of Zimbabwe has elevated this common law principle to a position of the constitution. Section 298(2) of the

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

[2](1921) 37 TLR884.

[3]. (1932) 2 KB 197.

constitution provides as follows; “No taxes may be levied except under the specific authority of this constitution or an act of parliament”.

Issues that have arisen relate to whether or not a payment required is a tax. If it is a tax, there must be specific authorities for it. In *Nyambirai vs NSSA*[4] , the Supreme Court had occasion to define a tax. In that case the issue was whether or not the compulsory payments imposed on employers and employees under the NSSA Act, were a tax. In terms of the Act and the regulations made under it, pension contributions to NSSA are compulsory in respect of the category of employers and employees covered by the scheme. The Applicant in that case challenged those payments contending that they were an unlawful deprivation of his property contrary the property rights in the constitution.

The government on the other hand argued that the payments were a tax and therefore protected by the constitution. The court defined a tax as follows; “It is a compulsory levy and not an optional contribution imposed by the legislative or other competent public authorities upon the public as a whole or a substantial sector thereof and to be utilised for the public benefit or to provide a service in the public interest”. From this definition, the court concluded that the NSSA payments were a tax. They satisfied all the features in the definition. The court went further to hold that the tax was reasonably justifiable in a democratic society.

A tax is constitutionally protected as a way of infringing the right to property – property can be compulsorily taken away without any other justification except that it is a tax.

If any of the features on the above definition is missing, the levy is not a tax. What makes ‘a tax’ a tax is not the word “tax”. It is tax if it satisfies the components above. Similarly, the fact that the word tax is not used is irrelevant, it can have any name. This point came out clearly in *Benard Wekare v The State & ZBC*[5]. In that case, the applicants owned and possessed TV sets. They did not have the requisite licences. The allegation was that they were listeners in possession of a receiver but without licences thereby contravening a provision of the Broadcasting Services Act. They admitted knowingly possessing TV sets without a licence. Their defence was

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[4]. *1995* (2) ZLR 1 (S).

[5]CCZ9/2016.

that the relevant provisions of the Act were constitutionally invalid on the basis that they violated their right to property. They were a compulsory deprivation of property contrary to Section 16(1) of the old constitution. Per Section 16(7) of the old constitution, the right to property was limited where a law made provision "in satisfaction of any tax or rate".

The issue therefore was whether or not the licence fee was a tax. In terms of the Act, every listener in possession of a receiver is required to have a licence. The licence fee is fixed by the ZBC with the approval of the Minister. It has to be published in the government gazette in a Statutory Instrument. The fee is payable into the general funds of the ZBC. The applicants argued that the fee was not a tax and therefore had no constitutional protection. They accepted that if it were to be held to be tax, they would have no case. MALABA DCJ started from the following correct position, a tax is not a tax merely because the word tax is used. Even where the word tax is not used, the payment may be a tax. See page 11 of the judgement where the judge defined a tax by borrowing from *Nyambirai vs NSSA*[6] without acknowledging it. The court held that the licence fee was a tax on the basis that it satisfied all the features of a tax.

The applicants had conceded that the licence fee was compulsory, that it was paid for a public purpose and was imposed on a substantial section of the public. However, the applicants argued that the levy had not been imposed by the legislature or other competent authority. Their position was that the ZBC was a private company incorporated in terms of the Companies Act. Accordingly, they argued further that giving a private company power to fix and collect licence fees to raise for its own operations/purposes was outside the contemplation of the constitution. This argument was rejected. The court held that the licence fee was imposed by the legislature. The fact that the legislature gave to ZBC the power to fix the licence fee with the approval of the Minister, did not make the ZBC the legislative authority. The court further dismissed the notion that the payment was for ZBC operations, it was for public broadcasting operations which were in the public interest. The applicants had also argued that the funds were being used for improper purposes and as such could not be classified as a tax. Again, this was rejected with the court saying the following; "Whether the ZBC does not use the

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[6]. *1995* (2) ZLR 1 (S).

funds for the purposes of the statute is not a matter going into the determination of the question of the licence fee being a tax". [7] The court said that the remedy for the applicants was to seek a mandamus compelling the proper use of the funds. **The definition of a tax is required for a variety of purposes, the most important being that it creates the starting point to the application of other principles, for example; whether a payment is a tax or not may lead us to investigate its statutory basis. The general principle is that in tax law, the governing legislation is everything.**

1.1.2 Constitution Background

In Zimbabwe, the British adopted a very sophisticated approach when they introduced law into its colony. They took into account the fact that Southern African had been under the influence of two other European systems: that is the Dutch and the Portuguese. A choice had to be made between either a wholesale introduction of English law with a continuation of the European system already in place. The Cecil John Rhodes factor meant that this territory was to be linked with South Africa. Rhodes himself was a leading politician at the Cape. The decision on the 10 June 1981 was communicated through the proclamation in the following words;

"... The law to apply in this territory shall be the law applicable at the Cape of Good Hope on this date." The framers of the proclamation were alive to the hundred year history of law at the Cape under the British rule and to more than 100 years of Dutch rule. This complicated the law of Zimbabwe. In 1980, the Constitution Of Zimbabwe[8], Section 89 provided as follows: ".... The Law to apply in Zimbabwe shall be the law applicable at the Cape of Good Hope on 10 June 1891 as subsequently modified ...." In 2013, The Constitution of Zimbabwe provided in Section 192 that the law to apply shall be the law applicable on the effective date. The law applicable on the effective date was section 89 of the 1980 Constitution. Accordingly, section 89 of the Old Constitution remained part of the law by virtue of Section 192 of the Current Constitution. This formulation has now been developed to mean that the law applicable has the following components:

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[7] *Benard Wekare vs The State & ZBC,* CCZ9/2016.See page 19 of the judgement.

[8] Section 89, Old Constitution Of Zimbabwe

1. Legislation has been modified or changed the law at the Cape. It would appear that there may be no longer any Cape Statutes still preserved by section 89 of the old Constitution, this is of course subject to further research.
2. Case law by Zimbabwean Courts that has replaced the law applicable at the Cape.
3. Case law by South African Court and other Courts that would apply in the absence of applicable Zimbabwean cases.
4. English Common Law that would apply in areas not covered by Zimbabwean cases where it is thought that English Law is more applicable.
5. The original sources of Roman Dutch such as books by the old Roman Dutch Jurists in areas where it is thought that none of the above is applicable.
6. Common sense where none of the above is applicable.

Despite the same constitution proclaiming its own supremacy and that

> *‘ any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. …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.’*[9]

Zimbabwe has a long history of conflict with upholding fundamental rights and the rule of law, which is often characterized by violation of the Constitution. A culture of constitutionalism, defined as

> *“…..a concept which subjects the officials who exercise power to limitations of a higher law. …proclaims the desirability of the rule of law as opposed to the rule by arbitrary judgment or mere fiat of public officials……the central element …is that in political society government officials are not free to do as they choose, they are bound to observe both the limitations of power & the procedures which are set out in the supreme, constitutional law ..It may be said that the touch stone of constitutionalism is the concept of limited government under a higher law’*[10]

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[9]. Constitution of Zimbabwe (amendment no.20) 2013; Section 2.

[10]. David Fellman Wiener ed In The Dictionary of The History Of Ideas: Studies in Selected Pivotal Ideas. Wikipedia

Or as

'.. The idea, often, associated with the political theories of John Locke, & the founders of the American republic, & equated with the principle of regula iuris 'rule of law' that government can and should be legally limited in its powers, & its authority to govern depends on enforcing these limitations'

It is fair to state that where compliance with constitutional constraints was viewed as too inconvenient or politically costly, these constraints were ignored without significant or direct repercussion…….lack of compliance with the .. Constitution has been facilitated, since 2001, by the failure of the courts to restrain the executive in accordance with the principle of the separation of powers. Thus any hope that the new Constitution adopted by Zimbabwe in mid - 2013 would check executive excess appears to be ill-founded as there has been a seamless transition into a new constitutional era, with violations taking place from the very inception of the new charter.'[11]

CISOMM above concluded that:

> *'(the new Constitution's)…litany of progressive protections has not been complimented with respect, improved compliance and strong, impartial enforcement by the State. Such noncompliance will present a significant threat to the rule of law and constitutionalism and is likely to undermine public confidence and dash the hopes of those who believe a new Constitution will bring an era of respect and protection of rights and ensure better lives and livelihoods for the people of Zimbabwe'*[12]

Section 176 of our Constitution, gives the High Court, Supreme Court and Constitutional Court the inherent power to develop the Common Law in the interests of justice. This provision has been heavily relied upon by the South African courts to fashion a new common law system in that country. If this provision is taken into account, stages 3, 4, 5 and 6 may become relevant to the extent that the courts may pick appropriate principles for further development.

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[11]. 'On the correct path or lost in the process? An assessment of State compliance with the new Constitution' Civil Society Monitoring Mechanism CISOMM 2014; 5

[12]. (n11) 27

In interpreting Statutes in Tax law it has become a bit complicated in both the Zimbabwean and South African context. Interpretation of tax legislation using the traditional approach is a claim that the interpretation of tax legislation is different from the interpretation of other legislation. It is said that with tax statutes it is the literal rule that must be applied. The basis for this claim is the old English of Pattington v Attorney-General[13] where the following
is said:

> "If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind today. On the other hand, if the statute seeking to impose the tax cannot bring the subject within the letter of the law, the subject is free, however apparent within the law the subject might appear to be. In other words if there be an equitable construction, certainly such a construction is not admissible in a taxing statute – where we must simply adhere to the words of the statute."

These statement were taken further in the case of Cape Brand Syndicate v IRC[14] where it was said:

> *"In a taxing statute, one has to look at what is clearly said. There is no equity about a tax. There are no presumptions to be implied. One can only look fairly at the language used."*

These two authorities are almost a universal starting point to a discussion on interpretation of taxation. The courts in SA took these statement and gave them a life of their own, namely: that tax statutes must always be interpreted literally. The question which arises is as follows – is the literal rule a mandatory rule of interpretation of tax legislation? A lot of learning has been devoted to this question. The English courts delivered a bombshell in Pepper v Hart [1993]. This was a decision of the House of Lords in a tax matter. The question in that case was whether or not the court could make reference to Parliamentary debates in ascertaining the intention of parliament. The court held that it was permissible for the courts to consult Hansard – the parliamentary debates,

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[13] 1869 AC 375

[14]. 1921 KB 69

and ascertain what the Minister intended. It proceeded to do so and examined the Minister's second reading speech. The effect of this judgment was introduce a purposive interpretation of tax legislation. [It was not the rule before that.] [Does this not undermine the principle of certainty?]

After the Pepper decision the English courts are now vacillating between the literal rule and the purposive approach and arguing that the purposive approach are restricted to cases of ambiguity – in other words where the statute is clear the principle in Cape Brand applies. It is now a matter of the preference of judges [see a Journal article]. [It is not a hard and fast rule that one applies one principle over the other].

The Zimbabwean and South African Constitutions have complicated the matter:

see: section 39[2] of the South Africa Constitution
see: section 46[2] of the Zimbabwe Constitution.

These provisions introduce a mandatory rule of statutory interpretation. The courts are required to take into account the provisions of the Bill of Rights in the interpretation of any legislation – tax legislation included. Accordingly, it can no longer be correct to say that there is no equity about a tax, the constitution necessarily requires equity in the affairs of human beings – that is what the Bill of Rights is all about. The better view appears to be this; although the literal rule is the most suitable rule in most tax problems, there is scope to apply a purposive approach in the interpretation of tax legislation. The possible conclusion would therefore be that there are no special rules about tax interpretation because the above approach is what applies whenever a court is faced with legislation.

1.2 STATEMENT OF THE PROBLEM

The Constitution of Zimbabwe requires equity in the affairs of human beings , that is what the Bill of Rights is all about. The problem is that it appears that the bill of rights only exists in theory in tax matters. The limitations to the bill of rights are often used for the benefit of the government in retrieving taxes from the tax payers. The power of government authority is limited in theory yet in practice, the government possesses excess power. The taxpayer is always prejudiced in tax matters, the bill of rights are constantly

being infringed. The courts are required to take into account the Bill of Rights in the interpretation of any legislation, but we find the judiciary leaning more in favour of the government when it comes to tax issues in court. The courts will even impliedly use the political question doctrine because they do not want to disturb the political set up and affairs of the government yet infringing the Bill of Rights.

1.3 PURPOSE OF THE STUDY

The study intends to explain if there is any constitutionalism, if the human affairs in the bill of rights are being appreciated by the courts they are handling tax issues. The challenges of interpretation of statutes in relation to the philosophies that are sometimes used by the courts in dealing with tax matters.

1.4 RESEARCH OBJECTIVES

1. To establish the level of Constitutionalism in tax matters.

2. To find out how tax matters are being handled and interpreted by the judiciary.

3. To explore the principles that are in a tax system.

4. To conclude and recommend

1.5 RESEARCH QUESTIONS

Based on the purpose of the study, the following questions are raised to provide a guideline and solution to the challenges of corporate governance in relation to the increased corporate scandals:

1. What is the level of constitutionalism in Tax matters?
2. How are tax cases being managed by the judiciary and interpreted?
3. What are the principles in a tax system?
4. Which recommendations can be provided?

1.6 ASSUMPTION OF THE STUDY

The research will be carried out on the strength of these well thought anticipated issues that are likely to prevail during the conducting of the research and these assumptions may have a bearing on the results of the research. The assumptions are as follows:

- The researcher will have access to the library and current tax law cases that are relevant in depicting constitutionalism.

