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Constitutional Reform in Africa: Positioning the New Constitutional Court of Zimbabwe in the Transformation of Civil and Political Rights

Submitted by

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Declaration

I, **Simbarashe Tembo**, Registration Number: **211541959** hereby declare that the dissertation entitled **Constitutional Reform in Africa: Positioning the New Constitutional Court of Zimbabwe in the Transformation of Civil and Political Rights**, is my work and that all sources utilised or quoted have been appropriately acknowledged and referenced. This dissertation is being submitted for the Degree of Doctor of Philosophy in Constitutional Law at the University of KwaZulu-Natal and has not been submitted for a degree or examination at any other university.

Signed

Date: October 2019

Place: Durban

Dedication

This work is dedicated to my beloved parents, Mr and Mrs Tembo – Mutesva.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act
ANC	African National Congress
AU	African Union
BSAC	British South Africa Company
CC	Constitutional Court
CCSA	Constitutional Court Southern Africa
CKRC	Constitution of Kenya Review Committee
COPAC	Constitution Parliamentary Committee
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
GNU	Government of National Unity
GPA	Global Political Agreement
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Covenant on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
HRC	Human Rights Commission
JSC	Judicial Service Commission
MDC	Movement for Democratic Change
MISA	Media Institute of Southern Africa
NCA	National Constitutional Assembly
NCOP	National Council of Provinces
NIBMAR	No Independence Before Majority Rule
POSA	Public Order and Security Act
WOZA	Women of Zimbabwe Arise

ZACC	Zimbabwe Anti-Corruption Commission
ZANU PF	Zimbabwe African National Union-Patriotic Front
ZCTU	Zimbabwe Congress of Trades Union
ZEC	Zimbabwe Electoral Commission
ZHRC	Zimbabwe Human Rights Commission

Abstract

This thesis investigated the prospects of the transformation of civil and political rights through the courts in Zimbabwe. The arguments made were based on the concepts of transformative adjudication and transformative constitutionalism as contemplated by Karl Klare. The adoption of a new Constitution in 2013 and the subsequent establishment of the Constitutional Court as the highest court in Zimbabwe made this study necessary. It is argued that the Constitution adopted in 2013 is transformative and the courts must ensure that the hopes and aspirations of the people embodied in the Constitution are realised. This argument is based on the understanding that there is a lack of political will to drive transformation through political or other legislative processes. Zimbabwe's constitutional history was explored to make a case for transformation. Therefore, the views of scholars on constitutional transformation and transformative adjudication were considered. It was observed that court-led transformation would be an ambitious project given the volatile political situation in Zimbabwe where the denial of civil and political rights is used as a tool for silencing opposition and maintaining power by the political elite. It may be ambitious, but not impossible, for the Zimbabwean judges to take the lead on the transformation of civil and political rights. Lessons were drawn from the discussions of the South African Constitutional Court, and the Kenyan Supreme Court to carve a path for judiciary-led transformation. The study recommended a change of attitude and interpretative methods by Zimbabwean judges. The thesis also recommended that whilst engaging in judiciary-led transformation, judges should consider other adjudication methods to avoid conflict with the political arms in Zimbabwe.

Keywords Transformation, Transformative Constitutionalism, Transformative Adjudication, Constitutionalism, Civil and Political Rights, Kenya, Zimbabwe, South Africa.

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CHAPTER 1

INTRODUCTION

1.1 Introduction

For two decades, Zimbabwe has been in socio-economic and political distress. Its post-colonial history is characterised by several legal and political challenges. Before 2013, the main legal challenge was how to deal with a Constitution[1] that had lost its relevance in the face of a new generation calling for a people-driven constitutional making process. As such, a new Constitution[2] was adopted and a new Constitutional Court was established in 2013.[3] Under the new Constitution, the challenge is how to fulfil its constitutional values and principles in the face of political rigidity. It is believed that constitutional courts entrusted with the interpretation of the supreme laws of democratic states play a crucial role in legal and social transformation processes.[4] The adoption of a new Constitution, together with the establishment of a new court as a custodian of the supreme law, represents the will and power to do away with the old order and usher in a new one based on respect for the rule of law and democracy. This custodianship places the courts at the centre of transformation and the democratisation process. However, this can only be carried out if the courts are well equipped in respect of their legal culture and interpretation of constitutional texts.[5] This would require a change of judicial mindset and methodology as 'they must be examined and revised so as to promote equality, a culture of democracy and transparent governance.'[6] The same holds for the new Constitutional Court of Zimbabwe. The Court has a dual role; to transform and to legitimise its work to avoid confrontation with the political arms in its adjudication of civil and political rights.

[1] Constitution of Zimbabwe, 1980.

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

[3] Ibid. Section 166(1) states that the 'Constitutional Court is a superior court of record and consists of- a.) The Chief Justice and the Deputy Chief Justice; and b.), five other judges of the Constitutional Court.'

[4] R Maruste "The role of the Constitutional Court in democratic society." (2007) 13 *Juridica International*. 8 -13.

[5] KE Klare "Legal Culture and Transformative Constitutionalism." (1998) 14 (1) *South African Journal on Human Rights*,146-188.

[6] Ibid, at 156.

It is posited that the 2013 Constitution is transformative and the Constitutional Court, as the custodian of this document, needs to read and interpret it in a manner that gives life to its transformative vision. Unless the Court adopts this sort of interpretation, the Constitution will be a missed opportunity at bringing about real change in the country in respect of rights to assembly and freedom of expression.

The work of Karl Klare is used to guide the conceptualisation of what transformative constitutionalism and transformative adjudication mean. It is conceded that delivering transformation is a duty placed on all arms of the state. In the absence of the political will to drive such transformation however, the judiciary must play a leading role in ensuring that the transformative object of the Constitution is realised. This study, therefore, focuses on the adjudicative role of the courts, particularly the Constitutional Court in the transformation process.

An exploration of Zimbabwe's constitutional history shows that the adoption of a new Constitution in 2013 was long overdue. Several attempts had been made to write a new constitution. These were, however, always blocked by deadlocks in respect of both substance and the procedure for the drafting of an acceptable document to all parties.[7] Historically, new constitutions are often preceded by a period of conflict. Zimbabwe is no exception to this.[8]

In 1979, Zimbabwe's (known as Rhodesia then) political parties agreed on a Constitution that would see the holding of free and fair elections and usher in a new era of universal suffrage.[9] The Constitution was adopted and became known as the Lancaster House Constitution.[10] The

[7]See for example K Vollan "The Constitutional History and the 2013 Referendum of Zimbabwe." (2013). A *NORDEM Special Report*.

[8] Zimbabwe's political conflict, from land reform to 2008 electoral violence. See for example B Raftopoulos "The 2013 elections in Zimbabwe: The end of an era." (2013) 39 (4) *Journal of Southern African Studies* 971-988.

[9] Elections had been held in April 1979 which saw Bishop Abel Muzorewa becoming the Prime Minister of Zimbabwe-Rhodesia, a country which was largely not recognised internationally.

[10] See Lancaster House Agreement, 21 December 1979. Southern Rhodesia Constitutional Conference Held at Lancaster House, London September - December 1979 Report in paragraph 1 says 'Following the Meeting of Commonwealth Heads of Government held in Lusaka from 1 to 7 August, Her Majesty's Government issued invitations to Bishop Muzorewa and the leaders of the Patriotic Front to participate in a Constitutional Conference at Lancaster House. The purpose of the Conference was to discuss and reach agreement on the terms of an Independence Constitution, and that elections should be supervised under British authority to enable Rhodesia to proceed to legal independence and the parties to settle their differences by political means.'

Lancaster House Constitution survived from 1980 to 2013 after going through a total of twenty Amendments.[11] The 20th Amendment became the new Constitution as it was a complete overhaul of the Lancaster House Constitution. The Constitution adopted in 2013 was to see a new era of democracy, the rule of law and respect for human rights.[12] Following this adoption, a Constitutional Court was established as a guardian of the Constitution.[13]

It is against this background that this study sought to explore and analyse the disjuncture between the transformative object of the Constitution and the interpretative methods adopted by the Zimbabwean judiciary. The idea of transformation in Zimbabwe is contemplated within the constitutional framework. The values of the new Constitution of Zimbabwe reflect a fresh system of democratic governance, openness, accountability, the rule of law and guarantees fundamental rights and freedoms.[14] The new Constitution has provisions that highlight its transformative objective.[15] However, there are laws, previously introduced to complement the Lancaster House Constitution, whose compatibility with the new Constitution is no longer viable and hence require realignment, and in some cases a complete overhaul.[16] The new legal order raised the hope for a nation founded on the principles of the rule of law, good governance, respect for human rights and fundamental freedoms, and all legislation and state conduct must

[11] Some of the most notable amendments were: Amendment No. 7 (Act 23 of 1987) which abolished the position of a Prime Minister and created an Executive President, Amendment No. 9 (Act 31 of 1989) abolished the bi-cameral legislature. Amendment No. 11 (Act 30 of 1990) allowed for corporal punishment and also that capital punishment in the form of hanging by the neck did not constitute inhuman and degrading punishment. Amendment No. 13 (Act 9 of 1993) made delays in the enforcement of capital punishment constitutional. Amendment No. 16 ousted the court's jurisdiction in matters involving compensation on land. Amendment No. 17 restricted freedom of movement.

[12]Section 3 of the Constitution of Zimbabwe 2013 states that the Constitution is founded on respect values and principles which include the rule of law, supremacy of the Constitution, human rights and fundamental freedoms, good governance among others.

[13]The Constitution was adopted in 2013 after a constitutional making process led by Parliamentary Constitution Select Committee co-chaired by members of the two main political parties and a national referendum in 2013.

[14]Section 3 (1) of the Constitution of Zimbabwe, 2013.

[15] The inclusion of a Declaration of Rights in the Constitution is a clear indication of its transformative nature.

[16]According to SADC Lawyers Association, 2014 'In Zimbabwe, the government announced a programme to align more than 450 pieces of legislation with the country's 2013 Constitution. However, despite the public pronouncements about the programme, there is scepticism over the government's willingness to ensure that the laws are indeed aligned with the Constitution.' See also M Makonese "Developments in the SADC region: A summary of electoral, legal and constitutional aspects." (2014) 544 *De Rebus* 16-18.

reflect this. At present, the Constitution is still to usher in the much-needed change. The country is still suffering violations of the rule of law and human rights, particularly civil and political rights. Ideally, the new Constitutional Court should be playing a crucial role to make the envisioned transformation a reality through its processes of giving meaning to the wording contained in the new Constitution.

It is acknowledged that undue judicial activism can lead to backlashes from the political arms against the judiciary. It is my supposition, however, that in as much as excessive judicial activism may lead to threats against the institutional security of the judiciary, excessive judicial timidity can be equally damaging.[17] This study, therefore, draws lessons from the record of the South African Constitutional Court and the Kenyan Supreme Court on how they have managed to balance between transformative adjudication and maintaining institutional security.

The thesis argues that the Zimbabwe Constitutional Court has the potential to be the force behind the transformation of the country. This can be achieved if the Court adopts a consistent approach to its interpretation of the Constitution. It is imperative that the approach adopted be one that breathes life into the transformative elements of the Constitution especially in the area of civil and political rights. Although other constitutional interpretation approaches are tenable, the Constitutional Court needs to adopt one that finds resonance with the South African Constitutional Court and Kenyan Supreme Court's discourses to bring about a desirable change.[18]

1.2 Background and problem statement

It is a fact that 'the new [C]onstitution, which [P]arliament approved in May 2013, enshrines respect for the rule of law, and commits the government to fully implement and realize the right to freedom of association, assembly, expression, and information.'[19] It is the enforcement and application of these rights by the courts that this study places into perspective. The

[17] This raises the issue of separation of powers; however, it is submitted that the judiciary review powers held by the courts should be used as an incident of the checks and balances that exist between the arms of state.

[18] Kenya and South Africa are used because, like Zimbabwe, they both adopted new constitutions after political conflict with the aim of ushering peaceful transformation and the constitutions themselves draw heavily from the South African constitutional design.

[19] *Human Rights Watch* "World Report 2015: Zimbabwe Events of 2014." Available at https://www.hrw.org/world-report/2015/country-chapters/zimbabwe [Accessed 15 March 2018]

Constitutional Court and other high courts have so far tentatively shown a move towards this transformation, albeit unconvincingly.[20]

The existence of security legislation such as the Public Order and Security Act (POSA)[21] and the Access to Information and Protection of Privacy Act (AIPPA)[22] pose a threat to democratisation and transformation in respect of civil and political rights. The failure to amend or repeal this legislation constraints the exercise of the rights to freedom of expression, assembly and association as guaranteed in both the Constitution and international instruments.

The High Court of Zimbabwe has made some inroads in the protection and promotion of human rights through its reading of the new Constitution.[23] For example in the case of *Democratic Assembly for Restoration and Empowerment and Others v The Police Commissioner and Others (DARE),*[24] the Court was asked to rule on the validity of a ban on all demonstrations in the Harare Central Business District and surrounding areas by the police acting through Statutory Instrument 101A as empowered by Section 26 of the POSA.[25] Section 26 of POSA has traditionally drawn criticism for empowering the police to ban demonstrations through statutory instruments and public notices.[26] This provision has been used by the State to repress opposition through the banning of gatherings. The banning of demonstrations and the accompanied heavy-handedness that it comes with have no place in the current constitutional dispensation. Fortunately, in *DARE*, the Court firmly adopted this position. Part of the

[20] Klare (n 5 above).

[21]Public Order and Security Act [Chapter 11:17].

[22] Access to Information and Protection of Privacy Act [Chapter 10:27].

[23] The High Court has, however, not been free of controversy as it has recently become a political battlefield. It will be shown that, in the process, the High Court has also made a few decisions that are against progressive constitutionalism during the period between 2013 up to date.

[24] *Democratic Assembly for Restoration and Empowerment and Others v The Police Commissioner and Others (DARE)* HC8940/2016**;** See also Demo Ban provisionally suspended. 2016 *The Herald* September 08, available at http://www.herald.co.zw/breaking-news-demo-ban-lifted/ [Accessed 09 Sept 2018].

[25] See (n 21 above).

[26] In terms of section 26 of Public Order and Security Act '(1) without derogation from subsection 25, if a regulating authority believes on reasonable grounds that a public gathering will occasion public disorder, he may by notice in terms of subsection 3 prohibit the gathering… (3) A notice given under subsection (1) shall have effect immediately it is issued and shall be published – (a) in a newspaper circulating in the area to which the direction applies; or (b) by notices distributed among the public or affixed upon public buildings in the area to which the direction applies; or (c) by announcement by a police officer that is broadcast or made orally.'

judgment reads 'it is ordered and declared that Statutory Instrument 101A of 2016 is invalid to the extent of its inconsistency with the Constitution as provided by s175(6) (a) and s2 of the [C]onstitution.'[27] Further, '[R]espondents... shall be and are hereby interdicted from unlawfully interfering with the rights of the citizens' right (sic) to exercise their right defined by s59 of the Constitution read together with s12 of Public Order and Security Act.'[28] Interestingly, the police purportedly corrected the defect in the ban and issued another Statutory Instrument[29] which effectively became a second ban. A different judge sitting in the High Court ruled that the second ban was constitutional.[30]

It should be noted that the second judgment came hardly a week after the then President, Robert Mugabe had publicly expressed his displeasure at the judgments passed by 'some' High Court Judges who granted the right to demonstrate to anti-government protestors.[31] The President's sentiments against the judges were criticized by various quarters of the legal profession who regarded it as an interference with the independence of the judiciary and were of the view that there was a likelihood of it being a source of a crackdown against the judiciary soon.[32] One would also argue that the President's sentiments had a bearing on the outcome. This, therefore, calls for the need to analyse the role that the courts must play in the transformation of civil and political rights in Zimbabwe cognisant of the potential backlash and threats against the newly established Constitutional Court.

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[27] See (n 24 above).

[28] Ibid.

[29] Extraordinary General Notice No. 239A of 2016.

[30] *Zimbabwe Divine Destiny v Newbert Saunyama N.O. and Ors* HH-589-16.

[31] *International Business Times* reports that 'On Wednesday (7 September) judges of Zimbabwe's High Court lifted an "unconstitutional"" ban by police on political demonstrations carried out by opposition parties and pro-democracy groups in the country. The decision came just days after President Robert Mugabe accused the judiciary of "recklessness" for allowing the demonstrations that turned violent at times.' available at http://www.ibtimes.co.uk/zimbabwe-tajamuka-activists-welcome-court-decision-overturn-police-ban-demos-1580334 [Accessed 12 September 2016] See also Robert Mugabe calls Zimbabwe judges reckless for permitting protests against him : 'I hope they learnt their lesson'. 2016 *The Independent.* 5 September. available at http://www.independent.co.uk/news/world/africa/robert-mugabe-calls-zimbabwe-judges-reckless-for-permitting-protests-against-him-i-hope-they-have-a7227036.html [Accessed 5 September 2018].

[32] See Mugabe goes after judiciary again. 2016 *Daily News.* 29 August. Available at https://www.dailynews.co.zw/articles/2016/08/29/mugabe-s-govt-goes-after-judiciary-again [Accessed 1 August 2018].

Laws such as POSA have over the years been used to limit the people's right to freedom of movement. The *Human Rights Watch report* states that;

> 'Police frequently misused provisions of POSA to ban lawful public meetings and gatherings. Opposition and civil society activists were wrongly prosecuted and charged under these laws. For instance, when hundreds of Women of Zimbabwe Arise (WOZA) members marched to petition Parliament over the national economic situation on February 13, police violently broke up the march and dispersed the demonstrators.'[33]

POSA stifles open debates that strengthen good governance, the rule of law and democracy. It oppresses diverse views of the people. 'In terms of the Zimbabwe Declaration of Rights, most sections of POSA are unconstitutional in that they deny the guaranteed rights of assembly and freedom of expression.'[34] The values and principles of the new Constitution have therefore failed to bring about any meaningful change to the lives of the people because of the operation of POSA and AIPPA and the courts have also not done much towards this. One would have expected to see a significant shift from the old order after the adoption of the 2013 Constitution. Murisa and Chikweshe point out that 'Zimbabwe is coming out of a period of what one would call supercharged politics characterised by interventionist international community [with] entrenched and deep divisions between political parties and the closing down of public sphere…'[35] Hence, the adoption of a new Constitution was to establish a new nation founded on the principles of democracy and the rule of law and to do away with a culture of polarised politics.

The Constitutional Court, although still in its infancy, has so far received several cases on the constitutional validity of some State conduct.[36] The judiciary, has in these cases, declared some pieces of the legislation invalid, following failure by the legislature to timeously align the laws

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[33]Human Rights Watch (n 19 above).

[34] Controversial POSA Invoked against MRT Member. *Zimbabwe Situation*. 16 December 2016. Available at http://www.zimbabwesituation.com/news/zimsit-m-controversial-posa-invoked-against-mrt-member/ Accessed [15 August 2018].

[35] T Murisa and T Chikweshe. *Beyond the Crises; Zimbabwe's Prospects for Transformation.* (2015) 25.

[36]For example *Mutumwa Dziva Mawere v Registrar General* CCZ 4/15; *Madzimbamuto v Registrar General CCZ 5/14; Madanhire & Another v Attorney General* (Const. Application No CCZ 78/12) [2015] ZWCC 02 (19 February 2015); and *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs* (N.O.) & Others (Const. Application No. 79/14) [2015] ZWCC 12 (20 January 2016).

with the new Constitution. For example, in *Madanhire and Another v the Attorney General*,[37] criminal defamation as contemplated in the Criminal Law (Codification and Reform) Act[38] was declared invalid.[39] It remains to be seen however whether this is a trajectory that the courts are going to pursue in future. It is important to stress that the decision to outlaw criminal defamation was also followed by worrisome political sentiments from the State.[40] The courts' involvement in the transformation process raises several questions around fundamental issues such as the judicialisation of politics, separation of powers and judicial activism. Fombad submits that 'if constitutionalism is to survive in Africa, then judges must be ready to play a more proactive role than they have played so far, they must be ready to use their powers to negate the continuous authoritarian impulses of elected politicians.'[41] This can be achieved if judges adopt a 'rights-sensitive approach.' Roux cautions, however, that where a court's decisions are not favourable to the state, in politically sensitive cases, institutional security of the court becomes threatened.[42]

This study, therefore, shows that the Constitutional Court of Zimbabwe must adjudicate in a manner that gives effect to the constitutional rights to freedom of expression, freedom of assembly and related civil liberties especially in the wake of stringent security legislation.

1.3 Research Objectives and Research Questions

Despite the adoption of a Constitution with a codified bill of rights, the human rights situation in Zimbabwe remains unchanged.[43] There is, therefore, a need for substantive research on this contemporary situation and what it means to 21st-century constitutionalism in Africa. There have been attempts to undermine the judiciary by some political actors. In this regard, the key

[37] *Madanhire & Another v Attorney General* (Const. Application No CCZ 78/12) [2015] ZWCC.

[38] Criminal Law (Codification and Reform) Act [Chapter 9: 23].

[39] See (n 37 above).

[40] VP Mnangagwa defends criminal defamation. (2015) *The Herald* 16 April.

[41] CM Fombad "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects New Constitutionalism." (2011) 75 *Buffalo Law Review* 1020.

[42] T Roux "Tactical adjudication: How the Constitutional Court of South Africa survived its first decade" http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf [Accessed 14 March 2017].

[43] See for example *Human Rights Watch. World Report* 2014: Zimbabwe events of 2013 available at https://www.hrw.org/world-report/2014/country-chapters/zimbabwe [Accessed 11 May 2018].

question would be: What are the implications of reliance on courts as means of addressing key political questions?

This research has four broad objectives;

1. To locate the Zimbabwe Constitutional Court's role in the transformation of politically and legally sensitive civil and political rights.

2. To examine how constitutional courts elsewhere have so far been used as a means of addressing democratic values and political questions in pursuit of a transformative agenda.

3. To investigate whether the adjudicative approaches adopted by the Zimbabwe Constitutional Court are sustainable considering Zimbabwe's socio-political situation.

4. To recommend a new adjudication approach for the Zimbabwean Constitutional Court to ensure that it avoids political backlashes and transform civil and political rights through transformative adjudication.

In so doing, several core questions are necessary;

i) How does the jurisprudence of the Zimbabwe Constitutional Court compare to other constitutional democracies with relatively new courts such as the South African Constitutional Court and the Kenyan Supreme Court?

ii) As a newly established Court, what likelihood is there that the Court's institutional security would be threatened? If so, how can the Court secure institutional autonomy?

iii) If the court declares the unaligned laws as invalid on a case by case basis, would that not be unacceptable judicial law making, judicial activism or judicialisation of politics or be viewed as a displacement of political actors?

iv) How best can the Constitutional Court of Zimbabwe adjudicate to ensure its continued existence and independence and transform civil and political rights at the same time?

A key focus is placed on the role that can be played by the new Constitutional Court of Zimbabwe in ensuring proper enforcement of human rights and in particular civil and political

rights of the citizens. This study also makes some recommendations and speculative remarks on the future trajectory of the Zimbabwe Constitutional Court as at the 16th of November 2017.

1.4 Literature review

This section serves as a conspectus of existing literature on transformative constitutionalism, the role of the judiciary in the transformation process, and the concept of transformative adjudication. There is a substantial literature on transformative constitutionalism and transformative adjudication. However, very few studies have been conducted on the subject about Zimbabwe. The Zimbabwean jurisprudence from 1980 to date is also silent on the concept of transformation. The concepts of transformation, transformative adjudication and transformative constitutionalism have not been explored within a Zimbabwean post-colonial discourse, and this study aimed to stimulate discussions around the subject matter.

Attaining constitutionalism is one of the most important objectives of modern democracies. However, its achievement is not always easy. According to Fombad, '[f]or Africa, after more than four decades of mostly authoritarian, corrupt and incompetent rule, the 1990s began with a slow and painful move towards what many optimistically hoped will usher in a new era of democratic governance and constitutionalism.'[44] Efforts have been made in almost every part of Africa to design reforms that lead to constitutionalism and democratic governance. However, attaining this has proved to be a challenge. As studies show, even though many governments in Africa have constitutions, they 'were quickly transformed into instruments of oppression under the pretext of pursuing coveted but elusive goals of national unity and economic development.'[45] They have led to "constitutions without constitutionalism."[46] Constitutionalism entails that the government power is sufficiently limited in a manner that protects the citizens from such vices as an arbitrary rule. This means that the government should only exercise power within its constitutional limitations.[47] According to Fombad;

> 'modern constitutionalism has six elements; i) the recognition and protection of fundamental rights and freedoms; ii) the separation of powers; iii) an independent judiciary; iv) the review of

[44] Fombad (n 41 above), at 1007.

[45] Ibid at 1011.

[46] See Q Zhang "A constitution without constitutionalism? The paths of constitutional development in China." (2010) 8 (4) *International Journal of Constitutional Law* 950-976.

[47] Ibid.

the constitutionality of laws; v) the control of the amendment of the constitution, and vi) institutions that support democracy.'[48]

It should be noted, however, that constitutionalism is not static, the presence of these institutions does not guarantee constitutionalism and it is 'the cumulative effect of these elements that enhance the chances for constitutionalism.'[49] This shows that the extent to which a state promotes and protects human rights determines the level to which it will achieve constitutionalism.

At independence, most African countries inherited constitutions that were crafted by their erstwhile colonial masters. These were predominantly Westminister and Gaulist models for Anglophone and Francophone states respectively. Most have since been revised to include elements of constitutionalism.[50] Surprisingly, this has not led to much change on the continent including in Zimbabwe.

Many African countries have undergone periods of political turmoil characterised by lack or absence of the rule of law and total disregard of democratic practices. This has led to serious calls for constitutionalism, in some instances, preceded by the adoption of new constitutions.[51] For example, in Zimbabwe, the new Constitution was primarily adopted to promote a new human rights culture, democracy and good governance. Political arms are less likely to take the charge of transformation especially where they have implications on their traditional powers. Therefore, the judiciary is best placed to ensure that constitutionalism is realised. As Fombad observes 'attaining these goals requires a judiciary that is willing to reflect the new spirit of constitutionalism when interpreting these constitutions.'[52]

Kenya adopted a new Constitution in 2010, particularly because of the urgent need to usher in a new era of constitutionalism, and this was significant in informing this study.[53] Just like in Zimbabwe, the adoption of a new Constitution in Kenya '…marks a crucial step in Kenya's struggle for a new constitutional dispensation that would help transform Kenyan society

[48] Ibid.

[49] Ibid at 1012.

[50] Ibid.

[51] See for example D Monyae "South Africa in Africa: Promoting Constitutionalism in Southern Africa, 1994-2004." In F Veronica and F Carlo. *Constitutionalism and democratic transitions* (2006).

[52] Fombad (n 41 above) at 1020.

[53] Constitution of Kenya, 2010

fundamentally.'[54] The Kenyan Constitution is commended for having opened avenues for litigation on matters of national importance and engaging in the new phenomenon of transformation through courts. In *Speaker of the Senate and Another v Attorney General and Another and 3 others*[55] the Supreme Court held that;

> 'Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional 'liberal' Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, the rule of law, freedom and democracy…'[56]

Githuru points out that 'the transformative constitution of Kenya is one that requires the judiciary to come up with a jurisprudence that resonates with that transformative vision.'[57] The role of the court in the transformation process has been previously highlighted by the Chief Justice of Kenya;

> 'Some have spoken of the new constitution as representing a second independence. This is when our institutions, and the people, are to come into their own, when the legislature will truly act as the representatives of the people and the supervisors of the executive, when the executive will put the interests of the nation first… this will only happen if we all, including the judiciary, play our part for the forces of resistance are strong.'[58]

The above statement echoes a generally accepted view that a new constitution should represent a new order, better than its predecessors. According to Githuru, the record of the Court under the new constitution shows 'a new attitude, innovation and bravery' alien to the old order.[59] This is accompanied by a progressive new jurisprudence that includes human rights cases, election petition cases, as well as public interest cases. The Court has, however, also been

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[54] W Mutunga "The vision of the 2010 Constitution of Kenya' keynote remarks on the occasion of celebrating 200 years of the Norwegian Constitution University of Nairobi" (19 May 2014).

[55] *Speaker of the Senate and Another v Attorney General and Another and 3 others* [2013] eKLR.

[56] See also E Kibet and C Fombad "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa." (2017) 17 (2) *African Human Rights Law Journal*, 340- 366, at 352.

[57] F M Githuru "Transformative Constitutionalism, Legal Culture, and the Judiciary under the 2010 Constitution of Kenya." (2015) PhD Thesis. *University of Pretoria* (Unpublished) 7.

[58] Ibid.

[59] Ibid, at 172.

blamed for exercising 'restraint and timidity' in some cases.[60] Recent developments have shown a new direction with the Court becoming bold enough to nullify national presidential election results in the case of *Raila Odinga and Another v Independent Electoral and Boundaries Commission*[61] in September 2017. This move has been widely regarded as a victory for democracy and human rights in the region setting an important precedent for African constitutionalism. Even though the transformative jurisprudence in Kenya is still developing, the courts have adopted a values-based approach to the interpretation of the Constitution.[62]

Rapatsa discusses transformative constitutionalism in South Africa's 20 years of democracy.[63] He argues that South Africa's history of colonialism, unjust legal system and other discriminatory practices 'bred a society of imbalances and socio-economic inequalities.'[64] He adds on that transformative constitutionalism was indeed a necessity to redress these injustices. This author, however, argues that the success of transformative constitutionalism largely depends on political will.[65]

According to Langa 'transformative constitutionalism involves entrenching civil and political rights, socio-economic and other pragmatic rights and ensuring that there exist institutions that safeguard a comprehensive realisation of these rights.'[66] Christiansen explores transformative constitutionalism in the context of South Africa. This author notes that 'the Court was uniquely empowered by its role to ensure the initial democratic transition and as ultimate interpreter of the new constitution through judicial review.'[67]

With reference to South Africa, Liebenberg notes that the 'notion of "transformative constitutionalism" has formed a deep resonance in academic literature, the jurisprudence of the

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[60] For example, *Republic v Attorney General and 3 others Ex Parte Kamlesh Mansukhal Damji Pattni.* [2013] eKLR.

[61] *Raila Odinga and Another v Independent Electoral and Boundaries Commission and Another* [2017] eKLR

[62] Kibet & Fombad (n 56 above).

[63] M Rapatsa "Transformative Constitutionalism in South Africa; 20 Years of Democracy" (2014) 5 (27) *Mediterranean Journal of Social Sciences.*

[64] Ibid, at 887.

[65] Ibid.

[66] P Langa "The Challenges Facing Transformative Constitutionalism in South Africa." *Prestige Lecture delivered at Stellenbosch University* on 09 October 2006.

[67] E Christiansen "Transformative Constitutionalism in South Africa, Creative Uses of Constitutional Court Authority to Advance Substantive Justice." (2010) 13 *Journal of Gender, Race and Justice.* 575-614, at 581.

courts.'[68] In addition, she submits that like any new constitution adopted during the periods of political transitions, the Constitution[69] is 'simultaneously backwards and forward-looking.'[70] This is because 'it provides a legal framework within which to redress the injustices of the past as well as to facilitate the creation of a just society in the future.'[71] Therefore, this gives rise to the need to examine this concept in the Zimbabwean context and have a broad discussion on the role the Constitutional Court can play to achieve it.

In addition to the four constitutional principles that govern the South African institutions, the Constitution also define their structures, functions and composition in a manner that ensures that none of the three organs of government can interfere with their operations.[72] 'Three main issues are critical to this: i) the strengthening of judicial independence and judicial competence, ii) the expansion of the scope for judicial intervention, and iii) the judiciary acting as agents of constitutional change and development.'[73]

Davis contends that the Constitution should represent a move from the old order. He argues, it is 'about the constituting of a new society, one that lasts.'[74] He uses Pitkin's view of such a constitution, 'which in human affairs, inevitably means something that will enlist and be carried forward by others.'[75] This is done within a framework of constitutional interpretation aimed at the creation of a new legal and political order.[76] This is what may be referred to as transformative adjudication. According to Karl Klare, transformative adjudication is a long-term project of constitutional presentation, interpretation, and enforcement dedicated to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.[77] In addition, transformative

[68] S Liebenberg. *Socio Economic Rights; Adjudication Under A Transformative Constitution.* (2010), at 25.

[69] The Constitution of South Africa, 1996.

[70] Liebenberg (n 8 above) at 25.

[71] Ibid.

[72] PM Mojapelo "The doctrine of separation of powers; A South African perspective." Paper delivered at the *Middle Temple South Africa Conference*, September 2012 available at http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf [Accessed 23 April 2018]

[73] Fombad (n 41 above) at 1009.

[74] D Davis "Democracy and Integrity; Making Sense of the Constitution." (1998)14 *South African Journal on Human Rights* 127-145, at 143.