1.7 STATEMENT OF HYPOTHESES

1. How Tax Law cases are handled does not affect constitutionalism.

2. How Tax Law cases are handled does affect constitutionalism.

1.8 SIGNIFICANCE OF THE STUDY

The area of consideration is invigorated by the need to discover the adequacy of how tax matters are adjudicated from the interpretation of the statutes to the philosophies used by the judiciary in reaching their decisions and if that process affects constitutionalism in relation to the bill of rights. The research will also contribute to building a bridge between human rights based constitutional law theory and practice, as the very noble and lofty theories and tenets of constitutional law are ever at risk of redundancy and obsolescence if the terrain and scope of their practical application to real life political conditions is not examined for its capacity to receive them. Alternatively if in reverse, they are not assessed for their practicability constitutionalist ideals in constitution making may lose their appeal where they do not deliver.

1.8.1 Academia

The information collected in this study on constitutionalism in relation to the tax handling issues can be used by scholars or academics as secondary data through the findings which can be used as a reference in academics and literature review. The study can also form the base for further study on this issue and related to constitutionalism and tax law.

1.8.2 The Legislature

Through the research, the legislature can come up with tax policy adjustments that are in alignment with the constitution and that allows implementation of a culture of constitutionalism.

1.8.3 Students

The study will benefit law students when referencing on tax matters viz-a-vis constitutionalism.

1.8.4 The government

By raising caution or awareness on the significance of tax law systems in relation to the limitations of governmental powers in line with the constitution bill of rights. It is also hoped that the entities not covered specifically by this study will also learn lessons from the findings of this research and use this knowledge to also adopt to good tax law implementing constitutionalism whilst the judiciary is observing the bill of rights section of the Zimbabwean new Constitution accountability and transparency in their countries in all sectors of business.

1.8.4 Private owned companies

It is anticipated that the solutions recognized will help private owned companies and individuals to address their challenges in the day-to-day running of the organizations and progress their performance in matters of tax laws.

1.8.5 The Researcher

The researcher is presented with an opportunity to sharpen his research skills in conducting this study. In addition, there is an opportunity to link theory with practice.

1.9 SCOPE OF THE STUDY

This research will be centred on constitutionalism and tax in relation to the bill of rights. The discoveries ought to subsequently be a reasonable representation of the viability, presence or absence of constitutionalism in tax law implementation that promotes the bill of rights.

1.10 DEFINITIONS OF KEY TERMS

Tax: a mandatory contribution to state revenue levied by the government on workers' earnings and business profits, or added to the price of certain goods, services, and transactions.

Constitutionalism: Constitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.[15] In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-

[15] Hilaire Barnet, Constitutional and Administrative Law 5 (London: Cavendish Publishing Limited, 3rd edition.. 2000 (1995)

fixed/ pre-determined in advance. The latter definition shows that having a constitution alone does not secure or bring about constitutionalism. Except for a few states which have unwritten constitutions, today almost all the nations/states in the world have constitutions. This does not, however, mean that all these states practice constitutionalism. That is why constitutionalism is far more important than a constitution.

1.11 LIMITATIONS OF THE STUDY

It is useful to set the parameters, in terms of what this study intends to do. The study

will be faced with the following limitations.

Corona 19: Access to libraries for search of secondary data would be a challenge as most libraries have restrictions due to the COVID-19 pandemic. The researcher would largely resort to the internet as the source of secondary data.

Data collection instruments: the study could be to a larger extent document analysis as a data collection instrument and less extent quantitative.

1.12 LITERATURE REVIEW

1.12.1 THEORATICAL FRAMEWORK

1.12.2 EQUITY THEORY

There is no equity in tax law. The tax collector is 'Caesar' while the tax payer should render to caesar the things that are 'Caesar's.' As a result Constitutionalism exists at the detriment of tax payers.

Key aspects of the study are: Constitutionalism; tax laws handlement, bill of rights

1.13 EMPIRICAL STUDIES

Post the 2013 constitution, the litany of human rights violations continues with impunity, very little has been done in the public arena to implement the 'new' constitutional human rights order that was introduced by the 'new' constitution. The public by and large appears to be unaware of its new rights, and lacks a propensity to assert them. The State manifests disdain of it through judicial decisions, legislative and executive actions that not only violate or ignore their duties to respect, promote, and fulfil their human rights obligations, but increasingly to repeal and amend them. This anomalous State of affairs makes it look

as if the new constitutional regime of broader guarantees of human rights simply does not exist.

Manifestations of the riding rough shod over the constitution, its human rights obligations and the law have been well documented by many.

'For the past 34 years, Mr. Robert Mugabe has served as Zimbabwe's political leader. There have been numerous instances of overreach during that time, in addition to the already extensive powers granted to him as President. It is fair to say that where compliance with constitutional constraints was deemed too inconvenient or politically costly, these constraints were ignored with little or no repercussions.… Since 2001, the failure of the courts to restrain the executive in accordance with the principle of separation of powers has facilitated noncompliance with the Constitution. Thus, any hope that Zimbabwe's new Constitution, adopted in mid-2013, would rein in executive excess appears to have been dashed, as there has been a smooth transition into a new constitutional era, with violations occurring.'[16]

CISOMM above concluded that

> (The new Constitution's)...litany of progressive protections has not been accompanied by respect, improved compliance, and strong, impartial state enforcement. Such noncompliance poses a significant threat to the rule of law and constitutionalism, and is likely to undermine public confidence and dash the hopes of those who believe a new Constitution will usher in an era of respect and protection of rights, ensuring better lives and livelihoods for Zimbabweans. [17]

Everybody, it seems loves constitutionalism, including even the Nobel laureate physicist Albert Einstein! He posits:

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[16] ‘On the correct path or lost in the process? An assessment of State compliance with the new Constitution’ Civil Society Monitoring Mechanism CISOMM 2014 5

[17] (n 5) 27

'The strength of a constitution is entirely dependent on each citizen's determination to defend it. Constitutional rights will be secure only if every citizen feels obligated to contribute to their defence.' [18]

The varying definitions of constitutionalism are as relevant to human rights discourse and a human rights approach are canvassed to a large extent in the literature. The most striking if not irreverent definition is arguably this by the non lawyer Walton H. Hamilton in his article on constitutionalism in the 1930 *Encyclopaedia of Social Sciences* :

'Constitutionalism is the name given to man's trust in the power of words written on parchment to keep government in order.' [19]

This definition and treatise, from an American realism perspective in analysing the power of a constitution to limit and restrain government power depicts the enigma explored by this enquiry, of how to transform parchment human rights ideals into a living human rights culture. Several authors such as Nick W. Barber[20] offer helpful paradigms to examine constitutionalism from particularly his seven principles of sovereignty, separation of powers, the rule of law, subsidiarity, democracy and civil society. Of these, the separation of powers, the rule of law, subsidiarity, democracy and civil society are instrumental to both human rights and constitution making analyses. There remains a gap in a direct research of constitutionalism in relation to tax laws taking into cosideration the bill of rights.

In a manner most apposite to this research, the Nigerian scholar Julius Ihonvbere adds a constitution making process dimension to constitutionalism as he says it includes

'a process for developing, presenting, adopting and utilizing a political compact that defines not only the power relations between political communities and constituencies, but also rights, duties and obligations of any citizens in any society' …who it is who makes or reforms it is central to is value"[21]

Maurice Adams, Anne Meuwese eds. agree on this ideals as they mutually inform and reinforce each other [22] while they explore how political reality on the one hand and

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[18]T Masiya & C Mutasa eds. Civil Society & Constitutional Reforms In Africa MWENGO 2014 page 1

[19]Larry Alexander ed. *Constitutionalism: Philosophical Foundations* Cambridge University Press 1998

[20]Nick Barber *The Principles of Constitutionalism* Oxford University Press 2018

[21]B Ludman Ed. Louise Olivier *infra*

[22]Adams M, Meuwese A & Ballin E 'Constitutionalism & The Rule of Law- Bridging Idealism & Realism' Cambridge University Press (2017)

constitutional dynamics relate. This is important in a study such as the present one as it precisely compares the theory of constitutionalism and how tax matters are handled.

Given the variance of the Zimbabwean reality from the theory, it may well be time to posit an alternative theory to constitutionalism which demonstrates that practice does not always enforce existing theories.

As judicial review of human rights constitutional provisions is central to this enquiry, an American critique by Bellamy[23] of judicial review as inimical to constitutionalism is instructive in it advocating caution. He appears to be a lone voice in defence of giving an open cheque to the dominant political order to develop as it sees fit a human rights dispensation from a constitution. He questions the effectiveness and legitimacy of judicial review by constitutional courts, positing that parliamentary majority rule has superior and sufficient methods of upholding human rights and the rule of law. He believes that rights based judicial review undermines the constitutionality of democracy through providing a counter majoritarian bias that promotes the interests of the privileged and distorts public debate by focusing on individual cases. It stands to test how his theory holds in a fledgling democracy without established democratic institutions and processes such as Zimbabwe.

By far the most scintillating writing encountered on the subject of constitutionalism and constitutional reform is by Joel I. Colon-Rios in 'Weak Constitutionalism: Democratic Legitimacy And The Question Of Constituent Power'[24] . The cross lateral hemisphere scholar who is an advocate of public participation believes that its absence breeds democratic illegitimacy of constitutional regimes. In discussing public participation's extent he advances two important ideas, namely:

a) That one solution for a democratic deficit of formal constitutions is the use of what he calls 'weak constitutionalism' based on extra ordinary mechanisms independent of the ordinary constitution amendment procedure
b) The notion of constituent power as a necessary element in contemporary constitution making.

[23]R Bellamy *Political constitutionalism: a republican defence of the constitutionality of democracy* 'Cambridge University Press 2007

[24]J Prebble ed. Ass't Ed Laura Lincoln Victoria *University Of Wellington Legal Research Papers Paper No. 33/2012* Vol 2 Issue No. 8 (2012)

Regarding weak constitutionalism, he recommends that critiquing it

> *'It requires an analysis and a critique of the ways in which concepts such as constitutionalism, democracy, constitutional change, and democratic legitimacy are understood and deployed in constitutional theory'.*

Colon-Rios in advancing that objective, and challenging those concepts, proposes his concept of 'weak constitutionalism' which requires constitutional regimes to provide 'an opening, a means of egress, for constituent power to manifest from time to time.' He questions why constituent power is often regarded as opposed to judicial review as he maintains that the two are in fact complementary.

He advocates for a departure from regarding participatory constitution making as primordal and laments how

> *'From a certain point of view the question of how a constitution was created and how it can be recreated appears a secondary concern or, more stridently, as democratically irrelevant. If you want to find out whether a country is democratic or not, you don't look at its constitution making record or its constitution amendment formula: you look at whether or not that country's laws provide for frequent elections. Whether citizens are allowed to associate in different organisations (including political political parties) to express their political opinions without fear of punishment'*

He proffers the alternative approach which influenced Zimbabwe's consultative constitution making process, i.e. harnessing constituent power which he describes as :

> '*constitution making power, the source of production of juridical norms. In its classical formulations (that of Emmanuel Sieyes, Carl Schmidt's conceptions, {Emmanuel Sieyes What Is the 3rd Estate_N.Y. Praeger 1963 Carl Schmidt Constitutional Theory Durham Duke University Press 2007}….. it is seen as unlimited power, a power that assumes the constitutional regime as radically open. While until recently absent from Anglo American constitutional theory, the theory of constituent power, in its Sieyesean's and Schittan's conception has played an important role in the development of Latin American constitutions. It has lately come to occupy a salient role in the constitutional discourse of the Latin American Left. To say that the people are the bearers of constituent power is to say that they are sovereign and that in the sense of that sovereignty they may create a constitution they want.*

He proceeds to define constituent power as:

> *'the power to create a constitution together with the participation of those subject to it'*

and cites with approval Andreas Kalya's position that he says has expressed quite clearly that constituent power :

> *prescribes that if one wants to create a new constitution, for example one that ought to co-institute it, to institute it jointly with others'* in 'The Basic Norm'.