[75] Ibid.

[76] Ibid.

[77] Klare (n 5 above).

constitutionalism suggests an enterprise prompting significant social change through peaceful political processes founded in law;

> 'I have in mind, a transformation, vast enough to be inadequately captured by the phrase 'reform' but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community governed through participatory democratic processes in both the polity and large portions of what we now call the private sphere.'[78]

According to Hirschl 'the concept of constitutional supremacy - one that has long been a major pillar of the American political order - is now shared, in one form or another, by over a hundred countries across the globe.'[79] This scholar adds that newspapers everyday carry headlines on 'constitutionalisation' processes in the world as well as landmark constitutional court rulings.[80] He, however, notes that this has come with judicialisation of politics, which he refers to as 'accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies.'[81] It is inevitable that in pursuit of a transformation agenda, courts usually find themselves entangled in national politics.

Fombad expresses similar sentiments arguing that armed with newly acquired judicial review procedures, national high courts worldwide have been frequently asked to resolve a range of issues, from the 'scope of expression and religious liberties, equality rights, privacy, and reproductive freedoms, to public policies on criminal justice, property, trade and commerce, education, immigration, labour, and environmental protection.'[82] These issues are intrinsically linked to politics, and when courts adjudicate on them, they are accused of interfering in politics.

Schor explores the emergence of constitutional courts and their role as political actors. He argues that constitutional transformation resulted in the courts (in Mexico and Colombia especially) displacing political actors 'in the task of constitutional construction and

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[78] Ibid, at 150.

[79] R Hirschl "The New Constitution and the Judicialization of Pure Politics Worldwide" (2006) 75 (2) *Fordham Law Review.*

[80] Ibid, at 721.

[81] Ibid.

[82] Fombad (n 41 above) at 1007-1108.

maintenance.'[83] This scholar further explores the 'more ambitious agenda' that has been pursued by the Colombian Court and concludes that 'although judicial activism has become a normative and political bone of contention in the United States…. Activist courts, such as the Columbian Constitutional Court, can play a key role in ushering needed democratic transformation…'[84]

Roux is of the view that in new democracies, judicial activism by judges would play a greater role 'where the judicial branch is by definition still in the process of building the legitimacy required to play a meaningful role in politics.'[85] In his other writings, Roux acknowledges the risks that come with this role especially for newly established courts in new democracies.[86] He argues, drawing from the jurisprudence of the South African Constitutional Court, that these courts make their decisions in a way that protects their institutional security by avoiding direct conflict with the political arms of the state. It is the dangers that come with decisions in controversial cases that Roux discusses in depth.[87] It is thus important that the role played by the Zimbabwean Constitutional Court be assessed cognisant of these factors.

Botha *et al.* contend that the general limitation clause in the South African Constitution itself raises the question of among others, 'style of adjudication, separation of powers and the degree of judicial activism or restraint that is proper in fundamental rights cases.'[88] They argue that the judges play an important role in the transformative process, however, this needs commitment.[89] Acknowledging that the Constitution of Zimbabwe is in many ways similar to

[83] M Schor "An Essay on the Emergency of Constitutional Courts; the Cases of Mexico and Columbia." (2009)16 (1) *Indiana Journal of Global Legal Studies,* 173-194.

[84] Ibid at 176.

[85]T Roux "Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court" (2003) 10 (4) *Democratization* 92-111, at 92.

[86] T Roux "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?" (2009) 20 (2) *Stellenbosch Law Review,* 258-285.

[87]T Roux "Tactical Adjudication: How the Constitutional Court of South Africa survived its first decade" http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf [Accessed: 14 March 2018]

[88] Botha et al *Rights and Democracy in A Transformative Constitution,* (2003) at 10.

[89] Making reference to this duty the authors says, 'a commitment on the part of judges to dialogue and practical reasoning together with readiness to listen to voices from the margins, may help us keep elusive ideal of self-government alive, and remind us of the transformative possibilities that are hidden away in our normative materials.' 31.

that of South Africa, the extent of the commitment to constitutional interpretation by Zimbabwean judges is critically examined in Chapter 5.

Beyond the African continent, Sieder *et al* discuss judicial activism in Latin America. They argue that courts have been significant actors in the politics of Latin American countries. They provide an example of how the Argentinian Court expanded labour rights. In addition, they argue that the judicialisation of politics raises fundamental issues of balance of powers and 'the responsibilities between the representative and elected bodies and appointed members of the judiciary.'[90]

Hirschl charts the contours of what he calls 'judicialization of mega or pure politics.' Firstly, there is 'the spread of legal discourse, jargon, rules and procedures into the political sphere and policy-making forums and processes,'[91] and secondly, there is the 'judicialization of public policy-making through "ordinary" administrative and judicial review.' Lastly, the judicialization of "pure politics"- the transfer to the courts of matters of an outright political nature and significance including core regime legitimacy and collective identity questions that define (and often divide) whole polities.[92] This reinforces the fear that the more the Zimbabwean judiciary get involved in cases of a political nature, the more likely its independence become compromised.

Still, on that, Roux argues that to be transformative, 'rights discourse and legal reasoning need to be more candid and self-conscious about the politics of adjudication...'[93] This essentially means that Roux accepts that courts have a role to play in rights-based transformation and should be wary of the politics of such postures. This argument essentially brings to the fore the theories of transformative adjudication and transformative constitutionalism.

Zimbabwe's human rights history is an essential part of this study. Ncube has set out this in his 2013 work.[94] He explores the post-2000 human rights developments in Zimbabwe. He argues that post-2000 Zimbabwe has been characterised by two polarising rights claims;

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[90] R Siederr, L Scholden and A Angel. *The Judicialization of Politics in Latin America* (2016).

[91] Hirschl (n 79 above) at 723.

[92] Ibid.

[93] Roux (n 86 above).

[94]C Ncube "The 2013 Elections in Zimbabwe: End of an Era for Human Rights Discourse?" (2013) 48 (3) *Africa Spectrum* 99-110.

> '[the first claim] is associated with Zanu PF, and that is rooted in anti-imperialist movements of the twentieth century that challenged colonial powers and demands the right to national self-determination, which should be realised when a country is sovereign enough to exploit its natural resources such as land and minerals without external influence.'[95]

To achieve self-determination, the ZANU PF government violated the civil and political rights of the opposition. The second claim - associated with the Movement for Democratic Change (MDC), the main opposition party in Zimbabwe, is rooted in the liberal political philosophy and democratisation of the 1990s. It demands fair elections along with civil, political and private property rights. The MDC championed these rights to challenge ZANU PF's hegemony in a way that, from a ZANU PF standpoint served "western hegemony." [96]

Ncube also gives a brief preview of Zimbabwe's constitutional history. He submits that in the year 2000 Zimbabwe civil society and the MDC campaigned for the rejection of a government-sponsored constitutional draft, arguing that it ignored citizens' demand for reduced presidential powers, among other pertinent issues, and that it entrenched ZANU PF's hold on power.

Violence was unleashed on the White commercial farming community, including farm workers, civil society and the MDC and its supporters. According to Ncube, this worsened until the tipping point in 2008, which saw the establishment of a Government of National Unity (GNU) and the eventual adoption of a new constitution in 2013.[97]

The constitutional history of Zimbabwe shows that several amendments were made during the life of the Lancaster House Constitution. Mupuva and Muyengwa submit that;

> 'sought to legitimise controversial actions, notably the expropriation of land in terms of the Land Acquisition Act 1985, which violated property rights, private and Voluntary Organisation Act of 1996, Broadcasting Services Act of 2000, Public Order and Security Act and the Access to Information Protection Act. 2002 among others.'[98]

However, there is a dearth of literature on the jurisprudence of the new Constitutional Court. Its approaches to human rights have not yet been academically scrutinised. It should, however,

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[95] Ibid.

[96] Ibid.

[97] Ibid, at 102.

[98] J Mupuva and L Muyengwa "A Critique of The Key Legislative Framework Guiding Civil Liberties in Zimbabwe" (2012) 15 (4) *Potchefstroom Electronic Law Journal* 125-164 at 126.

be noted that the transformative nature of the Constitutional Court processes finds foundation in the Constitution itself. The African Union has commended the Zimbabwe Constitutional Court's decision in *MISA Zimbabwe and others v Minister of justice and another.*[99] In a statement to Zimbabwe, the AU said it

> 'call[s] on your government to support the decision of the Constitutional Court in light of the potential of this ruling to promote and protect the right to freedom of expression as guaranteed by Article 9 of the African Charter on Human and Peoples' Rights, and as elaborated in the Declaration of Principles of Freedom of Expression in Africa.'[100]

With reference to the new Constitution of Zimbabwe, Ndhlovu submits that 'judicial enforcement of socio-economic rights is a powerful indication that the Constitution goes beyond merely guaranteeing abstract equality.'[101] Ndhlovu, however, acknowledges that even though the Constitution should be seen as transformative '[it] does not provide [a] comprehensive blueprint for a transformed society nor stipulate the precise process for achieving it.'[102] According to Ndhlovu, the very presence of institutions with a transformative agenda in the constitution clarifies this argument. Even though Ndhlovu's work focuses more on socio-economic rights, the interpretations contained therein can be extended to civil and political rights as contemplated in this study. The Constitution itself provides for institutions such as the Constitutional Court and the Human Rights Commission with full and quasi-judicial powers respectively. It is, therefore, a prerogative of these institutions to develop and transform civil and political rights as well. In addition, the founding values in section 3 of the Constitution, the objectives set out in Chapter 2 of the Constitution, are clear indication of its transformative nature.[103]

Ngang acknowledges the role that courts can play in bringing about social change. This scholar categorically states that '[she does] not advocate for courts to become crusaders of democracy, but as arbitrators of fair play in the political game between the government and the governed

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[99] *MISA Zimbabwe and others v Minister of justice and another* CCZ7/15.

[100] AU hails scrapping of criminal defamation in Zimbabwe. 2016 Media Institute of Southern Africa 06 March available at http://misa.org/issues/free-expression-the-law/au-hails-scrapping-of-criminal-defamation-in-zimbabwe/ (Accessed 07 August 2018).

[101] N Ndhlovu. *Protection of Socio-Economic Rights in Zimbabwe. A Critical Assessment of The Domestic Framework Under The 2013 Constitution of Zimbabwe* (2016), at 33.

[102] Ibid.

[103] Ibid.

the role of courts cannot be ignored.'[104] It is the proposition of this study that the Zimbabwe courts should adopt this role if the tenets of the 2013 Constitution are to be realised.

The Constitutional Court of Zimbabwe has also made some landmark judgments, albeit amid the realignment of the laws with the Constitution. The decisions made by the Constitutional Court thus far have reaching consequences and it needs to be cautious. In the case of *Madanhire and Another v Attorney General*, the Constitutional Court passed a judgment declaring the criminal defamation law as unconstitutional.[105] Criminal defamation laws are commonly used to suppress criticism of public officials. In democratic societies, the actions of public officials must be open to public inspection. Criminal defamation laws deter individuals from exposing the misconduct of public officials, and such laws are therefore irreconcilable with freedom of expression.[106]

Judgments with significant bearing on the constitutional trajectory have been handed down by the South African Constitutional Court in the cases of *S v Makwanyane,*[107] *Glenister v President of South Africa,*[108] and many other cases.

Hirschl is of the view that;

> 'the growing political significance of courts has become not only more widespread but also expanded in scope to become a manifold, multifaceted phenomenon that extends well beyond

[104]CC Ngang "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection; the Obligation to take other Measures" (2014) 14 (2) *African Human Rights Journal* 655-680. 656.

[105]*Madanhire & Another v Attorney General* (Const. Application No CCZ 78/12)

[106] Analysis; Facts http://misa.org/issues/analysis-facts-and-implications-of-zim-ruling-on-criminal-defamation/

[107]*S v Makwanyane* 1995 (6) BCLR 665 (CC). This case was decided under the Interim Constitution of South Africa. The Constitutional Court affirmed that the right to life and human dignity are sacrosanct in a constitutional democracy. The case involved the question of the constitutionality of the death penalty. The significance of this was however aptly summed by Klaasen: '*Makwanyane* is an example of a 'hard case' due to its extremely difficult interpretive choices. The drafters of the Constitution and the incumbent government left the resolution of the question of the constitutionality of the death penalty up to the courts.' A Klaasen "Constitutional interpretation in the so-called "hard cases": Revisiting *S v Makwanyane"* 2017 (50) 1 *De Jure*, 1-17. 2.

[108] *Glenister v President of South Africa* 2013 (11) BCLR 1246 (CC); In this case the Constitutional Court demonstrated its bravery in passing a judgement against the Executive. It held that the Hawks were not "sufficiently independent" and that the state had failed to 'fulfil its obligations to respect, protect, promote and fulfil the rights in the Bill of Rights as required by section 7(2) of the Constitution.'

> the now "standard" concept of judge-made policy making, through ordinary rights jurisprudence and judicial redrawing of legislative boundaries between state organs.'[109]

Having explored the existing literature for this study, it is necessary to now turn to the research methodology that is used to both gather and analyse the data.

1.5 Methodology

This study assumes a socio-legal approach. This allows for a departure from pure legal analysis to one that allows for a consideration that may help with insight into how political actors make their decisions which ultimately have legal and political consequences. This work relies on the background of the literature on the law of Zimbabwe, South African and Kenyan jurisprudence which were used as key comparators. A detailed review and analysis of the civil and political rights treaties, conventions, protocols and other instruments and documents to which is Zimbabwe is a party was made. This is meant to paint a picture on the application of these rights in Zimbabwe. Civil organisations' reports on Zimbabwe human rights situation are also considered.

This work takes a critical approach to the analysis of the relevant sources. Value judgments are made, basing on both my understanding of the law and that of other legal commentators. Where no legal materials are available, various other sources such as newspapers and relevant websites are used.

1. 6 Delimitation

This work is limited to legal and political developments preceding the 17 November 2017 Coup.[110] This is because the post-2017 coup regime has declared what it calls the Second Republic which warrants an independent study of its own. This study avoids being drawn into the political debates surrounding the legitimacy of the current government led by President Emmerson Mnangagwa.

[109] Hirschl (n 79 above) at 724.

[110] On the 17th of November 2017, the military, led by General Constantine Chiwenga, now Vice President, removed the former President Mugabe under the auspices of "Operation Restore Legacy" and replaced him with the former Vice President Emmerson Mnangagwa as President.

1.7 Overview of the Chapters

Chapter 1: This chapter serves as an introduction to the entire thesis. It provides an overview of constitutional transformation in Zimbabwe and also highlights the objectives of the study and its literary intervention.

Chapter 2: This chapter explores the historical development of constitutionalism or its absence in Zimbabwe, from the Lancaster House Agreement to the Constitution of 2013.[111] It explores Zimbabwe's constitutions to date in terms of both form and substance and the processes leading to its adoption. It argues that the processes leading to the adoption of a constitution are just as important as the constitution itself. It also serves to provide a background for the need for transformation in Zimbabwe.

Chapter 3: This chapter explores the application of civil and political rights from an international perspective. It shows that civil and political rights are first-generation rights guaranteed at the international level through various instruments to which Zimbabwe is a party. It is argued that this places an obligation on Zimbabwe to ensure that these rights are fully realised by the citizens, and an abdication from such duty is a violation of international law. The extent of the application of selected civil and political rights, and permissible limitations, thereof are discussed.

Chapter 4: This chapter examines the record of the South African Constitutional Court and the Kenyan Courts. Special attention is given to how these Courts have adopted a value-based approach of interpretation of the constitutionalism. Transformation, as an aspect of constitutionalism, is put into perspective. The Chapter demonstrates that the South Africa and Kenyan courts have developed some significant transformative jurisprudence, from which the Zimbabwean courts can draw lessons. It is argued that even though South African jurisprudence is predominantly socio-economic rights, the same interpretative methods are directly applicable to civil and political rights cases in Zimbabwe.

Chapter 5: This chapter interrogates the record of the Constitutional Court of Zimbabwe with special attention on the interpretative methods adopted in civil and political rights cases. The purpose is to examine whether there are any prospects for transformative adjudication in the

[111] Constitution of Zimbabwe, 2013.

country given the existing volatile legal and political situation that existed and continues to exist.

Chapter 6: This chapter summarizes the main findings of the thesis and makes some recommendations. The recommendations are based on both policy and legal interventions.

Having outlined this, it is necessary to turn to an exploration of Zimbabwe's constitutional history to make a case for the need for transformation.

CHAPTER 2

THE CONSTITUTIONAL HISTORY OF ZIMBABWE

2.1 Introduction

Zimbabwe's constitutional history hinges upon a critical discussion of not only the substance but also the processes leading to any significant constitutional developments. A chronological discussion of the history of constitutionalism in Zimbabwe forms the core of this study. It reflects an ever-increasing digression from the fundamentals of human rights protection, which is one of the tenets of modern-day constitutionalism. The roots of constitutionalism in Zimbabwe must be explored from early days of colonialism to the most recent constitutional development.

Zimbabwe, like many other African countries, is a former British colony whose democracy and sovereignty were gained through a combination of war and political negotiations.[1] This followed close to a century of white minority rule, characterized by oppression and subjugation of the Black majority. As is usually the case, new constitutions are often preceded by a period of instability and political bickering; Zimbabwe went to war in the 1970s. After the armed struggle against colonial rule, Zimbabwe adopted a new Constitution in 1980.[2] The Constitution was in force for a total of 33years and survived 19 Amendments, with the 20th Amendment becoming the 2013 Constitution. Even though it was an Amendment, the 2013 provisions were a complete overhaul of the Lancaster House Constitution (1980 Constitution). This alone demonstrates that there was something amiss regarding the 1980 Constitution and the many amendments were attempts to address that. It is argued, in this study, that the 1980 Constitution was not transformative enough to capture the ideals of the revolutionary war that resulted in its birth. Many scholars, therefore, argue that the 1980 Constitution was merely a

[1] The war culminated in the 1970s between the ZIPRA/ ZANLA and the Rhodesia National Army.

[2] The Constitution of Zimbabwe, 1980.

compromise and was not supposed to have lasted that long.[3] However, after 1980 there were several failed attempts to write a new constitution.[4]

It should be noted that the lack of the essential transformative elements in the 1980 Constitution resulted in serious human rights violations, emanating from abuse of power by the authorities, and a general lack of the rule of law or simply a deliberate disregard thereof. These violations included denial of civil and political rights, and socio-economic rights, as well as some acts that have arguably been regarded as genocide.[5]

This chapter, therefore, explores the history of constitutionalism in Zimbabwe, from the Lancaster House Conference to November 2017 when the "Second Republic" was declared. The view taken here is that the current constitutional dispensation is informed by the path that the country has taken over the years in terms of both constitutionalism and human rights. The role of the courts, in particular the Constitutional Court, to contribute to constitutional order in the country is also noted. In this regard, it is observed that most decisions that had a bearing on the constitutionality of the State's actions were followed by amendments that were essentially meant to nullify the court's decisions. This significantly affected the role of the courts in the transformation of human rights in Zimbabwe. Thus, it is necessary to investigate the role that the Constitutional Court can play to see through the transformation processes.

However, before discussing the Lancaster House Constitution, it is necessary to discuss its predecessors. From the time Zimbabwe was colonized until its independence in 1980, there were several colonial constitutions. Most of these constitutions did not survive for long. They

[3] See for example, C Ncube and U Okeke-Uzodike "Constituting Power and Democracy: Zimbabwe's 2013 Constitution-Making and Prospects for Democracy." (2015) 12 (3&4) *Africa Renaissance* 129-157; L Sachikonye (2011) "Zimbabwe's Constitution-Making and Electoral Reform Processes: Challenges and Opportunities," Draft paper prepared for the Conference on 'Legitimacy of power-possibilities of opposition' organised by the Department of Political Science and Public Administration, Makerere University, 1-20 and; S Marumahoko "Constitutional making in Zimbabwe: Assessing Institutions and Process." (2016) Doctor of Philosophy Thesis. *University of the Western Cape*. (Unpublished).

[4] The most prominent of these were the year 2000 Constitutional Commission constitutional Draft, the 2001 National Constitutional Assembly draft and the 2007 Kariba Draft.

[5] As will be shown below, Zimbabwe went through what was referred to as a period of 'madness' in which all those opposed to the incumbent in the 1980s were labelled dissidents and had a specially trained army unleashed on them killing an estimated over 20 000 people in the Midlands and Matebeleland Provinces.

were in stark contrast in terms of both substance and process, to the 1980 Constitution, hence, it is necessary to discuss them as well.

2.2 Pre-independence constitutional developments

When the British South Africa Company (BSAC) through Cecil John Rhodes annexed Zimbabwe, it became part of the British sphere of influence.[6] The first constitutional arrangement was known as the Royal Charter.[7] The Queen of England would confer the document to the British South Africa Company through Cecil John Rhodes to exercise all rights as to form a government for administrative purposes.[8] The Royal Charter,

> 'granted the BSACo the right to obtain powers necessary for the preservation of public order in territories that fall under its concessions. More specifically, it granted the BSACo the right to maintain public order by establishing and maintaining a police force … In addition, the Charter enjoined the BSACo to respect existing African laws and all religions. Importantly, the Charter provided for a legislative body called the Legislative Council whose main function was to assist the Company to run the country by enacting laws.'[9]

According to Marumahoko, the Charter had a lifespan of 25 years.[10] The British South Africa Company, however, had the option of extending its validity or enacting a new constitution. Following the expiry of the Charter, the British government gave Southern Rhodesia the power to set up its own Legislative Assembly. The Royal Charter's validity was subsequently extended to 1922. This Royal Charter is regarded as the first written Constitution of Zimbabwe although this is debatable. The Charter's main characteristic was its supremacy. Marumahoko

[6] The British South Africa Company was a company formed by the colonialists as a vehicle through which acquisition of territory in Southern Africa was to be done. Cecil John Rhodes under a Royal Charter formed the company in 1889. The British South Africa Company was given the power to establish a political entity, explore minerals and establish a paramilitary police. In acquiring territory from local rulers, the BSAC employed tactics such as misrepresentation, fraud or outright military conquest.

[7] The Charter of the British South Africa Company, (London Gazette), 20 December 1889.

[8] The Royal Charter, technically speaking, was not a constitution; however, it provided the legal foundations upon which the colonial legal order in the Southern Rhodesia was built. It is for this reason that it is often regarded as the first constitution.

[9] Marumahoko (n 3 above) at 12.

[10] Ibid.

argues that the Charter can be regarded as a constitution because it provided the legal basis on which the new country of Southern Rhodesia was established.[11]

When the Royal Charter expired in 1922, Britain did not extend its duration. This was after a "Whites-only" referendum that sought the people's views on whether or not to join the Union of South Africa as its 6th province failed.[12] This resulted in the integration of Southern Rhodesia into the British Empire in 1923 as a self-governing territory. The British government, through the Office of Colonial Affairs, adopted a Constitution of the colony. The Constitution was enacted as an Act of the British Parliament. The Constitution of 1923 established a Legislative Assembly. Members of the Legislative Assembly were elected through an election in which only White members of the population could participate. The threshold for voting was generally prohibitive.[13] The 1923 Constitution pronounced Rhodesia as a self-governing territory, which was welcomed by the Whites.[14] It lasted for thirty-eight years.

The year 1953 saw the adoption of a Constitution that led to the creation of a Federation of Rhodesia and Nyasaland.[15] The federation was to bring together Nyasaland, Northern and Southern Rhodesia. This Federation was to be 'based on the territorial distribution of power and the principle of shared sovereignty.'[16] The three territories collectively became known as the Federation of Rhodesia and Nyasaland. According to Marumahoko;

> 'it was envisaged that the alliance would bring together cheap labour from Nyasaland for the expansion of the agricultural and industrial sector in Southern Rhodesia, minerals from Northern Rhodesia and capital and technical expertise from Southern Rhodesia to grow the integrated economy.'[17]

A Constitutional Commission drafted the Federal Constitution. Of the thirteen delegates from Southern Rhodesia, only two were Black. Therefore, the resultant constitution was an

[11] Ibid, at 14.

[12] The British, for Southern Rhodesia to join the Union of South Africa comprised of Afrikaner and British States of Transvaal, Natal, Orange Free State and Cape in modern day South Africa had made suggestions.

[13] Only British male subjects above the age of 21 could vote.

[14] C Palley. *Constitutional History and Law of Southern Rhodesia 1888- 1965*. (1966).

[15] The Federation was an amalgamation of three British colonial states namely; modern day Zimbabwe, Malawi and Zambia respectively.

[16] Marumahoko (n 3 above) at 18.

[17] Ibid.

entrenchment of White interests. The Federation lasted until 1963 after independence was granted to Nyasaland and Northern Rhodesia.[18]

Consequently, following the collapse of the Federation, Southern Rhodesia had to draft a new constitution. A Constitutional Conference was established in 1961, it was tasked with negotiating and drafting a new constitution for Southern Rhodesia. The Constitutional Conference's delegates were drawn from political parties in Southern Rhodesia. The Prime Minister, Sir Edgar Whitehead, chaired it. According to the Prime Minister, the conference aimed at the 'creation of a constitution that would be satisfactory for Blacks, Whites, and the colonial power, Britain.'[19] During the drafting of this constitution, five contentious issues arose. These were, whether it was necessary to have a declaration of rights or bill of rights entrenched in the constitution, what to do with legislation that was discriminatory of blacks, the composition of the legislature, franchise of Black people and procedure for the amendment of the constitution. After these issues were resolved, the Constitution was adopted through a referendum in 1961.[20]

The 1961 Constitution did not last long. In the 1960s, Ian Smith led a campaign calling for the independence of Rhodesia from Britain. This saw his political rise to become the Prime Minister in 1964. Marumahoko notes, 'this development was significant as it changed the trajectory on the narrative of constitutional development in Southern Rhodesia.'[21] This was because Prime Minister, Ian Smith, paved way for the Unilateral Declaration of Independence (UDI)[22] and adoption of a constitution that entrenched White minority rule. Ian Smith made it clear that he could not accept 'the principle of unimpeded progress towards majority rule enshrined in [No Independence Before Majority Rule] NIBMAR principles.'[23] The UDI was declared after a referendum in which Whites were asked whether they supported the idea of divorcing Southern Rhodesia from the colonial power. The Rhodesians voted 'yes' and a declaration of independence was issued on 11 November 1965. In the same year the Smith

[18] Palley (n 14 above).

[19] Marumahoko (n 3 above) at 24.

[20] It was consequently enacted by the British House of Assembly as Southern Rhodesia Constitution Act 1961

[21] Marumahoko (n 3 above) at 29.

[22] The UDI was Rhodesia's declaration of Independence from the British. The British did not recognize it and as a response, it imposed sanctions.

[23] Marumahoko (n 3 above) at 30.

government, having unilaterally declared independence, started drafting a constitution.[24] The constitution, generally, was a counter to NIBMAR.[25] It represented everything against NIBMAR.[26] The drafting of this Constitution was criticized on the basis that Ian Smith had directed it. All the constitutional guarantees that had been extended to blacks were reversed in the 1965 Constitution.[27] The British government objected to the Constitution on the basis that the declaration on independence was illegal. Despite this objection, the constitution was promulgated on 13 November 1965.[28]

In 1967, Smith noticed that the Constitution had faced resistance on almost all fronts and had to act. A Constitutional Commission was appointed in 1967 to draft a new Constitution. The Commission was made up of five members. The Constitutional Commission embarked on a civic education mission encouraging people to participate in the constitution-making process.[29] The draft constitution increased the number of Black legislators.[30] The Constitutional Commission's draft was rejected on various grounds. However, the most notable reason for its objection was that it did not represent the interests of the Whites. Marumahoko submits, 'the

[24] The Constitution of Rhodesia, 1965.

[25] G Williams and B Hackland. *The Dictionary of Contemporary Politics of Southern Africa (*2015)

[26] According to Williams and Hackland, Ibid. 'There were five NIBMAR principles: unimpeded progress towards majority rule; guarantees against retrogressive amendments to the constitution that would retard African advancement; an increase in African political representation; the progressive end of racial discrimination; British satisfaction that proposals for independence were acceptable to Zimbabwe as a whole.'

[27] Some of the provisions that were amended were related to 'the rights of appeal to the Judicial Committee of the Privy Council, the protection of the constitution from amendment if any one racial group did not agree, the constitutional safeguards for blacks, and the Declaration of Rights.' Marumahoko (n 3 above) at 31.

[28] The consequences of this were that the government was regarded as a rebellious one; both the United Nations and the Commonwealth rejected the Constitution. It should also be noted that the constitution itself was a subject of litigation in Southern Rhodesia. In the case of *Stella Madzimbamuto v Desmond William Lardner-Burke and Frederick Phillip George*, (High Court case number GD/CIV/23/66.) the Applicant challenged the incarceration of her husband based on violation of an "illegal" constitution. The local courts rejected the Applicant's argument leading to the appeal in the Privy Council of Britain. The Privy Council ruled that the constitution was illegal.

[29] The commission interviewed 250 people and received more than 650 memoranda.

[30] 'According to the [constitutional] report [1968], some representatives of members of the black community in the legislature were to be selected through direct elections while others were to be selected through electoral colleges formed mainly by chiefs and headmen. Of the Lower House's 80 seats, 40 seats were to be reserved for White voters. The Senate was to consist of 31 members of whom 12 were blacks, another 12 were Whites and 7 were to be appointed by the Head of State.' See Marumahoko (n 3 above) at 36.

fact that racial bigotry influenced the rejection of the draft suggests that the authorities were hostile to the idea of a constitution that was acceptable across the racial divide.'[31]

In 1969 the ruling party embarked on a new journey to transform the 1961 Constitution. Consultative meetings with supporters of the party were held in six provinces. The executive committee responsible for the drafting of the constitution agreed that there was to be a declaration of rights, but it was not to be enforceable in court but only 'safe guarded by the State.' This essentially means that the rights contained in the Declaration of Rights would only be enforced by the State, but there would be no judicial recourse available. The land issue was at the core of the Constitution. The drafters saw to it that the White property interests were protected by the Constitution itself. The drafted constitution was put up for a Whites' only referendum. The results of the referendum showed that 72% of the voters accepted the proposed constitution and 28% rejected it. The Constitution was soon enacted in Parliament as Constitution Amendment (No. 2) Act of 1969.

The constitutions discussed above were, from a constitutionalism perspective, both substantially and procedurally irregular. They were not acceptable to all races and were drafted to protect the interests of the Whites. Constitutionally speaking, none of them would have passed modern-day constitutional muster informed by principles of non-discrimination, equality and tolerance.[32] This means that the constitutions were especially not acceptable to the blacks who formed the majority of the population, therefore, the liberation armed struggle continued. Black people continued to seek a constitution that would see the franchise extended to all regardless of the race with everyone exercising their right to vote freely and without fear and prejudice. On the contrary, whereas blacks were yearning for a more inclusive constitution, the White minority government continued to entrench racial segregation. The White minority government continued to face pressure from the adverse economic effects of war, as well as persistent calls for majority rule from the international community. As a result, the government agreed to form a government of national unity. The agreement was concluded on 3 March 1978.[33] Having acknowledged that the unjust 1969 Constitution was the main cause of the ongoing-armed struggle, the first task of the government was to write a new constitution. A

[31] Marumahoko (n 3 above) at 39.

[32] Ibid, at 42, 'a constitution can hardly be deemed to be legitimate if the methods by which it comes into operation are bigoted, racially biased and exceedingly prejudicial.'

[33] The Agreement was known as the Internal Settlement.

constitution drafting Committee was appointed and tasked with coming up with a constitution and the deadline for this was set for 31 December 1978. Both White and Black political parties were represented in the constitution drafting committee. It should be noted that the drafting Committee made it clear from the onset that it was not a commission therefore it was not going to seek views outside of the Committee. Because the drafting committee could not agree on certain issues, completion of the drafting process was delayed. The political parties endorsed a draft produced on 11 January 1979, and the Legislature approved the Constitution. A referendum on the adoption of the Constitution was held on 30 January 1979. The Constitution was approved by 85% of the White voters. The parties entered into a government of national unity.[34]

Regardless of these developments, the armed struggle continued. This time, the calls for majority rule were getting even louder. As noted by Marumahoko 'with the insurgency growing in strength daily and the ability of the defence forces to contain them reaching a breaking point, negotiating a new constitution started to emerge as the only way out.'[35] Britain, as the colonial power, saw the need to break the political impasse in Southern Rhodesia through peaceful means. The only means was by supporting a constitution that reflected the views of a much broader political spectrum regardless of race or ideology. Therefore, at the Commonwealth Summit of Heads of State and Government held in Lusaka Zambia,[36] the international community tasked Britain to negotiate a constitution and supervise an election to ensure the independence of Rhodesia. The British government invited all political parties to attend a constitutional conference at Lancaster House in 1979.