Colon-Rios proceeds to also incorporate the thinking of scholars like Antonio Negri who said

> *'to speak constituent power is to speak of democracy'*[25]

which is seen as opposed to democratic legitimacy which is

> *'the acquiescence of the governed including organs of state who even make it up'*[26]

He also approves of Hans Kelsen's[27] observations of the application of the constituent power model in South America through the Colombian Constitutional Court *viz* :

> *'…some courts have developed the idea of some implicit limits to constitutional reform: that ruling that constitutional changes of a fundamental nature cannot be through ordinary (constituted) institutions of government [but instead through constituent assemblies such as in Bolivia, Ecuador, Venezuela']*

thereby exemplifying weak constitutionalism. A similar approach is also discussed by Said Amir Arjomand in '*Law, Political Reconstruction and Constitutional Politics'*[28]

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[25]A Negri 'Democracy in Hans Kelsen's legal and political theory philosophy and social criticism' 2006 Vol 32(5) 589

[26]F Venter in A Jyranki Ed. 'Constitution making and the legitimacy of the constitution in national constitutions in the era of integration' *The Hague Kluwer Law International* 1999 21

[27]H Kelsen 'The function of a constitution' in C Richard Tur *et al* ed Essays On Kelsen Clarendon Press Oxford (1986) *Hans Kelsen General theory of law and state* Cambridge MA Harvard University Press1929

[28]SUNY at Stony Brook International Society March 2003. Vol 18 (1) 7 -32 SAGE London Thousand Oaks CA & New Delhi 02685809 (200303)18 :1732

A refreshing and attractive perspective of the IDEA approach is its conceptualisation of three rungs of legitimacy i.e. the legal (conformity to legal rules), political (national ownership and or sovereign independence of its adopters) and lastly the opposite moral legitimacy:

> *'embodied by a close relationship between the constitution and the shared values that underlie the moral basis of the state; in addition the constitution may aim at goals such as societal reconciliation, forgiveness after prolonged victimization, social inclusion and moral rejuvenation of the state…… the legitimacy of a constitution can be buttressed through the process by which it is built'*

It proceeds to offer the following sage advice to quieten the excitement of would be constitution making panaceatic hopefuls:

> *'Constitutions are not self executing: to achieve desired outcomes, interest groups must vigilantly press for and demand nearly all the positions already agreed in the constitution. A constitution will set out a framework for accomplishing particular objectives. Institutions matter, but it also matters when leaders engage as the constitution contemplates.' … This commitment to engagement the Guide envisions as 'constitution-building'* [29]

1.13.1 Theoretical Perspectives On The Human Rights Culture and Tax law

According to IDEA

> *A human rights culture is one in which the society values human rights to the extent that most, if not all official decisions aim to maximize the right. A strong or vibrant human rights culture evolves when the actions of public officials and institutions, and those other dominant actors in society, habitually honour rights, prevent violations and assist victims. In the absence of a culture of respecting rights, constitutional guarantees become worthless'*[30]

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[29] as above

[30] IDEA 'A practical guide to constitution building: building a human rights culture'_Winluck Wahiu Stockholm 2011 4

In addition, the United Nations has contributed to internationalizing human rights ethos in constitutions through the aegis of obligations under international law, by way of its 'core' international human rights instruments which are:

i. The Universal Declaration Of Human Rights (Universal Declaration) 1948 albeit not a treaty
ii. The International Covenant On The Elimination Of Racial Discrimination (CERD) 1965
iii. The International Covenant On Civil And Political Rights (ICCPR) 1966
iv. The International Covenant On Economic, Social And Cultural Rights (CESCR) 1966
v. The Convention On The Elimination Of All Discrimination Against Women (CEDAW) 1979
vi. The Convention On The Rights Of The Child (CRC) 1989
vii. The Convention Against Torture And Other Cruel, Inhuman And Degrading Treatment And Punishment (CAT) 1984

IDEA posits that the inclusion and scope of a human rights culture will be shaped by the type of process used to frame the constitution and the nature and type of the constitution and discusses various opportunities in and strategies of navigating the pitfalls towards a human rights culture in a conflict situation.

It is the following statement which explains the widespread difficult quest for a formula to entrench a human rights culture through constitutional reform, which echo Hamilton[31] . It is in response to a founding father of America's constitutional democracy James Madison's interesting view observed by Robert S. Peck[32] of doubt that a Bill Of Rights would be a useful addition to the constitution as he feared it would be violated repeatedly by populism:

> *'A constitution remains merely words on paper that can be conspirationally ignored, even by the people as a whole. The task of those who seek an efficacious*

[31] as above

[32]R Peck *The Bill of Rights and the politics of interpretation* West Publishing Company St. Paul 1992

constitutional system is to make important principles second nature to the people, to make them common reference points from which governmental authority and

Louise Olivier[33] agrees with Julius Ihonvbere 2000 on page 343 who appear to be some of the few academic writers who demonstrate that view i.e.

> 'If constitutionalism is defined in liberal political discourse as "a process for developing, presenting, adopting, and utilising a political compact that defines not only the power relations between political communities and constituencies, but also the rights, duties, and obligations of any citizens in any society," who makes or reforms it is central to its value.'

She proceeds to posit that such an approach contributes to the following as succinctly put by Ihonvbere 2000 at 343 :

'...making the constitution a living document by bringing it to the people so that they can understand it, claim ownership of it, and use it in defence of their democratic enterprise.'

Hassen Ebrahim[34] agrees, saying that the South African process is a good example of an extensive public consultation outreach that used a variety of techniques to attract lots of citizens' submissions including at least fourty seven advocates representing twenty nine political parties, organisations and individuals.

1.14 RESEARCH METHODOLOGY

This research will mainly follow the qualitative research method and the approach to be adopted is a desk or library-based research. It will rely on both published and unpublished material. The sources will include but not be limited to various writings such as books, articles and journals, treaties, conventions and agreements.

1.15 APPROACH

The researcher will be taking a desktop approach in the study since the philosophy already considered is the pragmatic philosophy.

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[33]B Ludman Ed. 'Constitutional review and reform and the adherence to democratic principles in constitutions in Southern African' countries_OSISA (2007)

[34]T Masiya & C Mutasa Eds.' Civil society and constitutional reforms in Africa' 9 2000

1.15.1 Advantages of Desktop approach

- It saves time, it's widely available and relatively inexpensive.

1.15.2 Disadvantages of Desktop approach

- May be outdated, biased and may not be information gathered specifically for your study.

1.16 PARADIGM/METHODOLOGY

This research paradigm be qualitative.

Qualitative: Qualitative research decides connections between collected information and perceptions based on numerical calculations. Theories related to an actually existing phenomenon can be demonstrated or discredited utilizing statistical methods. Researchers depend on qualitative investigation strategies that conclude "why" a particular theory exists together with "what" respondents have to say about it.

1.16.1 Advantages of Qualitative research Method:

- Shorter data collection time when compared to sequential methods
- It allows creativity to be the driving force
- It is less expensive.

1.16.2 Disadvantages of Qualitative Method:

- It is very biased creating misleading conclusions.

1.17 RESEARCH DESIGN

Blumberg[35] provides a comprehensive definition of a research design as "the plan and structure of examination so conceived as to obtain answers to research questions." In general, the arrangement is the plot or programme of the research. It includes a plan of what the investigator will do, from developing hypotheses and operational recommendations to data analysis. A research design communicates both the structure of the research problem and the plan of investigation used to obtain empirical evidence on the problem's relationships.

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[35] Blumberg 2011; 147

A research design specifies a method for gathering and analysing data. In general, the research plan can be defined as the arrangement for providing a sound and conclusive answer to research questions. It provides a platform from which answers to research questions can be obtained.

1.17.1 Explanatory designs

Employs a researcher's ideas and contemplations on a subject to advance and explore their speculations. The research clarifies unexplored perspectives of a subject and points of interest around what, how, and why of research questions.

The researcher will be looking to assess the basic cause of a particular subject or phenomenon in a diagnostic design. This strategy helps one learn more about the variables that make troublesome situations. This plan has three parts of the research:

- Beginning of the issue
- Determination of the issue
- Solution for the issue

1.18 RESEARCH INSTRUMENT(S)

A research instrument is an instrument utilized to get, measure, and analyze data from subjects around the research subject, these are also the same factors that makes research instruments very imperative. The researcher is selecting the research instruments based on a desktop method of research and therefore selecting a case study.

1.18.1 A CASE STUDY

A case study approach was identified as appropriate because it is suitable for eliciting experimental information from a specific contemporary phenomenon within real-life circumstances using various sources of evidence. When a study is limited to a small number of subjects, a case study provides explanatory information and a point-by-point level of analysis. A case study is an excellent source of ideas about the behaviour of the subjects under consideration.

Krishnasway et al (2006: 171) clarifies that a case study could be a total examination and report of a person's substance with regard to distinctive viewpoints of its totality. It can be used as a rejector of theories but cannot be emphatically utilized as a hypothesis verifier. It can portray development over time or cultural perspectives of an organization.

Fisher (2007:13) is of the view that a case study will help the researcher to focus on the interrelationships between all the factors such as technology, policies, groups, and people. This will enable us to give a holistic account of the subject of our research.

Characteristics of a case study have been identified by Yin 2006 and Fisher (2007:60) as follows:

- "It investigates a contemporary phenomenon within its real –life context, especially when the boundaries between phenomenon and its contents are not clearly evident.
- It has a single site, such as a team or an organisation, but many variables.
- A case study uses a variety of research methods and can happily accommodate qualitative data and qualitative material.
- Case study researchers tend to use theoretical propositions developed prior to the study to guide the data collection"

1.19 RESEARCH ETHICS AND LEGAL IMPLICATIONS

Ethics refers to rules or principles of conduct that guide proper choices aboutone's behaviour and relations with others [36]. The researcher will ensure that:

- There is no pressure on the librarians to perform contrary to the covid 19 restrictions, rules and regulations. This will be in accordance with the idea that the researcher must not extend any pressure on participants to be allowed access.[37]

1.20 DATA PRESENTATION AND ANALYSIS

The secondary and primary information will be put in a summary frame and analysis used, in order to improve the interpretation and presentation. Furthermore, data examination will be done keeping in intellect the research questions and objectives. Secondary data is going to be used in this research. The information collected is supposed to be data from

[36]Vaccino-Sahadere& Back ; 2021

[37]Panda ; 2021

Smith; 2016

secondary sources which will also be compared as a measure to find out the validity of the collected information. The qualitative analysis will use narration.

1.21 ORGANISATION OF CHAPTERS

The study will consist of the following sequence of chapters:

Chapter 1: Introduction

This will be the introductory orientation chapter aimed at familiarizing the reader with the whole research study. The main purpose is to define the statement of the problem and outline the aim of the study as well as to justify why it is necessary to carry out this study.

Chapter 2: The level of constitutionalism in tax matters.

The second chapter articulates the notion of constitutionalism, provides an overview perspective on constitutionalism through a comparative analysis on South Africa, China and United States of A merica on Constitutionalism and tax. The advantages of taxation are also articulated in this chapter. Further the philosophies that the judiciary uses to come to decisions in tax matters are elucidated in this chapter.

Chapter 3: How tax cases are being managed by the judiciary and interpretation of tax law.

Provides an overview of how the judiciary decides on tax matters. Further the philosophies that the judiciary uses to come to decisions in tax matters are elucidated in this chapter. The chapter seeks to give an overview on the interpretation of tax matters and how this affects the bill of rights.

Chapter 4:Principles in tax.

This chapter looks at the principles in tax law.

Chapter 5: Conclusion and Recommendations.

CHAPTER 2

WHAT IS THE LEVEL OF CONSTITUTIONALISM IN TAX MATTERS?

2.1 INTRODUCTION

Constitutionalism can be characterized as the tenet that administers the authenticity of government activity, and it suggests something distant more vital than the thought of lawfulness that requires official conduct to be in agreement with pre-fixed legitimate rules.[38] In other words, constitutionalism checks whether the act of a government is true blue and whether authorities conduct their open obligations in understanding with laws pre-fixed or pre-determined in advance. Taking this definition into consideration, it is then my view that of course we have constitutionalism in Zimbabwe in tax matters. The government is has a constitutional obligation to collect taxes from the tax payers and there is national legislation in support of the government collecting taxes. On the other hand, the last mentioned definition shows that having a constitution alone does not secure or bring around constitutionalism. The bill of rights enshrined in the Constitution is supposed to act as a substantive limitation of governmental powers, but in Zimbabwe those rights are sometimes being infringed. This infringement is emanating mainly from the procedure used in tax collection, the commissioner being given excessive powers of search and seizuire, thereby overlapping on the right to privacy, property and so on. But for a number of states which have unwritten constitutions, nowadays nearly all the nations/states within the world have constitutions. This does not, be that as it may, mean that all these states hone constitutionalism. That's why constitutionalism is distant more vital than a constitution. This chapter shall look at South Africa, Zimbabwe, China and America to effectively come to a conclusion whether there is constitutionalism or not, the level of constitutionalism in Zimbabwe in tax matters, whilst looking at the bill of rights in relation to tax.

2.2 CONSTITUTIONAL CONSIDERATIONS: A SOUTH AFRICAN PERSPECTIVE.

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[38]Hilaire Barnet, Constitutional and Administrative Law 5 (London: Cavendish Publishing Limited, 3rd edition.. 2000 (1995)

In a South African setting, coercive tax assessment has certainly advanced to a level that's accountable, particularly with the constitutional change and democratization that has taken place since 1994.[39] The introduction of an interim Constitution, [40] which was replaced by the final Constitution in 1996, [41] brought about a new era.[42] In the realm of taxation, the significance of the constitution lies especially in the fact that certain fundamental rights such as the right to privacy, property, equality, access to justice and access to information are enshrined in the Bill of Rights of the South African final Constitution.[43]

2.2.1 Substantive Limitations: The Bill of Rights

The foremost imperative substantive impediment to the government's taxing control is the Bill of Rights contained in chapter 2 of the South African Constitution, which is pertinent to all laws and binds the judiciary, legislature, executive and all other organs of the state.[44] In the Zimbabwean Constitution, a similar substantive limitation to the governments taxing power is contained in Chapter 1, Section 2 Subsection (1) and (2) where the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct conflicting with it is invalid to the degree of the irregularity and the commitments forced by this Constitution are authoritative on each individual, natural or juristic, counting the State and all executive, legislative and judicial institutions and offices of government at each level, and must be satisfied by them.

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[39]Tax Law an introduction, 2nd Edition; Thabo Legwaila; Annet Wanyana Oguttu; Elzette Muller, RC Williams; Cornelius Louw, Peter Surtees 2019.

Although members of the coloured races were generally not permitted to participate in elections, they were still required to pay taxes in the era prior 1994.

[40]Constitution of the Republic of South Africa, Act 200 of 1993.

[41]Constitution of the Republic of South Africa, 1996.

[42]Following the enactment of the interim Constitution and subsequent recommendations by the Katz Commission in Chapter 6 of its report titled 'Implications of the Constitution of the Republic of South Africa', some of the discriminatory provisions in fiscal statutes were deleted or amended. See summary and discussion by Croome BJ 'Constitutional Law and Taxpayers' Rights in South Africa- An Overview (2002) 17 (1) Acta Juridica 1 3 – 6 and Chrome PhD Thesis 11-14.