2.3 Post-colonial constitutional developments

The post-colonial history of Zimbabwe starts with the negotiated settlement in the form of Lancaster House constitutional agreement to the adoption of the new Constitution in 2013. The decade after 1998 which was characterised by a 'cacophony of voices from every nook and

[34] J Hatchard "The Constitution of Zimbabwe; towards a model for Africa" (1991) 35 (1&2) *Journal of African Law* 79-101.

[35] Marumahoko (n 3 above) at 12.

[36] Held between 1 August and 7 August in Zambia in 1979.

corner of Zimbabwe's body politic' resulted in the current dispensation.[37] This period enjoyed its fair share of rigorous debates around several draft constitutions and constitutional discourses in Zimbabwe. At the centre of these debates was the question of how to draft a document that would be acceptable to the people in terms of both substance and process. The question of what an acceptable document would be was very clear - people wanted a new constitutional dispensation characterised with respect for human rights, the rule of law and democracy. Given Zimbabwe's history of polarisation, civil and political rights were critical to this transformation.

2.3.1 The Zimbabwe Constitution of 1980

The Zimbabwe Constitution of 1980 was adopted following negotiations between the warring parties in 1979. The Constitution contained several provisions that were meant to bring peace and usher in a new era of constitutional rule.[38] The 1980 Constitution contained provisions that would see a move from minority to majority rule, put an end to colonialism, and bring about equality and the rule of the law. As Sachikonye notes;

> '… the Lancaster House Constitution was premised upon a recognition of liberal notions of constitutionalism. Hence its incorporation of the concepts of separation of powers, independence of the judiciary, supremacy of the legislature over the executive, public service neutrality and governmental accountability.'[39] (sic)

Given the history of colonialism, 'the Constitution, therefore, sought to place extensive limitations on powers of government vis-à-vis individual rights and sought to check the powers

[37] K Magaya "Constitution by the People or to the People: A Critical Analysis of Zimbabwe's Constitutional Development in View of the Constitution Select Committee (Copac) Led Process." (2015) 3 *Journal of Political Science and Public Affairs*.

[38] Magaisa notes that 'The new constitution was clearly a product of compromise as evidenced by its weaknesses relating to the land question." Elaborating on this point, Magaisa cites Linnington who "observes that the final agreement reflected to a large extent the fact that the various participants had had to make concessions on a number of issues. For example, the Patriotic Front (representing the nationalists) was obviously disappointed that its views on the land issue were not reflected in the text of the new constitution.' A Magaisa "The Land Question and Transitional Justice in Zimbabwe: Law, Force and History's Multiple Victims." (2010) available at https://www.law.ox.ac.uk/sites/files/oxlaw/magaisalandinzimbabwerevised2906101.pdf [Accessed 23 September 2018].

[39] LM Sachikonye "Constitutionalism, the Electoral System and Challenges for Governance and Stability in Zimbabwe" (2004) 2 *African Journal on Conflict Resolution*, at 143.

of the executive arm of the state.'[40] Perhaps the most notable features of the Lancaster House Constitution were the moratorium clauses that were placed on several key provisions. Some argue that the clauses were necessary for providing for a smooth transition and avoid possible post-war retributions. As a result, the Constitution contained moratorium clauses related to changes on issues on the bill of rights, the rules for changing the Constitution and sections relating to emergencies and detentions. These moratoriums were for ten years.[41] In addition, there was a seven-year moratorium on the composition of the two chambers of the Parliament, including the White voters roll. However, at the expiry of the moratoriums, Zimbabwe government began to make changes detrimental to White interests.[42] This is one fact that indicates that the Constitution as it was in 1980, was only accepted as a ceasefire document meant to allow for a smooth transition in the country.

The key question that emanates from the adoption of the Lancaster House Constitution is whether it was transformative enough as a post-conflict document. The answer to this lies in how the constitution failed to change the lives of many ordinary black people. As a result, several amendments were made to the Constitution, most of them flawed. To an extent, the weaknesses of the Lancaster House Constitution can also be blamed for the misrule, including human rights violations, that characterized Zimbabwe's political scene from 1980. As one would correctly observe, '… while the Constitution served an important purpose in transferring power from a minority to a majority government, it was not necessarily a foundation for good governance.'[43] Furthermore, the process that led to the adoption of the 1980 Constitution was flawed as it was only led an elite few.[44] It has been described as 'an outdated, imposed and

[40] Ibid at 143.

[41] 'This was designed to ensure that the transition to independence would not entail a substantial shift in social and property relations.' Sachikonye Ibid.

[42]N Chitty *et al*. *Routledge Handbook of Soft Power*. (2016). *See* also Magaisa (n 38 above) who reflects 'The Lancaster House Constitution contained a clause (section 16), that created a strong and robust framework for protecting property rights. It ensured, in effect, that for the first ten years of independence, land redistribution would be based on the "willing buyer, willing seller" principle. Section 16 was one of the entrenched provisions of the new constitution which meant that it could not be amended for a period of ten years.' After the expiry of the 'willing buyer, willing seller', 'the first move was to amend section 16 of the Constitution. This was achieved by an amendment which came into effect in 1991 and repealed elements of the provision relating to government compensation for acquired land.'

[43] Agenda (1998). *A Newsletter of the National Constitutional Assembly*. Agenda.

[44] The participants of the Lancaster House Conference were from the three main parties to the constitutional discussion namely, the British, Mugabe and Nkomo parties, and Muzorewa's party. The parties were represented

transitional instrument … which does not represent the aspirations of the people for good governance and development'[45]

In addition to these weaknesses, the government itself was keen on preserving certain provisions. 'Although the provisions which restricted changes to the Lancaster House Constitution expired in 1990, the government was somehow not keen to change it to improve conditions for democratization.'[46] As a result, the Constitution itself could not be trusted as a means for transformation. The government resisted attempts to amend the constitution in such a way that would make the country more democratic. The discussion below shows that the constitutional changes since 1980 were mainly aimed at entrenching the State's power and not necessarily for transformational reasons as would be expected.

2.3.1.1 Constitutional changes of 1987-89

The expiry of the first moratorium in 1987 saw the birth of significant constitutional changes. Amendment No 6 of 1987 abolished the system of the White roll in both houses.[47] This essentially changed the system from a parliamentary system to a presidential system.[48] This

as follows; "United Kingdom Delegation; Lord Carrington (Chairman), Sir I Gilmour, Sir M Havers, Lord Harlech, Mr R Luce, Sir M Palliser, Sir A Duff, Mr D M Day, Mr R A C Byatt, Mr R W Renwick, Mr P R N Fifoot, Mr N M Fenn, Mr G G H Walden, Mr C D Powell, Mr P J Barlow, Mr R D Wilkinson, Mr A M Layden, Mr R M J Lyne, Mr M J Richardson, Mr C R L de Chassiron, Mrs A J Phillips, Mr M C Wood." The Mugabe and Nkomo delegation; Mr J M Nkomo, Mr J M Chinamano, Mr E Z Tekere, Gen J M Tongogara, Mr E R Kadungure, Dr H Ushewokunze, Mr D Mutumbuka, Mr J Tungamirai, Mr E Zvobgo, Mr S Mubako, Mr W Kamba, Mr J W Msika, Mr T G Silundika, Mr A M Chambati, Mr John Nkomo, Mr L Baron, Mr S K Sibanda, Mr E Mlambo, Mr C Ndlovu, and Miss E Siziba" and the Muzorewa delegation "Bishop A T Muzorewa, Dr S C Mundawarara, Mr E L Bulle, Mr F Zindoga, Mr D C Mukome, Mr G B Nyandoro, Rev N Sithole, Mr L Nyemba, Chief K Ndiweni, Mr Z M Bafanah, Mr I D Smith, Mr D C Smith, Mr R Cronje, Mr C Andersen, Dr J Kamusikiri, Mr G Pincus, Mr L G Smith, Air Vice Marshal H Hawkins, Mr D Zamchiya, Mr S V Mutambanengwe, Mr M A Adam and Mr P Claypole." Lancaster House Agreement, 21 December 1979. Southern Rhodesia Constitutional Conference Held at Lancaster House, London September - December 1979 Report.

[45] Sachikonye (n 39 above) at 143.

[46] Ibid.

[47] Constitution of Zimbabwe Amendment (No. 6) Act 15 of 1987.

[48] According to Szylagyi 'The office of President characterises the presidential system. The President is both the chief executive and the head of state. The President is elected independently of the legislature.' And 'In parliamentary governments the head of state and the chief executive are two separate offices. Many times, the

Amendment also resulted in the abolition of the post of prime minister with the Executive powers shifting to the President. The original Lancaster House Constitution provided for a largely ceremonial President, with most of the Executive political powers concentrated in the office of the Prime Minister. The 1987 move was a signal for the significant doubts on the acceptability of the 1980 Constitution. 'This, in itself, is very telling of the acceptability of this document in our society.'[49] In 1989, Amendment No 9 abolished the bicameral system of parliament and replaced it with a unicameral one.[50] Real political power shifted from the Parliament to the President.[51] The 1989 Amendments also provided for the Attorney General becoming a member of cabinet thus bringing the Judiciary under Executive influence. As will be shown later, most of these changes served more political purposes than legal ones.

As noted above, these changes were mere attempts to rewrite the Constitution to one that would be acceptable to the black majority and are considered to have laid the foundation for the current constitutional dispensation. However, some had other more sinister motives. 'Most of the Amendments have sought to reverse judicial rulings which have set standards for constitutional conduct by the State.'[52] In addition, the Zimbabwe Lawyers for Human Rights placed the acceptability of the Constitution into perspective;

> 'The Constitution of Zimbabwe was a ceasefire document conceived during peace talks to protect selected interests. It therefore remains flawed and unable to substantively promote and protect the human rights of all the people of Zimbabwe today. Further, virtually all amendments made to this ceasefire document have been in favour of entrenchment of state power, and have compounded the attack on, rather than the protection of, civil rights and liberties as confirmed by the courts and otherwise.'[53]

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head of state functions are in a primarily ceremonial role, while the chief executive is the head of the nation's legislature.' I. M. Szilagyi "Presidential versus Parliamentary systems" (2009) 8 (2) *AARMS* 307-314.

[49] Zimbabwe Lawyers for Human Rights; Amendments to the Constitution of Zimbabwe: A Constant Assault on Democracy and Constitutionalism. (No Date) Available at http://hrlibrary.umn.edu/research/constitution%20statement-sunday%20mirror.pdf

[50] Constitution of Zimbabwe Amendment (No. 9) Act 31 of 1989.

[51] Ibid.

[52] Ibid.

[53] *Zimbabwe Lawyers for Human Rights* "Amendments to the Constitution of Zimbabwe: A Constant Assault on Democracy and Constitutionalism." (No Date) Available at http://hrlibrary.umn.edu/research/constitution%20statement-sunday%20mirror.pdf

Amendment No. 9 of 1989[54] abolished bi-cameral legislature and introduced a single House of Parliament. Considering the ceasefire notion carried in the previous legislation where some parliamentary seats were 'transitionally' reserved for the White minority, the State failed to open all parliamentary seats to the vote and instead used them to continue to allow the President to exercise extreme powers over the legislature by appointing a large proportion of this erstwhile 'independent' institution, essentially to promote political party interests. This was a direct violation of the people's right to elect their leaders.

A rather more interesting move by the State was its enactment of the Amendment No. 11[55] which came as a response to a human rights-related Court ruling in *S v A Juvenile.*[56] The Supreme Court of Zimbabwe held in *S v A Juvenile* that corporal punishment amounted to inhuman and degrading treatment which was not reasonably justifiable in a democratic society.[57] In response, the Legislature in Amendment No. 11 changed the Constitution to add a provision expressly allowing such corporal punishment. It added that hanging by the neck 'did not amount to inhuman and degrading treatment.'[58]

This directly reversed the ruling of the Supreme Court and negatively affected the independence of the judiciary and the principle of separation of powers. In a further assault on the judiciary, when the Supreme Court of Zimbabwe held in *Catholic Commission for Justice and Peace v Attorney- General and Others*[59] that a delay in the enforcement of capital punishment amounted to inhuman and degrading treatment, the Legislature in Amendment No. 13[60] again reversed the decision by inserting a provision that such conduct would be considered acceptable. The impact of these and other decisions on constitutionalism will be discussed in detail in Chapter 5.

2.3.2 Constitutional developments of the early 2000s

The beginning of the 21st Century was a turning point in Zimbabwe's constitutional history. There were two unsuccessful attempts, within two years, to write a new constitution for

[54] Act 31 of 1989.

[55] Act 30 of 1990.

[56] *S v A Juvenile* 89 (2) ZLR 61 (SC); 1990 (4) SA 151 (ZS).

[57] Ibid.

[58] Zimbabwe Lawyers for Human Rights (n 53 above).

[59] *Catholic Commission for Justice and Peace v Attorney- General and Others* 1993 (4) SA 239 (ZS).

[60] Act 9 of 1993.

Zimbabwe. After these attempts, the constitutional debate became even more relevant during a decade-long period of political instability and economic meltdown. The constitutional developments in the 2000s started with the formation of the National Constitutional Assembly, followed by the constitutional draft of 2000 followed by the constitutional Amendment of 2000 and with the 2001 draft.

2.3.2.1 The National Constitutional Assembly

Perhaps the most important period in Zimbabwe's constitutional history was the late 1990s. This period saw growing calls for a new constitution in Zimbabwe. Commenting on the many amendments made to the Zimbabwe constitution, Marumahoko said 'this led civil society to argue that the piece-meal constitutional changes have transformed the Lancaster House Constitution such that it no longer bore resemblance to the original constitution.'[61] This eventually led to the formation of a new civil society organisation with its main focus placed on constitutionalism. The organisation formed in 1998 came to be known as the National Constitutional Assembly (NCA) led by academics, students and activists. Describing the NCA, Sithole said;

> 'The NCA is an effective pro-democracy network that strives to keep democratization as a priority issue on the national agenda and consistently acts as an advocate for good governance. Its membership comprised both institutional and individual members. The former include scores of civil society organizations like the influential and well-respected Catholic Commission for Justice and Peace; religious organizations like the Zimbabwe Council of Churches; human rights advocacy groups such as Zimrights; women's groups like the Women's Coalition; student organizations such as the Zimbabwe National Students Union; and, most important of all, the powerful Zimbabwe Congress of Trade Unions (ZCTU), which is also the backbone of the MDC [Movement for Democratic Change].'[62]

The NCA has been credited for pushing the constitutional agenda. Hatchard notes that,

> 'The debate on a new constitution for Zimbabwe to replace the 1979 independence document commenced in earnest in 1997 when a grouping of various civic organizations that included

[61]Marumahoko (n 3 above) at 136.

[62] M Sithole "Fighting Authoritarianism in Zimbabwe." (2001) 12 (1) *Journal of Democracy*, at 160-161.

churches, political parties (although crucially not the ruling party, ZANU(PF)) and human rights groups formed the National Constitutional Assembly (NCA).'[63]

To illustrate the role of the NCA, as Sachikonye notes, '[t]he first salvo was fired by a broad alliance of civil society organisations that founded the National Constitutional Assembly (NCA) in 1998.'[64] The objectives of the NCA were spelt out as: i) to identify shortcomings of the current Constitution and to organize a debate on possible constitutional reform; ii) to organize the constitutional debate in a way that allows broad-based participation, and iii) to subject the constitution-making process in Zimbabwe to popular scrutiny per the principle that constitutions are made by and for the people.[65] Although these objectives resonated with the State's objective of writing a new constitution, there were fundamental differences that later proved to be irreconcilable. The main differences were centred around the process and the substance of the constitution. Substantially, 'the NCA singled out several clauses in the Constitution which, it argued, were not justifiable in a democratic society.'[66] It was observed, for example, that the protections in the Bill of Rights were not as wide as is desirable in a democratic society. Concerning the procedure, Sachikonye notes that 'while there was basic agreement on the case for a new Constitution, there was a polarisation of positions over the process to follow in crafting one.'[67] This essentially led to a stalemate that resulted in 'an unprecedented constitution-making exercise dominated by ZANU-PF and involving a government-appointed Constitutional Commission consisting of 400 members, of whom 150 were parliamentarians.'[68] The NCA, however, found resonance with the newly formed opposition political party the Movement for Democratic Change that was also calling for respect of human rights and fundamental freedoms and a new constitutional order that would bring back the rule of law.[69] As a result, the NCA enjoyed significant support across the

[63]J Hatchard "Some Lessons on Constitution-Making from Zimbabwe." (2001) 45 (2) *Journal of African Law*. 210.

[64] Sachikonye (n 39 above) at 145.

[65] National Constitutional Assembly 1997. Building a People's Constitution, in Newsletter. Harare: National Constitutional Assembly.

[66] L Sachikonye. *Zimbabwe's Lost Decade: Politics, Development and Society* (2011), at 71.

[67] Sachikonye (n 39 above) at 147.

[68] Ibid.

[69] 'The steady decline in living standards throughout the 1990s is identified generally as one of the main reasons for the growing dissatisfaction with the government that in September 1999 galvanised civic groups and the Zimbabwe Congress of Trade Unions (ZCTU) into forming a political party, the Movement for Democratic

country. The NCA thus went on a massive national campaign. 'The NCA exercise involved an extensive civic education campaign to explain why it had begun to write a new Constitution. It identified the limitations of the Lancaster House Constitution and solicited suggestions and proposals about what a new Constitution should contain.'[70] This was the greatest strength that the NCA had in the constitution-making process.

2.3.2.2 The Constitutional Commission Draft and Referendum

The Constitutional Commission was constituted through Statutory Instrument[71] by the President in 1999. The Constitutional Commission was tasked with initiating the process of constitutional review and to write a new constitution. The rationale was to 'afford the people of Zimbabwe the opportunity to author and found their constitution enshrining freedom, democracy, transparency and good governance.'[72] In the words of the then President Robert Mugabe, the Commission was mandated to 'review the Lancaster House Constitution, as amended, and to appreciate the functions and powers of the three principal pillars of State (that is, the Executive, the Legislature and the Judiciary) and the extent and scope of the Bill of Rights…..'[73] According to Sachikonye, the Commission constituted of 500 members drawn largely from the ruling party and a few from the private sector and a cross-section of State friendly civil society organizations.[74] The Commission was chaired by the late Justice Chidyausiku, who was, at the time, the Judge President of the High Court, who was to later become the Chief Justice of the Supreme Court then the Constitutional Court.[75] Marumahoko argues that the Commission was given unfettered powers in terms of setting its own rules and

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Change (MDC), currently led by Morgan Tsvangirai.' C Maroleng "Zimbabwe's Movement for Democratic Change Briefing Notes." (2004) *Institute for Security Studies*.

[70] Sachikonye (n 39 above).

[71] Statutory Instrument 138A of 1999.

[72] Statutory Instrument 138A of 1999.

[73] Marumahoko (n 3 above) at 138.

[74] According to Marumahoko 'of the 500 commissioners, 150 were elected Members of Parliament and 350 were ordinary citizens drawn from outside of state institutions. Those appointed included members drawn from civil society; they were sworn in on 21 May 1999.' Ibid.

[75] Marumahoko notes that he was assisted by three deputy chairmen: Professor Walter Kamba, who, at the time, was Dean of the Namibian Law School and former Vice-Chancellor of the University of Zimbabwe; Reverend Bishop Jonathan Siyachitema of the Anglican Church; and Mrs Grace Lupepe, a prominent citizen. In addition, the President appointed Charles Utete, Chief Secretary to the President and Cabinet, as the Secretary of the Constitutional Commission' Ibid.

procedures for constitutional making.[76] The Commission started its work in August 1999 and by the end of September 1999, it had completed its consultations. It was divided into nine distinct thematic committees responsible for '(a) executive organs of state; (b) citizenship, fundamental and directive rights; (c) separation of levels of government; (d) public finance and management; (e) customary law; (f) independent commissions; (g) separation of powers among the three branches of government; (h) transitional arrangements; and (i) legal matters.'[77] During its work, the Commission received written and oral submissions. According to records, it held 5 000 meetings and consulted 700 000 people.[78] These consultative meetings were done by 10 consultation groups made of 43 commissioners each.[79] Their duty was to collect and record what people wanted to see in the new constitution. However, the challenge came in the compilation of its findings and the drafting of the constitution. After the consultations, the Commission held a plenary session with all the consultation teams to submit their findings.[80] This was followed by the drafting stage.[81]

According to Raftopoulos and Savage 'in producing the draft constitution the Constitutional Commission did not faithfully record the views that it had gathered in the interviews recorded

[76] Marumahoko (n 3 above).

[77] Ibid, at 138-139.

[78] See for example L Sachikonye "Constitutionalism, the Electoral System and Challenges for Governance and Stability in Zimbabwe" (2004) *African Journal on Conflict Resolution;* S Marumahoko "Constitutional making in Zimbabwe: Assessing Institutions and Process." (2016) Doctor of Philosophy Thesis. *University of the Western Cape* and; Centre for Democracy and Development 2000. The Zimbabwe Constitutional Referendum. London: Centre for Democracy and Development (Mimeo).

[79] Ibid.

[80] This plenary session was broadcast live on national television.

[81] The drafters of the constitution, according to Marumahoko (n 3 above) were, 'Moses Chinhengo, a former High Court judge in Zimbabwe and Botswana, Brian Desmond Crozier, a former director of legal drafting in the Attorney-General's Office and law lecturer at the University of Zimbabwe and Priscilla Madzonga, a partner of Costa and Madzonga Legal Practitioners.' It should also be added that the drafting was done under the guidance of the constitutional commission, and Marumahoko has further accused the commission of undermining the drafters 'Operationally, the drafters referred their work to the Constitutional Commission for assessment and approval. Often, the drafts came back with instructions indicating provisions that the Constitutional Commission wanted modified. The communication between the two sides, mediated through the Chairman, continued until the Constitutional Commission was satisfied with the product.' And adds, 'Soon after adoption, the draft constitution was submitted to the State President. Upon consideration, the State President personally made alterations to the draft constitution. The draft constitution was endorsed by the cabinet on 19 November 1999.'

in the CRC reports.'[82] It is also on record that once the Constitutional Commission adopted the draft, the President also made his alterations and sent it to Parliament for adoption on November 19 1999.[83] Highlighting the shadowy manner in which the drafting process was undertaken, Marumahoko puts it as follows;

> 'On 19 January 2000, under the heading 'Corrections and Clarifications', the government again published in the Government Gazette, the final draft constitution. In total, forty amendments were made to the draft constitution adopted by the Constitutional Commission under the guise of 'corrections and clarifications'. The executive justified the amendment of the document through a statement published in the national media; It is common cause that any draft is by definition subject to improvement by way of grammatical and factual corrections as well as linguistic clarifications in order to avoid any doubt about the meaning of what is in the draft. The corrections and clarifications below were done on the basis of the records of the Commission's Committee minutes and published in the Commission's 1437-page Social Report. It's all there for the asking and there is nothing new because the record is public and therefore speaks for itself. Only people with literacy problems or hidden political agendas will find it difficult to tell the otherwise clear difference between corrections and clarifications on the (sic) one hand and amendments on the other. Don't be misled.'[84]

The Draft Constitution was becoming more contentious. It has been reported that even some members of the Commission approached the Court seeking a declaratory order for invalidity of the Draft Constitution. The grounds for the applications to High Court were, *inter alia*, the constitutionality of the President's unilateral amendments to the draft as well as the clear disparity between the submissions and the final draft.[85] As a result, the National Constitutional Assembly (NCA) rejected the Constitutional Commission processes. The NCA, 'like the Constitutional Commission (CC), also conducted an extensive outreach programme in different parts of the country on what should form the content of the new Constitution.'[86] In its outreach and campaigns, the NCA pointed out the shortfalls of the Constitutional Commission and as

[82] B Raftopoulos and A Savage. *Zimbabwe; Injustice and Political Reconciliation* (2004), at 247.

[83] Constitutional Commission 1999. Draft Constitution. Harare: Constitutional Commission.

[84] According to Marumahoko (n 3 above) Judge Bartlett presided and dismissed the applications arguing that the President had the power to make 'any corrections, clarifications, alterations or amendments to the draft constitution he so wishes' adding that the President 'could even have discarded it completely and put his own draft before the electorate.'

[85] Ibid.

[86] Sachikonye (n 39 above) at 147.

Sachikonye puts it, 'eventually, the credibility of the CC exercise was thrown into serious doubt when its draft omitted and misrepresented some of the citizens' views on what the new Constitution should contain.'[87] The NCA went on a rigorous campaign calling for the rejection of the Commission's draft in a referendum that was to follow in February 2000. 'The CC's draft was decisively rejected in the referendum in February 2000. The NCA had contributed to that rejection through its 'no' campaign, which resonated with the electorate. What followed was a stalemate on the future direction of the reform process.'[88] The rejection of the Constitutional Commission draft was viewed as a victory for the opposition and civil society. However, it also marked a turning point in Zimbabwe's political history, as this was largely seen as the ruling party's first-ever defeat. As Marumahoko puts it;

> 'The results of the referendum represented the first significant national snubbing of a major political programme institutionalised by ZANU PF, the ruling party … The 'no' vote also signified the opposition to the awkward manner in which the government-appointed Constitutional Commission had organised and managed the process of constitution-making. The State President was, however, gracious enough to publicly accept the results of the referendum as binding, noting that 'the people had spoken.'[89]

What followed thereafter was a politically charged decade characterised by State-sponsored human rights violations. There was also a further contraction of civil and political rights through the introduction of the Public Order and Security Act (POSA)[90] and the Access to Information and Protection of Privacy Act (AIPPA)[91] in 2002. The legislation restricted freedom of assembly and freedom of expression respectively. Their operation was beyond the limitations of the permissible rights in terms of the international law and was therefore unacceptable in a democratic society. The introduction of this legislation even further polarized

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[87] Ibid.

[88] See also Nordem Report's analysis of what led to the rejection of the draft constitution in the 2000 referendum. 'The President added some controversial changes allowing land expropriation without compensation and the draft was presented to the public in a referendum in February 2000. The draft fell with 54 per cent of the votes against and 46 per cent in favour of the draft. The result came after a campaign where the constitutional commission, the government and ZANU PF supported the draft.' K Vollan "The constitutional History and 2013 Referendum of Zimbabwe." A Nordem Special Report 2013. *Norwegian Centre for Human Rights, University of Oslo*. 17. In addition to this Marumahoko observes that 'of the 1 312 738 votes cast in the constitutional referendum, 54.7% rejected the document while 45.3% approved it.'

[89] Marumahoko (n 3 above) at 144.

[90] [Chapter 11: 17].

[91] [Chapter 10: 27].

Zimbabwe's political space. More people belonging to the opposition were arrested on allegations of violating the provisions of POSA and journalists belonging to the private media were also not spared through the operation of AIPPA.

After the referendum, the constitutional debate was temporarily shelved with attention shifting to the impending 2002 presidential election. Most of the amendments that followed were in one way or the other meant to guard against the growing criticism of the State and many arrests were made under POSA and AIPPA. The 1980 Constitution could not sufficiently protect civil and political rights as it had been manipulated through several amendments.

2.3.2.3 Key features of the Constitution Commission's 2000 draft.

Some key provisions of the Constitutional Commission Draft must be discussed. This is because it is one of the few publicized draft constitutions for Zimbabwe before the adoption of the 2013 Constitution. It would also be interesting to see if the Constitutional Commission draft had any transformative elements that could inform the trajectory of the Zimbabwe courts' jurisprudence.

The Commission's Draft committed to the constitution as the supreme and fundamental law of the land. This was indeed a key feature as it guarantees the supremacy of the law which in turn is important in ensuring the rule of law, something which had for long been absent in Zimbabwe. The Draft further stated that the organs and agencies of the State were not exempt from the supremacy of the Constitution. Executive authority was vested in the President, Prime Minister and Cabinet. The Constitution placed the presidential two terms limit. However, this was not to apply to the incumbent. Arguably, these were the most progressive features of the Commission's Draft. However, the President's powers were even entrenched further.[92] And this was retrogressive.

In addition, the power to make peace or war was vested in the President. The President also had the power to deploy military forces outside the country's borders. The Draft Constitution established the office of the Prime Minister.[93] It is important to note that the office of the Prime Minister had been abolished in the 1987 Amendments to the Constitution.[94] The Parliament

[92] See G Dzinesa "Zimbabwe's constitutional reform process: Challenges and Prospects." (2012) *Institute for Justice and Reconciliation Africa Programme.*

[93] Constitutional Commission 1999. Draft Constitution. Harare: Constitutional Commission.

[94] Zimbabwe Constitution Amendment (No.7) Act 23 of 1987.

was to be comprised of two houses, the Senate, and the National Assembly. This was one of the contentious provisions of the Draft.[95] Further, the Draft vested the judicial authority in the courts that is the Constitutional Court (which was to be established), Supreme Court, High Court, Magistrate's Court, Customary Law Courts as well as any other courts established through acts of Parliament. The Constitution guaranteed the independence of the judiciary. The extent of this independence was however debatable. The Constitution made a provision that judges, other than the Chief Justice were to be appointed by the President from a list of names drawn by the Judicial Services Commission. The President, however, was responsible for the appointment of the Chief Justice and was to only consult with the Judicial Services Commission. One may argue that this document was a reformed version of the Lancaster House Constitution, however, the process that led to its drafting was not acceptable to the masses which led to its rejection at the referendum.

2.3.2.4 Constitutional changes of 2000

The year 2000 saw a significant constitutional change that has often been blamed for the socio-economic challenges that Zimbabwe is currently facing. Through the Constitution of Zimbabwe Amendment No. 16,[96] the Government purportedly transferred the responsibility of compensation for land belonging to dispossessed commercial farmers from the Government of Zimbabwe to the British Government. Amendment 16A read;

> (1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance (a) Under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation; (b) The people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980; (c) The people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly (i) The former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and (ii) If the former colonial power fails to pay compensation through such a fund, the

[95] This was seen by the opposition as a ploy by the ruling party to increase its chances of control the parliament since a substantial number of members of the uppers were to be appointed by the President and some to come from the traditional chiefs' body.

[96] Constitution of Zimbabwe Amendment (No. 16) Act 2000.

> Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.[97]

Consequently, this provision resulted in the farm invasions of the early 2000s that were later legalised *via* another Amendment in 2005.[98] It is important to note that the land invasions of the year 2000 were a direct response to the emergence of a new political party, the MDC, formed by students, academics, trade unionists and the civil society. The political debates surrounding the issue of land resulted in a ruling party led a crackdown on the opposition, White commercial farmers and the civil society.[99] It is the crackdown on the opposition and civil society that led to new calls for a new dispensation based on the rule of law, democracy and respect for human rights.

2.3.2.5 The 2001 National Constitutional Assembly Draft

The rejection of the Constitutional Commission draft led to an 'ambitious' constitution-making process by the civil society led by the NCA. This project was undertaken by civil society with the belief that the Government was not sincere in its commitment to a new constitutional order. They also accused the government of not treating the constitutional issue with the urgency it deserved. Many civil organisations came together intending to write a new constitution. To achieve this, the NCA convened an extraordinary summit on 31 March 2001.[100] The objective of the summit was for the affiliated members to chart a way forward in a quest for a new constitution. An all Stakeholder's Constitutional Conference was consequently held in Harare for the NCA to get a formal mandate to write a new constitution for Zimbabwe.[101] More than 7 000 delegates attended the Conference. The delegates included civil society, women organisations, students, and youths. The NCA was unanimously elected to drive the constitution-making process. Having received the mandate, the NCA embarked on a civic education campaign to produce a draft by 30 September 2001. Its civic education was primarily focused on acquainting the masses with the process, structure and how input was to be sourced.

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[97] Constitution of Zimbabwe Amendment (No. 16) Act 2000.

[98] Constitution of Zimbabwe Amendment (No.17) Act 2005.

[99] *Zimbabwe Human Rights NGO Forum.* Human rights and Zimbabwe's June 2000 Election Special Report 1 (2001) 27.

[100] Marumahoko (n 3 above) at 148.

[101] Magaya (n 37 above).

This was done through various billboards, radio and television advertisements as well as through newspapers. Rallies and marches were also conducted.

During consultations, the NCA sought to gather the input of the people on what they wanted to see in the constitution. The consultations took the form of community outreach programmes. The First Draft of the NCA Constitution was published on 28 September 2001. Following various debates, comments, and suggestions, the draft was updated and endorsed by 85% of the delegates at the All Stakeholder Conference on 1 December 2001. The Draft was then presented to the Government for adoption. Marumahoko cites the Draft Constitution of 2001;

> 'This is now the Final Draft, which from the evidence available to the NCA, has been endorsed by a broad section of the people of Zimbabwe. It is being presented to the government of Zimbabwe with a DEMAND that it be enacted into law. The Government must among other things, facilitate the holding of a referendum on any future Constitution of Zimbabwe. The NCA will be leading a process of ensuring that Zimbabwe eventually has a new, democratic and people-driven constitution. This Final Draft represents such a constitution and the NCA will advocate for its enactment into law.'[102]

The Government did not accept the proposed constitution on various grounds. Firstly, the government argued, 'the actions of the NCA did not carry moral and legal authority. The NCA, it was argued, could not act as the representative of the people.'[103] Secondly, the constitution was objected on the basis that its land and property clause was too generous and that the changes were broad.