[43]Croome BJ Taxpayers' Rights in South Africa (Juta & Co Ltd 2010)

[44]Constitution of the Republic of South Africa Chapter 2 s 8 (1);

Croome BJ Taxpayers' Rights in South Africa (Juta & Co Ltd 2010)

However, the fundamental rights are not absolute in South Africa and may be restricted[45] in terms of s36, which gives that a right may as it were be restricted in terms of- law of general application to the degree that the restriction is justifiable and reasonable in an open and democratic society based on human dignity, equality and freedom, taking into consideration all pertinent variables, including (a) the nature of the right, (b) the significance of the reason of the restriction, (c) the nature and degree of the confinement, (d) the connection between the limitation and its purpose and (e) less restrictive means to realize such reason. Within the zone of tax assessment, and particularly the inconvenience of a charge, the elemental rights cherished in s9 (equality) and s 25 (property) deserve consideration. In Zimbabwe the bill of rights are also not absolute, they may be limited in terms of s86.[46]

2.2.2 Right to equality

Section 9 provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'.[47] It furthermore directs that the state may not unfairly discriminate against anyone on grounds such as race, gender , birth, language, culture, belief, conscience, religion, disability, age, sexual orientation, colour, social origin or ethnic, marital status, pregnancy or sex,[48]unless it is established that the discrimination is fair.[49] It is therefore not lawful, for example, to impose a tax that applies exclusively to a section of the community.[50]Because the fiscal statutes that levy taxes in South Africa constitute laws of general application, they do not currently discriminate unfairly on the grounds set out in s9 of the Constitution.[51]

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[45]Croome BJ Taxpayers' Rights in South Africa (Juta & Co Ltd 2010)

[46] Constitution of Zimbabwe (Amendment 20) 2013

[47]Constitution of the Republic of South Africa Chapter 2 s9 (1).

Croome BJ Taxpayers' Rights in South Africa (Juta & Co Ltd 2010)

[48]Constitution of the Republic of South Africa Chapter 2 s 9 (3).

[49]Constitution of the Republic of South Africa Chapter 2 s 9 (5).

[50]Croome PhD Thesis 17; Thabo Legwaila, Annet Wanyana Oguttu, Elzette Muller, RC Williams, Cornelius Louw, Peter Surtees The Law An Introduction 2nd Edition, Juta 2019

[51]Croome PhD Thesis 31.

2.2.3 Right to property

Section 25 (1) provides that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. Although a comprehensive description of 'property' is difficult to achieve for purposes of section 25, the term has a wide meaning.[52] The levying of a tax on a taxpayer's entitlement to certain benefits or rights would generally constitute a deprivation of property as envisaged in s 25 of the Constitution.[53]

In **First National Bank of SA Ltd t/a Wesbank v CSARS**[54] Conradie J (at 449) commented:

Taxation does not amount [in principle] to a deprivation of property. Nor is there anything which is expropriated. No one would think of claiming compensation for having been taxed. Freedom from taxation is not a fundamental right. Nothing protects the subject against taxation. Not even death… It may be different where the impugned tax is oppressive or partial and unequal in its operations… If its reach seems broader than it need be, that is no ground for a constitutional challenge.

This line of thinking is also in accordance with the internationally accepted viewpoint.[55] Thus, where a taxing measure applies equally to all citizens of South Africa, a taxpayer will generally fail to challenge its constitutionality merely because it constitutes a violation of the right to property.[56]

2.3 CONSTITUTIONAL CONSIDERATIONS: A ZIMBABWE PERSPECTIVE.

In a Zimbabwean context, taxation has also developed to a level that is accountable as enshrined in the Constitution of Zimbabwe.[57]Just like South Africa, in taxation, the

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[52]In First National Bank of SA Ltd t/a Wesbank v CSARS 2002 (4) SA768 (CC), 2002 (7) BCLR (CC), 64 SATC 471 the court stated (at para [51]) that at this stage of our constitutional jurisprudence it is… practically impossible to furnish- and judicially unwise to attempt- comprehensive definition of property for purposes of s25. Such difficulties do not however, arise in the present case. Here it is sufficient to hold that ownership of corporeal movable property must- as must ownership of land-lie at the heart of our constitutional concept of property.'

[53]Croome PhD Thesis 28;

[54]2001 (3) SA 310 (C) , 2001 (7) BCLR 715 (C), 63 SATC 432

[55]Croome PhD Thesis 32-36 discusses the approaches of the European Convention on Human Rights and the constitutional law of Australia, Switzerland, Trinidad and Tobago, India, the US, Ireland and Canada.

[56]Croome PhD Thesis 36.

[57]Constitution of Zimbabwe Amendment No 20 of 2013 Act

importance of the constitution lies in the fact that certain fundamental rights are enshrined in the Bill of Rights of the Zimbabwe new Constitution.

2.3.1Taxpayers Rights in Zimbabwe.

The right to certainty is also the basis for the contra fiscum rule which applies to ambiguous legislative provisions that imposes the least burden on the taxpayer where a statutory provision is ambiguous and capable of more than one diverging interpretation.[58]

The right entails a number of variants, however in its basic nature, it relates to the fact that a taxpayer should be given the necessary information by the Commissioner before the latter can take any form of action that affects the taxpayer's rights.

Taxpayers' rights and obligations should be clearly stated by the law. The tax laws and obligations should be brought to the attention of taxpayers and tax obligations cannot be imposed with retroactivity. According to this realization, Section 51 (2) of the Act[59] provides that the said assessment to a taxpayer should be issued whenever an assessment is carried out. Section 51 (3) also provides that the said notice of assessment shall give the taxpayer notice that any objection to the assessment shall be lodged to the commissioner within 30 days from the date of such notice. In *Barclays of Zimbabwe Limited v Zimbabwe Revenue Authority*[60] the court observed in relation to the Commissioner's assessments that a taxpayer should have no doubt as to whether a document sent by the Commissioner is an assessment in view of the taxpayer's right to object to the assessment within 30-days.

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[58]M. Tapera; AF Majachani Unpacking Tax Law & Practice In Zimbabwe 2015 Edition page 468

See also Beric Croome…etl Tax Law An Introduction

[59]Income Tax Act

[60]HH-162-04

2.3.2 Right to fair administrative action

Section 68 of the Constitution[61]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. 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. 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.”

Section 3 (1) of the Administrative Justice Act (Chapter 10:28) provides that an administrative authority which has the responsibility or power to make any action which may affect the rights of any person should act lawfully in time or within reasonable time, reasonably and fairly together with furnishing written reasons for the action so taken.

2.3.3 Right to a fair hearing

Section 69[62] provides 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. 4. Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.” This therefore implies that a taxpayer has a right to object and appeal against a Commissioner’s decision.

2.3.4 Right to objection and Appeal against Commissioner’s decision

A taxpayer is entitled to make objections to the Commissioner’s action including assessments within 30 days of the assessment. Section 62 (1)[63] provides that the objection by a taxpayer can only relate to the following:

[61]Constitution of Zimbabwe Amendment No 20 of 2013 Act.

[62]Constitution of Zimbabwe Amendment No 20 of 2013

[63]Income Tax Act

1. Any decision of the Commissioner spelled out in the 11th Schedule, or
2. An assessment made by the Commissioner on the taxpayer, or
3. The determination of a reduction of tax in terms of section 92 to 96 of the Act

While a taxpayer can truly object to the Commissioner's acts as indicated over, there's a potential inroad to this right in Section 68 and 69 of the Income Tax Act. Section 68 of the Act provides that any decision of the Commissioner other than those specified in the 11th Schedule is not subject to any objection and appeal. Section 69[64] further affects the efficacy of the taxpayer's right of objection and appeal as aptly described by Zhou J in the case of **Triangle Limited v Zimbabwe Revenue Authority**[65] that:

'…section 69 of the Act clearly states that the obligation to pay and the right to receive any tax chargeable under the Act shall not be suspended pending the decision of any objection or appeal unless the Commissioner directs otherwise. This clearly shows that the Act safeguards and protects the interests of the fiscus more where assessed taxes are still being disputed, than it does the interest of the taxpayer. The taxpayer has to pay first and should a decision against ZIMRA be made by a court later, then ZIMRA will have to refund any amounts that would have been found to have been not due."

2.3.5 Right to Privacy

The taxpayer's right to privacy is captured, at least in theory, in section 57 of the Constitution. It provides that:

"Every person has the right to privacy, which includes the right not to have –

(f) Their home, premises or property entered without their permission;

(g) Their person, home premises or property searched;

(h) Their possessions seized;

(i) Their privacy of their communications infringed

(j) …………………………………………………"

[64]Income Tax Act

[65]HB 12-11

No person shall be subjected to unlawful search of the person, home or other property of that person, or unlawful entry by others of the premises of the person. In addition, no person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

It should, however be noted that section 45(2) as read with section 86[66] shows that there is no absolute right to privacy. Section 86(2) of the Constitution on "Limitation of rights and freedoms" provides that a fundamental right may be limited 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, where it is necessary for 'general public interest'

The taxpayer's right to privacy is however affected through application of some of the provisions of the Income Tax Act, particularly those relating to the Commissioner's powers of search and seizure in order to access information from any taxpayer regarding his income, liability to tax, and any transaction.

The taxpayer's right to privacy could also be affected by the provisions of the Interception of Communications Act (Chapter 11:20). In terms of section 5 (1) (d) of the Act, the Commissioner is an authorised person qualified to apply to the Minister for a warrant to intercept any relevant communication for the purposes of administration of fiscal matters, for example ZIMRA is empowered along with the Central Intelligence Organisation, Army and Zimbabwe Republic Police to intercept mail, emails, telephones etc. on upon application to the Minister. Section 5(3), the Commissioner is required to state in the application certain information, for instance the period for which the interception is to be effected; the target person for the interception among others. Section 6 of the Act provides that the Act provides that the Minister would grant the interception warrant should he be satisfied that there are reasonable grounds that the gathering of information concerning an actual threat to any compelling national economic interest is necessary.

Based on the above it is the opinion of some authors[67] "it is not difficult for the Commissioner, as one of the authorised persons' to be granted an interception warrant for the spying of a taxpayer's activities especially where he has grounds to believe that the

[66]Constitution of Zimbabwe Amendment No 20 of 2013

[67]M.Tapera& AF Majachani; Unpacking Tax Law & Practice In Zimbabwe 2015 Edition page 471

gathering of information would result in the fiscus being enriched substantially or to reasonable extent."

2.4 A CHINA PERSPECTIVE

The issues of China's tax assessment framework uncover a major imperfection in its Structure and reflect a false understanding of tax assessment sayings. Through dissecting three major problems with regard to its income taxes, one of the most reasons that numerous businesses and common citizens throughout the nation are hesitant to pay taxes is that they appreciate few rights as citizens. According to the modern protected hypothesis and assessment law hypothesis, taxpayers' rights not as it were concern people's private property rights but relate, also, to their civil and political rights. Few Chinese sacred researchers pay sufficient consideration to the fact that limiting government could be a prerequisite to cultivating development in constitutionalism. This linkage between taxpayers' rights and constitutionalism in China and proposals by some scholars shows that China is advocating for tax laws that are in the constitution, in the hope that there may be constitutionalism since the state is viewed as having too much power at hand. Zimbabwe has a constitution that makes tax legitimate in every way, just like South Africa and United States of America. America has taken a step further by clearly stating in their constitution how the tax payers' money is to be collected and its uses. Thus Zimbabwe and South Africa are still a bit behind as nothing is said in the constitution about how the tax payers' money should be utilised.

Ordinary citizens in China[68] by and large have no sense of being citizens. It could be a common marvel all throughout the entire nation that businesses and citizens make extraordinary endeavours to maintain a strategic distance from paying their income taxes or committing tax evasion. On the other hand, common citizens, particularly labourers or workers making a living on their month-to-month pay rates, as well as ranchers in the countryside, have in truth endured appallingly from overwhelming tax burdens and other sorts of non-tax fees imposed by diverse government offices or local governments, but they remain ignorant that they are entitled to inquire for government services.

[68]From the point of view of Beijing, the People's Republic of China has four jurisdictions, i.e, the Mainland, Hong Kong, Macao and Taiwan. Their legal systems are different and the relationship between the Mainland and the other three is complicated, especially with Taiwan. This chapter is focused on the Mainland

The government's conduct is unsuitable in numerous aspects, in spite of the fact that the nation and its government have chosen that "The People's Republic of China governs the nation according to law and makes it a socialist nation ruled by law."[69] The truth, however, is that the government's actions and power does not meet the prerequisites of the "rule of law".[70] Three major problems that are in China. To begin with, the government's power in China has been growing to the degree that it enables itself not only to go past the limits of laws by way of designated enactment but moreover as often as possible to interfere with judicial adjudication, not to say ultra vires regulatory acts it takes and self-assertive uses of its discretionary power. The government budget is as well hazy to know its subtle elements and not accessible to the public, and the power to force taxes is ineffectually controlled by laws, causing serious corruption among government authorities at numerous levels. This unavoidably prevents the state from accomplishing the "rule of law". It moreover incredibly harms common citizens' private property rights and it exasperates market autonomy. Third, fundamental human rights assurance is far from adequate. The huge gap between poor and wealthy has ended up a more serious social issue than ever before. Serious problems exist with regard to the quality and quantity of government administrations.

On the surface, the people's tax avoidance and unbridled government have small close link. However, from the viewpoint of the constitutional hypothesis that tax compels a government's fiscal power, a coordinated association between the two may really exist. How to advance toward a restricted government in China may be a troublesome question. Numerous politicians and legal researchers have put forward a few suggestions, such as

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[69]The new paragraph was added to Article 5 of the Constitution as the first paragraph in the Amendment of the Standing Committee of the National People's Congress (SCNPC) to the Constitution of the People's Republic of China on 15 March 1999.

[70]"Rule of law", as numerous researchers have contended, is an "essentially contested concept". Randall Peerenboom categorized it into two sorts: thin and thick. He clarified that "[a] thin hypothesis stresses the formal or instrumental perspectives of rule of law"; "a thin rule of law requires procedural rules for law-making and laws must be made by a substance with the authority to create laws in understanding with such rules to be substantial; and "a thin rule of law requires freely proclaimed laws, comprehensible in progress, that is by and large prospective rather than retroactive, moderately clear, steady, with other laws, and subject to fast changes". In contrast to thin adaptations, thick or substantive conceptions start with the essential components of a thin concept of rule of law but at that point consolidate components of political profound quality such as specific financial arrangements (free-market capitalism, central arranging, etc), forms of government (democratic, single party socialism, etc), or conceptions of human rights (liberal, communitarian, "Asian values", etc). Peerenboom maintains that modern China "is within the middle of a move toward a few adaptations of rule of law that measures up favorably to the prerequisites of a thin hypothesis. See Randall Peerenboom, China's Long Walk toward Rule of Law (Cambridge: Cambridge College Press, 2002), pp 3, 6.

through the “political method”[71]or the “cultural way”,[72]but tragically, these solutions cannot palatably answer the question. This chapter keeps up that by drawing on the constitutional meaning of tax collection and the legal frameworks utilized to force taxation, certain fundamental, promising steps might be taken to assist China to construct a constrained government in understanding with the “rule of law”.

2.4.1 Tax Theory and the Right to Tax

In a constitutionalized nation, the government's control of tax isn't blessed with the birth of the state but infers eventually from the private property rights possessed by common citizens. [73]

From a constitutional viewpoint, a government infers its powers from the extreme assent of those who are governed. The power to tax is one illustration of such a power. It is suggested that the authorized agent of impelling, the government, may be limited in its extend of action by a constitution.[74]

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[71]For occurrence, Mao Zedong, the first Chairman of the People's Republic of China, kept up that the basic way to constitutionalism is “revolution”. See Mao Zedong, “Xin Min Zhu Zhu Yi Xian Zheng [New Democratic Constitutionalism]” in Mao Zedong Xuan Ji [Choices of Mao Zedong] (Beijing: Renmin Press, 1991), Vol II, p 732.

[72]Wang Renbo, Xian Zheng De Zhong Guo Zhi Dao [The China's Way to Constitutionalism] (Jinan: Shan Dong People's Press, 2003), pp 1-22. For illustration, Wang Renbo demonstrated that western constitutionalism was born on the premise of its cultural conventions and was the characteristic result of its social and cultural evolutionary advancement. On the contrary, China does need a truly mature cultural premise for such a sort of constitutionalism, in spite of the fact that it contemporarily presented western constitutional hypotheses and considerations to its legal and social systems.

[73]Niclas Berggren, “Social Order through Constitutional Choice: A Contractarian Proposal” in Niclas Berggren, Essays in Constitutional Economics (Stockholm, Sweden: Economic Research Institutes, Stockholm School of Economics, 1997), pp 16-19. There, certainly, may be different views on this issue, the original source of government powers. Those who criticise the Buchanan view take a range of differing views. This chapter does not attempt to discuss these debates at length since it would distract attention from its main purposes. The chapter is, in the main, adopting the Buchanan view. It agrees with him on the point that the power to tax is ultimately drawn from the consent of citizens. As to what kinds of consent it obtains and by what rules it obtains consent, these are not this chapter's main concerns. Another research work incorporated basic elements from the version presented in the works of James Buchanan. It argued, through clarifying its normative base and core idea for constitutional choice, that the normative basis for the contractarian enterprise is unanimous agreement among individuals. This basis follows directly from the central notions of methodological and normative individualism, the latter of which can be motivated on epistemological grounds or because the individual is, quite simply, seen as the ultimate sovereign in matters of social organization.

[74]Geoffrey Brennan and James M. Buchanan, The Power to Tax: Analytical Foundations of a Fiscal Constitution (Cambridge: Cambridge College Press, 1980), pp 1-2.

Some recommendations have been made by some scholars in China to constitutionalise the tax system in China in the hope that this would create a limitation of governmental powers in tax collections. I am of the view that this has been tried and tested in Zimbabwe. Though there is constitutionalism in the operations pertaining to tax. The government still has overwhelming power over tax because tax in itself is compulsory in nature and the government has the constitutional right to collect taxes such that the right to property, the right to privacy and so on, of a tax payer seize to be considered and are over-rided by the objective of collecting tax only.

2.5 AN AMERICAN PERSPECTIVE

Congress in the United States has the authority to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[75]

Historically, the US Supreme Court had always regarded an "income tax" as a tax that only took the form of a direct tax, until the 16 th Amendment's passage blurred the distinctions. Excise taxes were not considered "income taxes" by the court. The Supreme Court explicitly noted in numerous instances between 1913 and 1921 that the various tax acts approved by Congress that imposed excise taxes under the pretense of "income taxes" were not indeed "income tax acts."

The US Constitution establishes two "rules" regarding how the national government might levy direct and indirect taxes, in addition to permitting such taxation. The many states that may be a part of this Union must receive an equal share of direct taxes.[76] All duties, imposts, and excises (indirect taxes) must be the same across the country.

It is safe to argue that apportionment demands that the population data from the most recent census be used to spread the tax burden equally among the states of the Union, despite the fact that there has been some controversy about what it actually implies in a political sense.

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[75]Article 1,Section 8 of the Constitution of America.

[76][See I, Section 2, Clause 3 and I, Section 9, Clause 4]. American Constitution

Uniform taxation refers to the principle that every taxpayer will pay taxes at the same rate at which every other taxpayer would pay taxes in the same situation. For instance, if someone makes 80 proof black rum in the Virgin Islands and imports it at the port of New Orleans, he will pay the same tax as any other man who would make the same move. However, it is constitutional for a man to be taxed at a different rate if he imports 100 proof black rum from the Virgin Islands and ports at New Orleans because his situation (importing 100 proof rum) differs from the first guy's (who imported 80 proof rum).

What the 16th Amendment might have been intended to achieve openly or otherwise, is how shady its politics were, or whether or not it was lawfully ratified are all possible theories.

In this period, we will keep to "what is."

2.5.1 The Right to Property

Some academics refer to the 16th Amendment as "dastardly" not because of the politics involved in its drafting or purported ratification, but rather because of the massive government theft of property from the American people that resulted from the great misunderstandings that followed its purported ratification. To suggest that the 16th Amendment has led to the biggest fraud ever committed by a government against its citizens some writers say is a factual statement. It is my submission that if the American Government can use the 16th amendment to defraud its citizens. 'Can one possibily say that constitutionalism exists in America?' For me the answer is that yes its there but only being used to disadvantage and infringe the rights of the tax payer.

Some authors use the word "fraud" because one of the elements of fraud is failing to speak up when one has a clear obligation to do so. In this case, the American government has an obligation to inform the public that the majority of Americans do not owe any Subtitle "A" or "C" taxes, either under the original terms of the Constitution or under the purported authority of the 16th Amendment.

The federal government routinely seizes property that is not legally subject to seizure, regularly drags non-taxpayers into regulatory administrative tribunals, and repeatedly throws people in jail for failing to pay a tax they never actually owed. This is done with the cooperation of the state governments. The 16th Amendment's existence is the only reason why all of this government lying and manipulation is ever conceivable.

The 16th Amendment was an attempt to overcome the purported tax restrictions placed on the national government by the US Supreme Court's ruling in the case of Pollock v. Farmer's Loan and Trust Co.,[77] through a constitutional amendment (1895). While it is believed that, in light of the Pollock ruling, the 16th Amendment is entirely unneeded, that explanation would require a whole different essay.

According to the 16th Amendment, the Congress has the authority to impose and collect taxes on incomes, regardless of their source, without consideration to how the money is distributed among the many States or to any censuses or enumerations. This means that the American government is no longer limited in any way the rights of the tax payer are infringed and the American government, hiding behind the concept of constitutionalism and the amendment is part of the legislation, constitutionalised.

The 16 th Amendment says: The Congress shall have power to lay and collect taxes on incomes,

from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

A direct tax has historically been imposed on an individual's person, real property (including slaves), or the exercise of other fundamental rights. A tax on one's property's fruits, such as getting money for renting out real estate, was also known to them as a direct tax, unless the earnings came from privileged activities in which case they were subject to an excise tax.

According to the US Supreme Court's ruling in Pollock, a tax on income generated from one's existing property (real or personal) must be regarded as a direct tax that is subject to the apportionment rule.

This caused worry in banking and government circles because they believed—and the Americans concur—that companies were a product of government legislation, and as a result, their benefits should have been subject to an excise tax.

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[77] 157 US429

In other words, the Pollock ruling did not distinguish between a guy receiving a rent payment from his own land and a man receiving a return on his investment in a business. The former must be correctly regarded as a direct tax, whereas the later must be correctly regarded as an excise. The man's apartment's rent

But since the state created the company in the first place, any profit or gain (to a shareholder) from a corporate enterprise should be seen as income that is subject to taxation as an excise taxable activity.

We may never know if the drafters of the 16th Amendment had a genuine concern that Pollock might be used to challenge the 1909 Corporate Tax Act or if it was just a handy justification for trying to change the Constitution's tax law (i.e. apportionment for direct taxes).

Fortunately, it doesn't matter what they may have intended; what counts is what was actually achieved. The 16th Amendment's definition has been the subject of numerous decisions by the US Supreme Court. It can be challenging to understand the rulings consistently or to assign all the cases a single, agreed-upon meaning, nevertheless, because each case has unique facts. Fortunately, since the Court has been extremely clear on the definition of "income" as defined in the 16th Amendment, we don't need to spend a lot of time bringing together all the different details of each case.

That definition is quite important because the Amendment only gives Congress the authority to "lay and collect taxes on earnings."

According to the US Supreme Court's ruling in the Brushaber case, any tax legislation that falls inside the 16th Amendment's purview must be correctly regarded as an excise and is not subject to apportionment.

A direct tax can be effectively created by the Executive Branch's incorrect enforcement of an indirect tax. In that case, the US Supreme Court has ruled that it is necessary for it to deem the old excise tax to be a direct tax without apportionment and, as a result, unconstitutional.

2.5.1 Advantages of Taxation in United States Of America

Federal income taxes are an annual responsibility for many.Taxation is one of the essential functions of government and a fact of life for taxpayers that requires compliance and planning. Income, wealth and sales taxes reduce how much money consumers need to

save or spend. Corporate taxes put some strain on retail businesses, but regardless of the source, taxpayers' money goes to some of the same causes.[78]

2.5.2 Finance governments

One of the most fundamental benefits of taxes is that they allow the government to spend money on basic operations. Article I, Section 8 of the US Constitution lists reasons why the government may tax its citizens. This includes raising an army, paying foreign debts and running a post office. By funding military and security forces, taxes protect Americans. The state administration, which does everything from passing laws to promoting national policies, would not exist without the taxpayers' money needed to cover expenses.[79]

2.5.3 Wealth redistribution

Taxes also distribute wealth between taxpayers and those receiving government assistance. Taxes like the federal income tax are progressive taxes, meaning wealthier taxpayers pay a larger proportionate amount of tax. For those who support progressive taxation, this type of taxation contributes to greater economic and social equality in society. The benefit of this is that the wealthiest taxpayers help fund programs that benefit low-income and middle-class citizens, while also contributing to the basic services to which all taxpayers have equal access. These are the same programs and services that make wealth possible in the first place.[80]

2.5.4 Taxation of consumption

Some taxes only apply to certain products, which has the advantage of reducing or discouraging consumption. For example, government taxes on alcohol and cigarettes help moderate their consumption. Cigarette taxes also fund anti-smoking campaigns, which benefit public health. Government gasoline taxes help reduce gas demand and curb international oil demand while protecting the environment from overconsumption.[81]

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[78] Dennis Hartmen; https://www. sapling.com/7288080/advantages-taxes/ o6 July 2022

[79] Dennis Hartman; https://www. sapling.com/7288080/advantages-taxes/ o6 July 2022

[80] Dennis Hartman;https://www. sapling.com/7288080/advantages-taxes/ o6 July 2022

[81] https://prosancons.com/pros-cons-of taxation 06 July 2022

2.5.5 Local taxes

State and local governments, like the federal government, rely on local income and sales taxes for their basic functions. Other local governments also levy property taxes. These corporations, which may include states, cities, counties, school districts, and fire districts, fund everything from fire departments and highway construction to public schools through the taxes that owners pay each year. Municipalities can also encourage population growth by lowering tax rates, which can benefit the local economy.[82]

2.5.6 Special projects

Taxes also give voters and taxpayers the ability to select and fund specific projects that they feel are needed by their communities. This is the case when voters vote for or against a particular proposal or voting measure that involves a temporary tax increase to fund a particular project. Improvements in public transportation, infrastructure and schools are some of the programs that voters may need to consider in an electoral action.

Taxation is an essential task of the state. Without taxes, governments will not be able to support various social programs such as developing infrastructure, providing social security, and providing medical care to the public.

Taxes can reduce how much money a consumer spends or saves, and every taxpayer must comply with tax regulations set by the government. Taxes paid include income tax, sales tax or property tax.