Even though the NCA constitution did not come to fruition, it provided the basis for constitution-making in Zimbabwe. The elements of inclusivity and national participation were to be commended, and these became the guidelines for the 2013 constitution to be discussed later.

2.3.2.6 Constitutional changes of 2005

In 2005, the Constitution Amendment (No. 17)[104] was enacted. This Amendment had three main characteristics. The first is that it revived a bicameral Parliament through the

[102] Marumahoko (n 3 above) at 151.

[103] Ibid.

[104] Constitution of Zimbabwe Amendment (No.20) Act, 2000.

reintroduction of the Senate, a house that had been previously abolished.[105] The Senate became the Upper House of Parliament.[106] The second feature is that the Amendment provided for the compulsory acquisition of land from white commercial farmers. The Act, through section 16B 'introduced a new provision to confirm the acquisition of land for resettlement purposes which took place according to the Land Reform Programme beginning in 2000, and provide for acquisition in the future of agricultural land for (sic) and other purposes.'[107] The provision also had the effect of ousting the jurisdiction of the courts in matters involving land and reduced individuals' right to access to courts in similar matters.[108] 'This Amendment was to be the subject of the long and fierce legal battle between Mike Campbell (Pvt) Ltd[109] (a Zimbabwean farming company) and the Government of Zimbabwe.'[110] This Amendment also had far-reaching consequences. As a result, several cases were heard in both Zimbabwean and regional courts.[111]

The third main feature of the 2005 Amendment was its effect of reducing the extent of the right to freedom of expression. This Amendment also altered Section 22 of the Constitution by extending the grounds on which the right to freedom of movement could be limited.[112] Legal

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[105] Section 6

New section inserted in Constitution Chapter V of the Constitution is amended by the insertion in Part I of the following section after section 32

"33 Parliament

Parliament shall consist of two Houses, called the Senate and the House of Assembly."

[106] Discuss the constitutional powers of the senate under the 1980 constitution

[107]S Mubvuma "Summary of Amendments to the Former Constitution of Zimbabwe" (2014) 2 (1) *University of Zimbabwe Student Journal Law Review* 1-8.

[108] S Tembo "An Analysis of the SADC Tribunal and the East African Court of Justice: A Human Rights Perspective" (2015) 1 *University of Kwa-Zulu Natal Student Law Review* 113-130 and; S Tembo "The Human Rights Jurisdiction of the SADC Tribunal and the East African Court of Justice: legal and political implications." (2016) Master of Laws Thesis. *University of KwaZulu Natal*.

[109] *Mike Campbell Private Ltd v Republic of Zimbabwe* SADC (T) Case No. 2/2007; *Mike Campbell Private Ltd v Republic of Zimbabwe* SADC (T) Case No. 3/2009.

[110] Mubvuma (n 107 above)

[111] Notable examples being *Mike Campbell (Pvt) Ltd & Anor v Min of National Security & Ors* S-49-07; *Fick v The Republic of Zimbabwe* SADC Tribunal (2010); *Mike Campbell Private Ltd v Republic of Zimbabwe* SADC (T) Case No. 2/2007; *Mike Campbell Private Ltd v Republic Of Zimbabwe* SADC (T) Case No. 3/2009; *Fick v The Republic of Zimbabwe* (657/11) [2012] ZASCA 122 and *Gramara Pvt Ltd and Others v Republic Of Zimbabwe* HC33/09.

[112] See Zimbabwe Constitution of 1980 Section 22 (3) (a), (b), (c), (d) and (e).

commentators viewed this as a strategy to circumvent the decision of the Supreme Court in *Chirwa v Registrar General*[113] in which the Court ruled it unlawful to restrict a citizen's right to travel in terms of section 22 of the Constitution.[114] As will be shown in the following Chapters, constitutional amendments had become a tool by which the state could reverse the court's rulings on constitutional matters. This effectively led to increased calls for a new constitution.

2.3.2.7 Constitutional changes of 2007 and Kariba Draft

Perhaps the most controversial development in Zimbabwe's constitutional history was the drafting of a constitution that became known as the Kariba Draft. The Kariba Draft derives its name from the name of the town in which it was drafted.[115] There is not much legal information about the drafting of this document as it was done secretly by political parties around 2007.[116] The Draft, however, suffered a premature death and the only time in which it found legal meaning is when it was referenced in Article 6 of the Global Political Agreement.[117] The Kariba Draft has often been criticized for its flaws in terms of both substance and process. The Kariba drafting process overlooked the role that could be played by other stakeholders including the ordinary citizens. It essentially denied people the right to self-determination through a people-

[113] *Chirwa v Registrar General* 1993 (1) ZLR 1 (H).

[114] This was in terms of Constitution of Zimbabwe before enactment of Amendment Number 17.

[115] It was reported that a few politicians from the two main political parties (ZANU PF and MDC) gathered in the resort town of Kariba in 2007 where they purportedly clandestinely drafted a constitution on behalf of the people.

[116] Dzinesa (n 92 above) See also NCA (National Constitutional Assembly) (2009) The Shortcomings of the Kariba Draft Constitution. Harare: NCA.

[117] '6. Constitution

> Acknowledging that it is the fundamental right and duty of the Zimbabwean people to make a constitution by themselves and for themselves;
>
> Aware that the process of making this constitution must be owned and driven by the people and must be inclusive and democratic;
>
> Recognising that the current Constitution of Zimbabwe made at the Lancaster House Conference, London (1979) was primarily to transfer power from the colonial authority to the people of Zimbabwe;
>
> Acknowledging the draft Constitution that the Parties signed and agreed to in Kariba on the 30th of September 2007, annexed hereto as Annexure "B";
>
> Determined to create conditions for our people to write a constitution for themselves; and …'

driven constitutional making process.[118] A few people representing political parties drafted the Kariba document and it is often suggested that not more than six people were primarily responsible for the drafting.[119] This was contrary to the values and principles set in the Zimbabwe People's Charter,[120] which calls for a "people-driven, participatory" process of constitutional reform spearheaded by an inclusive All Stakeholders Commission.'[121] 21st-century constitutionalism requires that the views of the people be taken into account when drafting constitutions that would be acceptable to the people. Commenting on the Kariba Draft, one author pointed out:

> 'It is regrettable that the attempt at constitutional reform was tied to the whims and caprices of the political elite. The fact that the process of constitution-making was concocted by a collection of politicians and reflected executive preferences suggests that the final document could not claim to be democratic, legitimate and reflective of the popular will of the people.'[122]

Substantially, the Kariba Draft was flawed. It was simply a merger of the Lancaster House Constitution and the 2000 Constitutional Commission draft which both sought to entrench Executive powers as opposed to expanding the scope and protection of fundamental human rights. Therefore, the Draft could not meet the minimum expectations of a constitutionally drafted document.

2.4 The Global Political Agreement and 2009 Amendments

Arguably, the most important stage in Zimbabwe's post-colonial history is the formation of the Inclusive Government in 2009. Following a disputed election in June 2008:

> 'on the 15th of September 2008, Zimbabwe entered into a historic Global Political Agreement (GPA) which gave birth to the Government of National Unity (GNU) to end the political and

[118] See for example, 'Ordinary citizens and the press were not allowed anywhere near the constitution-making venue. To make matters worse, no mechanisms were put in place to enable ordinary citizens to participate in the process of constitution-making through civil society organizations or directly by making oral and written submissions, workshops or special consultative forums.' Marumahoko (n 3 above) at 155.

[119] *National Constitutional Assembly* (n 116 above) at 2.

[120] The People's Charter is a document adopted by the people of Zimbabwe at a People's conference held in Harare on 08 February 2008 to provide a statement of principles which should guide Zimbabwe in all levels of government.

[121] *National Constitutional Assembly* (n 116 above) at 2.

[122] C Zvorwadza. *Attempts to impose Kariba draft constitution hit snag* (2009). 1-4.

economic impasse in the country as well as a foundation towards a new constitutional dispensation, founded on the protection of human rights.'[123]

The Global Political Agreement is often credited for setting the base on which the new Constitution was founded.[124] As Arat notes 'democracy depends largely on the extent to which it recognizes and enforces civil and political rights.'[125] Some of the provisions that can be singled out include Article 6 which informed the constitutional-making process.[126] In terms of the substance, Articles 11, 12, 18 and 19 provided for civil and political rights.[127] From its inception, the mandate of the new Government was clear. Firstly, it was to carve a path to economic recovery, and secondly to restore democracy and the rule of law. Morgan Tsvangirai, one of the Global Political Agreement (GPA) principals was once quoted saying that the

[123] C Dziva "A Critique of the 2008 Government of National Unity and Human Rights Protection in Zimbabwe" (2013) 2 (8) *International Journal of Humanities and Social Science Invention* 83-92. The Global Political Agreement was signed by Robert Mugabe of ZANU PF, Morgan Tsvangirai of the MDC-T and Arthur Mutambara of the MDC-M.

[124] Also note that some scholars do not particularly agree with this argument as they say that the process that led to the signing of the GPA was not inclusive, transparent and participatory.

[125] ZF Arat *Democracy and Human Rights in Developing Countries* (1991) 4.

[126] Article 6 provides;

6.1 The Parties hereby agree:

(a) that they shall set up a Select Committee of Parliament composed of representatives of the Parties whose terms of reference shall be as follows:

(i) to set up such subcommittees chaired by a member of Parliament and composed of members of Parliament and representatives of Civil Society as may be necessary to assist the Select Committee in performing its mandate herein;

(ii) to hold such public hearings and such consultations as it may deem necessary in the process of public consultation over the making of a new constitution for Zimbabwe;

(iii) to convene an All Stakeholders Conference to consult stakeholders on their representation in the sub-committees referred to above and such related matters as may assist the committee in its work;

(iv) to table its draft Constitution to a 2nd All Stakeholders Conference; and

(v) to report to Parliament on its recommendations over the content of a New Constitution for Zimbabwe

[127] Article 10 (free political activity), Article 11 (the rule of law, respect for the constitution and other laws), Article 12 (freedom of assembly and association), Article 18 (security of persons and prevention of violence), Article 19 (freedom of expression and communication).

Government of National Unity (GNU) was not about power-sharing but a return to democracy and the rule of law.[128]

Most importantly, the parties in the GNU agreed to set up a committee that would spearhead the drafting of a new Constitution. Soon after the formation of the GNU, some key constitutional Amendments were made. These amendments came through Constitution Amendment No. 19,[129] which was the last amendment on the old Constitution. The Amendment was engineered to activate and operationalize the Government of National Unity.[130] This Amendment dealt with issues to do with citizenship, citizens' duty to respect the Constitution, duty to uphold the rule of law, granted political rights as well as guaranteed the independence of several commissions.[131] Concerning the issue of citizenship, the Constitution was amended in several ways. It repealed the old Chapter on citizenship and replaced it with a new chapter.[132] This new Chapter set out the grounds for citizenship by birth, descent and registration. People married to Zimbabwean citizens could also now obtain citizenship by registration. In addition to this, the Constitution imposed a duty on every citizen to 'observe and respect the Constitution, to respect the national flag, and the national anthem and to the best of his/her ability, to defend Zimbabwe in time of need.'[133] Notably, Amendment 19 also provided that every citizen be entitled to the protection of the State. Furthermore, a new section titled 'political rights' was inserted into the Constitution.[134] This section obliged the State to

[128] Dziva (n 123 above) at 83.

[129] Zimbabwe Constitution Amendment (No.19), Act 2009

[130] 'Amendment No. 19 was also used to lay out the legal framework to implement the power-sharing agreement which included the post of Prime Minister and Deputy Prime Ministers. This was achieved by the insertion of Schedule 8 to the Constitution.' Mubvuma (n 107 above) at 7.

[131] The amendment was broad, and it covered a number of the all-important constitutional values in order to capture the spirit of inclusivity established by the inclusive government.

[132] Sections 4 – 10 of the Constitution of Zimbabwe 1980 (As amended by Amendment No. 19)

[133] Constitution of Zimbabwe (Amendment 19).

[134] Section 23A Political Rights

(1) Subject to the provisions of this Constitution, every Zimbabwean citizen shall have the right to

(a) free, fair and regular elections for any legislative body, including a local authority, established under this Constitution or any Act of Parliament;

(b) free, fair and regular elections to the office of President and to any other elective office;

(c) free and fair referendums whenever they are called in terms of this Constitution or an Act of Parliament.

(2) Subject to this Constitution, every adult Zimbabwean citizen shall have the right

guarantee every citizen the right to a 'free, fair and regular elections for local and national political offices'[135] The right to vote included the right to vote freely in both elections and referendums, and the right to stand for public office. It should be noted that these Amendments were meant to address the ills of the 2008 elections.

To strengthen democracy, Amendment 19 established various independent commissions. It provided that these commissions are independent and not subject to any form of control by political organs. In addition, it required commissioners to exercise their authority without fear, favour or prejudice. The two main changes in this regard were the changes in the composition of the Zimbabwe Electoral Commission (ZEC)[136] and the establishment of the Zimbabwe Anti-Corruption Commission (ZACC). The former's composition was highly contested on the basis that it was not independent and that Commissioners were ZANU PF loyalists, so the latter had to be introduced to combat corruption, misappropriation and abuse of power.

2.5 Constitution-making: Background

The preceding sections painted a picture of the constitutional crisis that Zimbabwe was in before 2013. The only solution for Zimbabwe was to adopt a new Constitution- one that would usher in a new era of democracy and respect for human rights. Following the disputed Election in 2008, a new inclusive Government was established. This new Government was to be popularly known as the Government of National Unity as it was made up of the three main political parties in the country. The new Government was formed under the mediation and brokerage of regional and sub-regional bodies such as the Africa Union (AU) and the Southern African Development Community (SADC). The GNU came to power on the 13th of February 2009 following negotiations on a power-sharing deal and several agreements on constitutional issues.

The guidelines for the drafting of the new Constitution were contained in the Global Political Agreement (GPA). In terms of Article 6,[137] the Constitution Parliamentary Committee

(a) to vote in referendums and elections for any legislative body established under this Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office

[135] Ibid.

[136] The Amendment increased the number of commissioners from 7 to 9 (including the Chairperson) nominated from a list of 12 nominees submitted to the President by the Committee on Standing rules and Orders.

[137] Article 6 of the Global Political Agreement.

(COPAC)[138] was to call for a constitutional conference to seek guidance on the themes and structure of the Constitution. As outlined in the GPA, the new government's mandate was to drive a new constitution-making process in Zimbabwe. This duty was placed in the hands of Parliament, through a Select Committee. This was needed to promote human rights and democracy.[139]

> 'In the quest to promote and protect human rights, the GPA principals pledged to create conditions for Zimbabweans to write a constitution that deepens democratic values and principles. In principle, parties in Article 4 agreed to draft a people-driven "constitution that provides for some basic political and economic rights as guaranteed by international law."[140]

Despite this need for a people-driven constitution, in practice it was dominated by political parties, through a Parliament-led process under the direction of the Constitution Parliamentary Affairs (Select) Committee (COPAC), which defeated the voices of the people by making the whole process determined by inter-party negotiations.[141]

The COPAC was constituted of 25 legislators drawn from all the political parties represented in the Government of National Unity.[142] As a result, the constitutional-making process was riddled with contestations. Different political parties had different political views. Critics have argued that the very composition of COPAC was not representative.[143] Notably, they expressed concern over the fact that Parliamentarians led the process. Reynolds cited by Marumahoko also 'questioned the suitability of Parliament on the basis that it did not represent all the political parties.'[144] In response to this argument, the Speaker of Parliament (the Hon. L Moyo) said that a Parliament-led process would ensure that the process was transparent and credible. Marumahoko is of the view that 'putting a Parliament in charge of the Constitution-making

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[138] It was also referred to as the Parliamentary Select Committee.

[139] 'Democracy depends largely on the extent to which it recognizes and enforces civil and political rights.' Arat (n 125 above) at 4.

[140] Dziva (n 123 above) at 33.

[141] Ibid, at 87.

[142] Of the 25 legislators, 7 were women and there were also 3 co-chairpersons representing the 3 main political parties.

[143] 'The members of the select committee attended courses on constitution-making, and held workshops and consulted with civil society about the process, although some critics argue that not many of the assurances given to civil society were adhered to.' D Dzinesa "Zimbabwe's Torturous Road to a New Constitution and Elections." 17 August 2012 *Institute for Security Studies* Situation Report.

[144] Marumahoko (n 3 above) at 163-164.

process puts the ruling politicians of the day in an ideal position to dominate the process of constitution-making under the guise of being representatives of the people.'[145]

This argument is premised on the notion that the incumbent always has control of all arms of the State as well as the State media which provides room for electioneering. Another criticism of the constitutional making process in Zimbabwe was that 'Parliament is necessarily a product of temporary electoral choices that depend on the political winds, interests and prejudices of the moment.'[146] In addition to this, Moyo submits that 'unsuitability of parliamentarians as constitutional makers stems from the fact that they are chosen to represent the people who vote them into Parliament and those who subscribe to political values that are in conflict with those they purport to embody.'[147] The other argument made against the involvement of Parliamentarians is that as elected representatives of the people, Parliamentarians only serve for a limited period, therefore they are not best suited to be the authors of a document that would endure well beyond their parliamentary terms.[148] As valid as the arguments against the composition of COPAC may sound, the constitutional-making process in Zimbabwe was widely regarded as democratic, and certainly better than the previous attempts.

2.6 The COPAC-led process.

The Constitution-making process started in earnest with the calling of the Constitutional Conference. This was known as the First All Stakeholder Conference.[149] It was held from the 12th to the 13th of July 2009. The participants of the Conference were drawn from the political parties, civil society, and non-governmental organizations. The objective of the Conference was to discuss and determine the methodology of the collection of people's views, input and to constitute thematic committees of COPAC.[150] This was a participatory process meant to ensure that citizens were involved in the process from the beginning.[151] Records show that the first day of the Conference was marred by confusion, and did not produce much. Regardless of

[145] Ibid.

[146] Ibid.

[147] Ibid at 164- 165.

[148] Ibid at 165.

[149] The conference was attended by 4000 delegates. See Dzinesa (n 143 above) at 6.

[150] Ibid.

[151] See for example, Marumahoko (n 3 above) at 178 cites Chatora who indicates that 'the principles of participation influenced the activities of the conference.'

this, the Conference managed to record some degree of success, sufficient to start the process.[152]

In terms of Article 6 .1 (a) of the GPA, COPAC had the mandate to solicit the views of the ordinary people.[153] The views of ordinary people were collected through outreach consultation meetings led by COPAC. 54 teams of 16 members each were tasked with the duty of consulting the ordinary citizens on issues surrounding the themes that were agreed on at the First Stakeholders Conference. The outreach teams consisted of members of the civil society, political parties and traditional leaders. It is on record that they held a total of 4 943 meetings and an estimated total of 1 118 760 people participated in the meetings.[154] Further, views were also submitted via email and other electronic platforms. This was meant to cater to those citizens who were not physically available to attend meetings especially those in the diaspora.[155]

Even though these meetings were participatory, they were not as perfect as they should have been. There were reports of coercion by the police and the military.[156] The meetings were criticized for not reflecting the views of the people but those of political parties, as there was evidence of coaching. After the data was collected and collated, a committee drafted the constitution.

COPAC released the first Constitution Draft on 18 July 2012. It was reported that MDC accepted the Draft as it was whilst ZANU PF proposed several amendments. Ncube and Okeke-Uzodike note that 'ZANU PF proposed several amendments and declared them non-negotiable.'[157] The Opposition rejected the Amendments in the strongest of terms, the Welshman Ncube led Movement for Democratic Change described the Amendments as 'preposterous, a mockery of the people, and flaunting gross disrespect, contempt insult and audacity by ZANU PF hawks to block transition.'[158] The Draft Constitution was presented at

[152] Ibid.

[153] Global Political Agreement.

[154] T Abiate *et al. Public Participation in African Constitutionalism* (2017).

[155] Zimbabwe has an estimated more than 4million people living outside of its borders. In 2013, it was estimated that south Africa hosts between 2 and 3million Zimbabweans and the UK host close to 500 000. Available at https://mg.co.za/article/2013-04-19-millions-of-zimbabweans-abroad [Accessed; 13 December 2017.]

[156] Magaya (n 37 above).

[157] Ncube and Okeke- Uzodike (n 3 above) 129-157.

[158] Ibid. 131.

the Second All Stakeholders Conference that was held in October 2012. The Conference was aimed at giving feedback to the stakeholders and to review the Draft Constitution. After the review, the MDC accepted the document and ZANU PF rejected provisions relating to devolution of powers of which they favoured decentralization, legalization of same-sex relationships, dual citizenship, the idea of presidential running mates, and establishment of a Constitutional Court and the idea of an independent prosecution authority. [159] These demands resulted in an impasse. The impasse was subsequently resolved leading to a referendum and the adoption of the Constitution. At the referendum, Zimbabweans voted overwhelmingly in support of the new constitution. The Constitution was enacted as the Constitution of Zimbabwe Amendment No. 20.[160] This Constitution saw overwhelming support at the referendum because of its transformative object. This was a commonly shared vision amongst the citizenry.

2.7 Salient features of the 2013 Constitution

The 2013 Constitution presented Zimbabwe with a chance to respect democracy, the rule of law and human rights. As noted in the earlier Chapters, the new Zimbabwe Constitution was negotiated and adopted by the people, and unlike the Lancaster House Constitution, there was no external influence. The main feature of the Constitution in so far as human rights is concerned is its broad Declaration of Rights.[161] The other main feature is that it is founded on principles of separation of powers, democracy, accountability, good governance and the rule of law among others. There is therefore hope that this new Constitution may represent a new system of governance. This was also further entrenched by the establishment of the Constitutional Court. However, according to Justice Chinhengo, a former judge of the High Courts of Zimbabwe and Botswana, '[o]n its own, the adoption of the new Constitution does not in any way guarantee this departure as envisaged under the new Constitution.'[162] This simply indicates that even though the Constitution is transformative, there is a need for the judges to ensure that the transformation envisaged is realised.

2.7.1 Separation of Powers

[159] Ibid. 137.

[160] Constitution of Zimbabwe Amendment No. 20 Act, 2013

[161] Chapter 4 of the 2013 Constitution of Zimbabwe contains the Declaration of Rights.

[162] Former Justice Chinhengo foreword in A Mavedzenge and D J Coltart. *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights* (2014).

Separation of powers in the Constitution of Zimbabwe is found in the distinct constitutional powers that are granted to the three arms of the state. Section 88 (2) vests executive authority in the President and Cabinet, section 162 vests judicial authority in the courts and section 116 vests legislative powers in the Parliament.[163] Even though there is no strict separation of powers, for example between the Legislature and the Cabinet, separation of powers allows for the smooth operation of government.[164] This is because of the existence of a system of checks and balances which promotes transparency and accountability. Without a system of checks and balances, there is a likelihood of abuse of powers by the different arms of the state.[165]

2.7.2 The Rule of Law

The Preamble of the 2013 Constitution refers to the need to 'entrench democracy, good, transparent and accountable governance and the rule of law.'[166] This makes the rule of law a salient feature of the new dispensation founded on constitutionalism in Zimbabwe. Theoretically, the rule of law 'is a doctrine which requires that all citizens and their government be bound by the same laws and be protected by the same standards or rules; which are interpreted by the same principles at all times and as fairly as possible.'[167] The rule of law is therefore an essential feature of constitutional democracy. It has also been noted by scholars that the rule of law plays a dual role of protecting normative values of a constitutional democracy against manipulation, and also functions as a vehicle for the enforcement of those normative values. However, the rule of law should not only be the absence of manipulation or equal treatment but substantially, it should be about having laws that are acceptable to humanity.

In *Commissioner of Police v Commercial Farmers Union*, the High Court of Zimbabwe (per Chinhengo J) held that 'the rule of law which is divorced from justice and just laws become a hollow concept.'[168] It is imperative to make it clear that the rule of law contemplated in the

[163] Constitution of Zimbabwe, 2013.

[164] L Chiduza "Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial independence suffice?" (2014) 17 (1) *Potchefstroom Electronic Law Journal*, 368-418.

[165] See, P B Kurland "The Rise and Fall of the "Doctrine" of Separation of Powers." (1986) 85 (3) *Michigan Law Review*, 592-613.

[166] Preamble of the 2013 Constitution of Zimbabwe

[167] A Mavedzenge and D J Coltart. *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights* (2014), at 16.

[168] *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (HC) 2000 (1) ZLR.

2013 Constitution, if holistically read with other provisions on human rights and accountability, is that which ensures both formalistic and material aspects of the rule of law. According to Mavedzenge and Coltart, 'the formalistic side of the rule of law ensures that government decisions conform with the law, while the material side ensures that the law itself is consistent with the entrenched constitutional democratic values and principles.'[169]

The rule of law in the 2013 Constitution is further entrenched through various provisions such as section 3(1) (b) which lists the rule of law as a founding principle, section 2 (1) which binds the conduct of the State to the Constitution, and section 44 which places a duty on everyone including the State to respect human rights and fundamental freedoms. More importantly, the Constitution places an obligation on all organs of the State to respect the decisions of the courts.[170] As will be shown below the State has, on several occasions, abdicated these provisions.

2.7.3 Judicial Review

Like in many constitutional democracies, the 2013 Constitution provides for judicial review. Judicial review, as contemplated in the Constitution, refers to the Court's power to test the constitutional validity of the decisions of the Legislature, the Executive and other agencies of the State.[171] '[J]udicial review has become [a] necessary mechanism of ensuring governance is in accordance with the constitutionally entrenched normative values and principles of democracy.'[172] The court, the Constitutional Court in particular, in terms of the 2013 Constitution has the power to review the Constitutionality of laws as well as executive action in terms of section 167 (2).[173] This work is therefore based on the argument that the courts in Zimbabwe should be bold enough to exercise these powers "without fear or favour" to bring about the much-needed change. Judicial review is an intrinsic feature of constitutionalism.

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[169] Mavedzenge & Coltart (n 167 above).

[170] Section 164 (3).

[171] The High Court also enjoys concurrent judicial review powers with the Constitutional Court as provided for in section 26 of the High Court of Zimbabwe Act [*Chapter 7:06*].

[172] Mavedzenge & Coltart (n 167 above) at 17.

[173] 'The Constitutional Court now has the exclusive jurisdiction to advise on the constitutionality of any proposed legislation and also makes the final decision as to whether an Act of Parliament or conduct of the President or Parliament is constitutional or not and must confirm any order of invalidity made by another court before that order has any force.' Chiduza (n 164 above) at 374.

2.7.4 Constitutional democracy

The Constitution provides for constitutional democracy. Under section 155(1) the government is obliged to ensure that elections are conducted regularly in a free, fair and peaceful manner. In addition to this, the same provision prescribes that elections will be conducted through a secret ballot, universal adult suffrage, equality of votes and be free from violence and other forms of electoral malpractices. The Constitution, under section 3(2) also creates a multiparty democracy.[174] Multiparty politics has the potential to improve government scrutiny and accountability. Where the legislative arm is composed of various political parties, there is the likelihood of a vibrant oversight of executive action. Furthermore, the Constitution guarantees political rights to every citizen through the provisions of section (67), and these are the right to free, fair and regular elections, and the right to make political choices freely. More importantly, the Constitution gives every citizen the right to:

'form, join and to participate in the activities of a political party or organisation of their choice; to campaign freely and peacefully for a political or [other] cause; to participate in peaceful political activity; and to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the government or any political or whatever cause.'[175]

Within the Zimbabwean context, this is an important provision as it is a corollary to various civil and political rights such as the right to demonstrate. This right has been a subject of extensive litigation in the Zimbabwean courts and will be discussed extensively in this Chapter.

2.7.5 Independent Commissions

To entrench democracy and the rule of law, the Constitution establishes several independent commissions. These institutions are primarily established to promote, respect, and protect human rights, and democratic values and principles. Central to the functionality and effectiveness of these institutions is their independence, and this is guaranteed by the Constitution itself. It is, therefore, crucial that the institutions carry out their duties without any hindrance or interference from the State or political parties.

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[174] Section 3(2) The principles of good governance, which bind the State and all institutions and agencies of government at every level, include-- a multi-party democratic political system.

[175] Section 67 (2).

The 2013 Constitution, in Chapter 12, establishes the Zimbabwe Electoral Commission (ZEC), the Zimbabwe Human Rights Commission (ZHRC), the Zimbabwe Media Commission, the Zimbabwe Gender Commission, and the National Peace and Reconciliation Commission. The objectives, jurisdictions and scope of the operations of these commissions are in terms of section 233 of the Constitution. According to Mavedzenge and Coltart, '[i]ndependent constitutional institutions are therefore a necessary element of the constitutional infrastructure of a democracy.'[176] It is even more important that the Constitution entrenches their independence and gives them sufficient powers to play their oversight role in the protection of democracy.[177]

2.7.6 The Declaration of Rights

One of the most progressive features of the 2013 Constitution is its inclusion of a Declaration of Rights in Chapter 4. Like most modern constitutions, the Declaration of Rights contains all the fundamental rights, civil, political, social, economic and cultural rights. The purpose of the Declaration of Rights is to protect the citizens by spelling out the rights that cannot be derogated, especially by the State, and qualify others as not absolute. The rationale for the limitation of rights, essentially, is to allow the government to govern effectively. However, it should be stressed that in Zimbabwe, even though the Declaration of Rights protects several rights, including the right to freedom of assembly and freedom of expression, notorious laws such as the Public Order and Security Act (POSA)[178] and the Access to Information and Protection of Privacy Act (AIPPA)[179] continue to operate despite being inconsistent with the declaration of rights. In addition to this, several executive actions continue to violate human rights. For example, police brutality, bans on demonstrations and persecution of media practitioners among others are still rampant in Zimbabwe.

2.7.7 Independence of the judiciary

The 2013 Constitution provides for the independence of the judiciary. This is important in ensuring justice and effective judicial review. According to Chiduza, '[i]n a country founded on constitutional democracy, the independence of the courts is pivotal to the protection of

[176] Mavedzenge & Coltart (n 167 above) at 23.

[177] Ibid.

[178] Act of 2002 [Chapter 11:17].

[179] Act of 2003 [Chapter 10:27].

human rights.'[180] Central to judicial independence are the issues to do with the appointment and removal of judges, jurisdiction, and the salaries payable to judges. Section 164(1) of the Constitution provides for the independence of the judiciary and its judgements. The government is obliged to respect the independence of the judiciary and to respect the decisions of the court.[181] Section 164 (2)(b) places a duty on the State to enact legislation that will supplement the constitutional provision of independence of the judiciary.

2.7.8 The Constitutional Court

The adoption of the new Constitution in 2013 led to the establishment of the Constitutional Court in terms of section 162 of the Constitution of Zimbabwe.[182] The 'Constitutional Court' provision in the Constitution was a subject of politically diverse views during the drafting process.[183] It was, however, finally agreed that a Constitutional Court with a specific constitutional jurisdiction was necessary for the new dispensation.

2.7.8.1 Composition of the Constitutional Court

The Chief Justice heads the Constitutional Court, just like he/she does the Supreme Court.[184] In terms of section 166(1), the Constitutional Court bench also includes the Deputy Chief Justice and five other judges. It should be noted that, in terms of the Constitution, the Chief Justice also has the power to appoint an Acting Judge to the bench of the Constitutional Court.[185] This appointment is, however, only for a limited period. The key values and principles that guide the operation of the Court are judicial independence, impartiality, and effectiveness of the Court. This means that the Court is expected to execute its duties expeditiously, without fear, favour or prejudice.[186] In addition to this, the integrity of the Court is also maintained

[180] Chiduza (n 164 above).

[181] Section 164(3) 3. 'An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies and must be obeyed by them.'

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

[183] M Kika. "Returning to the rule of law in Zimbabwe - The Role and Attitudes of the Constitutional Court, 2013-2017" 2017 *Harvard University*. (Unpublished LLM Thesis).

[184] Section 163 (2).

[185] Section 166 (2).

[186] See Kika who notes that 'In exercising judicial authority, it says, members of the judiciary must be guided by the principles that justice must be done to all irrespective of status, that justice must not be delayed, and that members of the judiciary must perform their judicial duties efficiently and with reasonable promptness, with the

through a provision that, ' members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.'[187]

2.7.8.2 Jurisdiction of the Court

The jurisdiction of the Court is set out in section 167(1)(a) and (b) of the Constitution where it says:

> '(1) The constitutional court-
>
> (a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;
>
> (b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131(8)(b) and paragraph 9(2) of the Fifth Schedule.'

In addition to this, the Court has the power to pronounce on the constitutionality of the actions of Parliament or the President, including powers to determine whether they failed to discharge a constitutional obligation.[188] Should any other court make a pronouncement on the validity of the conduct of the President or Parliament, the Constitutional Court is obliged to confirm that decision.[189] The Court also has exclusive jurisdiction in section 167(2) as it relates to decisions on the constitutionality of any proposed legislation; hear or determine disputes relating to the election of a President; hear and determine whether or not a person qualifies to hold the office of Vice President; or to determine whether Parliament or the President has failed to discharge constitutional duties.[190]

The Constitution provides *locus standi* in the Court through the provision in section 167(5). In terms of this section, 'the rules of the Constitutional Court must allow a person, when it is in the interests of justice and, with or without leave of the Court, to bring a constitutional matter directly to the Constitutional Court; to appeal directly to the Constitutional Court from any

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role of the courts being paramount in safeguarding human rights and freedoms and the rule of law." Kika (n 183 above).

[187] Ibid.

[188] Section 167.

[189] Section 167(2).

[190] Kika (n 183 above) at 26.

other court, or to appear as *amicus curiae.*'[191] It can thus be argued that the jurisdiction of the Constitutional Court is not inhibitive. In addition to this, the Constitution gives the Court the power to develop its own rules, the Common law or the Customary law in the interest of justice and the Constitution.[192]

2.7.8.3 Appointment of judges and Constitutional Amendment (No.1)

One of the most contentious issues during the drafting of the Constitution was on the appointment of judges, in particular, the appointment of the judges of the Constitutional Court and the Chief Justice. The appointment of judges is very significant and has a direct bearing on the balance of powers in a *trias politica*. According to Kika, 'the very functioning of the courts is dependent on who sits on the bench.'[193] As such, the Constitution, when it was adopted in 2013, provided that the judges be appointment through a nomination process by the President as well as the public. The President, however, was the appointing authority. The 2013 Constitution provided a cushion against manipulation of the appointment process by providing for public interviews for candidate judges.[194] These interviews were to be conducted by the Judicial Service Commission (JSC).[195] From the qualifying candidates, interviewed publicly, the Judicial Service Commission would choose three candidates for each vacant post and submit the list to the President to appoint one.[196] The significance of this is that the President

[191] Ibid, at 26.

[192] Section 176.

[193] Kika (n 183 above).

[194] See for example Kika Ibid at 27 who notes that 'The new Constitution now lays down a different procedure. In terms of s 180, the President is still the appointing authority for all judges in the judiciary. However, the process has become much more transparent and insulated from political manipulation, and whenever it is necessary to appoint a judge, the JSC is required to advertise the position and interested candidates must apply, including when nominated by either the President or members of the public.'

[195] This Judicial Service Commission is made up 'of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court, one judge nominated by all the judges of the superior courts, the Attorney General, the Chief Magistrate, the Chairperson of the Civil Service Commission, three legal practitioners of at least seven years' experience nominated by the Law Society of Zimbabwe, a professor or senior lecturer of law, one person qualified as an auditor or public accountant and one person with at least seven years' experience in human resources management.' G Manyatera and CM Fombad "An Assessment of the Judicial Service Commission in Zimbabwe's new Constitution." (2014) XLVII *Comparative International Law Journal of Southern Africa* 89-108.

[196] Manyatera & Fombad Ibid, note that 'The mechanisms of judicial selection are an important element of an independent judiciary and a wide range of judicial selection systems are in use across the world.' For clarity on

could no longer appoint judges outside of the submitted list. According to Chinhengo, 'this provision vests the power of selecting and appointing the CJ and all judges not in one person but in two authorities, the JSC and the President with the former selecting and the latter appointing. It ensures that the person appointed to any of these high offices is not beholden to one person.'[197] However, with the coming into existence of the 1st Amendment of the 2013 Constitution, this position is now different.[198]

Before turning to the Constitution of Zimbabwe Amendment (No. 1), it is necessary to lay down the political context around the Amendment. The ruling ZANU PF, during the drafting of the Constitution, had reservations on the issue of appointment of judges and the constitutional provision establishing the Constitutional Court. As such, it can be speculated that, when the main opposition divided into various formations following the election loss in 2013, ZANU PF saw an opportunity to use its two-thirds majority in Parliament to amend the Constitution. The year 2016 was the perfect time to do this because the then Chief Justice's (the late Chidyausiku CJ) term was ending, and he was reaching the constitutional retirement age of 70.[199] Therefore, the Ministry of Justice Legal and Parliamentary Affairs proposed amendments to section 180 seeking to empower the President to make the appointment of the new Chief Justice unilaterally.

While the Parliamentary process for a constitutional amendment was ongoing, the Judicial Service Commission, in October 2016, called for nominations for the position of Chief Justice in terms of the Constitution.[200] The JSC scheduled interviews for four nominated judges. However, a day before the interviews, an urgent chamber application was made to the High Court by one Romeo Zibani who sought to interdict the JSC from conducting interviews on the basis that there was an impending amendment to section 180 which provides for the

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the process, see AT Magaisa "The Big Saturday Read; Critical Reflections on Constitutional Amendment (No.1)" Available at https://www.bigsr.co.uk/single-post/2017/07/30/Big-Saturday-Read-Critical-reflections-on-Constitutional-Amendment-No-1

[197]MH Chinhengo "An Analysis of Constitution of Zimbabwe Amendment (No. 1) Bill 2016" (2017) 1 *Zimbabwe Electronic Law Journal.*

[198] See Constitution of Zimbabwe Amendment (No. 1).

[199] Magaisa (n 196 above).

[200] The JSC is required at law to call for nominations from the members of the public and the president to fill in a vacancy.

appointment of the Chief Justice.[201] Hungwe J of the High Court granted the interdict.[202] The JSC made an urgent appeal to the Supreme Court seeking reversal of the interdict and the JSC proceeded with the interviews after the appeal was upheld.[203] What caught the attention of the people is how the Minister of Justice, cited as one of the respondents in the case, failed to give any meaningful opposition to the application and even supported the idea of stopping the interviews pending Amendment. This has raised the question of whether an impending Amendment has the power to stop the operation of an existing provision.

The very nature and manner in which the Amendment was done have drawn criticism from scholars. Magaisa notes that '[t]he retrogressive character of Amendment No. 1 against the standards of constitutionalism is quite apparent. In addition, it was soiled by the controversy surrounding its introduction in December 2016.'[204] It is interesting to note that one of the four nominated judges was absent from the interviews. The reasons for not attending the interview, according to Magaisa, were not made public. One can, however, speculate that this was a ploy to delay the process whilst the Parliamentary process proceeded and render the interviews useless.

Following the litigation and interviews in terms of section 180, Constitution of Zimbabwe Amendment Bill No 1 was passed into law by Parliament.[205] The Amendment repealed section 180 and replaced it with provisions that overturn the whole process of public interviews for the Chief Justice, Deputy Chief Justice and the Judge President.[206] This means that the processes

[201] *Zibani v Judicial Service Commission and Others* HC 12441/16.

[202] See for example Mucheche who notes that "The court's decision simply means that the appointment of the next Chief Justice of Zimbabwe now rests with the President's prerogative. Both the Supreme Court and High Court decisions reached the same destination that the President has the final say in the appointment of the Chief Justice but using different routes." C Mucheche "A Critical Legal Analysis of the Supreme Court Decision Delivered on 13 February 2017 in the Case Concerning the Interviews for the Position of Chief Justice of Zimbabwe" (2017) *Zimbabwe Electronic Law Journal*.

[203] The decision in the appeal case was delivered by the court orally on the same day.

[204] Magaisa (n 196 above).

[205] Promulgated on the 3rd of January 2017.

[206] See also Magaisa ibid who observes that '[t]he new procedure introduced by Amendment No. 1 gives more powers to the President in the appointment of senior judicial officers who are in charge of the judiciary. First, whereas he was bound to select from a list submitted by the JSC, he is now free to completely ignore the JSC's advice on appointments. Second, whereas the old procedure involved public interviews, the new one has dispensed with the need for such interviews. Third, whereas the old procedure was open and transparent, the second will be

that apply to the appointment of other judges no longer apply to the Chief Justice, Deputy Chief Justice and the Judge President. The Amendment reads;

> '(2) The Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court shall be appointed by the President after consultation with the Judicial Service Commission. (3) If the appointment of a Chief Justice, Deputy Chief Justice, and the Judge President of the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (2) the Senate shall be informed as soon as possible: Provided that, for the avoidance of doubt, it is declared that the decision of the President as to such appointment shall be final.'[207]

This provision has drawn criticism from several legal scholars and civil rights groups. In a joint statement signed by more than 100 civil rights groups in Zimbabwe, the Amendment was labelled 'a shameless action'.[208] The Human Rights Watch organisation noted that the Amendment undermines the independence of the judiciary.[209] It is argued, therefore that given how the Chief Justice is appointed, it would take some boldness on the part of the bench to transformatively decide on cases involving the most sensitive cases of civil and political rights.

2.8 The state of civil and political rights in Zimbabwe

Civil and political rights in Zimbabwe are guaranteed and protected by the Constitution. However, this remains one of the most sensitive areas in the Zimbabwean legal and political sphere. These rights, though constitutionally guaranteed, are not fully protected by the State.

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opaque and secretive. Fourth, whereas the old procedure provided room for public participation in the nomination of candidates and as the audience during public interview in recognition of the fact that all judicial authority derives from the citizens, the new method completely excludes the public. Finally, whereas the old procedure had checks and balances on presidential powers, the new procedure leaves the President with excessive discretionary powers. All in all, the President now has more power to control the leadership of the judiciary without serious checks and balances than he did under the old procedure.'

[207] Constitution of Zimbabwe Amendment (No. 1).

[208]Zimbabwe coalition says change in constitution 'shameless'. (2017) *Eyewitness News.* available at http://ewn.co.za/2017/07/27/zimbabwe-coalition-says-change-in-consitituion-shameless [Accessed 27 September 2018].

[209] D Mavhinga and A Nyambasha "Zimbabwe Constitutional Court May Lose its Independence; Parliament Amends Constitution, Allows President to Appoint Top Judges" (2016) *Human Rights Watch* Available at https://www.hrw.org/news/2017/07/27/zimbabwe-constitutional-court-may-lose-its-independence [Accessed 27 September 2018].

This is even though Zimbabwe has also acceded to international laws such as the International Covenant on Civil and Political Rights.[210] As noted in Chapter 3, this international instrument requires the State to respect, protect and fulfil the rights contained therein. Regardless of this, the human rights situation in Zimbabwe, especially on the political front, remains dire. The Constitution of Zimbabwe also obliges the State to respect international law.[211]

The Constitution places an obligation on both natural and juristic persons to respect, promote and fulfil the rights and freedoms that are enshrined in the Declaration of Rights. The responsibility to respect and protect civil and political rights mainly lies with the State. 'Accordingly, the government and its organs at all levels, be it administrative organs, parastatals, law enforcement agencies… the Executive, Judiciary, and Parliament are constitutionally mandated to respect, promote and fulfil civil and political rights.'[212] Thus, in terms of section 44, the State must desist from any conduct that may negatively interfere with the enjoyment and realisation of these rights.

Several enacted pieces of legislation continue to hamper the enjoyment of these rights, especially the Public Order and Security Act[213] and Access to Information and Protection of Privacy Act.[214] For this work, freedom of expression and freedom of assembly are discussed and are used to discuss how the courts have handled cases involving civil and political rights and determine the attitudes of the courts towards the transformation of these rights.

2.8.1 Freedom of expression

The 2013 Constitution guarantees the right to freedom of expression. Despite this protection, the right to freedom of expression continues to be violated, against members of the public, by the State.[215] 'This clearly shows that the mere fact that civil and political rights are protected under the Zimbabwe Constitution 2013 does not in itself guarantee the enjoyment of and/or respect for these rights in Zimbabwe.'[216] Journalists remain at the receiving end of the media

[210] Zimbabwe acceded to the Treaty on 13 May 1991.

[211] See Section 12(1)(b).

[212] P Mokone and H Chitimira "Selected Challenges Associated with Civil and Political Rights Violations in Zimbabwe (Part 1)" (2018) 14 (2) *ACTA JURIDICA* 5-24. 12.

[213]Public Order and Security Act [Chapter 11:17].

[214] Access to Information and Protection of Privacy Act [Chapter 10:27].

[215] Mokone & Chitimira (n 212 above) at 6.

[216] Ibid, at 6-7.

and security laws such as the Access to Information and Protection of Privacy Act.[217] It should be noted that 'journalists and other members of the media play a pivotal role in exposing civil, political and other human rights violations by the governments and other persons in many countries including Zimbabwe.'[218] According to scholars, the rationale behind the enactment of this law was to control the flow of information and restrict the operations of journalists.[219] In addition, the Act prohibits journalists from carrying out their work in Zimbabwe without accreditation from the Zimbabwe Media Commission.[220] The requirement of accreditation of journalists is not in itself a violation of the right to freedom of expression. However, the Zimbabwe Media Commission stands accused of denying accreditation to several journalists not aligned to the State media.[221] According to Freedom House:

> '[T]he 2002 Access to Information and Protection of Privacy Act (AIPPA) requires all journalists and media companies to register and gives the information minister sweeping powers to decide which publications can operate legally and who is able to work as a journalist. Unlicensed journalists face criminal charges and a sentence of up to two years in prison.'[222]

Another Act that has been previous used by the State to curtail freedom of expression is the Criminal Law (Codification and Reform) Act[223] (hereinafter referred to as the Criminal Code). Some of the provisions in this Act have since been found to be unconstitutional.[224] In stark violation of the Constitution, sections 31(a)(i) and 33(a)(ii) criminalised the inciting or what would be perceived as the promotion of public disorder and made it a criminal offence 'to cause hatred, contempt or ridicule of the President or Acting President, whether in person or respect of the President's Office.'[225]

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[217] See N Ngwenya "Compliance through decoration: Access to Information in Zimbabwe" In O Shyllon. *Morden Law on Access to Information for Africa and other Regional Instruments: Soft Law and human rights in Africa*. (2008).

[218] Mokone & Chitimira (n 212 above) at 17.

[219] See in particular Sections 14 – 37.

[220] Section 79.

[221] [221] J Mupuva and L Muyengwa "A Critique of The Key Legislative Framework Guiding Civil Liberties In Zimbabwe" (2012) 15 (4) *Potchefstroom Electronic Law Journal*, 125-164, at 140.

[222] Freedom House "Zimbabwe Freedom of the Press 2016 Country Report" (2016) available at House https://freedomhouse.org/report/freedom-press/2016/zimbabwe [Accessed 28 March 2017].

[223] [Chapter 9: 23].

[224] *Madanhire and Another v Attorney General* ZWCC 78/12 (2015).

[225] See *S v Mwonzora* [unreported] and *Mwonzora v The State* CCZ 09/15 (2015).

In addition to this, the Broadcasting Services Act[226] has been previously used to violate freedom of expression by maintaining State media monopoly of the nation's airwaves. The State-owned broadcasters have been accused of not covering opposition political parties, especially during election campaign periods. As a result, people have no alternative broadcast media, as they are forced to rely on State broadcasters for information. The Broadcasting Services Act also prohibits foreign funding and investment in the broadcasting services sector thereby making it difficult for private players to create alternative means of disseminating information.[227] According to Jafari '[i]n a country where there is little internal capital investment, section 71 severely hampers the ability of new organisations to raise money.'[228]

2.8.2 Freedom of Assembly

Section 58 of the 2013 Constitution of Zimbabwe guarantees the right to peaceful assembly. Further, section 67 also guarantees the right to political participation. This means that everyone has a right to participate either in groups or as individuals in peaceful activities to 'influence, challenge or support policies of the government of Zimbabwe.'[229] However, the realisation of this right remains a challenge, especially because of the continuous existence of Public Order and Security Act[230] whose various provisions limit several civil and political activities such as the right to demonstrate, picket or petition government, and the right to freedom of movement. The Act has traditionally been used for political reasons. According to Hellum *et al* 'the brutal crackdown on opposition and dissent was legitimized through a series of repressive laws such as the Public Order and Security Act (POSA).'[231] Non-Governmental Organisations and civic

[226] Broadcasting Services Act [Chapter 12:06].

[227] Freedom House "Zimbabwe Freedom of the Press 2016 Country Report" (2016) available at House https://freedomhouse.org/report/freedom-press/2016/zimbabwe [Accessed 28 March 2017].

[228] J Jafari "Attacks from Within: Zimbabwe's Assault on Basic Freedoms through Legislation." (2003) 10 (3) *Human Rights Brief* 6-10, at 2.

[229] Freedom House "Joint Civil Society Statement: Zimbabwe Must Respect Freedom of Assembly and Human Rights." December 28, 2016 available at https://freedomhouse.org/article/joint-civil-society-statement-zimbabwe-must-respect-freedom-assembly-and-human-rights [Accessed on 17 September 2017].

[230] [Chapter 11:17].

[231]A Hellum "Rights claiming and rights making in Zimbabwe: a study of three human rights NGOs," In Bård A. Andreassen & Gordon Crawford (ed.), *Human Rights, Power and Civic Action - Comparative Analyses of Struggles for Rights in Developing Societies* (2013), at 25.

education groups have also been affected by these laws by limiting their organisation and assembly.[232]

According to Jafari '[s]ection 17 of POSA, which addresses public violence, has been expanded to apply to anyone who 'forcibly disturbs the peace, security or order of the public… or invades the rights of other people.'[233] On the surface, the objective of this provision seems to preserve the peace by punishing rioters. A closer examination, however, reveals that it can be applied to anyone who objects to the operation of the State.[234] Section 25 of this Act gives wide discretionary powers to the police to either approve or disapprove or shutdown any public gathering. The notification requirement in the Act is often abused or misconstrued by the police as a request for permission.[235] This is best illustrated by how the police banned demonstrations against the Zimbabwe Electoral Commission on the 24th of July 2018.[236] In response to a letter addressed to the police in terms of section 25 of POSA, the police said 'you have already applied for a star rally scheduled for the 28th of July which we have sanctioned. Have held two similar demonstrations against ZEC on the 5th of June and on the 11th of July over the same issues.'(sic)[237] This response points to two things, firstly, the police view the notification in terms of section 25 as an application, which is contrary to the African Commission on Human and Peoples' Rights' Guidelines on Freedom of Association and Assembly in Africa[238] and secondly, the police abused their powers by placing a limit to the number of rallies or demonstration one can hold.

2.7 Chapter Summary

[232] Ibid, at 26.

[233] Jafari (n 228 above).

[234] Ibid, at 2.

[235] Notification is made in terms of section 24 of the Act 'Organiser to notify regulating authority of intention to hold public gathering (1) Subject to subsection (5), the organiser of a public gathering shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the gathering is to be held: Provided that the regulating authority may, in his discretion, permit shorter notice to be given.'

[236] Police ban MDC-Alliance demo. 2018 *The Herald* 25 July, available at https://www.herald.co.zw/police-ban-mdc-alliance-demo/ [Accessed 25 July 2018].

[237] Ibid.

[238] African Commission on Human Rights Guidelines on Freedom of Association and Assembly in Africa, 2017 para 72.

Zimbabwe's constitutional history is a long and detailed one. In discussing the history of constitutions in Zimbabwe, the history of colonial constitutions cannot be ignored as they informed the processes and substance of their successors. However, a stark contrast exists in the constitutions before independence and those adopted after independence. Zimbabwe became a democracy in 1980 after adopting a new Constitution. Even though this Constitution lasted for a total of 33 years, it was amended a record 19 times. The Amendments did not do much to reflect the tenets of constitutionalism and democracy and instead they entrenched elements of authoritarianism from one-party state to one centre of power. There were also various failed attempts at writing a new constitution for the country. They all have their strengths and weaknesses in terms of both substance and procedure. The Constitution adopted in 2013 is widely accepted and has so far been amended once. The Constitution adopted in 2013 contained civil and political rights, including the rights to freedom of expression and assembly. To understand how the courts in Zimbabwe have subsequently interpreted those rights, it is necessary to discuss the nature, extent and the limitations of their application.

CHAPTER 3

CONCEPTUAL FRAMEWORK FOR CIVIL AND POLITICAL RIGHTS

3.1 Introduction

In a quest to fully comprehend the application of civil and political rights, one has to understand the philosophical and conceptual underpinnings of these rights. This chapter, therefore, seeks to explore the various rights, looking first, at their foundation, rationale and development in recent years and then to discuss their application at both international and domestic levels. As stated previously, one of the main objectives of this thesis is to examine the role that the Constitutional Court can play in the transformation of civil and political rights in Zimbabwe. The discourse being advanced is that in the absence of political will to transform civil and political rights, constitutional litigation becomes necessary.[1] Discussion of the fundamentals of human rights litigation requires a solid conceptual foundation. This foundation should set the basis for understanding meaning, application and interpretation of civil and political rights. This work argues that civil and political rights in Zimbabwe can be transformed through the national courts, in particular the newly established Constitutional Court. Simmons agrees with this notion and states that 'litigation in national courts is one of the best strategies available for creating home-grown, pro-rights jurisprudence.'[2] However, this is only possible if the judiciary is sufficiently independent. Even though the conceptualization of civil and political rights undertaken here presupposes a broad spectrum, it is conceded that the State bears the primary role to protect and promote civil and political rights of its citizens. The extent of the protection and implementation of these civil and political rights varies from one jurisdiction to another. This variation emanates, mostly, from political factors and the degree of the limitations placed on the enjoyment of these rights.

[1] In his dissenting judgement in *Gilbert v Minnesota*, 254 U.S. 325, 338 (1920), Brandes. J said: 'In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril.'

[2] B Simmons "Civil rights in international law: Compliance with aspects of the "International Bill of Rights." (2009) 16 (2) *Indiana Journal of Global Legal Studies*. 437-481. 443.

To ensure a clear and definitive understanding of how the courts can be used as agents for transforming civil and political rights, it is important to first discuss the field in which the notion of civil and political rights finds itself. Civil and political rights, primarily, are informed by international law. International law is founded on the understanding that states are autonomous and are equals, and consequently should be bound by their agreements.[3] International law has also been entrenched by the generally accepted principles of law that have been elevated to the status of international customary law.[4] By becoming a party and ratifying a treaty, states choose to bind themselves. The Universal Declaration of Human Rights (UDHR), International Covenant for Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) have become the generally accepted standards and norms of human rights at the international level and have attained for themselves a 'constitutional' status in international law. It should be noted right from the outset that the drafters of these treaties were cognizant of the different political circumstances that exist in different jurisdictions. Therefore, they did not make the rights contained therein absolute but provided a room for limitations 'when necessary to protect public interests.'[5]

Human rights frameworks, in recent years, have developed to include various regional and sub-regional treaties supported by their respective institutions.[6] This Chapter, therefore, aims to clarify the concept of civil and political rights as contemplated in both jurisprudential writings and in international law. The object is to expose and elucidate the gaps between conceptual underpinnings of civil and political rights and their role in democracy and good governance which often gives rise to their breaches at a domestic level. The state of civil and political rights

[3] Steiner, Alston and Goodman submit that 'the idea that the will of States is the basis of international law and hence that the law is dependent on consent of States is referred to in international law theory as 'voluntarism' or 'consensualism.' Voluntarism is not only a theory held by academic scholars. It is also an expression of the strongly held conception of State sovereignty dominant in most governments.' H J Steiner, P Alston, and R Goodman. *International human rights in context: law, politics, morals: text and materials* (2008).

[4] 'In as much as customary law arises through uniformities of state conduct accompanied by the belief of States that they are conforming to what amounts to a legal obligation, the States that participated in such conduct and recognize the obligation created by it can reasonably be considered to have consented to the rule thus established….' Ibid.

[5] See for example the limitations provision in Article 22 (2) of the ICCPR; 'No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order….'

[6] Examples being the American Convention on Human Rights, African Charter on Human and Peoples Rights and the European Covenant on Human Rights.

in Zimbabwe makes this necessary. The adoption of legislation such as POSA and AIPPA as shown in Chapter 2 constitutes a systematic stifling of the people's right to freedom of assembly and freedom of expression by the State. This makes it pertinent that a discussion of the application and permissible limitations of these rights be undertaken. The discussion undertaken in this Chapter contributes substantially to the development of the interpretation methods that can be used in civil and political rights provisions by the Constitutional Court of Zimbabwe.

3.2 Fundamental and Basic Human Rights

To explain and understand the applicability of human rights, scholars have made a distinction between rights by identifying them as either, absolute, relative and rights that may be limited by norms:

> '1) Inherent or absolute rights, which may not be limited in any condition, including war and emergencies. These are the right to life, not to be subjected to torture, inhuman and humiliating treatment or punishment prohibition, prohibition of slavery, prohibition of retroactive punishment;
>
> 2) Reduced or relative rights - government may allow some limitations only during war or emergency situations or existing definite circumstances, as a rule it is specified in the relevant article. It is not allowed to limit these rights with reference to the general public interest;
>
> 3) Rights that may be limited by norms, such as, for example, public order, national security - and the public health and moral in peaceful time [sic]. These limited norms refer to the defined group and it does not require any special action to fulfill [sic] by the government.'[7]

Another distinction is made based on generations, thereby creating first, second and third-generation rights. According to Mubangizi, 'classification (according to the generations) has proved to be a useful typology for conceptualizing human rights, and has helped to extend the idea of human rights beyond a narrow Western liberal construction.'[8] The classification according to three tiers was formally introduced in the international human rights instruments

[7] T Giorgadze, "Classification of Fundamental Human Rights. Right to Life." (2013) 9 (10) *European Scientific Journal* at 144.

[8] J C Mubangizi. "Toward a new approach to the classification of human rights with specific reference to the African context" (2004) 4 *African Human Rights Law Journal*. 93-107.

adopted since 1948.[9] French Jurist, Karel Vasak was the first to use the three generations as a means of classifying human rights.[10] According to Maclem 'Vasak himself alluded to a conception of human rights that classifies them in terms of the interests they seek to protect by grandly suggesting that the three generations of human rights correspond, respectively, to the three ideals of the French Revolution: liberty, equality and fraternity.'[11]

3.2.1 The classification of rights

First generation rights are those that relate to the liberty of persons, and these are mainly civil and political rights.[12] These include 'the rights of free speech, press, religion, and thought.'[13] According to Leonard, some scholars have referred to these as negative rights.[14] They guard against the state's encroachment on individuals. According to Walters, this is the reason why these rights were 'initially conceived more in [the] negative ("freedoms from") than positive terms ("rights to").'[15]

The second-generation rights are those that are related to equality, and these are mostly socio-economic and cultural rights. Socio-economic rights are intrinsically linked to dignity and equality. According to de Vos and Freedman, the achievement of these requires 'the state and other powerful institutions to take positive steps…'[16] This essentially means that these rights are not immediately realisable and are only subject to availability of resources. This is one of the characteristics that has been largely attributed to the categorisation of human rights. Regardless of the categorisation, all human rights are of equal status.[17] It has been opined by scholars that it is apparent, from the nature of the rights, that, regardless of the politics or

[9] F Pocar. "Some Thoughts on the Universal Declaration of Human Rights and the Generations of Human Rights." (2015) 10 *Intercultural Human. Rights Law Review.* 43, at 43.

[10] K Vasak, "A 30-year struggle", UNESCO Courier, November 1977, at 29.

[11] P Macklem "Human rights in international law: three generations or one?" Forthcoming in (2015) 3 *London Review of International Law*.

[12] D Shiferaw and Y Tesfa, "Human Rights Teaching material", *Justice and Legal System Research Institute* (2009).

[13] TM Leonard. *Encyclopedia of the developing world*. (2003) at 780.

[14] Ibid.

[15] JG Walters, *Human Rights in Theory and Practice: A Selected and Annotated Bibliography, with an Historical Introduction* (1995).

[16] P De Vos, P., W Freedman, D Brand. eds.. *South African constitutional law in context*. (2014) at 433.

[17] See Macklem (n 11 above) and Mubangizi (n 8 above).

economic levels of a state, all states are capable of giving effect to first generation rights, because they are mainly negative.[18] States cannot do the same with second generation rights that need the state's 'ability to provide the financial and technical resources for the realisation of affirmative oblations [sic] such as education and an adequate standard of living.'[19]

Third-generation rights are related to group and collective rights such as the right to a clean safe environment, the right to peace, right to self-determination etc. These are the latest addition to the human rights regime and were recognized quite recently.[20] Many of the rights contained in this category are controversial. Scholars and jurists alike do not exactly agree on the nature and meaning of each right. This includes normative expressions such as the right to peace and the right to a healthy environment. Some of the controversies surrounding them are that they require both positive and negative obligations from both states and individuals.[21]

The classification of human rights according to generations is not free of weaknesses. It is not rigid. There have been debates surrounding the classification of these rights, in particular the distinction between the first and the second-generation rights. A prominent debate occurred during the Cold War when the first-generation rights were criticized for following Western tradition and liberal thinking, and the second-generation rights were criticized for reflecting Eastern socialist approach. According to Pocar;

> 'in reality there is no distinct conceptual or ideological approach behind the separation of the two categories of rights: both continue to constitute a single set of rights as in the Universal Declaration; however, they were separated based on the obligations surrounding their implementation.'[22]

Mubangizi argues that the three categories create the assumption that there is a hierarchical order of rights. He notes that;

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[18] See for example P Macklem "Human rights in international law: three generations or one?" (2015) 3 (1) *London Review of International Law* and R Hirschl, Negative Rights vs. Positive Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order. (2000) 22 *Human Rights Quarterly,* at 1060.

[19] OC Ruppel, "Third-generation human rights and the protection of the environment in Namibia." *Human rights and the rule of law in Namibia. Windhoek: Macmillan Education Namibia* (2008): 101-120. at 102.

[20] Ibid, at 103.

[21] Ibid.

[22] Pocar (n 9 above) at 45.

> 'denoting the generations of human rights as first, second and third can be seen as to imply a priority for civil and political rights, as if they somehow come first in any consideration of human rights, and that a hierarchy is therefore assumed which reinforces the tendency to marginalise other categories of human rights.'[23]

In addition to this;

> 'it is often assumed that the first generation (civil and political) rights are individual rights, which can easily be enforced through domestic courts of law. Second and third-generation rights, on the other hand, are seen as collective rights based on notions of international solidarity and therefore not justiciable in domestic courts.'[24]

States as well as litigants themselves must have an understanding of the nature of each right, including the extent of each justiciability. In authoritarian regimes, there seems to be no distinction given in the protection of derogable and none-derogable rights which has resulted in the closure of democratic spaces and contracted political participation.

3.3 The evolution of civil and political rights

The concept of human rights, as they are understood today, can be traced back to the Roman Empire, and during the creation of newly independent states after the fall of the Empire. In the Roman Empire, human rights came about as a result of the need to develop rules to deal with interactions among or between people in the diverse Roman Empire.[25]

As independent states emerged from the Roman Empire, coupled with new conquests by states as well increased trade, the need for set standards or rules became necessary. However, McInerny argues that human rights developed through the development of natural law theory.[26] Conceptions of natural law included theories of natural rights, with the emphasis on the duties of man. Natural law philosophy had strong religious underpinnings as natural law was perceived as being sourced from the law of God. It posited that 'all human law derive (sic)

[23] Mubangizi (n 8 above) at 98.

[24] Ibid, at 100.

[25] A Orford, "Jurisdiction without territory: From the Holy Roman Empire to the responsibility to protect." (2008) 30 *Michigan Journal of International Law.* 981.

[26] R McInerny. "Natural Law and Human Rights." (1991) 36 *American Journal of Jurisprudence,* at 1.

from and are subordinate to the law of God.'[27] The linkage between human rights and natural law is conceptually apparent. What it means to be human and the values for that personhood is what informs the moral conception of human rights. Even though the law is derived from the law of God, there are some contradictions with modern-day human rights principles such as respect for freedom of movement, expression, equality and human dignity. For example, early laws legalized or recognized slavery and serfdom, which are considered as serious violations in modern-day human rights law.

The idea that human rights are inalienable was also prominent. Hernandez-Truyol notes that '[f]rom the early days, the view of these rights of "man" as inalienable was reflected in the language in which they were couched.'[28] For example, Locke argued that 'certain rights self-evidently pertain to individuals as human beings ... that chief among them are the rights to life, liberty (freedom from arbitrary rule), and property.'[29] If the state failed to guarantee these natural rights, the people would also have a right or responsibility to defy it through a revolution.

In addition to this, positivist views on human rights also began to emerge. According to Hernandez-Truyol '[t]he value of the positivists' contributions to the development of human rights law lies in their recognition of the importance of organizing rules by established processes of the states.'[30] The challenge with positivism in the development of human rights law is that the law was only shaped by the perspectives of those with authority to do so. Hernandez-Truyol argues that 'under a positivist model, human dignity is what a state makes it.'[31] However, positivism can be acknowledged for its contribution to the development of human rights law according to the changing morals of the society.