2.5.7 Keep people out of poverty:

Tax payments help build a social network that keeps people out of poverty. Funds contributed by paying taxes can be used to help the poor.[83]

2.5.8 Fair and Just:

Taxes are usually progressive or proportional and each individual is charged based on their ability to pay. Everyone knows their tax liability.

2.5.9 Discourage the use of harmful products:

[82]https://prosancons.com/pros-cons-of taxation 06 July 2022

[83]https://prosancons.com/pros-cons-of taxation 06 July 2022

Some products may be taxed to discourage their consumption. To protect public health, taxes may be levied on smoking cigarettes and alcohol products.

2.5.10 Encourage domestic industries:

The government imposes tariffs on imported goods to encourage greater consumption of products from local industries rather than foreign industries. Anyone who is active in the export business pays less tax.[84]

2.5.11 Controlling Inflation:

Taxation can be used as a means of controlling demand-pull inflation by raising various tax rates. Increasing the taxation of various products will limit their consumption.

2.5.12 Good credit rating

If companies pay the right taxes, they get good credit ratings from financial institutions and other bodies.

2.6 CONCLUSION

It is my opinion basing on the above that in tax matters the government controls the stakes at play. The government is always benefiting at the expense of upholding the rights of the taxpayer. The Bill of rights is only existing in theory. Yes Constitutionalism exists, but there is constitutionalism in theory, our legislation, our constitution provides for constitutionalism but in practice, in tax matters, there is no limitation to governmental powers, there is no equity, the government as the tax collector is above the tax payer. What makes a tax is its compulsory nature. The government possesses this excessive unlimited power to make sure that tax is collected. Tax is collected even when there is going to be an infringement of property rights. In other words constitutionalism does exist in Zimbabwe, in our legislation, the courts are merely coming up with decisions based on the law that is in existence but the procedure for collection of taxes leaves a lot to be desired.

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[84]https://www. sapling.com/7288080/advantages-taxes/ o6 July 2022

CHAPTER 3

How are tax cases being managed by the judiciary and interpretation of tax law?

3.1 INTRODUCTION

Despite the constitutional power and the legislation authority that the state has on tax collections. The Judiciary in Zimbabwe is further leaning more in favour of tax collections even at the expense of the bill of rights. Of course, it is agreed that the bill of rights are not absolute in nature, there are limitations to them. It is also agreed that tax collection is also constitutionally protected by the Zimbabwean Constitution which has taken tax law to another higher level through Section 298(2) of the constitution which provides as follows; "No taxes may be levied except under the specific authority of this constitution or an act of parliament." It becomes worrisome to know that there is not a time that has been recorded in the courts were the bench has leaned towards upholding the constitutional rights of tax payers. It is also a troubling aspect of excessive dismissal of cases on technicalities. The avoidance has not only been via procedural technicalities before merits are considered, but even after the merits have been considered.[85] In this chapter, I will look at different court cases that have been decided in Zimbabwe.

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. Tax is in itself a politically sensititive matter throughout the world including in Zimbabwe. Hence, the courts will tend to use even the political question doctrine to decide on Tax matters so that the executive remains in control with tax issues. Constitutionalism will remain at forefront as the government is said to be following enacted regulations and in line with the constitution, yet it remains known that there is no equity when it comes to tax issues, the state remains with the upper hand whilst the tax payer is bound to pay tax.

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[85]The Judiciary and the Zimbabwean Constitution; James Tsabora

The early years of implementation of the 2013 Consitution by Zimbabwe's Constitutional Court: Spotlight on Human Rights, rule of law and Constitutional interpretation; Musa Kikaa

The Murowa Diamonds v ZIMRA & Anor[86] gives us an insight on how the courts reach their decisions on constitutional challenges pertaining to tax issues.

Among other things, the applicant challenges the constitutional validity of the statutory tax regime that empowers the first respondent to unilaterally incept tax collection mechanisms to recover outstanding tax even if that tax be genuinely in dispute. Specifically, the applicant moves the court to declare s 58 of the Income Tax Act to be in conflict with s 56(1) and s 68(1) of the Constitution of Zimbabwe. Section 58 of the Income Tax Act is the provision that empowers the first respondent to invoke coercive recovery measures to collect any tax as may be outstanding, due and payable, and as assessed by itself. Invariably, the first respondent does this by a process of garnishment of a tax payer's bank accounts, or levying attachments on any such amounts as may be held by third parties on behalf of the defaulting tax-payer.

The foundational legal basis for the applicant's claim is that s 58 of the Income Tax Act permits the first respondent to resort to extra-judicial self-help in the recovery of bona fide disputed liabilities and is therefore in conflict with the Declaration of the Bill of Rights in the Constitution that guarantees to all persons the right to equal protection of the law, non- discrimination and the right to administrative justice.

It is my submission that I am in agreement with the applicant's foundational legal basis. Constitutionalism is supposed to be a limitation of governmental powers, yet in this case the respondent is furnished with excessive powers for the purposes of making sure that taxes are collected despite the negative impact it has on the sustainability of the bill of rights. The collection of tax is given priority by the government, by the legislature and by the judiciary at the detriment of the bill of rights. At the same time, it is also prudent to take note that the same constitution is giving the government full authority to collect taxes without any obstacles in place. The Income Tax Act further mandates the government to collect taxes. Therefore, one can also submit that tax collection is constitutionally protected by the constitution as well. There are no limitations to the collection of taxes, the bill of rights are supposed to be the substantive limitation to the governments collection of taxes but in Zimbabwe tax collections comes first before

[86]HH 125-20

HC 156/18

upholding the Bill of Rights. One cannot thereafter proceed to articulate that there is no constitutionalism as the government is acting within the parameters of the law and the judiciary is implementing what is stated by the law, but obviously leaning in favour of tax collections instead of upholding the Bill Of Rights.

s 56(1) and s 68(1) of the Constitution read: "(1) 56 Equality and non-discrimination (1) All persons are equal before the law and have the right to equal protection and benefit of the law." "68 Right to administrative justice (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

As a preliminary point, the first respondent objects to the dispute before me being dealt with as a constitutional point deductible. The first respondent maintains that that dispute can easily be resolved without resort to constitutionalism by merely applying domestic legislation and relevant principles.

On the merits, both respondents argue that the tax recovery powers reposed in the first respondent by s 58 of the Income Tax Act are not unconstitutional; that they are reasonable and necessary for an efficient revenue collection system in a constitutional democracy and that they are exercised by virtually all the jurisdictions around the world.

In light of the argument made by the respondents on the merit, I am of the view that indeed, the tax recovery powers in the first respondent by s 58 of the Income Tax Act are not unconstitutional. In as much as they are necessary for an effective revenue collection system in a constitutional democracy and that they are exercised by all the jurisdictions around the world. I am not sure if I agree that the powers are "reasonable" as articulated by the respondents. It is my submission that s58 may be constitutional but there is no constitutionalism in it, the tax collector has too much power, the legislature has given the tax collector too much power in the existing legislation and the judiciary is in turn leaning more in favour of the government when deciding on tax matters because of the existing legislation that is already giving too much power to the government. This is being done at the expense of violations of the Bill of rights whilst hiding behind the constitutional limitation that there is no absolute right to the Bill of rights, yet the same Bill of right is supposed to be the only thing with a substantive limitation of governmental powers, but as it stands right now, it is to no avail.

The applicant received a letter from the respondent and the sting was in the last paragraph which read: “In light of the foregoing position, you are required to make your payments as agreed in the meeting of 24 November 2017. Kindly take note that the recovery measures will be instituted accordingly against the company in the event of failure to comply with this request.”

The applicant perceived the letter to be the first respondent’s intention to invoke its powers in terms of s 58 of the Income Tax Act to garnish the applicant’s bank accounts. As such, the applicant feared that such a development would so severely cripple its financial standing as to ground its operations and threaten its going concern status. Therefore, in order to avoid such Armageddon, the applicant made payment arrangements on a without prejudice basis. But it also filed a formal appeal to the Special Court and, at the same time, mounted this constitutional challenge.

A determination whether s 58 of the Income Tax Act is in conflict with s 56(1) and s 68(1) of the Constitution of Zimbabwe.

First the determination whether or not the alleged constitutional challenge violates the doctrine of ripeness and avoidance. Simply put, this doctrine says where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. There is a glut of cases on the point, both from this jurisdiction and elsewhere: e.g**. S v Mhlungu & Ors 1995 (3) SA 867, at p 895E.** In this jurisdiction, Ebrahim JA put it this way in **Sports and Recreation Commission v Sagittarius Wrestling Club & Anor 2001 (2) ZLR 501 (S), at p 505F - H:**

“Courts 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.”

In the **Sports and Recreation Commission case** above, the constitutional challenge failed partly on the basis of the ripeness and avoidance doctrine when the Supreme Court found that the applicants were not challenging any law, but merely an administrative decision against which they could have appealed to the Administrative Court, or taken on review.

I consider that the doctrine of ripeness and avoidance is a necessary restriction in any legal system. All legislation is valid until set aside. In **Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority 2014 (2) ZLR 78 (C),** Malaba DCJ, as he then was, held that any court faced with an application challenging the constitutionality of a statutory provision is required to proceed on the assumption that the legislation is constitutionally valid until the contrary is clearly established.

The applicant argues that now, or in these proceedings, is the time to decide the constitutional validity of s 58 of the Income Tax Act and that the doctrine of ripeness and avoidance should not be invoked to block a determination of that issue because the nature of the specific remedy that it seeks solely depends on the declaration of constitutional invalidity of that section.

PAY NOW ARGUE LATER CONCEPT

The court held that: By the powers vested in the first respondent by s 58 of the Income Tax Act, the applicant is at risk of its monies held by third parties, such as its bankers, being hived off and appropriated to the fiscus by the first respondent. In terms of s 69 of the Income Tax **Act, neither** does an objection against a tax assessment nor an appeal to the Special Court suspend the taxpayer's obligation to pay. This is known the world over as the 'pay-now-and-argue-later' concept of revenue collection by the revenue collector of government.

Built into this pay-now-and-argue-later principle is the power reposed in the collector of revenue, to enforce payment without first resorting to litigation. That is the power given s 58 of the Income Tax Act. In practice, the first respondent issues orders akin to garnishments against third parties who may be owing monies to the defaulting taxpayer. To do this the first respondent does not need a court order. It is not obliged to precede the garnishment with any notice to the defaulting taxpayer. Its power to do so is not suspended by the fact that the taxpayer may be disputing the liability or that he may have lodged an objection or appealed the assessment.

In casu, the applicant is not challenging the pay-now-argue-later principle even though in its heads of argument there seems to be some gratuitous or stray argument suggesting that the constitutional challenge is against both s 58 and s 69 of the Income Tax Act. The draft order clearly impugns s 58 only.

RIPENESS AND AVOIDANCE

The constitutional doctrine of ripeness and avoidance does not apply in this case because the first respondent has already advised of its intention to invoke garnishment procedures. At any time, it may pounce. There is no way the applicant may legitimately stop it. No other person, not even a court of law, can stop it because it has the power and the force of the law behind it, unless of course, if it has strayed outside the four corners of its mandate: **see Fairdrop Trading (Private) Limited v Zimbabwe Revenue Authority HH 68-14; Mayor Logistics (Pvt) Ltd, supra and Zimbabwe Revenue Authority v P (Pvt) Ltd 2016 (2) ZLR 84 (S).** Only until that law is declared unconstitutional can the applicant get any reprieve. The applicant's remedy depends entirely **on the** constitutional point. In the premises the preliminary point is decided in favour of the applicant

In a bid to determine the unconstitutionality of s 58 of the Income Tax Act. It is argued that such self-help powers are draconian. They are executed outside the purview of any judicial supervision. The first respondent is the prosecutor, judge and executioner in its own cause. A law that permits one party to a dispute to resort to such unilateral powers is repressive and repugnant. It is discriminatory. It is contrary to s 56(1) of the Constitution. It also violates s 68(1) of the Constitution in that it impedes one's right to administrative justice from an impartial court or tribunal.

The applicant further argues that the remedies provided by the tax legislation are woefully inadequate. Among other things, by the time an objector gets reprieve, he will probably have gone bankrupt. For example, the amounts sought by the first respondent in this case are staggering. And in practice, the first respondent never gets to pay back if its assessments are set aside. It merely passes on a credit. A law that permits such kind of inequality and unfairness is disproportionate to any right sought to be protected. It is unreasonable, unfair, unnecessary and unjustifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

The Administrative Justice Act, Cap 10:28, is the Act of Parliament contemplated by s 68(3) of the Constitution to regulate administrative conduct. Section 3(2) of that Act provides that for an administrative action to be taken in a fair manner, an administrative authority shall give the person whose rights, interests or legitimate expectations may be affected by such action adequate notice of the nature and purpose of the proposed action, and a reasonable opportunity to make adequate representations.

The applicant submits that, in contrast, s 58 of the Income Tax Act does not require the first respondent to give either a notice of its intention to invoke garnishment procedures, or a reasonable opportunity for the targeted taxpayer to make representations. It submits that, apart from this being a constitutional breach, the conduct is also in conflict with the common law rules of natural justice, namely:

 audi alteram partem, that provides that no man shall be condemned without being afforded the chance to make representations, and

 nemo judex in sua causa, that provides that no man shall be judge over his own cause.

COMPARISONS WITH OTHER COUNTRIES

Mr Mafukidze makes comparisons between our tax regime and those in other countries like South Africa, United States of America, Canada, India and the like. His argument is that modern tax legislation incorporates, inter alia, the obligation of the collector of revenue to give some period of notice to the targeted taxpayer. It also gives guidelines on how the collector of revenue may deal with an objection to a tax assessment. In South Africa for example, some of these guidelines include:

 the consideration whether the recovery of the disputed tax will be in jeopardy or whether there will be a dissipation of assets;

 the compliance history of the taxpayer;

 whether prima facie fraud is involved in the origin of the dispute;

 whether payment will result in irreparable hardship to the taxpayer;

 whether the taxpayer has tendered adequate security for the payment of the disputed tax.