The notion of civil and political rights is a product of western liberal philosophies of the seventeenth and eighteenth centuries.[32] These philosophical ideas have been credited for

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[27] B E Hernandez-Truyol "International law, human rights, and LatCrit theory: Civil and political rights: An introduction" (1996) *The University of Miami Inter-American Law Review*. 223-243. 228.

[28] Ibid

[29] John Locke cited by P Van Ness. (Ed.) *Debating human rights: critical essays from the United States and Asia* (2003) at 104.

[30] Hernandez-Truyol (n 27 above) at 228- 229.

[31] Ibid, at 228.

[32] S Joseph and M Castan. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2013).

influencing the wording of the American Declaration of Independence in 1776. In the declaration words such as '… all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness' are used and have been influential in informing current human rights discourses.

A similar notion was found in the French Declaration of Rights of Man and Citizen in 1789. According to Joseph and Castan '[t]raditional civil and political rights, the subject matter of both the US Bill of Rights and the French Declaration, are largely concerned with the liberty to act following one's own wishes.'[33] Civil and political rights as contemplated by the natural law theories 'was not understood to require State assistance, so civil and political rights conform to the libertarian nature of early Western capitalist societies.'[34] Stemming from this notion, human rights are now protected at both domestic and international level. Zimbabwe has largely ignored this protection of human rights as it should domestically, instead of promoting the protection of civil and political rights, the State has enacted legislation that limits these rights. This has resulted in a crackdown against the opposition and civil society leading to renewed calls for transformation with the hope of attaining the rule of law, democracy and respect for human rights.

Modern human rights protection provides for the protection of human rights at the international level. It is conceded that the protection of human rights is the prerogative of the state. However, the norms and standards set at the international level should at all times be used as the minimum core. It is therefore necessary to turn to the international human rights framework.

3.4 The international human rights framework

The relevance of human rights in the relationship between states and states and individuals has become increasingly prominent. This has created a common culture of judging states based on their relationship with their citizens. For example, states that have a strained relationship with their subjects have been synonymous with authoritarianism. Those that enjoy a good relationship with their states are associated with democracy. Therefore, various international instruments were introduced to achieve common goals for states in the protection and promotion of human rights. This is because there are several set standards and norms that states have to abide by in international law. There is consensus at the international level in respect of

[33] Ibid, at 5.

[34] Ibid.

what these rights or norms are. They emanate from the acceptance that humans have inherent dignity that needs to be protected at all times.[35] Therefore, human dignity elevates individual rights to a standard of universal acceptance.

> 'Consequently, there can be no challenge to the universal acceptance that, for example, genocide, race discrimination, and terrorism are wrong and universally condemned, regardless of whether the actors are states or private persons and regardless of the victims' nationality.'[36]

The importance of human rights is grounded in their definitive nature. According to human rights scholars 'human rights are those rights vital to an individual's existence; they are fundamental, inviolable, interdependent, indivisible, and inalienable.'[37] It is important to note that the term "human rights" is broad and includes various dimensions of rights. For example, Hernandez-Truyol says, 'human rights are moral, social, religious, and political rights that concern respect and dignity associated with personhood and [a] human being's identity.'[38] This means that there are various rights accorded to an individual that both fellow humans and the state need to respect and protect.

In standardizing this, the United Nations, in 1948, unanimously passed the Universal Declaration of Human Rights. According to Shelton, 'the adoption of the Universal Declaration of Human Rights constituted a landmark moment in human rights law. Its thirty articles cover civil, political, economic, social and cultural rights.'[39] National constitutions are heavily influenced by the provisions contained in the UDHR.[40] Many of its provisions now form what is termed "customary international law".

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[35] C McCrudden, "Human Dignity and Judicial Interpretation of Human Rights." (2008) 19 (4) *European Journal of international Law*, 655-724.

[36] Hernandez-Truyol (n 27 above) at 227.

[37] Ibid.

[38] Ibid, at 226.

[39] D Shelton *The Oxford handbook of international human rights law*. (2013); See also D Shelton, and PG Carozza, *Regional protection of human rights* (Vol. 1) (2013).

[40] Schwelb notes that, 'It is not surprising that constitutions drafted in co-operation with the United Nations, such as those of Libya and Eritrea, show the marked in fluence of the Universal Declaration, although they fall short of its provisions in one important respect, viz., the right of women to vote. It can be seen from express references to the Declaration in many other constitutions and statutes from various regions of the world, and, in the absence of such express references, from extraneous evidence, that the in fluence of the Declaration is also reflected in many instruments not written under United Nations sponsorship.' It is further noted that 'The preamble to the Constitution of the most recent Member of the international community and youngest Member of the United

Beginning with the United Nations Charter, the United Nations always had a human rights agenda. The purpose of the United Nations Charter is to 'promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religions.'[41] This was the beginning of structural protection of human rights and all forms of injustice through international law. The international protection of human rights was essentially influenced by the events of the Second World War (WWII).[42] The Nuremburg and Tokyo Trials followed WWII in the mid-1940s after the Nazis had committed atrocities against humanity during the war. One scholar correctly captures the relevance of these trials in international human rights law as follows:

> 'Nuremberg clearly established that rules of international law applied to individuals. In a now famous and oft quoted phrase, the Tribunal provided that "[c]rimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'"[43]

The War was followed by an unprecedented general agreement that individuals should be recognized along with states as key players in the international domain. This resulted in the inclusion of individual rights in the human rights instruments that were to follow.

The Universal Declaration of Human Rights was a legal instrument binding all parties to the United Nations Charter.[44] The UDHR was adopted following years of war that had left the world in total disarray. The early stages of the framing of the UDHR saw the philosophers' committee crafting theoretical issues that the UDHR needed to cover.[45] This was followed by

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Nations, the Republic of Guinea, proclaims that "the State of Guinea fully endorses the United Nations Charter and the Universal Declaration of Human Rights." Title 10 of the Constitution of Guinea contains a catalogue of fundamental rights and duties of the citizen.' E Schwelb "The Influence of the Universal Declaration of Human Rights on International and National Law." (1959) 53 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 217-229.

[41] The Charter of the United Nations, 1949.

[42] T Buergenthal, D Shelton and D P Stewart. *International Human Rights in a Nutshell* (2009) 34.

[43] Hernandez-Truyol (n 27 above) at 233.

[44] The Charter of the United Nations, 1949.

[45] 'In 1946, as part of the preliminary work of drafting the Declaration, under the auspices of UNESCO, Jacques Maritain assembled a Philosophers' Committee to identify key theoretical issues in framing a charter of rights for all peoples and all nations. The work of the Philosophers' Committee then moved to the UN Commission on Human Rights.' G Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*. (2016).

the drafting of the UDHR by the Human Rights Commission (HRC), consisting of 18 Commissioners led by Chairperson Eleanor Roosevelt.[46] The Commissioners came from various historical and cultural backgrounds. They decided to draft a declaration, instead of a treaty and they also agreed to include both civil and political rights and socio-economic rights.

This adoption is largely regarded as symbolizing the awakening up to the unconscionable horrors of the Holocaust: 'The framers of the declaration envisaged three parts to the postwar human rights enterprise; a set of general principles; the codification of those principles into law and a practical means [of] implementation.'[47] In addition, 'the nations of the world did issue a historic declaration of human rights- a pantheon that for the first time encompassed civil, political, social and economic rights.'[48] The importance of civil and political rights in international law is demonstrated by their inclusion in the first 19 Articles. It is noted that even though this international instrument provides a framework for the protection of human rights, 'the laws and national constitutions of states, in most instances will be the first recourse to address any violation of human rights and should be regarded as the ordinary mode of the implementation.'[49]

Article 29(2) of the UDHR;

> 'sets out the circumstances in which limitation on individual rights are permissible. The declaration as a whole document should be read as the assertion of a strong presumption in favor of human rights and articles should be read as placing the burden of proof on anyone who seeks to limit them.'[50]

This shows that even though there are permissible limitations to rights, any interpretation given to any provision should be one that favours affording more rights as opposed to contracting them. In Zimbabwe, the courts have at times failed to comprehend this requirement and instead have interpreted the law in a manner that further contracts human rights, civil and political

[46] Eleanor Roosevelt was the widow of President Franklin D. Roosevelt. 'It also included René Cassin of France, who composed the first draft of the declaration; Commission Rapporteur Charles Malik of Lebanon; Vice-Chairman Peng Chung Chang of China; and John Humphrey of Canada, Director of the UN's Human Rights. Division, who prepared the Declaration's blueprint.' Ibid. G Brown.

[47] Ibid, at 1.

[48] Ibid, at 2.

[49] Ibid.

[50] Ibid. 217.

rights to freedom of assembly and association.[51] As a result, there is a need for the Courts to transform civil and political rights, and this is done by changing how they interpret these rights.

3.4.1 The International Covenant on Civil and Political Rights (ICCPR)

As mentioned earlier, civil and political rights form the core of human rights. As such, the international community, in 1966, adopted the ICCPR to standardize protection and respect that can be afforded to these rights. The ICCPR contains what may be termed "negative rights" which lays down what states and fellow humans should desist from doing against individuals. According to Macklem, '[t]he role that civil and political rights play in international law is to mitigate the harm that states can cause to rights-bearers in the exercise of sovereign power that international law vests in states.'[52] Simmons has acknowledged that the signing and ratification of the ICCPR by states is likely to improve the civil rights situation in a country. The primary challenge to this is the question of the state's right to exercise its sovereign power and how to frame these rights in particular contexts. Simmons, however, stresses that this change does not come immediately after ratification. The ICCPR essentially creates relationships between states and individuals in international law.

Various challenges are facing the international community in trying to ensure states compliance with the ICCPR. These challenges are mainly rooted in the absence of effective enforcement mechanisms. Nevertheless, the existence of human rights regimes at the international level is commendable: 'States generally recognize that they are bound by the ICCPR obligations though they may disagree over their interpretation in concrete situations.'[53] The Human Rights Committee (HRC) is responsible for the monitoring of the ICCPR. It has three different enforcement mechanisms available. The first is in terms of Article 40 which provides for states to submit reports on their implementation of the ICCPR to the HRC.[54] The second is in terms

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[51] *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors* HH-554-2016 and *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors*; *Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-2016.

[52] Macklem (n 11 above) at 20.

[53] S Joseph "A Rights Analysis of the Covenant on Civil and Political Rights" (1999) 5 *Journal of International Legal Studies* 64-65, at 57.

[54] Article 40 states

> '1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and, on the progress, made in the enjoyment of

of Article 41 which calls on other states to submit complaints about violations of the ICCPR by another state.[55] This only applies to state parties that made declarations accepting the

those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.'

[55] 'Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

competency of the HRC in that regard. The third is through the Optional Protocol to the ICCPR which allows individuals to petition or submit complaints to the HRC on alleged violations of the ICCPR by the states.[56] These mechanisms have their inherent weaknesses. For example, the Article 41 mechanism is rarely used, states generally do not submit complaints against each other.[57] The Optional Protocol mechanism is only available to citizens of those states that are party to it. It should be noted that the HRC is the 'pre-eminent interpreter of the ICCPR, which is itself legally binding.'[58] In as much as there is a lack of enforcement measures in the form of effective punitive measures or sanctions, the decisions of the HRC have 'directly caused states to alter their laws and or practices so as to conform to the ICCPR.'[59]

The ICCPR lists several rights that fall under this category. Even though this work is mainly concerned with freedom of movement and expression, it is necessary that the meaning of most of the protected rights within the context of ICCPR is understood. The conceptual framework for civil and political rights as outlined below.

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;….

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.'

[56] Joseph (n 53 above) at 57.

[57] The Optional Protocol requires that individuals from state parties should have exhausted their domestic remedies before submitting applications to the UN Human Rights Commission.

[58] Joseph (n 53 above) at 6.

[59] Ibid.

3.5 Conceptual considerations for civil and political rights

To grasp the international protection of civil and political rights, it is necessary to highlight the critical elements of these rights and that which makes them distinct from other rights. This will help understand the need for international protection as well as explain why these rights should not be unreasonably derogated.

3.5.1 Civil rights

The UDHR makes provision for the protection of civil rights. These civil rights can be grouped into three categories namely; integrity rights, freedom of action, and rights relating to fairness or due process. According to Stoke and Tostensen 'the integrity rights include the right to life, liberty and security of person. Torture and maltreatment are prohibited; so is slavery and forced labour, arbitrary arrest, detention or exile.'[60] Freedom of action is ordinarily associated with freedom of movement, expression, religion, and other fundamental freedoms. Finally, rights relating to due process are rights such as the right to a fair trial, right to access to justice and right to an independent and impartial judge. It should be noted that the rights relating to integrity are absolute and cannot be derogated. Some provisions allow the other rights to be constrained where necessary, as will be shown in discussions on selected rights.

3.5.2 Political rights

Political rights are some of the most important rights in any state. Political rights allow people to engage in meaningful participation in all democratic processes within their country. Article 21 of the UDHR states that 'the will of the people shall be the basis of the authority of the government.' This provision forms the basis of the intrinsic relationship that exists between human rights and democracy. It is for this reason that human rights are used as a measure for democracy and good governance. Article 21 implies that the people shall have the right to participate in political processes through the expression of their will.[61] In a modern democracy, this is done either directly, through referendums or indirectly, through chosen representatives. It should be noted that the exercise of this right also has its fundamentals such as the ability to do so freely, within the confines of the rule of law and free of manipulation. According to Eide,

[60] H Stokke and A Tostensen, (Eds.) *Human Rights in Development: Yearbook 1999/2000 the Millennium Edition*. (2001), at 488.

[61] Article 21 of the Universal Declaration of Human Rights.

'the preamble of the declaration also underscores the close relationship between human rights and government, by pointing out that "it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny, that human rights should be protected by the rule of law."'[62]

However, unlike integrity rights, political rights can be limited. Article 29 provides that the exercise of political rights is subject to limitation as would be determined by law. In terms of this provision, the limitations are placed solely 'for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.'[63] In addition to this, the other international treaties such as the ICCPR have also recognized the necessity, in relevant instances, for limitations on the exercise of political rights. However, the ICCPR goes a step further by adopting a detailed regime for these limitations in Article 4. In terms of this provision, in case of a public emergency, "that threatens the life of the nation", a state may officially proclaim a state of emergency and suspend or derogate from civil and political rights only to the extent necessary required by the demands of the situation.[64] In addition to this, the ICCPR provides that the rights that are subject to suspension are only those that are not designated as non-derogable rights such as prohibitions against murder, slavery and torture.[65] Having said that, it is apparent that human rights are salient to the realization of democracy and good governance in any state.

3.6 State compliance with ICCPR

Having highlighted the importance of the ICCPR as the heart of civil and political rights, it is important to discuss state parties' compliance. Compliance is the basis of international law. International laws are primarily anchored on states' goodwill to live to their word in the form of desisting from violating their agreements with other states. Enforcement of international laws is problematic. Therefore, many treaties or international instruments' respect and promotion largely depend on compliance by individual states. According to Simmons, 'human

[62] A Eide, "The historical significance of the Universal Declaration." (1998) 50 (158) *International Social Science Journal*, 475-497, at 488- 89.

[63] Article 29 of the Universal Declaration of Human Rights.

[64] Article 4 of the International Covenant on Civil and Political Rights.

[65] LR Helfer, "Sub-regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement" (2015) 32 *iCourts Working Paper Series* 4.

rights treaties are likely to be enforced, according to a dominant view, and for this reason, states are likely to ratify so that they may enjoy the expressive benefits of doing so without concern that their legal commitment will be enforced.'[66] This means that the general obligation lies on the state to comply with the treaties that they ratify.

Flowing from the above, the view taken here is that enforcement of international treaties depends principally, on domestic politics and laws of each state. As Simmons puts it,

> 'while it may be true that international actors and especially other states have little incentive to enforce their peers' human rights commitments in any serious and systematic ways, domestic actors have a clear stake in their enforcement. For the locals, their rights and freedoms are at stake. Thus, we should expect that if international law with respect to human rights is to be enforced, the most consistent pressure to do so should emanate from the domestic politics.'[67]

It is trite, that for this to work, the courts and other institutions promoting human rights and democracy in the countries to be sufficiently independent to execute their mandate without fear or favour. They should be independent of any political influence to improve the chances of constraining political actors. For this mechanism to be fully exploited, human rights defenders should be willing to engage in human rights litigation in domestic courts. Thus, domestic courts should play a critical role in the creation of homegrown rights enforcement jurisprudence.

3.7 Freedom of expression and freedom of assembly

Having discussed the importance of the civil and political rights in general, it is important to understand some selected civil and political rights, such as the right to freedom of expression and right to assembly as these form the bulk of the cases that have so far been received by the Zimbabwe Constitutional Court as discussed in Chapter 5. It is worth mentioning that most of the judgements passed by the Zimbabwean courts, though progressive, have not made any significant contribution to the development of the transformative interpretation of human rights. This is because this is a task that requires a relative degree of boldness from the judges. In Zimbabwe, freedom of assembly and freedom of expression are sensitive topics for the State.

3.7.1 Freedom of expression

[66] Simmons (n 2 above) at 443.

[67] Ibid.

Freedom of expression is a right that has since acquired the status of an international customary norm. According to Mendel 'it is the lynchpin of democracy, the key to the protection of all human rights, and fundamental to human dignity in its own right.'[68] O'Flaherty quotes a Chinese Nobel laureate, Liu Xiaobo when he expresses the importance of freedom of expression: 'Freedom of expression is the basis of human rights, the source of humanity and the mother of truth. To block freedom of speech is to trample on human rights, to strangle humanity and to suppress the truth.'[69]

This right, at international law, was first recognized in the Universal Declaration of Human Rights under Article 19. In terms of this provision, 'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.'[70]

Freedom of expression is a right that finds much relevance and recognition in international law hence its inclusion in various other instruments such as the International Convention on the Elimination of All Forms of Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The enjoyment of freedom of expression leads to the enjoyment of other rights. As O'Flaherty says, 'it is sometimes described as a multiplier or *meta* right because of its role in enabling the enjoyment of so many other rights.'[71]

Freedom of expression has both a personal and a social dimension. According to Howie, they are 'indispensable conditions for the full development of the person, "essential for any society" a "foundation stone for every free and democratic society."'[72] Freedom of expression is a prerequisite for the functioning of a human being in a truly democratic society. As such the people of Zimbabwe have for years called for their rights to be respected and protected to fully

[68] T Mendel, "Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression." (2010) *Centre for Law and Democracy Paper,* at 1.

[69] M O'Flaherty, "Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34." (2012) 12 (4) *Human Rights Law Review,* 627-654, at 628.

[70] Art. 19 UDHR UN 1948.

[71] O'Flaherty (n 69 above) at 631.

[72] E Howie, "Protecting the Human Right to Freedom of Expression in International Law." (2018) 20 (1) *International Journal of Speech-language Pathology,* 12-15.

realize their potential in a democratic society. Under the ICCPR, freedom of expression includes 'freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of a person's choice.'[73]

The scope of protection of this right includes 'spoken, written and sign language and non-verbal expression through artworks.'[74] This essentially provides a wide enough scope to ensure adequate protection of this right. Together with the right to assembly or association, the importance of this right is that it is cardinal to the enjoyment of other civil and political rights such as the right to vote. The exercise of the right to vote without being able to freely air differing opinion or being able to freely mobilize through the assembly is an exercise in futility.

According to Howie, the UN expert report[75] says 'individuals seeking to exercise their right to expression face all kinds of government-imposed limitations that are not legal, necessary or proportionate.'[76] It is further noted that 'targets of restrictions include journalists and bloggers, critics of government, dissenters from conventional life, provocateurs and minorities of all sorts.'[77]

In recent years, many states have been found wanting regarding the violation of international laws on freedom of expression by limiting this right, especially, the right of people to express themselves through protests by enacting anti-protest laws. Howie cites the American Civil Liberties Union, which alleged that in 2017 alone, the United States of America responded to growing protests by civil rights movements such as the Black Lives Matter and those opposed to the Dakota Access Pipeline, by proposing new laws to limit people's right to protest in at least 20 states.[78] This is regardless of the fact that the Supreme Court in the US has previously held that 'both the rights to freedom of speech and assembly encompass the right to peaceful social protest which in turn is critical to the preservation of "freedoms treasured in a democratic

[73] UN 1996 Art. 19 (2).

[74] See for example International Covenant on Civil and Political Rights or Universal Declaration of Human Rights.

[75] UN General Assembly Report 2016.

[76] Citing UN General Assembly, 2016, para. 55.

[77] Howie (n 72 above) 12-15.

[78] Ibid.

society."'[79] In response to this, the Office of the High Commissioner for Human Rights reported that;

> 'The bills, if enacted into law, would severely infringe upon the exercise of the rights to freedom of expression in international law and freedom of peaceful assembly, in ways that are incompatible with US obligations under international human rights law and with First Amendment protections. The trend also threatens to jeopardize one of the United States' constitutional pillars: free speech.'[80]

In Zimbabwe, this happened through the enactment of the AIPPA and that legislation is contrary to the values enshrined in the Constitution of 2013. AIPPA has no place in a democratic society such as the one contemplated within the new constitutional dispensation.

3.7.1.1 Freedom of expression under the European Convention on Human Rights (ECHR)

Article 10 of the European Convention on Human Rights provides for the protection and promotion of the right to freedom of expression.[81] According to Harris, O'Boyle and Warbrick in interpreting Article 10, the Court examines whether there was an interference with freedom of expression as contemplated in the first paragraph of Article 10 and if so, the Court looks into whether the interference is justified under the second paragraph. In so doing, the Court weighs the conduct against the tripartite standards, i) whether an impugned measure is 'prescribed by law'; ii) whether it pursues a legitimate aim(s), and iii) whether it is necessary for a democratic

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[79] Ibid.

[80] OHCHR 'UN rights experts urge lawmakers to stop "alarming" trend to curb freedom of assembly in the US', Geneva 2017, United Nations. Accessed (13 August 2019) Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21464&LangID

[81] Article 10:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorders or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

society.[82] Zimbabwe has largely faltered on this standard as there are laws that are enacted by the State to specifically limit the enjoyment of these civil and political rights. These laws specifically target opposition political parties and civil society including human rights activists.

It is apparent in the European system that the first standard, prescribed by law requires the state authorities to identify the basis in national law for restricting a person's right under Article 10. The second requirement of legitimate aim has rarely generated substantive discussion in the case law. Overall, the Court's analysis, when interpreting the right, focuses on the third standard, which is the most demanding test. Therefore, the normal interpretation given to the requirement of 'necessary in a democratic society' is that it presupposes a 'pressing social need', and this is done by striking 'a proportionate balance between the means chosen to satisfy a legitimate end and the degree of injury inflicted on the expression of right.'[83] This has helped in clarifying the interpretation hurdle on "sufficiency", as the requirement is that states must adduce relevant and sufficient reasons to justify the interference with the right. Relevance is rarely contested.

The interpretation of rights under the Convention is also guided by Article 31(1) of the Vienna Convention on the Law of Treaties, 1969. In terms of this, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'[84] According to van Dijk, 'in many cases, some deviation from fundamental freedoms guaranteed will be considered acceptable under the Convention, provided, inter alia, that the proportionality principle is observed.'[85] The proportionality principle calls for the striking of a balance between the various competing interests.

The importance of the right to freedom of expression was underscored by the European Court of Human Rights in *Handyside v United Kingdom*,[86] 'freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress

[82] D J Harris, et al. *Law of the European Convention on Human Rights* (2014).

[83] Ibid, at 614.

[84] Van Dijk, G J Hoof and G J Van Hoof. *Theory and practice of the European Convention on Human Rights*. (1998) at 72.

[85] Ibid, at 80.

[86] *Handyside v United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737.

and the development of every man.'[87] It is for this reason that this right is jealously guarded by the Court.

3.7.1.2 Freedom of expression under the American Convention on Human Rights (ACHR)

The American Convention on Human rights, under Article 13, provides for the protection and promotion of freedom of expression.[88] The content of this right is clear- it is the right to 'seek, receive, and impart information…' In Advisory Opinion OC-05/85, the Court affirmed:

> 'Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.'[89]

The Inter-American Court of Human Rights has interpreted this right to presuppose a dual character, in that it entails that individuals have a right to express themselves as well as to receive information and ideas.[90] This also means that freedom of expression will be violated where the State has prevented one (individually or collectively) from receiving information or to have access to such information. In the case of *Franscisco Martorell v Chile*,[91] the Inter American Commission of Human rights expressed that:

> 'Article 13 establishes a dual right: the right to express thoughts and ideas, and the right to receive them. Therefore, arbitrary interference that infringes this right affects not just the

[87] Ibid, at 49.

[88] Article 13.

> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

[89] Advisory Opinion OC-05/85.

[90] C Grossman "A Framework for the Examination of States of Emergency under the American Convention on Human Rights." (1986) 1 *American University International Law Review.* 35.

[91] *Francisco Martorell v Chile,* Case 11.230, Report No. 11/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 234 (1997). REPORT Nº 11/96 CASE 11.230 CHILE.

individual right to express information and ideas but also the right of the community to receive information and ideas of all kinds.'[92]

In the case of *Oropeza v Mexico*,[93] the Court also expressed that freedom of expression is;

> 'universal and involves a legal concept that aids everyone, whether individually or collectively, to express, transmit, or disseminate thoughts, and, in parallel and correlative form, that freedom to inform oneself is universal and involves the collective right to receive information communicated by others without interference and distortion.'[94]

Under the American Convention, the indivisibility of expression and dissemination has been made clear. In an Advisory Opinion, the Court said, 'expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely.'[95] In addition to this, freedom of expression under the American Convention does not restrict the dissemination of information to mainstream and usual forms of communication but applies to dissemination of ideas and information by any means. The American Convention protects all types of expression including silence.[96]

3.7.1.3 Freedom of expression under the African Charter on Human and Peoples' Rights (ACHPR).

The African Commission on Human and Peoples' Rights has indicated in Article 9 that 'this Article reflects the fact that freedom of expression is a basic right, vital to an individual's personal development, his political development, his political consciousness, and participation in the conduct of public affairs of his country.'[97] In terms of Article 9, every individual has a right to receive, express and disseminate his/her opinion. The Article further states that this should only be done within the law. The inclusion of the phrase 'within the law' has a far-reaching effect as it can be interpreted as a claw-back clause. Welch has expressed this more

[92] Grossman (n 90 above) at 53.

[93] *Oropeza v Mexico* Case 11 .740, Inter-Am. C.H.R.

[94] Ibid, at para 2.

[95] Advisory Opinion OC-05/85.

[96] Grossman (n 90 above) at 35.

[97] *Media Rights Agenda and Others v Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96.

precisely. '"Within the law" is a phrase that opens the door, at least theoretically, to any sort of *raison d'etat*. It is a clawback clause restricting rights from the start.'[98]

If interpreted literally this means that freedom of expression can be enjoyed only within the confines of the domestic laws regardless of their effect or legitimacy. Therefore, it provides room for the negation of the peoples' rights by state parties to the Charter through the use of domestic laws or any other laws with that effect. However, the African Commission on Human and Peoples' Rights has since clarified that as is required under international law, domestic laws should be consistent with state parties' international obligations. This, therefore, means that States cannot limit freedom of expression in terms of domestic laws that are inconsistent with constitutional and international human rights standards, including international customary law.

According to Salau, the African Commission on Human and Peoples' Rights has previously stated that 'article 9 signifies that freedom of expression is a basic right vital to personal development and civic participation.'[99] However, it should be noted that the protection of freedom of expression in the African Charter is very limited.[100] According to Adjei:

> 'African political leaders continue to misapply and misinterpret Article 9 (2) of the ACHPR because of its vagueness and continue to rely on criminal defamation statutes and the like to suppress critical and dissenting views. These broadly phrased prohibitions encouraged by the poor drafting of Article 9 (2) of the Charter, criminalise the legitimate exercise of freedom of expression and have a real "chilling effect" on debate on matters of public interest.'[101]

This has created several challenges regarding the protection of this right in an African context. The colonial states in Africa formed a historical basis for the restriction of the right to freedom of expression. The rise of nationalism in former colonies in Africa led to the enactment of various national security laws some of which placed a severe restriction on access to information as well as the dissemination thereof. The roots, according to Welch, lie in

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[98]C E. Jr. Welch "The African Charter and Freedom of Expression in Africa." (1998) 4 *Buffalo Human Rights Law Review* 103 at 113.

[99] AO Salau "The Right of Access to Information and National Security in the African Regional Human Rights System" (2017) 17 *African Human Rights Law Journal*, 367-389.

[100] Welch (n 98 above) at 103.

[101] WE Adjei "The protection of freedom of expression in Africa: problems of application and interpretation of Article 9 of the African Charter on Human and Peoples' Rights." PhD Thesis. *University of Aberdeen* (Unpublished).

Howard's words '[t]he idea that the African Press should not be critical of the established government is thus a direct legacy of the colonial period.'[102] This has been worsened by a general lack of political will to interpret the provisions relating to freedom of expression in the African Charter broadly.

The interpretation is given by the African Commission to Article 9 in the case of *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*[103] is that:

> 'According to Article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.'[104]

As will be shown in Chapter 5, freedom of expression has been met with the imposition of laws on defamation, slander and hate speech that are often misconstrued by politicians in Zimbabwe. The imposition of these laws led to calls for constitutional transformation, which is yet to see fruition despite the adoption of a new constitution that seeks to promote and protect human rights and democracy in Zimbabwe. Members of the opposition and civil society in Zimbabwe have over the years been obstructed from exercising their various civil and political rights as any criticism of the government or its official are deemed criminal defamation.

The African Commission, in the case of *Media Rights Agenda,*[105] noted that 'in the absence of evidence to the contrary, it should be assumed that criticism of government does not constitute an attack on the personal reputation of the head of state.'[106] The Commission also added that ' [p]eople who assume highly visible roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.'[107] In addition to this,

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[102] Welch (n 98 above) at 108.

[103] See (n 97 above).

[104] Ibid. See also R Murray (ed) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000,* (2002) at 853-854.

[105] See (n 97 above).

[106] Ibid.

[107] Ibid.

the Commission held that the test is whether the exercise of this right poses a real danger to national security.

3.7.1.4 Permissible limitations to freedom of expression

As noted earlier, freedom of expression is not an absolute right. There is a distinction between freedom of expression and freedom of opinion.[108] In terms of the ICCPR, whereas freedom of opinion is absolute, freedom of expression can be limited in terms of various instruments.[109] According to Ahmed and Bulmer,

> 'some rights may have to be limited because of the potential adverse impact that the abuse of such rights could have on society at large or on the rights of others: for example, the right to freedom of speech may in many instances legitimately be restricted to prevent harassment of others.'

For example, Article 29(2) of the UDHR, states that:

> 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'[110]

This general limitation clause of the UDHR is cognisant of the competing rights of people and that in the exercise of one's right, an individual may infringe upon the rights of others. In addition, this limitation includes those limitations placed to counter competing interests of individuals and those of the public good, such as those meant for the maintenance of public order and peace.[111]

In terms of Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

> 'The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime,

[108] However, scholars often use them interchangeably with freedom of speech as well.

[109] See Article 19(1) of the International Covenant on Civil and Political Rights.

[110] Art. 29(2) of the Universal Declaration of Human Rights.

[111] D Ahmed and E Bulmer. '*Limitation Clauses' International Institute for Democracy and Electoral Assistance*. 2nd ed. (2017).

> for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'[112]

The ICCPR also sets the benchmark for the limitation of freedom of expression. In terms of the ICCPR Article 19(3):

> 'The exercise of the rights provided in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;
>
> a) for respect of rights and reputations of others;
>
> b) for the protection of national security or of public order or of public health or morals.'[113]

Only limitations that meet the above requirements are considered to be legitimate or legal. The ICCPR Article 19(3) provides a test to determine whether the limitation is justifiable in the circumstances. The test is that the limitation should be provided by law, for a legitimate aim and it must be necessary.[114] This is a complex test that has been interpreted differently by different courts. In some cases, the courts have even adopted a different approach altogether.

For example, the European Court of Human Rights departed from the test in the case of *Özgür Gündem v Turkey*.[115] In this case, the Court sought to determine whether the State had unlawfully restricted this right by determining the balance that could be struck between the general interests of the community and that of the individual. The Court, in this case also gave regard to 'the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources.'[116] The heavy-handedness of the police in Zimbabwe when controlling demonstrations shows that the State has no regard to the balance that can be

[112] Article 10(2) of the European Convention on Human Rights.

[113] Article 19(3) of the International Covenant on Civil and Political Rights.

[114] See Mendel (n 68 above) at 17, see also *Lingens v Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

[115] *Özgür Gündem v Turkey, Ersöz and ors v Turkey*, Merits, App No 23144/93, ECHR 2000-III, [2000] ECHR 104, (2001) 31 EHRR 49, (2001) 31 EHRR 1082, IHRL 2863 (ECHR 2000), 16th March 2000, European Court of Human Rights [ECHR].

[116] Ibid.

struck between the need to permit peaceful protests and the cost of policing them, which in many cases has led to the loss of lives.[117]

In addition to this, the Inter-American Court has also departed from the test in the case of *Claude Reyes and Others v Chile*.[118] This departure was however justifiable for the reason that the Court dealt with an issue of the right of access to information as opposed to freedom of expression. Further, it should also be noted that restriction in cases of freedom of expression must be done by a public actor, not a private individual or private institution.

Before applying the three-part test, one must determine whether someone's right to freedom of expression has been restricted, if the answer to this question is in the affirmative, the test is then applied. It is important to note that sometimes determining a *prima facie* restriction can be straightforward. For example, a *prima facie* case of restriction is made where a person was sanctioned for making a statement or prevented from making one.

As noted earlier, the three-part test involves inquiring into whether the restrictions were provided by law and necessary.[119] Law refers to different types of laws such as administrative laws, civil and criminal laws, as well as the constitution. In common law jurisdictions, this also includes decisions of the courts. In explaining this, the Inter-American Court, as cited by Mendel said:

> '[T]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.'[120]

The Court added further that 'the word "laws," used in Article 30, can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, under the procedure set out in the domestic law of each State.'[121]

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[117] See *Human Rights Watch.* Zimbabwe: Excessive Force Used Against Protesters Investigate, Prosecute Responsible Security Forces. Available at https://www.hrw.org/news/2019/03/12/zimbabwe-excessive-force-used-against-protesters [Accessed 17 April 2019]

[118] *Claude Reyes v Chile,* Petition 12.108, Inter-Am. C.H.R., Report No. 60/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003).

[119] In terms of art. 19(3) of the ICCPR.

[120] Mendel (n 68 above) at 10.

[121] Ibid, at 1.

It is also generally accepted that the law may delegate certain functions to various officials which may among others, including the discretion to make pronouncements limiting freedom of expression. In this regard the Ontario High Court in the Canadian case *Ontario Film and Video Appreciation Society v Ontario Board of Censors,*[122] has cautioned against the use of excessive discretion:

> '[I]t is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.'[123]

In addition to the requirement that the restriction or limitation must have been provided in law, the restriction must be for the protection of "a legitimate and overriding interest."[124] In determining this requirement, scholars have argued that the purpose and effect of the restriction would be taken into account.[125] According to Mendel, the Supreme Court of Canada has had an opportunity to explain this point by saying that,

> 'where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld; "[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."'[126]

It would be imperative that Zimbabwean courts adopt a similar interpretation to afford more civil and political rights and restrict limitations. At present, the limiting mechanisms both legislative and policy-wise have the effect of stifling any prospects for democracy in the country.

The test also requires a consideration of whether the restriction on freedom of expression protects the rights and reputations of others, as well as national security or public order or public health or morals. Scholars have noted these are general and at times may be difficult to define. For example, Mendel argues that 'public morals are not only hard to define and change over time'[127] Public order in Article 19(3) 'does not refer simply to the maintenance of physical

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[122] *Ontario Film and Video Appreciation Society v Ontario Board of Censor* (1984), 45 O.R. (2d) 80 (C.A.)

[123] Ibid, at para 592.

[124] Mendel (n 68 above) at 1.

[125] Ibid at 13.

[126] Ibid.

[127] Ibid.

order, but also includes the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the right of the individual.'[128]

The final part of the test is that the limitations on freedom of expression should be necessary to protect the interests discussed above. An enquiry is made into whether the benefit of protecting the interests is greater than the harm caused by restricting freedom of expression. In any case, this simply is an interrogation of the substance of the limitation. Mendel notes that 'it has been held that the measures to protect the right must be rationally connected to the objective of protecting the interest.'[129] Technically, this means that the authority or law restricting freedom of expression should be the least intrusive measure available. In respect of this, the Inter-American Court has previously held that 'if there are various options to [protect the legitimate interest], that which restricts the right protected must be selected.'[130] Mendel has also used the decision of the Supreme Court of Canada that explained this point; '[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.'[131]

3.7.2 Freedom of assembly

Freedom of assembly is a very important right, and it is cardinal to the exercise of various other civil and political rights. Delaney defines this right as the right that 'protects the peoples' ability to come together and work for the common good.'[132] This right is the vehicle for the exercise of many other 'civil, cultural, economic, political and social rights.'[133] Assembly was defined by the African Commission on Human and Peoples' Rights as;

> 'an act of intentionally gathering, in private or public, for an expressive purpose and for an extended duration. The right to assembly may be exercised in a number of ways

[128] Ibid.

[129] Ibid, at 18.

[130] *Lingens v Austria*, 8 July 1986, Application No. 9815/82, para. 39 (European Court of Human Rights).

[131] Ibid. Citing the Supreme Court of Canada in *R v Oakes*, [1986] 1 SCR 103, pp.138-139.

[132] S Delaney "The right to freedom of assembly, demonstration, picket and petition within the parameters of South African Law." (2012) available at https://www.fhr.org.za/files/3815/1247/0494/Protest.pdf [accessed 04 May 2019].

[133] Ibid. at 2.

including through demonstrations, protests, meetings, processions, rallies, sit-ins and funerals, through the use of online platforms or in any other way people choose.'[134]

Limitations on this right have been instrumental in furthering dictatorships and authoritarianism in various states. This right is essential for good governance and democracy. The exercise of freedom of assembly has been primarily related to political gatherings, demonstrations and other forms of mass gatherings as will be discussed in the following Chapters.

This right is protected under international law. In international law, it refers to gather 'publicly or privately to collectively express, promote, pursue and defend common interests.'[135] Consequently, this right is contained in international instruments such as the ICCPR,[136] The African Charter,[137] the UDHR,[138] the African Charter on Rights and Welfare of the Child,[139] the European Convention on Human Rights,[140] and the American Convention on Human Rights[141]. The right to freedom of assembly is a right that applies to everyone, that is, individuals and groups. This right requires that no one should be extra-judicially prohibited from assembling, and conversely, no one should be forced to participate in an assembly. It is important to note this right only applies to peaceful assembly, as contemplated in the ICCPR.[142] According to The Guidelines on Freedom of Association and Assembly in Africa,[143]

> 'The right to freedom of assembly extends to peaceful assembly. An assembly should be deemed peaceful if its organizers have expressed peaceful intentions, and if the conduct of the assembly participants is generally peaceful.

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[134] African Commission on Human and Peoples Rights; Guidelines on Freedom of Association and Assembly in Africa. Adopted at the Commission's 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017

[135] *South African Human Rights Commission* "The status of Human Rights Defenders in South Africa" Research Brief April 2018. 22 (Accessed 13 August 2018) Available at https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf

[136] Article 21 of the International Covenant on Civil and Political Rights.

[137] Article 11of the African Charter on Human and Peoples Rights.

[138] Article 20(1) of the Universal Declaration of Human Rights.

[139] Article 8.

[140] Article 11.

[141] Article 15.

[142] Article 21.

[143] See (n 134 above).

a. 'Peaceful' shall be interpreted to include conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes or obstructs the activities of third parties.

b. Isolated acts of violence do not render an assembly as a whole non-peaceful.[144]

Save for the African Charter, this right is referred to as a right to peaceful assembly. In the American Convention peacefulness is contemplated in the words "without arms." This essentially means a gathering or assembly must be peaceful and that the peacefulness is guaranteed through an expression of intent to be peaceful. According to the African Commission Guidelines on Freedom of Assembly in Africa, parties who intend to participate in an assembly are required to place a notification with relevant authorities for purposes of public order and safety. However, the lack of notification need not result in deeming an assembly illegal.[145] It is also a general requirement that procedures set for notifications should not be burdensome. The time limit for notice should not be required too far in advance, but only far enough in advance to allow for any preparations and exchange of views that may be necessary.

The European Convention, however, does not require a notice for assembly to be given in terms of Article 11. The Venice Commission Guidelines on Freedom of Peaceful Assembly say that states may require that a prior notice for assembly be given so that preparations such as those designed to maintain public order may be made.[146] In this regard, this Venice Commission Guideline has cautioned against regarding this notification as a request for permission.

The European Court of Human Rights discussed the notification requirement in the case of *Eva Molnar v Hungary:*

'[A] prior notification requirement would not normally encroach upon the essence of that right. It is not contrary to the spirit of Article 11 [of the Convention] if, for reasons of public order and national security, a priori, a High Contracting Party requires that the holding of meetings be subject to authorisation.'[147]

In the same vein, the European Court has reiterated the fact that lack of prior notification of assembly does not serve as a ground for sanction. It is however acknowledged that preliminary administrative procedures are common-place and should not be used as obstacles to assembly.

[144] Ibid, para 70 a) and b).

[145] See (n 134 above).

[146] ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly, 2007.

[147] *Éva Molnár v Hungary*, App. No. 10346/05 Final, Eur. Ct. H.R. (Jan. 7, 2009).

In the case of *Bukta and Others v Hungary*[148] the European Court held that Hungary had violated article 11 of the European Convention after the police had dispersed a peaceful assembly held without prior notice.[149] The European Court held further that even though the laws of Hungary required that the police be notified of any future gatherings, the dispersal was disproportionate to the peaceful assembly.

3.7.2.1 Permissible limitations on freedom of assembly

Limitations placed on freedom of assembly may only be those permissible at law. These limitations are referred to as 'limitation of the right imposed.' It is trite, that states shall not place limitations on freedom of assembly depending on the nature of the expression involved. Gatherings for purposes of spreading hate speech and incitement of violence are not protected. In terms of paragraph 79 of the African Guidelines 'speech addressing matters of public interest, or political or policy affairs, including criticism of the state or state officials, including as exercised in the context of an assembly, is given maximum protection under the right to freedom of expression.'[150]

Blanket bans, where the state or authorities place a general ban on gatherings in certain places or certain times are a common practice in many states, are only permitted as a means of last resort. This is because freedom of assembly cannot be unreasonably limited.

3.8 Chapter Summary

The concept of civil and political rights has its roots in historical texts. Its primary foundation is in the international legal instruments of the mid-20th Century. There is general agreement at the international level regarding what civil and political rights are, as well as the substance thereof. The adoption of and consensus regarding the International Covenant on Civil and Political Rights, has made this general agreement and acceptance possible. This Chapter has paid special attention to civil and political rights, such as the right to freedom of expression, freedom of association/assembly and the right to citizenship as contemplated in various international instruments. It has been shown that civil and political rights are not absolute rights

[148] *Bukta and Others v Hungary*, App. No. 25691/04 Final, Eur. Ct. H.R. (Oct. 17, 2007).

[149] Ibid.

[150] See (n 134 above) at para 79.

and may be subject to limitations. These limitations, however, must be just and equitable in terms of international law guidelines and principles.

Zimbabwe has had a terrible civil and political rights record. From the persecution of the opposition, forced disappearances to killings by the uniformed forces.[151] These have been abated by the unconstitutional limitations on civil and political rights in the country. The laws such as POSA and AIPPA have been primarily relied on to clamp down on diverse views and public demonstrations. It is acknowledged that civil and political rights are not absolute and that they should be exercised within limits. It is argued that such limits should be ones that are acceptable in an open and democratic society. International law discussed in this Chapter has shown that courts should adopt standards and tests to construe the nature, extent and limitation of a right. The Zimbabwean courts have a lot to draw from the discussion made above to interpret civil and political rights in a manner that meets the generally accepted standards informed by human rights, the rule of law and democracy. Without this, transforming civil and political rights in Zimbabwe will remain a pipe-dream.

This conceptual framework, therefore, sets the basis for a more detailed examination of how the courts have arrived at their decision in Zimbabwe and serve to provide a thesis of how these rights have been abused over the years. The following chapter examines how the South African Constitutional Court and the Kenyan Supreme Court have used transformative adjudication in respect of these and other rights, for illustrative purposes.

[151] Ibid.

CHAPTER 4

TRANSFORMATIVE CONSTITUTIONALISM AND ADJUDICATION IN SOUTH AFRICA AND KENYA

4.1 Introduction

This chapter explores the notion of transformative constitutionalism and how the courts have adjudicated in human rights cases in South Africa and Kenya. The significance of this Chapter is that it guides the analysis of the record of the Zimbabwe Courts in the following Chapter and help with mapping a trajectory for Zimbabwe. This chapter explores how the courts in more pronounced (South Africa) and emerging (Kenya) constitutional democracies have navigated the political sensitivity which human rights cases involve.

Attention is paid to the methods of constitutional interpretation adopted in these jurisdictions. Both jurisdictions have passed landmark decisions using transformative interpretation methods to give life to the values and principles contained in their constitutions in ways that aim to achieve the aspirations of the people. It is acknowledged that the courts appreciate the role of political actors, and contrary to popular belief, adjudicating in such matters or exercising judicial activism as opposed to judicial restraint does not amount to a violation of the doctrine of separation of powers.

The courts have to jealously guard the values and principles of the constitution. Transformative adjudication has been used in both jurisdictions to better the lives of the people and to achieve the constitutional goals and national aspirations. The first part of this chapter will explore the notion of transformative constitutionalism in the South African context, considering both the scholarly literature and the record of the Constitutional Court of South Africans. The second part explores Kenyan transformative jurisprudence. This chapter shows that the jurisprudence in these countries can be used to guide courts in countries with new constitutions such as Zimbabwe or other emerging democracies in shaping the trajectory of their transformations especially in matters involving civil and political rights. In Zimbabwe, rights adjudication has not been fully explored to transform and expand the ambit of the scope of protection of civil and political rights.

Part A

4.2 Transformative constitutionalism and adjudication in South Africa

This section explores how South African courts have managed to transform society through various means. Emphasis is placed on the South African Constitutional Court's transformative agenda, its appreciation of the court's role, and the interpretative methods adopted to ensure that transformation in South Africa becomes a reality. To achieve this, this section provides a brief background to the socio-legal and political strata that transformed the Court's agenda since its inception in 1994. The record of the Court in human rights cases is explored to show how the Court crafted its judgements in a manner that avoids confrontation with other branches of government. But for this craftsmanship, political arms would have accused the Court of judicial law-making or trampling on Executive authority in violation of the doctrine of separation of powers.

4.2.1 Background

At the demise of Apartheid, South Africa entered a new era of constitutional democracy founded on the values of equality, dignity, the rule of law, equality and respect for fundamental freedoms. This was a significant shift from the previous dispensation that was based on racialism, oppression, and discrimination. Just like any colonial territory in Africa, the African majority was mostly at the receiving end of the socio-economic and civil and political ills associated with colonialism. The legislative and the justice system of the time did not help either.[1] There was a need for real change to ensure that Africans were afforded the human rights they deserved. African people were previously deprived of their rights. Therefore, following years of conflict and negotiations, a new path in South African history was paved with the adoption of the Interim Constitution in 1994.[2] The adoption of the Interim Constitution in 1994 resulted in an agenda to transform social, economic and political life through respect for human

[1] Singh and Bhero argue that during the Apartheid, judges primarily used the 'orthodox textual position.' As such the judges were 'not empowered to make any modifications, alterations or additions to the legislative text, as this function was solely the responsibility of the legislature.' A Singh and MZ Bhero "Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of Section 39(2) of Constitution" (2016) 19 *Potchefstroom Electronic Law Journal.*

[2] Enacted as Act 200 of 1993.

rights and fundamental freedoms. As Rapatsa puts it, 'the post 1994 regime embodied a vivid paradigm shift entrusted in law and social order thereby creating a new normative system, characterised mainly by respect for human life, dignity, human rights and fundamental freedoms.'[3] A constitutional duty was placed on the body politic to ensure that South Africa achieved true and meaningful democracy that would manifest itself not only through the holding of regular elections but also on the lives of the people themselves.

The Constitution not only served to redress the injustices of the past but also sought to entrench the newly found principles of respect for human rights and fundamental freedoms.[4] Pius Langa has viewed the constitution as a project aimed at healing the wounds inflicted in the past and guide the people into the future.[5] South Africa needed to find a way of entrenching human rights and institutions promoting democracy. There were several lessons to be learnt from post-colonial administrations from across Africa where the misery of most people was perpetuated by newly formed brutal regimes, sowing the seeds of endless coups and counter-coups as witnessed in the 1970s and 80s.[6] 'The elusiveness of constitutionalism in post-colonial Africa has attracted the attention of many scholars in Africa. Okoth-Ogendo, for instance, [described] Africa's post-colonial situation as one of "constitutions without constitutionalism".'[7] Thus, South Africa had to forge a realistically transformational path and avoid a return to or reverse-Apartheid or even a revolution against the new democratic system.

The history of South Africa has informed the need for a rights-based approach to transformative adjudication. During Apartheid, civil and political rights were alien to the majority of South Africa. The final Constitution[8] adopted in 1996, was based on the tenets of transformative constitutionalism, anchored primarily on socio-economic rights and civil and political rights as contemplated in Chapter 2 that contains the Bill of Rights. This was done as a way of bringing

[3] M Rapatsa "South Africa's Transformative Constitution: From Civil and Political Rights Doctrines to Socio-Economic Rights Promises." (2015) 5 (2) *Juridical Tribune Journal* 208, at 211.

[4] M Rapatsa "Transformative Constitutionalism in South Africa: 20 Years of Democracy." (2014) 5 (27) *Mediterranean Journal of Social Sciences*. 887- 895.

[5] P Langa "Transformative constitutionalism" (2006)17 *Stellenbosch Law Review* at 352.

[6] See, W R Jackman *et al* "Explaining African Coups D'Etat." (1986) 80 (1) *The American Political Science Review*, 225.

[7] E Kibet and C Fombad "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa" (2017) 17 *African Human Rights Law Journal*, 340 at 343.

[8] The Constitution of the Republic of South Africa, 1996.

about much-needed social justice, peace, and reconciliation, after so many years of social and political conflict.

What is of interest in respect of transformation, is the role that has been played by the South African Constitutional Court in championing this, and often setting itself on a collision course with the other branches of government. The Constitutional Court has since its inception taken a progressive human rights activist role by giving meaning to the form and substance of the Constitution, in pursuance to the values and principles of transformative constitutionalism.[9] The record of the South Africa Constitutional Court shows that it has intervened in many socio-economic as well as civil and political rights disputes, by making progressive pronouncements or determinations ordering the State to act within the confines of, or in a manner prescribed by the Constitution. In instances where there is a clear absence of political will from the Legislature and the Executive, the Constitutional Court has been called upon to safeguard the rights of the people.[10] This study shows in Chapter 5 that there exists a lack of political will to transform the state of civil and political rights in Zimbabwe, hence the call for a court-led transformation process.

Regarding transformation, Chief Justice Pius Langa stated that 'this project is a constitutional commitment to heal wounds of the past and guide us to a better future.'[11] To elaborate on this point, Langa CJ notes that:

> 'Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.'[12]

This chapter examines the record of the South African Constitutional Court in transformative adjudication. For illustrative purposes, the Court's record in socio-economic rights is used to illustrate how the Court's interpretative methods and adjudication techniques are used for transformative purposes. This is done for comparative purposes, to inform the next Chapter

[9] AC Diala "Judicial Activism in South Africa's Constitutional Court: minority Protection or Judicial Illegitimacy?" (2007) LLM Dissertation *University of Pretoria.*

[10] The emergence of public interest litigation in South Africa is evidence on the fact that where politics or politicians have failed the people, the courts are used as an alternative to enforce the Constitution.

[11] Langa (n 5 above) at 352.

[12] Ibid, at 351.

where the record of the Zimbabwean Constitutional Court and its duty to transform the lives of the people in general and civil and political rights, in particular, will be discussed.

4.2.2 The transformative nature of the South African Constitution

The South African Constitution has been hailed as the embodiment of progressive democracy. South Africa's Constitution has over the years resulted in a real change of both the social, economic and social spaces within the country. John Dugard notes that 'the Constitution of the Republic of South Africa is not only 'moral', but it is also inherently transformative.'[13] According to Rapatsa 'this Constitution carried with it, a progressive agenda of transformation geared towards changing all spectrums of society with specific emphasis on altering social and economic conditions of ordinary South Africans.'[14] Indeed, South Africa adopted a constitution whose core values are to create 'a society based on democratic values, social justice and fundamental human rights . . .'[15] Besides, the constitutional aspiration is to better the life of every individual and free their potential.[16] The transformative nature of the South African Constitution is based on its founding pillars which were influenced by the events of the past struggle. Rapatsa explains that these founding values 'represented a collective commitment geared towards ensuring that the conditions which led to conflict and suffering in society are eradicated and not given space to re-emerge.'[17] The Constitution, therefore, presented South Africa with an opportunity to break with the past by introducing a new normative system. It can be said that the adoption of a new Constitution in Zimbabwe provides a similar opportunity for it to break with the past norms of polarization, human rights violations and the absence of the rule of law and democracy.

The adoption of the values of constitutionalism in 1994 saw the issue of transformation coming to the fore of legal scholarship. In trying to understand the South African Constitution, post-1994 scholars have formulated various meanings for transformative constitutionalism. Prominently, Karl Klare defined transformative constitutionalism as a 'long term constitutional enactment, interpretation and enforcement committed to transforming a country's political,

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[13] J Dugard "Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation." (2007) 20 (4) *Leiden Journal of International Law* 965 at 970.

[14] Rapatsa (n 3 above) at 209.

[15] See the Preamble, Constitution of the Republic of South Africa, 1996.

[16] Ibid.

[17] Rapatsa (n 3 above) at 208.

legal and social institutions, and power relations in a democratic, participatory and egalitarian direction.'[18] This essentially means that the Constitution provided the opportunity to effect political change through legal processes. Karin Van Marle perceived it as 'an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practices in a manner that it will radically alter existing assumptions about law, politics, economics and society in general.'[19] Practically, this assertion is to be found in Christiansen's description of transformative constitutionalism in South Africa: 'South Africa has been attempting to transform itself through a constitution that zealously protects traditional civil and political rights and addresses the more fundamental elements of justice as well.'[20] The transformative nature of the Constitution has been primarily viewed through socio-legal lenses.

The Constitution has also been viewed as a transformative document, because it entrenched civil and political rights together and justiciability of socio-economic rights. This on its own is a sign that the drafters of the Constitution envisaged a document that would be used by the people as a tool for demanding what is owed to them by the State. These include the promotion and protection of various rights contained in the second chapter of the Constitution. Unlike many liberal constitutions, the South African Constitution does not only place a negative obligation on the State not to violate human rights but also places a positive obligation on the State to take all steps necessary to ensure that they are realised.[21]

South Africa's transformation, though ongoing, did not come through legislative means only. The courts have developed a rich jurisprudence in the furtherance of the transformation agenda. Christiansen notes that 'indeed, South Africa has established a jurisprudence of expansive dignity and equality protections as well as the only relatively comprehensive, affirmative social rights jurisprudence of any nation a reflection of the transformative values of the

[18] K Klare "Legal Culture and Transformative Constitutionalism." (1998) *South African Journal on Human Rights'* at 150.

[19] K Van Marle "Transformative constitutionalism as/and critique." (2009) 20 *Stellenbosch Law Review*, 286 at 288.

[20] EC Christiansen "Transformative Constitutionalism in South Africa: Creative uses of Constitutional Court Authority to Advance Substantive Justice." (2009) 13 *Journal of Gender Race and Justice.* 575. 576.

[21] See Pierre de Vos. The court keeping a check on the South African State. 2011 *The Guardian* 2 December available at https://www.theguardian.com/commentisfree/libertycentral/2011/dec/02/south-africa-jacob-zuma-constitutional-court [Accessed 22 June 2018].

Constitution.'[22] This has been made especially possible by the courts' justice-oriented ideology. This serves to illustrate the role that the court has to and can play in leading the transformation process and it is argued that this can be imported into the Zimbabwean constitutional adjudication design.

4.2.3 Transformative adjudication in South Africa

The courts in constitutional democracies or countries with a democracy of sorts must uphold the rule of law, fundamental rights and the promotion of constitutionalism. Constitutions generally place this duty on institutions of the State, by requiring the State to commit to respecting and upholding these values. However, this is only practical in ideal democracies, and those are rare. More often states, acting through various agencies, are at the fore of violating these values. Many African courts, after independence, faced by despotic and repressive governments, struggled with carrying out their mandate to be the guardians of their constitutions and to promote and protect human rights. Even though this cannot be generalised, there exists a general pattern indicating that courts were either 'impotent or complicit' in the repressions.[23]

The courts in Apartheid South Africa failed to play any meaningful role in the transformation of the human rights particularly due to the legal and legislative structures that were designed to support the system of Apartheid.[24] Parliamentary sovereignty of the pre-1993 Constitutions[25] of South Africa ensured that courts could do little detrimental to Executive or Legislative decision.[26] For example, courts were not permitted to review the constitutionality of the acts of Parliament.[27] This meant that decisions of the Cabinet or Parliament, no matter how

[22] Christiansen (n 20 above) at 577.

[23] Kibet & Fombad (n 7 above) 344.

[24] Ibid.

[25] Four Constitutions preceded the 1996 Constitution. The first three, that is 1910, 1960 and 1983 Constitutions served the interests of the White minority, and the 1993 one was adopted as inclusive and transitional document that paved way for the Final Constitution in 1996.

[26] See for example Dugard who notes that '[d]ecisions dealing with the "restriction" of individuals were also characterized by judicial abstention: the courts, led by the Appellate Division, refused to invoke the normal principles of administrative law in order to review arbitrary executive action.' J Dugard "The Judiciary in a State of National Crisis- With Special Reference to the South African Experience." (1987) 44 *Wash. & Lee Law Review*, 477 at 492.

[27] Kibet & Fombad (n 7 above) at 344.

outrageous, could not be questioned by the courts.[28] The Apartheid government had numerous constraints on freedom of expression, freedom of assembly and freedom of movement and these were cemented by bureaucratic controls meant to implement the laws.[29] Unlike the current constitutional dispensation, the Apartheid legal order allowed very little room for judicial review, it was premised on an 'explicitly racist constitution and parliamentary sovereignty, ostensibly "unencumbered by the British doctrine of the rule of law".'[30] John Dugard has laid criticism against the Apartheid Judges for their failure to find room for the 'judicial advancement of human rights in the interstices of the apartheid legal order.'[31] According to Wacks, South Africa's legal order was 'quintessentially unjust.'[32] In that respect, Chaskalson submits that judges who shared this view and were concerned about the moral dilemma of having to apply apartheid laws should have resigned.'[33] John Dugard referred to the judges' subordination to the executive and the legislature as 'vulgar positivism.'[34] Dugard elaborates that:

> 'Government strategy became more devious. First, it ruled that 2 judges, as against the customary five, had to preside in AD [Appellate Division] cases concerning constitutional matters. It then set about appointing to the AD more judges sympathetic to the NP [National

[28] See Moseneke who notes that 'Parliament was supreme and entitled to override any rights that may be located in the common or prior statutes. The sovereignty of Parliament that courts could not invalidate any law passed by the unrepresentative parliament. Judicial review was virtually absent. In any event, the dominant judicial culture required courts to defer to law makers. Although, administrative law of the time permitted the review of subordinate legislation and administrative decisions, judges rarely set them aside.' D Moseneke "Remarks: The 32nd Annual Philip A. Hart Memorial Lecture: A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa" (2013) 101 *Georgetown Law Journal*, 749.

[29] A Chaskalson "From Wickedness to Equality: The Moral Transformation of South African Law." (2003) 1(4) *International Journal of Constitutional Law*, 590.

[30] Dugard (n 13 above) at 967.

[31] J Dugard "Should Judges Resign? – A Reply to Professor Wacks" (1984) 101 *South African Law Journal* 286, at 291.

[32] R Wacks "Judges and injustice." 1984 *South African Law Journal*. 266 at 269.

[33] Chaskalson (n 29 above) at 592.

[34] J Dugard "Some Realism about the Judicial Process and Positivism - A Reply" (1981) 98 *South African Law Journal* 372, at 374.

> Party] outlook **...** It also amended the Constitution to provide that "no court of law shall be competent to pronounce upon the validity of any law passed by Parliament".'[35]

Law schools and academics were not spared either: According to McQuoid-Mason:

> 'The few legal academics who did undertake criticism and analysis of the injustices of apartheid were themselves subjected to considerable criticism for becoming involved in politics from their peers, the legal profession and the bench. Sometimes they were prosecuted for what they wrote.'[36]

John Dugard has written extensively on the idea that there were opportunities that the Apartheid judges could have explored to engage in judicial activism of some sort. He made unequivocal calls for the 'judicial advancement of human rights through the use of common-law principles of equality and liberty.'[37] The judiciary was encouraged to take a more activist posture to secure a more just society. An interesting point made by this scholar was that;

> '[t]he South African judiciary has been relatively frank about its law-making function in the development of the common law… Why, then, is it that the myth of judicial sterility is preserved in the case of the interpretation of statutes? Why do we still adhere to the phonographic theory of judicial function in this sphere?'[38]

The above does not serve to lay criticism on the Apartheid judges, but to highlight that scholars have always been clear about the role that the courts should play in ensuring transformation through interpretation of statutes in ways that afford rights to the marginalised groups. The decisions of the Apartheid courts such as in the case of *Collins v Minister of Interior*[39] serves to illustrate how the judiciary was devoid of any craftsmanship to keep the Executive or Legislature in check. In *Collins*, it was held that 'if the provisions of the law are clear, we, as a court, are not concerned with the propriety of the legislation or policy of the Legislature, our duty is to minister and interpret it as we find it.'[40]

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[35] Ibid, at 966.

[36] DJ McQuoid-Mason "Access to justice and the role of law schools in developing countries: some lessons from South Africa: pre-1970 until 1990: Part I." (2004) 29 (3) *Journal for Juridical Science*. 28 at 30.

[37] J Dugard "The Judicial Process, Positivism and Civil Liberty" (1971) 88 *South African Law Journal* 181.

[38] Ibid, at 183.

[39] *Collins v Minister of Interior* 1957(1) SA 552 (A).

[40] Ibid.

Post-apartheid South Africa can be said to have generally escaped the ills that characterised post-colonial Africa. This escape is owed to the transformative nature of its Constitution as well as the role played by the courts in giving meaning to the word and purport of the Constitution. Since 1994, the South African courts have been making crucial judgments, especially on issues to do with human rights, equality, the rule of law and general principles of democracy[41]. In Africa, comparatively, South African courts have been at the fore of upholding the rule of law, constitutionalism and fundamental rights.[42] The notion that courts carry the ultimate power to make pronouncements on the meaning of law has, since World War II, been embraced by most democracies world over. It is this notion that empowers the courts to act in a manner that may be seen to be bringing about change to the lives of ordinary citizens. This power, however, thrusts the courts in the centre of politics, with significant political implications. When courts carry out such duties, their independence is placed at risk. As a result, they have to find ways of executing their duty whilst maintaining their institutional security. As will be shown, in Zimbabwe, the courts have previously faced political backlash for passing decisions that are not favourable to the State.

In South Africa, the courts' power to act is inherent in the Constitution of South Africa which gives the power to review legislation, policies and administrative actions and other political decisions. These powers, when not exercised carefully, set the judiciary on a collision course with the Executive.[43] The South African Constitution provides for several rights that are aimed

[41] The Inter-Parliamentary Union states that the basic principles of democracy are that "the people have a right to a controlling influence over public decisions and decision-makers, and that they should be treated with equal respect and as of equal worth in the context of such decisions." Inter-Parliamentary Union . *Democracy: its principles and achievement*. 1998. Inter-Parliamentary Union.

[42] Kibet & Fombad (n 7 above) at 344.

[43] Siyo and Mubangizi illustrate this point using the Al Bashir case 'what is more important are the attacks on the judiciary made by various government officials and government alliance partners, all of which seem to relate to or were instigated by the al-Bashir ruling. These attacks have included statements that the judiciary is biased against the state, that the judiciary is driven "to create chaos", is "overreaching" and "contradicting the interest of the state" (according to ANC Secretary General Gwede Mantashe), and, importantly, that the judges were influenced to reach certain verdicts (according to Police Minister Nathi Nhleko). These attacks on the judiciary eventually led to an extraordinary judicial heads of court meeting, after which Chief Justice Mogoeng Mogoeng announced that the judiciary would meet President Jacob Zuma to discuss matters, after "repeated and unfounded criticism" of the judiciary, given that the criticism "has the potential to delegitimise the court." L Siyo and JC Mubangizi "The Independence of South African Judges: A Constitutional and Legislative Perspective." (2015) 18 (4) *Potchefstroom Electronic Law Journal*, 817.

at improving the lives of the people. The Constitutional Court, like the national government, has had a significant impact on the socio-economic and political justice.[44] Critics argue however that a lot still needs to be done on the economic front. The establishment of the Constitutional Court of South Africa in 1994 signified a turning point in the country's judicial history. The first task the Constitutional Court had was to scrutinise the 1994 Interim Constitution against the Principles[45] that had been agreed to by the negotiating parties. Indeed, the Interim Constitution was repealed by the new Final Constitution in 1996. The Interim Constitution ended the Apartheid rule and brought in a new dispensation. What is also novel about the Interim Constitution was that it:

> 'ended the era of parliamentary supremacy in South Africa and invested very broad judicial review authority in the courts of South Africa—including the power to review proposed legislation, national and provincial statutes, provincial constitutions, acts of the executive branch and administrative bodies, and decisions of lower courts on all matters related to the Constitution.'[46]

The South African courts have been able to freely adjudicate on matters that ordinarily would be dealt with by the Executive and Legislature. This is despite the existence of "separation of powers" as one of the guiding principles in the country. In terms of the Constitution, the power to declare any law or conduct of the State as unconstitutional is vested in the Constitutional Court.[47] Further to this, the Constitution grants the courts the power to make any order that is just and equitable in a democratic society in any matter before it.[48] These powers inevitably set the courts on a collision course with other arms of the state.