The applicant's case is that s 58 of the Income Tax Act, not being compliant with modern tax regimes elsewhere, it being in violation of the common law rules of natural justice, and, above all, it being in conflict with constitutional provisions, must be struck down and deleted from the statute books.

Section 86 of the Constitution provides for the limitation of rights and freedoms. In paraphrase, it says the fundamental rights and freedoms set out in the Bill of Rights 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, taking into account all relevant factors. One of the factors listed by this section as being relevant to the limitation of rights and freedoms is whether such limitation is necessary in the interests of, among others, the general public interest.

There can be no callipers to measure with absolute precision concepts like reasonableness, proportionality or fairness in the derogation of rights for the public good. These are concepts of a general application, to be considered objectively in any given case. I acknowledge the difference between value added tax and income tax, and the force of Mr Mafukidze's argument. But the first respondent is the Biblical Caesar. Like every other subject, the applicant is under the injunction: 'Give to Caesar the things which are Caesar's' 5 . As observed by Binns-Ward J in Capstone 556 and Khu, this is an injunction that does not rest easily with taxpayers. Thus, some smart operators craft tax evasion or avoidance schemes. Others take on Caesar headlong. But Caesar is reposed with enormous powers and all sorts of instruments. He has a standard argument. Public policy demands that revenue inflows to the fiscus should not be interrupted by frivolous objections. An efficient tax collection regime is the life blood of all modern societies the fiscal wheels of which must continue turning.

The power given to the first respondent by s 58 of the Income Tax Act should be looked at in context. Briefly, the respondent's powers begin with the right and obligation to levy and collect taxes in terms of s 6. They then include the power in s 45 to make tax assessments and to make estimates of taxes due from such of the information as may have been provided by the taxpayer. They then proceed to the power in s 46 to levy penalties on taxes due and unpaid; the power in s 58 to appoint another person to be the agent of a taxpayer where there is some money due by the agent to the taxpayer, and then the power to penalise the agent for any breach of this obligation. Section 69 empowers the first respondent to insist on payment of any tax as levied pending the determination of any objection or appeal against a tax as charged.

I find the applicant's argument on equality rather flawed. Caesar is not equal to his subjects. The applicant and the first respondent may be two parties to a dispute. But that is as far as the equality goes. The respondent must collect the tax due to the fiscus. Government business must not grind to a halt by reason of glitches in the recovery process. The first respondent must be clothed with powers to effectively collect the tax. It must be equipped with powers and instruments to overcome roadblocks in its collection

mandate. The first respondent is an administrator. It cannot be said to be equal to the taxpayer. Section 56(1) of the Constitution does not apply. It addresses a position altogether different from the applicant's situation herein. This was crisply set out in **Nkomo v Minister of Local Government, Rural & Urban Development & Ors 2016 (1) ZLR 113 (**CC). Ziyambi JCC said : "The right guaranteed under s 56(1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to find his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain person have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons."

The applicant's further argument that the power given to the first respondent in s 58 is disproportionate to the need to protect any national interest or that such power is unreasonable, unfair, unnecessary and unjustifiable in a democratic society that is based on openness, justice, human dignity, equality and freedom, is equally flawed. Firstly, the applicant's approach to target for impeachment only s 58 of the Income Tax Act against a whole gamut of the tax legislation is rather curious and somewhat irrational. The respondents questioned such an approach as early as the opposing affidavits. Only in the heads of argument is there an attempt to include s 69 for impeachment. But no amendment was sought. The draft order still seeks relief as against s 58 only.

Secondly, and more importantly, tax legislation is complex. It is intricate. The provisions are interrelated. They are interdependent. The whole tax regime is designed to achieve one purpose: the efficient recovery of outstanding taxes unhindered by disruptive and interruptive objections and legal processes. This stems from public policy. Tax legislation is like a gear with several cogs, a wheel with spokes. It makes no sense to me to seek to knock down one cog or one spoke. All what that will do is to impede the flawless function of the gear or the wheel. In the present case for example, if the first respondent has assessed the tax due by the applicant who does not impeach s 69 that allows such tax to

be recovered even in the face of an objection, I see little point or the justification to hamstring the first respondent and disable it from going all the way to recover the tax due. What the applicant attacks in this application is the recovery method. Yet one would imagine that, as the respondents argue, that is the tail-end of the entire tax recovery process. The pith of the applicant's problem is the legislative provision that allows an impugned tax to be recovered, that is, the pay-now-and argue-later principle.

The pay-now-and-argue-later principle of tax collection is so entrenched in our legal system. It is futile to isolate for impeachment a single provision out of the whole gamut. I acknowledge that the South African Constitutional Court left open scrutiny of this principle as it relates to income tax particularly.

In Capstone case, it was said different considerations may apply. But I am not persuaded that any such different considerations have been identified in the present case as to warrant the plucking out of s 58 from the statute books so as to restrict the powers of the first respondent to recover outstanding tax.

The applicant's submissions regarding the Administrative Justice Act gloss over the fact that the powers given the first respondent in s 58 of the Income Tax Act are the tail-end of the recovery process. Preceding them is the provisions allowing for intense engagements between the first respondent and the taxpayer. The records over which the first respondent uses to audit and re-assess the impugned tax are those of the tax payer. The taxpayer himself first makes a self-assessment. The taxpayer is given the chance to object. He has the opportunity to make representations. He has the right to appeal where the first respondent overrules the objection. It may be an imperfect system. But all that man makes is fallible. Only divine systems are infallible. I disagree that the rules of natural justice are violated.

Much can be said of the tax regimes of other countries that have now expressly incorporated the need for notice before garnishment procedures are invoked and the inclusion of some guidelines before the collector of revenue exercises his discretion in dealing with objections. This is certainly a development that could well be recommended to our own Parliament. However, I am not convinced that there are such gross deficiencies in our tax legislation as should lead one to declare as unconstitutional the first respondent's powers in s 58 of the Income Tax Act. As observed by Wunsh J in **Hindry v Nedcor Bank Ltd & Anor [1999] 2 All SA 38 (W),** the garnishee procedure is recognised

in all other countries which have open and democratic societies based on freedom and equality and which recognise, protect and enforce human rights.

RECOMMENDATIONS BY THE COURT

In the draft order the applicant seeks alternative relief. This is to compel the first respondent to table before Parliament, within certain specific time frames, a Bill to amend the Income Tax Act so as incorporate three things:

- limiting the first respondent's powers to incept garnishee orders only to cases of spurious objections;

- including judicial control over the first respondent's powers to issue such garnishees, and

- providing for the right of a taxpayer to make representations before an impartial arbiter in relation to the inception of garnishees.

There is a further adjunct sought in the draft order. If the first respondent should fail to move the amendment, or if the amendment should fail to pass, then s 58 of the Income Tax Act should automatically be deemed struck down within the times frames proposed in the draft order.

However, in view of the courts findings in this judgment, the alternative prayer cannot succeed. It is still an impeachment of s 58 of the Income Tax Act in another form. In the circumstances, the application was dismissed.

3.2 NYAMBIRAI vs NSSA 1995 (2) ZLR 1 (S)

In *Nyambirai vs NSSA 1995* (2) ZLR 1 (S), the Supreme Court had occasion to define a tax. In that case the issue was whether or not the compulsory payments imposed on employers and employees under the NSSA Act, were a tax. In terms of the Act and the regulations made under it, pension contributions to NSSA are compulsory in respect of the category of employers and employees covered by the scheme. The Applicant in that case challenged those payments contending that they were an unlawful deprivation of his property contrary the property rights in the constitution.

The government on the other hand argued that the payments were a tax and therefore protected by the constitution. The court defined a tax as follows; "It is a compulsory levy

and not an optional contribution imposed by the legislative or other competent public authorities upon the public as a whole or a substantial sector thereof and to be utilised for the public benefit or to provide a service in the public interest". From this definition, the court concluded that the NSSA payments were a tax. They satisfied all the features in the definition. The court went further to hold that the tax was reasonably justifiable in a democratic society. A tax is constitutionally protected as a way of infringing the right to property – property can be compulsorily taken away without any other justification except that it is a tax.

3.4 BENARD WEKARE vs THE STATE & ZBC CCZ9/2016

In that case, the applicants owned and possessed TV sets. They did not have the requisite licences. The allegation was that they were listeners in possession of a receiver but without licences thereby contravening a provision of the Broadcasting Services Act. They admitted knowingly possessing TV sets without a licence. Their defence was that the relevant provisions of the Act were constitutionally invalid on the basis that they violated their right to property. They were a compulsory deprivation of property contrary to Section 16(1) of the old constitution. Per Section 16(7) of the old constitution, the right to property was limited where a law made provision "in satisfaction of any tax or rate". The issue therefore was whether or not the licence fee was a tax. In terms of the Act, every listener in possession of a receiver is required to have a licence. The licence fee is fixed by the ZBC with the approval of the Minister. It has to be published in the government gazette in a Statutory Instrument. The fee is payable into the general funds of the ZBC. The applicants argued that the fee was not a tax and therefore had no constitutional protection. They accepted that if it were to be held to be tax, they would have no case. MALABA DCJ started from the following correct position, a tax is not a tax merely because the word tax is used. Even where the word tax is not used, the payment may be a tax. See page 11 of the judgement where the judge defined a tax by borrowing from **Nyambirai vs NSSA** without acknowledging it. The court held that the licence fee was a tax on the basis that it satisfied all the features of a tax. The applicants had conceded that the licence fee was compulsory, that it was paid for a public purpose and was imposed on a substantial section of the public. However, the applicants argued that the levy had not been imposed by the legislature or other competent authority. Their position was that the ZBC was a private company incorporated in terms of the Companies Act. Accordingly, they argued further that giving a private company power to fix and collect licence fees to raise for its own operations/purposes was outside the contemplation of the constitution. This

argument was rejected. The court held that the licence fee was imposed by the legislature. The fact that the legislature gave to ZBC the power to fix the licence fee with the approval of the Minister, did not make the ZBC the legislative authority. The court further dismissed the notion that the payment was for ZBC operations – it was for public broadcasting operations which were in the public interest. The applicants had also argued that the funds were being used for improper purposes and as such could not be classified as a tax. Again, this was rejected with the court saying the following; "Whether the ZBC does not use the funds for the purposes of the statute is not a matter going into the determination of the question of the licence fee being a tax". See page 19 of the judgement. The court said that the remedy for the applicants was to seek a mandamus – compelling the proper use of the funds.

3.5 THE POLITICAL QUESTION DOCTRINE.

3.5.1The American concept, Zimbabwean context and other countries

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 courts has seemingly taken a hands-off approach to operationalizing 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.[87] This has been seen in several cases in which the courts has failed to protect the rights.

This doctrine says that there are certain questions that may not be determined by a court. The leading case is an American case[88]. In that case Justice Brenna defined The Political Question Doctrine as follows; " A political question is found either;

1. A textually demonstrable constitutional commitment to a coordinated political department; and
2. A dearth of judicially discoverable and manageable standards for resolving it.

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[87]The Judiciary and the Zimbabwean Constitution; James Tsabora

The early years of implementation of the 2013 Consitution by Zimbabwe's Constitutional Court: Spotlight on Human Rights, rule of law and Constitutional interpretation; Musa Kikaa

[88]Barker v Carr 369 US186 (1962)

3. The impossibility of making a decision in the absence of an initial policy determination clearly for non-judicial discretion.

4. The impossibility of a court making an independent decision without expressing dissatisfaction with the coordination of government departments.
5. An unusual requirement for unquestioning adherence to a previously made political decision.

The risk of embarrassment from multiple pronouncements by various departments on a single issue.

The political question doctrine concerns matters as to which departments of government other than the courts must have the final say. Not everything is for a court. The state is made up of other departments ie, the legislature and the exective. The judiciary must respect the tripartite relationship. It must act within its constitutional limits.

Where this doctrine arises in the American context, a court declines jurisdiction on the basis that the matter is not justiciable. The doctrine therefore plays a role at the jurisdictional level. It appears correct that courts only exercise judicial power, they have no other power under the doctrine of seperation of powers. The issue in each case is as follows; What is 'judicial'? It is for the courts to decide whether an issue is judicial or not judicial. Some have argued that there is no need for a political question doctrine because it is basic that the starting point always is to determine whether a matter is judicial. Section162[89] provides that, " In exercising judicial authority or judicial functions or the judiciary. It is clear therefore that courts exist to exercise the judicial power of the State. It is my view that if the courts are exercising the judicial powers of the the state. It means that the powers of the state are not limited, they are in excesive. Yet constitutionalism is supposed to be a limitation of governmental powers. If it can be shown that the power being exercised is not judicial power, a court would be acting contrary to its founding basis. This is the foundation upon which the political question doctrine is built.

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

Outside the USA, issues of jurisdiction founded on whether or not a matter is justiciable arise everyday in other matters including tax matters. They may not be described as political question. However, it is legitimate to challenge a court on the simple basis that a matter being brought is not justiciable. The courts themselves have reacted differently on such challenges. The first line of response by the courts has been an acceptance that some matters are better dealt with by other organs. In **Nyambirayi v NSSA** and another[90] the Supreme Court was called upon to declare th compulsory contributions to NSSA as unconstitutional. The court was urged to find that " the contributions were not reasonable justifiable in a democratic society".[91] It is clear that the constitutin allowed the courts to assess whether or not an action or thing was "reasonably justifiable in a democratic society." The question was therefore justiciable. The court accepted that it had jurisdiction to determine that question. The government argued in the case that the compulsory contribution were necessary as a form of national security. Further, the social security benefited more persons who had historically been exclude from social security coverage. It was the further contention of the government that in providing the social security, the government was following the traditions of many other countries. The Minister's opposing affidavit had an annexure showing social security schemes operating in 163 countries throughout the world. That list reflected that Zimbabwe was among the countries proving the least coverage. The supreme court dismissed the application. It accepted the government position on the following basis;

"I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the judiciary what is to the public benefit. In implementing social and economic policies, a government's assessment as to whether a particular service or programme it intends to establish will promote the interests of the public is to be respected by the courts. They will not intrude, but will allow a wide margin of appreciation, unless convinced that the assessment is manifestly without reasonable foundation. The Minister says it is in the public interest. That is an assessment which the

[90]1995(2) ZLR (SC).

[91]Repealed Lanchester House Constitution of Zimbabwe. The quoted expression was in the former constitution which was repeled by the new constitution of zimbabwe of 2013 Act.

court should respect. Certainly, it is an assessment which the court should respect. Certainly, it is not manifestly without reasonable foundation."[92]

In the above case, it may be said that the political question doctrine was applied indirectly- not to decline jurisdiction but to influence the exercise of judicial power.

3.6 INTERPRETATION OF TAX LEGISLATION IN SOUTH AFRICA AND ZIMBABWE.

As in the case of any other statute, tax legislation should be interpreted by ascertaining what the legislature intended in using the words it chose to use.[93] Of cardinal importance are the scope and purpose of the legislation and the context in which the words and phrases are used.[94] Furthermore, s 39(2) of the Constitution requires that the spirit, purport and objects of the Bill of Rights should be promoted in the interpretation of any legislation. However, a purposive approach to legislation cannot be used, even in a post-constitutional era, when it is at odds with the ordinary meaning of the words used by the legislature. The disregard of words used by the legislature on a basis of general 'fairness' leads not only to uncertainty, but also to a failure to observe the separation of powers.[95]

In general, it is only where the text is ambiguous or unclear, or if a strict literal meaning will be absurd,that the literal meaning of the words may be departed from. In, for example, **CSARS V Airworld CC and Another**.[96] The Supreme Court of Appeal followed a purposive and contextual approach in the interpretation of a word contained in the Income Tax Act in circumstances where more than one meaning could be accorded to the relevant word. Where the enactment is ambiguous, the taxpayer may also rely on the *contra fiscum rule*, requiring the court (in interpreting the enactment) to follow the interpretation that favours the taxpayer.[97]

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[92]Gubbay CJ At page 9-10; Nyambirai v NSSA And Another 1995(20 ZLR (SC)

93Glen Anil Development Corporation Ltd v SIR 1975 (4) SA 715 (A) 727G-H.

94Standard General Insurance Co Ltd v Commissioner for Customs and EXCISE 2005 (2) SA 166 (SCA) para [25].

95South African Airways (Pty) Ltd v Aviation Union of South Africa and Others 2011 (3) SA 148 (SCA) paras [19], [28] and [32].

962008 (3) SA 335 (SCA), 70 SATC 48.

97See, for example, Welch's Estate v CSARS 2005 (4) SA 173 (SCA), 66 SATC 303 para [35]; Kommissaries, Suid-Afrikaanse Inkomstediens v Boedel Wyle De Beer 2002 (1) SA 526 (SCA), 63 SATC 467 para [8]; Shell's Annandale Farm (Pty) Ltd v CSARS 2000 (3) SA 564 © 575F-H, 62SATC 97 108.

In interpreting Statutes in Tax law it has become a bit complicated in both the Zimbabwean and South African context. Interpretation of tax legislation using the traditional approach is a claim that the interpretation of tax legislation is different from the interpretation of other legislation. It is said that with tax statutes it is the literal rule that must be applied. The basis for this claim is the old English of **Pattington v Attorney-General**[98] where the following is said:

"If the person sought to be taxed falls within the letter of the law, he must be taxed, regardless of how great the hardship appears to the judicial mind today." However, if the statute seeking to impose the tax is unable to bring the subject within the letter of the law, the subject is free, no matter how obvious within the law the subject appears to be. In other words, even if there is an equitable construction, it is not admissible in a taxing statute, where we must simply follow the words of the statute." These statement were taken further in the case of **Cape Brand Syndicate v IRC**[99] where it was said:

"In a taxing statute, one has to look at what is clearly said. There is no equity about a tax. There are no presumptions to be implied. One can only look fairly at the language used."

These two authorities are almost a universal starting point to a discussion on interpretation of taxation. The courts in SA took these statement and gave them a life of their own, namely: that tax statutes must always be interpreted literally. The question which arises is as follows – is the literal rule a mandatory rule of interpretation of tax legislation? A lot of learning has been devoted to this question. The English courts delivered a bombshell in **Pepper v Hart [1993]**. This was a decision of the House of Lords in a tax matter. The question in that case was whether or not the court could make reference to Parliamentary debates in ascertaining the intention of parliament. The court held that it was permissible for the courts to consult Hansard – the parliamentary debates, and ascertain what the Minister intended. It proceeded to do so and examined the Minister's second reading speech. The effect of this judgment was introduce a purposive

981869 AC 375

99.1921 KB 69

interpretation of tax legislation. [It was not the rule before that.] [Does this not undermine the principle of certainty?]

After the Pepper decision the English courts are now vacillating between the literal rule and the purposive approach and arguing that the purposive approach are restricted to cases of ambiguity – in other words where the statute is clear the principle in Cape Brand applies. It is now a matter of the preference of judges [see a Journal article]. [It is not a hard and fast rule that one applies one principle over the other].

The Zimbabwean and South African Constitutions have complicated the matter:

see: section 39[2] of the South Africa Constitution

see: section 46[2] of the Zimbabwe Constitution.

These provisions introduce a mandatory rule of statutory interpretation. The courts are required to take into account the provisions of the Bill of Rights in the interpretation of any legislation – tax legislation included. Accordingly, it can no longer be correct to say that there is no equity about a tax, the constitution necessarily requires equity in the affairs of human beings – that is what the Bill of Rights is all about. The better view appears to be this; although the literal rule is the most suitable rule in most tax problems, there is scope to apply a purposive approach in the interpretation of tax legislation. The possible conclusion would therefore be that there are no special rules about tax interpretation because the above approach is what applies whenever a court is faced with legislation.

3.7 CONCLUSION

It is therefore my submission that even after the enactment of the 2013 Constitution. The judiciary is at the hands of the state when it comes to handling tax matters. The court is largely leaning in favour of the state in collecting tax. They will go to the extent of using other doctrines like the political question doctrine so that the state remains with an upper hand in tax issues. This stance is strongly supported by the fact that Tax itself is actually given a right in the constitution and in national legislation. So it will be prudent to say that by and large, there is constitutionalism in how tax matters are handled in Zimbabwe, but the question will actually remain in one's mind if there is an actual limitation to the government's power? The answer is obviously 'no' but it is not really justifiable as every action by the state is supported by legislation in tax matters. There is no equity in tax,

constitutionalism is there in theory but in practice whilst trying to protect the bill of rights, the rights will take the losing side.

CHAPTER 4

WHAT ARE THE PRINCIPLES THAT MUST BE TAKEN INTO ACCOUNT IN A TAX SYSTEM?

4.1 WHAT PRINCIPLES UNDERLY A TAX SYSTEM?

Adam Smith, a famous economist, published in 1776 a book that has remained relevant today. The title of the book is "An enquiry into the nature and causes of the world of nations". In that book, he outlined four principles which he termed "cannons of taxation" – being principles that must be taken into account in devising a tax system. These principles provide non-political guidelines to policy-makers, they provide rational, although fiscal legislation need not conform to these 'canons' in order to be enforceable. In Partington v Attorney- General[100], it was stated that: 'If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be, even though the so called "canons of taxation" as propounded by Adam Smith in The Wealth of Nations, namely equity, neutrality, certainty and administrative efficiency have not been observed.'

4.2 Equity

This principle demands that taxpayers ought to contribute towards the State's revenue on the basis of their "ability to pay". Those taxpayers with more resources must pay more in taxes. The measure of ability to pay maybe income or consumption or wealth. The other measure of equity that Adam Smith put across is that persons may contribute to the State's revenue in proportion to what they respectively enjoy under the protection of the State.[101] This approach has not been followed in most jurisdiction.

4.3 Certainty and Simplicity

Tax ought to be certain, and not arbitrary, which implies that the manner, time and amount of payment should be clear and ascertainable to the taxpayer.[102] Certainty also involves simplicity, requiring that taxes should be simple in concept, collection and

[100](1869) LR 4HL 100,21 LT370

[101]Smith (1776) book v ch ii pt ii, available at http://www.adamsmith.org.

[102]Smith (1776) book v ch ii pt ii, available at http://www.adamsmith.org

See also Margo Report (1986) para 4.47

administration.[103] Certainty of law is closely linked to legality, both principles of adherence to the rule of law, and is an essential quality of a true democracy where the taxing authorities are accountable to the electorate.

4.4 Convenience

This maxim provides that every tax ought to be levied at a time, or in a way most convenient to the taxpayer.[104] This principle touches upon the proposition that taxes should preferably be levied in cash rather than in kind.

4.5 Cost- effectiveness and Efficiency

The economic function of a tax in a market economy is to transfer resources from the private sector to the public sector.[105] The maxim requires that the costs of a tax should not be a disproportionately high percentage of the revenue yield.[106] There are three major components of costs, namely collection costs, 'dead weight' market costs and unproductive costs.

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[103]Margo Report (1986) para4.47

[104]Smith (1776) book v ch ii pt ii, available at http://www.adamsmith.org

[105]Beric Croome, Annet Oguttu, Elzette Muller, Thabo Legwaila, Maeve Kolitz, RC Williams & Cornelius Louw; Tax Law An Introduction 2013.

[106]Beric Croome, Annet Oguttu, Elzette Muller, Thabo Legwaila, Maeve Kolitz, RC Williams & Cornelius Louw; Tax Law An Introduction 2013.

Smith (1776) book v ch ii pt ii, available at http://www.adamsmith.org

See also Margo Report (1986) para 4.47

CHAPTER 5

5.1 CONCLUSION AND RECOMMENDATIONS

It is my conclusion that the matter of constitutionalism in Zimbabwe is subjective. Prior the enactment of the 2013 Constitution, many scholars and human rights activists who were advocating for the implementation of human rights strongly stood their ground that there was no constitutionalism. I tend to be in agreement with most of these postulated views. After the 2013 Constitution, these views remain subjective. Now, when I am discussing the issues of Constitutionalism in tax matters, the question is "Is there really constitutionalism in tax matters?" From the responses obtained through the unstructured interviews[107], it was established that there is constitutionalism in tax law of Zimbabwe. A limitation is provided for in the constitution through the bill of rights. Through the concept of separation of powers the judiciary is empowered to use the political question doctrine so that matters of the state remain being controlled by the state. By using this political question doctrine, I am of the view that the judiciary is giving unlimited power to the executive to control matters that the judiciary is supposed to deal with and come up with decisions that also benefit the general public. There is no equity when it comes to tax matters. It is however my submission that, indeed there is constitutionalism in tax matters and the way that the judiciary is handling tax matters in courts. Constitutionalism further exists from the viewpoint that the state is afforded a right in the constitution to collect taxes from the tax payers at the same time the tax payer is afforded rights through the bill of rights in the Constitution. One should take note that these rights are not absolute rights for the tax payer and at the same time the state is in full control of collecting taxes.

On the flip side of the coin, the bill of rights is supposed to stand as a substantial limitation to the powers of the state in tax matters but from the cases discussed in this essay, the rights of the tax payer are consistently being overlooked and overshadowed by the power and will of the state to collect taxes.[108] The commissioner is even given too much power by being allowed to collect tax first before the tax payer has exercised the right to a free and fair hearing. This shows that there is no equity in tax law, the tax payer is supposed 'to render to Caesar the things that are Caesars.' Searches and seizures of private property

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[107] I had an opportunity to have unstructured interviews with some High court judges who are of the view that there is constitutionalism in tax matters. 26 June, 2022.

[108] Sectin 86 of the Constitution of Zimbabwe is often being used by the judiciary.The rights in the bill of rights are not absolute.

are not uncommon in tax matters when the state is collecting taxes. Rights of tax payers' are constantly being over ridden by section 86 of the Constitution. When one looks at it this way, one can certainly be bound to say that the state is hiding behind legislation and the constitution so that we all say that there is constitutionalism. Yet it is clear that there The known idea is that there no equity in tax, can lead one to say that, Constitutionalism exists but the government still processes unlimited powers to some extent.

Although it is admittedly normal for countries to collect taxes in the whole world there are reforms that our Zimbabwean tax law still requires so that constitutionalism trurly exists without doubt or questions.

Through a comparative analysis with China, South Africa and America. It is clear that merely having a written constitution does not mean that there is constitutionalism. China at some point in time advocated for tax law to be promulgated and become a part of a written constitution in the hope that it would limit the excessive power of its government when collecting taxes and at the same time China thought this would prevent the abuse of property rights by the government. Whilst on the other hand, Zimbabwe has a written Constitution which gives the state a constitutional right to collect taxes, but does not say anything about how these tax monies are used. Such that it often becomes a challenge to know and make a constitutional challenge if the tax payers money is inappropriately used. America has gone a step further in providing how tax money is to be used in their Constitution. Zimbabwe Constitution is still silent on that. Hence an amendment should be made in that regard.

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