Transformative adjudication requires that the courts embrace transition as was envisioned by the drafters of the Constitution. In South Africa, one of the ways that have been used by the courts to avoid confrontation with the State is by acknowledging that social transformation is a duty which primarily rests with the State.[49] The courts have therefore stepped in, as provided for in the Constitution, to adjudicate in matters where the State's legislative and administrative

[44] The Constitutional Court has managed to do this through the judicial review mechanisms whilst the national government has relied on executive action.

[45] Constitutional principles Schedule 4 of the Interim Constitution.

[46] Christiansen (n 20 above) at 575.

[47] In terms of Section 172 (1) (a) of the Constitution of the Republic of South Africa, 1996.

[48] Ibid, Section 172 (1) (b).

[49] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

conduct falls short of what is acceptable in a democratic society. For example, in *Minister of Health v Treatment Action Campaign*[50] the Court essentially acknowledged that it was the responsibility of the Government to formulate and implement policies.[51] It argued, however, that in this case, the Government had failed to adopt reasonable measures to achieve the progressive realisation of the right of access to health care services under section 27 of the Constitution.[52]

The Court demonstrated that it would make pronouncements in cases where the State had failed to discharge its constitutional mandate, to hold the Executive to account. This courage has primarily been absent in Zimbabwe, save for few instances, and has resulted in the judiciary being accused of timidity.[53] As will be shown in Chapter 5, in Zimbabwe, even though the courts have made some progressive decisions, these have not substantially contributed to their interpretation methods or human rights jurisprudence in a way that would transform the society. Judiciary-led transformative process requires judges who are bold enough to adjudicate in politically sensitive matters regardless of popular political sentiments.

Those who argue against transformative adjudication often invoke the separation of powers doctrine to prevent flexible interpretation of the law by the courts. Liebenberg has argued that the separation of powers doctrine is likely to be applied rigidly in socio-economic rights case to avoid making decision likely to challenge the political arms of the state. She elaborates that 'this is particularly the case when the doctrine assumes an idealised form of separate terrains

[50] *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC)

[51] Ibid, at para 99, '[w]here state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.'

[52] Ibid, at para 135 'It is declared that: a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.'

[53] JW Chikuhwa. *Zimbabwe: The end of the first republic* (2013).

with the strict demarcation between the roles of each branch instead of a functional and pragmatic device to facilitate responsive, accountable governance.'[54]

A rigid construct of separation of powers is contrary to ideal transformative constitutionalism as envisaged by the Constitution.

4.2.4 Navigating around the separation of powers

The South African courts have adopted an approach that some may see as violating the doctrine of separation of powers especially in matters that constitute political questions. This is contrary to the notion of positivism which is unwilling to accept the idea of transformative adjudication. The positivist view is that the primary objective of transformative adjudication is to invite judges to 'accomplish political objectives.'[55] This notion essentially confines legal interpretation to texts of rules of law and prevents any form of craftsmanship, use of subjective intellectual, ethical or moral views by the judges. However, the South African Constitutional Court appreciates its wide powers and scope of interpretation in determining all cases of a constitutional nature.[56] As will be shown in Chapter 5, the Zimbabwean Constitutional Court has shown a move towards an appreciation of its wide powers, however, more work still needs to be done.

The Court also has the power to hear disputes on the conduct of the President, as well as provincial, and national spheres of Government.[57] In addition to this, the Court has the power to hear disputes between organs of the State concerning their constitutional status, powers and functions,[58] the constitutional validity of Executive actions and the constitutional validity of parliamentary or provincial bills.[59]

Given these powers, a conflict between the courts and these arms of the state is inevitable. South Africa's courts-led transformation has been primarily visible in socio-economic rights cases. Chaskalson acknowledged that 'enforcement of these rights represent (sic) hard cases.

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[54] S Liebenberg "Towards a Transformative Adjudication of Socio-Economic Rights" in Osode and Glover (eds.), *Law and Transformative Justice in Post-apartheid South Africa* (2010) at 51.

[55] D Moseneke "Transformative Adjudication." *South African Journal on Human Rights*. (2002) 18 (3) 309-319.

[56] Section 167(3)(a), The Constitution of the Republic of South Africa 1996.

[57] Ibid Section 167 (5).

[58] Section 167(4)(a).

[59] Section 167 (4) (b).

Governments are elected to deal with these issues, and socio-economic rights are at the border of the separation of powers between the Judiciary and the Executive.'[60] According to Moseneke:

> 'The essence… is that courts are duty bound to give full effect to the constitution in order to transform society. However, if their judgments are substantially at odds with the dominant political and social views of society they may lose the respectability they so need to function well.'[61]

It has thus been suggested that there is a need for striking an 'equilibrium between rigorous judicial review, on the one hand, and the historic need for effective executive government to pursue reconstruction and development of society.'[62]

The judiciary has faced several criticisms on both its interpretation of the Constitution and the constitutional construct itself. Judges, judgements and the institution of the judiciary have been attacked by both disgruntled litigants as well as powerful political figures.[63] 'And, most concerning of all, senior political leaders have questioned the very idea of constitutional review.'[64] Moseneke has pointed out that:

> 'Recently the state has announced an executive initiated review of our jurisprudence of the Constitutional Court and the Supreme Court of Appeal amid political chants that the judiciary is untransformed or that it impedes transition to a socially just society. Sometimes the criticism veers towards blaming, not State inaction and ineffective economic policies, but the Constitution itself for deepening poverty and inequality.'[65]

Despite these hurdles, the record of the South African Constitutional Court remains pro-transformation. It is, therefore, necessary to turn to some of the cases in which the Court has exercised its authority to advance transformation.

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[60] Chaskalson (n 29 above) 590.

[61] Moseneke (n 28 above) at 768.

[62] Ibid.

[63] G Marcus and J Brickhill "The Fall and Rise of two Chief Justices" –paper delivered to the South African Reading Group, 5 April, New York.

[64] Ibid.

[65] Moseneke (n 28 above) 770.

4.2.5 The record of the Constitutional Court in transforming human rights.

The record of the South African Constitutional Court shows that the Court has been industrious enough to navigate around political hurdles in its quest for a truly transformed society. According to Christensen,

> 'the South African Constitutional Court was the branch of government that was undeniably the first among equals. The Court was uniquely empowered by its role to ensure the initial democratic transition and as the ultimate interpreter of the new Constitution through judicial review due to its placement at the pinnacle of a court system newly empowered by a transformational value set.'[66]

It should be noted that most of the cases recorded by the Constitutional Court involved socio-economic rights. It is submitted that the interpretative methods used in these decisions are transferrable to other human rights, particularly, civil and political rights.

The Constitutional Court, in the case of *Soobramoney v Minister of Health*,[67] was faced with the question as to whether the Applicant was entitled to receive dialysis treatment as a manifestation of his right not to be denied emergency medical treatment as well as the right of access to health care. In brief, the facts were that the Applicant was a patient suffering from kidney failure and his life could only be sustained by ongoing dialysis treatment. He was informed by a hospital that it could not afford to give him dialysis because of limited resources and that his condition made him ineligible for a kidney transplant. Hence, he could not be allowed to access dialysis treatment. The Constitutional Court acknowledged that the realisation of several socio-economic rights was dependent on the availability of resources. The Court held that the State had not breached its constitutional obligations. 'The Court promised that it would be slow to interfere with rational decisions taken in good faith by authorities for such matters.'[68]

However, in the case of *Government of the Republic of South Africa v Grootboom*[69] the Court reaffirmed its commitment to transforming the lives of the people through its interpretation of

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[66] Christiansen (n 20 above) at 575.

[67] *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC).

[68] A Govindjee "Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa: Walking the Tightrope between Activism and Deference?" (2013) 25 (1) *National Law School of India Review* 62, at 69.

[69] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

the law. This case involved a group of poor residents who had been made homeless as a result of their eviction from privately-owned land they had occupied. The group included children. Before the occupation of the private land they had lived in deplorable conditions. They had no access to basic services such as water, sewer and refuse collection. After their eviction, they applied to the High Court for an order requiring the government to provide them with adequate shelter. The High Court granted the order. The Government appealed to the Constitutional Court where the Court confirmed that in terms of Sections 26(1) and 26(2) of the Constitution, the State, though not express, has a negative obligation to refrain from violating the right to access to adequate housing. In addition to this, subsection 2 was interpreted to mean that the State was obliged to take reasonable steps, including legislative measures within its available resources to ensure the realisation of this right.[70] The Court specifically stated that the obligation to provide adequate housing was shared by all spheres of government and that the government needed to adopt clear measures, not only legislative but also to ensure appropriate finances and other human resources were made available. The Court had the opportunity to comment on the then-current government's housing plan and pronounced that the plan was not flexible enough to cater for those who had no roofs over their heads or those living in intolerable conditions.[71]

Another case in which the Court had to use its power to challenge government policies to realise the transformative agenda of the Constitution is that of *Minister of Health v Treatment Action Campaign.*[72] In this case, the Treatment Action Campaign, a non-governmental organisation, made an application before the High Court for an order to compel the government to make an antiretroviral drug Nevirapine generally available and accessible and to develop a comprehensive program on HIV/AIDS. The Court held that 'the government program to combat HIV/AIDS fell short of the constitutionally mandated standard…'[73] The government appealed this decision to the Constitutional Court. The Constitutional Court also held that the government's policy was not flexible; 'the government's policy relating to the limited use of Nevirapine at research and training sites constituted a breach of constitutional rights. Implicit

[70] Ibid, at para 39.

[71] Enforcement of socio-economic rights remains a challenge regardless court decisions. Irene Grootboom died in 2008 without having afforded adequate housing as per the court's ruling. See Grootboom dies homeless and penniless. August 08. *The Mail and Guardian*. 2008.

[72] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721.

[73] Govindjee (n 68 above) at 71.

in the Court's finding was that the waiting period before deciding to make the drug generally available was not reasonable within the meaning of section 27(2) of the Constitution.'[74] Interestingly, the Court also alluded to the pertinent issue of separation of powers.[75] The Court, in this case, confirmed that policy formulation and implementation remain the prerogative of the Executive. Therefore, the courts would not rush to make decisions that have the effect of forcing the Executive to pursue a particular policy. According to Govindjee, '… this doctrine did not restrain the courts completely from making orders that impacted on the policy.'[76] In addition to this, 'in so far as this constituted an intrusion into the Executive domain, the Constitutional Court held that such an intrusion was constitutionally mandated.'[77]

In the landmark decision of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,[78] the Constitutional Court demonstrated its powers by declaring unconstitutional several laws that prohibited gay sex and declared the common law of sodomy as unconstitutional. The Court did this by basing its argument on the rights to equality and dignity.[79] This was an interpretation that the Constitutional Court would not have arrived at had it not been for the transformative nature of the Constitution. Ackerman J, delivering the judgement, interpreted the right to equality in a manner that afforded rights to those unfairly discriminated based on their sexual orientation. Ackerman J said:

> 'We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people

[74] Ibid, at 72.

[75] The Government, in its arguments, raised the issue of separation of powers arguing that policy formulation is the prerogative of the government and not the courts, and the Court held, at para 98, '[t]his Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.'

[76] Govindjee (n 68 above) at 72.

[77] Ibid.

[78] *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999(1) SA 6 (CC).

[79] Ibid.

> concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.'[80]

The transformative nature of this decision lies in the correction of the State and Legislative structures that caused a disadvantage and discrimination against same-sex couples. According to Langa CJ, the Court did this by 'using new norm and rules which remedy and eradicate the disadvantage from its roots.'[81]

In *Minister of Home Affairs and Another v Fourie and Another*[82] the Constitutional Court also made a bold decision by recognising same-sex marriages. The Court declared the common law definition[83] of marriage in the Marriage Act[84] unconstitutional.[85] The Court said the Act was unconstitutional only to the extent that it excluded same-sex couples from the marriage status. The Court suspended the declaration for unconstitutionality for a year to allow the legislature to correct the defects. This was a sign of the recognition placed by the Court on the duty of the legislative arm to make and amend laws as they may see fit to comply with the Court's decision. The *Fourie* decision is one of the many in which the Court exercised its counter-majoritarian authority which, if it was not for the appreciation of its role in the transformation agenda, would have set it on a collision course with the other arms of the state. This was a case where 'it can be said that society's "feelings" around a moral controversy are, as HLA Hart once called it, at "concert pitch"[86] or as Dworkin would put it, meets with "passionate public disapproval".'[87] This was indeed true in the aftermath of the *Fourie* judgement during the public participation proceedings facilitated by the legislature to comply with the decision of the Court to take

[80] Ibid, at para 66.

[81] Langa (n 5 above) at 351.

[82] *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

[83] In terms of the common law, marriage is defined as 'a union of one man with one woman, to the exclusion, while it lasts, of all others.'

[84] Marriage Act 25 of 1961.

[85] H, De Ru. "The Civil Union Act 17 of 2006: A Transformative Act or a Substandard Product of a Failed Conciliation between Social, Legal and Political Issues." (2010) 73 (4) *Journal of Contemporary Roman-Dutch Law* 553.

[86] HLA Hart. *Law, Liberty and Morality* (1963), at 48.

[87] R Dworkin "Lord Devlin and the Enforcement of Morals" (1966) 75 *Yale Law Journal* 986. 991: See also J Barnard-Naude "For Michelman, on the Contrary: Republican Constitutionalism, Post-Apartheid Jurisgenesis and O'Regan J's Dissent in *Minister of Home Affairs v Fourie*" (2013) 24 *Stellenbosch Law Review*, at 342.

legislative steps to correct the defects in the Marriage Act.[88] The members of the public openly voiced their opposition to same-sex marriages.[89]

In *S v Makwanyane and Another*,[90] the Constitutional Court, through Judge Ismail Mahomed said;

> 'The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular, repressive and a vigorous identification of the commitment to a democratic universalistic caring and aspirationally egalitarian ethos expressly articulated in the Constitution.'[91]

According to Dennis Davis, the Constitution of 1996, was 'seen as the means by which a repressive, racially and sexually divided society could be transformed into a non-racial, non-sexist and egalitarian community.'[92] The Constitution was, therefore, a means to bridge the past and the future through engagement in a transformation process in which the Constitutional Court is a key stakeholder.

The Court in *Makwanyane* demonstrated its courage by declaring the death penalty unconstitutional despite public opinion. The Attorney General even expressed the importance of public opinion and submitted that public opinion was important in determining the constitutional validity of the death penalty. The stance taken by the Court therefore shows that it was aware of its constitutional duty to review law and to promote and protect human rights.

In another case, that would ordinarily have been met with resistance, *Du Toit and Another v Minister of Welfare and Population Development and Others*[93] the Court granted same-sex couples the right to adopt children. In this case, the Applicants had brought an application

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[88] Barnad-Naude, Ibid, at 342 - 343, observes that 'in the public participation proceedings before the legislature's Portfolio Committee on Home Affairs (tasked with the responsibility to draft a legislative instrument that would satisfy the tenor of the majority judgment's instructions in Fourie), arguably indicated a level of concert pitch fervor amongst vast sections of South African society against the legalisation of any form of same-sex union.'

[89] Ibid.

[90] *S v Makwanyane and Another* 1995 (3) SA 391.

[91] Ibid, at para 262.

[92] D Davis "Transformation: The Constitutional Promise and Reality" (2010) 26 *South African Journal on Human Rights.* 85.

[93] *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC).

before the High Court challenging the constitutionality of section 17(a), 17(c) and 20(1) of the Child Care Act[94] as well as section 1(2) of the Guardianship Act[95]. These provisions, the Applicants argued, limited their right to adopt as they referred to married couples only. It was submitted that these provisions, therefore, violated the right to equality as contemplated in section 9(3). The High Court found for the Applicants, and they subsequently applied to the Constitutional Court for confirmation of judgment in terms of section 172 of the Constitution. The Constitutional Court confirmed the decision of the High Court.[96] This shows that, even though the Court was aware of the possible threats on institutional security, it was willing to go a stretch further in the protection and promotion of people's rights as part of its transformation duty.

The case of *Economic Freedom Fighters v Speaker of the National Assembly and Others*[97] demonstrates that the State can no longer exercise powers arbitrarily and that the Constitutional Court has adopted a bold stance in its determination of constitutional and rights matters. In the opening paragraph of this case, Mogoeng CJ stressed the need to preserve the constitutional vision of guarding against the abuse of State power. He said, '[t]his is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.'[98] In this case, the Court also alluded to its recognition of the principle of separation of powers, and that it must be wary of instances wherein it may be called to take Legislative or Executive action.[99] In the same case, the Chief Justice cited the *Doctors for Life International v Speaker of the National Assembly and Others*[100] and said:

> '[B]ut under constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. Parliament must act in accordance with,

[94] Child Care Act 74 of 1983.

[95] Guardianship Act 192 of 1993.

[96] *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC).

[97] *Economic Freedom Fighters v Speaker of the National Assembly and Others* [2016] ZACC 11.

[98] Ibid, at para 1.

[99] Ibid, at para 92.

[100] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

> within the limits of, the constitution,' and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled.'[101]

The judgements have also been widely used in some of the most persuasive arguments for the justiciability of socio-economic rights the world over. The approach adopted in these cases is indeed commendable if the Constitution is to meet the people's expectations. Of note, is the complex balancing act that was used by the courts in these cases. The inevitable effect of these judgments is that they create tensions between the Legislature, Executive and the Judiciary. The South African Constitutional Court has, however, so far, managed to discharge its duty without any real threats against its institutional independence and this is due to the bold and consistent approaches that the Court has adopted. There are therefore many lessons that other African jurisdictions can draw from the record of the South African Constitutional Court.

Govindjee notes, 'in the broader African context, for example, it has been argued that judiciaries must play the role of social reformers, often necessitating activism in order for such an endeavour to succeed.'[102] More elaborately, he notes:

> 'Judges must use their judicial power in order to give social justice to the poor and economically and socially disadvantaged. South Africa is the best equipped to do this. Its bill of rights contains social and economic rights. In interpreting those provisions which protect social and economic rights, judges should remember that they cannot remain aloof from the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they move forward and improve the social and economic conditions of the poor. In South Africa the bill of right is, without interpretation, activist on its own right. However, it requires activist judges to make its provisions living realities.'[103]

The thesis here is that transformative adjudication, through judicial activism, if adopted elsewhere in Zimbabwe, has the potential to unlock people's potential in both economic and political spheres for the improvement of democracy. It is argued that even though the jurisprudence discussed above relates primarily to socio-economic rights, its theoretical underpinnings accompanied

[101] *Economic Freedom Fighters v Speaker of the National Assembly and Others* [2016] ZACC 11 Per Mogoeng CJ at para 92 citing paras 37 and 38 the *Doctors for Life International v Speaker of the National Assembly and Others.*

[102] Govindjee (n 68 above).

[103] Ibid, at 75.

by the attitudes of the Court have potential to be used as a basis for the transformation of civil and political rights in Zimbabwe.

The South African Constitutional Court has also made significant strides in transforming civil and political rights in the country. In the case of *Mlungwana and others v The State and others*[104], the Court was faced with the question of the constitutional validity of section 12(1) (a) of the Regulation of Gatherings Act of 1993.[105] This provision essentially criminalised a convener of a gathering's failure to either give notice or sufficient notice to the local authorities. Mlungwana, who had convened such a gathering was convicted in the Magistrate's Court. He appealed in the High Court where the Court held that section 12(1)(a) was unconstitutional on the basis that it limited the constitutional right to freedom of assembly as contemplated in section 17 of the Constitution. An application was then made to the Constitutional Court for an order confirming the invalidity of the contested provision.

The Constitutional Court weighed the nature and extent of the right to freedom of expression against the limitation in section 12(1) (a) of the Act. Petse JA noted that;

> 'The possibility of a criminal sanction prevents, discourages, and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed.'[106]

In arriving at its confirmation of invalidity, the Court emphasised the importance of freedom assembly in a democracy. It was held that to take away a tool that allows people, especially the poor, to express themselves would undermine the constitution and the participatory democracy that it envisages.

The Court has previously outlined that freedom assembly is a right that allows for the enjoyment of other civil and political rights. In *South African National Defence Union v Minister of Defence*, it was held that freedom of expression is related to freedom of religion, right to dignity, freedom of association, and right to vote.[107]

[104] *Mlungwana v the State* [2018] ZACC 45.

[105] Regulation of Gatherings Act 205 of 1993.

[106] (n 104 above) at para 47.

[107] *South African National Defence Union v Minister of Defence* [1999] ZACC 7 at para 8.

Transformative constitutionalism in South Africa has not been without criticism. One of its main weaknesses in South Africa is that it has managed to bring about tangible change in as far as eradication of poverty is concerned. Sibanda questions the formulation of transformative constitutionalism in South Africa; 'Is South Africa's constitutional project, as currently conceived, formulated in such a way that it will withstand the pressures of seemingly deepening cycles of racialised, intergenerational poverty and social decay?'[108] It is further submitted that South Africa's transformative constitutionalism is imbedded in liberal democratic constitutionalism. Liberal democratic constitutionalism is not suitable for the achievement of poverty eradication. Sibanda submits that;

> 'the courts have sought to enforce its principles and aspirations in adjudication, however the prevalence of a liberal democratic constitutional paradigm in South African constitutional discourse – despite the best intentions of transformative constitutionalism – has had the effect of defining the goods of constitutionalism in narrower terms than is in fact necessary or desirable for purposes of pursuing a truly transformative project of poverty eradication.'[109]

Sibanda posits that transformative constitutionalism, as currently formulated, has several weaknesses that impede the attainment of a truly egalitarian society. Transformative Constitutionalism should, instead, be conceptualised in a manner that is 'alive to the possibility of delivering a substantively more egalitarian society committed to true social and economic emancipation in which poverty is not only alleviated so as [to] assuage the collective conscience of the haves…'[110] It is argued that these criticisms, though not lacking in merit, ignore the fact that transformation is not an event but an ongoing project with many facets all aimed to achieve a truly egalitarian society. As a judiciary led project, transformative constitutionalism in South Africa has equipped the people with the right tools they need to claim, from the state, rights afforded in the constitution.

It should be stressed, however, that not all decisions of the South African Constitutional Court are without criticism from a transformation perspective. The case of *Mazibuko v City of Johannesburg*[111] is widely criticised for being retrogressive. The applicants in this case were residents of a poor community within the Johannesburg City. The city water authorities had

[108] S Sibanda "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty." (2011) 22 (3) *Stellenbosch Law Review* 482, at 483.

[109] Ibid at 486.

[110] Ibid at 486.

[111] *Mazibuko v City of Johannesburg* (2010) 4 SA 1 (CC)

made a decision to supply six kilolitres of water free of charge every month to the residents of this community. In their application, the residents challenged the constitutionality of the City's decision and avered that the Constitution provides that everyone has the right of access to sufficient water and the six kilolitres per month were not sufficient. It was further submitted that the installation of prepaid water meters was illegal. The main question before the court was whether the City, as an organ of the state, had an obligation to provide sufficient water. The Court held that the right of access to water does not confer an obligation to make the water immediately available but is subject to progressive realization within the available resources.

The decision of the court had a direct impact on the poor. Mohlakoana and Dugard argue that providing water infrastructure or physical access to people who cannot afford it is meaningless.[112] The state ought to have done more and the court ought to have placed a higher obligation on the state to provide adequate water to the poor.

Roux has also proffered his criticism of transformative adjudication as posited by Klare from a conceptual perspective. Roux views transformative adjudication as a concept that blurs the distinction between law and politics. He submits that '[l]iberal legalists cannot do transformative adjudication thus understood, because it offends one of their central tenets, namely the strict law/politics distinction.'[113] A fair elaboration made to this argument is that the distinction between law and politics prohibits the pursuit of ideological projects.[114] As Venter notes, '[c]onstitutional interpretation for the purposes of creating a changed society is however far from an exact science. Its outcome is inevitably strongly flavoured by the premises of the interpreter.'[115]

4.2.6 Legal culture and judicial craftsmanship

The cases discussed above clearly show that by adopting an activist posture in pursuit of the transformation agenda, courts are likely to come into conflict with the political branches of the

[112] N Mohlakoan, and J Dugard. "More work for women: A Rights-based analysis of Women's aces to basic services in South Africa." (2009) 25 (3) *South African Journal on Human Rights*, 546-572.

[113] T Roux "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?" (2009) 20 (2) *Stellenbosch Law Review* 258-285.

[114] Ibid at 258.

[115] F Venter "The limits of transformation in South Africa's constitutional democracy" (2018) 34 (2) *South African Journal on Human Rights* 143 at 144.

state. Normally, when political branches are threatened by courts, they attack the court's institutional integrity or even interfere with the judiciary's independence. It is necessary to now look at what the South African Constitutional Court has done to 'enable it to accomplish its most important task: staying in business long enough to give meaningful effect to constitutional rights.'[116] According to Theunis Roux, the South African Constitutional Court has adopted tactics such as the use of 'doctrinally redundant language' to set the tone of a judgment, a preference for formulaic tests over substantive moral reasoning, conversion of conceptual tests into discretionary standards, interpreting the constitutional text to give pragmatic outcomes and framing certain issues as political questions to avoid deciding them.[117] These do not however mean that the Constitutional Court does not use other techniques of legal reasoning.

Firstly, Roux argues that the language and tone that is used in a judgment are just as important as the words themselves, the words referred to here is the strictly legal reasoning found in the Court's judgments. The use of words and tone can shape how those affected by the judgment are going to understand it or receive it. Given the volatile political environment in Zimbabwe, judges need to pay more attention to word use and tine when crafting their judgments. It is acknowledged that the task of setting the tone and language right is time-consuming, however, due to the low caseload that the Constitutional Court has, it can invest enough time into this. In addition, within the South African context, this is said to reflect the current stage that the South African democracy, at the consolidation stage. It is argued that the Court knows it possesses the power to negate the majoritarian wishes. This role on its places the Court in a very delicate position. What the Court then does to counter this, is 'rhetorically to align itself with the political branches' transformation efforts.'[118]

For example, in a decision that ultimately goes against the State, the Court starts by agreeing with the policy being pursued. For example, Roux quotes the Court in the *Treatment Action Campaign* judgment to illustrate this point:

> 'The HIV/AIDS pandemic in South Africa has been described as 'an incomprehensible calamity' and 'the most important challenge facing South Africa since the birth of our new democracy' and government's fight against 'this scourge' as 'top priority'. It has claimed

[116] T Roux "Tactical Adjudication: How the Constitutional Court of South Africa survived its first decade" (unpublished).

[117] Ibid.

[118] Ibid.

> millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy'. These are not words of alarmists but taken from a Department of Health publication in 2000 a ministerial foreword to an earlier publication.'[119]

According to Roux, this passage is legally redundant. It has no contribution or justification for the findings made in this case. It is however masterfully crafted in such a way that it uses the government's very own words indicating its commitment to providing treatment to those infected with HIV. Roux captures this; 'these are your own words, this is your own policy … how can there be any objection to our helping you to implement it properly?' Roux calls all this rhetorical craftsmanship; 'the careful packaging of a decision so as to make it more palatable to those who must obey it.'[120]

The case of *Port Elizabeth Municipality v Various Occupiers*[121] has also been noted as one of the typical examples in which this type of adjudication was used. In this case, the first 47 paragraphs are redundant, it is only in the 47th paragraph that the Court says, '[it] is necessary now to consider whether the application for leave to appeal should be granted.'[122] This means that all the paragraphs preceding this are simply meant to set a foundation on which the real case will be decided but without quickly addressing the key questions in the case. These passages are also doctrinally redundant. Interestingly, the case was a leave to appeal after all. A typical redundant paragraph, in this case, is paragraph 41 written by Sachs J;

> 'thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such stereotypical approach has [no] place in the society envisaged by the constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time, those who find themselves compelled by poverty to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking possibilities of moral agency.[123]

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[119] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 1.

[120] Roux (n 113 above).

[121] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[122] Ibid at para 47.

[123] *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) para 41.

Though redundant, the above paragraph and 46 others in the judgment, 'are necessary, not in a strictly doctrinal sense, not because they constitute rigorous moral reasoning but because they express an attitude, an ethic of compassion if you like, that the CCSA is very seriously saying is part of the South African new Constitutional order.'[124]

Secondly, the South African Constitutional Court, according to Roux, prefers to use formulaic tests over substantive moral reasoning in its judgements. Roux submits that 'in case after case, faced with the duty to give meaning to a hitherto unelaborated constitutional right, to fit the right into the grand constitutional design, the CCSA has eschewed substantive moral reasoning in favour of casuistry or the articulation of formulaic tests.'[125] An example of this is found in the *Doctors for Life International v Speaker of the National Assembly and Others*[126] where the Court was faced with a task to interpret the meaning of the NCOP and provincial legislature's duty to 'facilitate public involvement in their processes.' According to Roux, this task required the Court to 'reflect on the nature of South African democracy, and in particular the balance to be struck between its representative and participatory elements.'[127] The however did not do this by discussing the theories of democracy but 'settled for something less ambitious; a statement of the way in which the representative and participatory elements of the system could be reconciled in relation to the particular question presented for decision.'[128]

This has resulted in the South African Constitutional Court giving expansive judgements that do not focus on substantive legal reasoning but on justifying why a particular interpretation is justifiable within the current constitutional design. As submitted earlier, a new court's primary task is to ensure its survival, and this is ensured by the nature of judgments that it passes. According to Roux, the ruling party, the African National Congress (ANC), has previously criticized the Court, but the institution as a whole remains secure.[129] This security can be attributed to, among other things, how it has crafted its judgments.

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[124] Ibid at 16.

[125] Ibid at 17.

[126] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC)

[127]T Roux "Tactical Adjudication: How the Constitutional Court of South Africa survived its first decade" (unpublished) at 19.

[128] Ibid.

[129] T Roux "Principle and pragmatism on the Constitutional Court of South Africa." (2009) 7 (1) *International Journal of Constitutional Law* 106 at 107.

The legitimacy of a court depends on how it decides cases before it. To maintain legitimacy, it is important for a court to 'decide cases according to forms of reasoning acceptable to the legal community of which it is a part.'[130] Even in cases where the decision is against political branches, if the forms of reasoning are acceptable, the court is unlikely to face political reprisals. This aspect is very important in the case of Zimbabwe where certain decisions of the court have been met with hostility from the political arms.

In explaining how the South African Constitutional Court has managed to survive so long, Roux has argued that the record of the Court reflects a mixture of principle and pragmatism.[131] The Constitutional Court's successful adjudication in the cases involving the death penalty, sexual minority rights, and the realisation of socio-economic rights such as access to health care housing is primarily a result of this.

> 'the CCSA was able to hand down legally credible decisions in circumstances that were not obviously favourable to principled decision making. From the political science perspective, such decisions should not have been possible, since the CCSA had not, by the time of these decisions, built the institutional legitimacy required to assert its policy preferences in this way.'[132]

An otherwise interpretation of the law would have resulted in the loss of legitimacy and would have invited political wrath upon the court.

4.2.7 Conclusion

It can be seen that the South African Constitutional Court has been at the forefront of bringing about real change as envisaged by the drafters of the Constitution. South African courts have used a broad reading of the Constitution to give meaning to various human rights provisions contained therein. The Courts have managed to pass the hurdle of separation of powers despite accusations of judicial activism by purposively reading the powers of the courts as contemplated by the Constitution. The Courts have also used some degree of craftsmanship in the wording of their judgments in such a way that they are not seen to be encroaching on the powers of either the Legislature or the Executive. However, transformative constitutionalism as envisaged in South Africa has not been free of weaknesses. It has been noted that it has

[130] Ibid at 108.

[131] Ibid at 117.

[132] Ibid at 117.

failed to deliver a truly egalitarian society in as far as distribution of resources, as manifested by poverty, is concerned. Having said that, it is now necessary to discuss how Kenyan courts have executed their role of transforming the state of human rights in their jurisdictions.

Part B

4.3 Transformative constitutionalism and adjudication in Kenya

This section explores how the transformation agenda has been carried out by the judges in Kenya. Since adopting a new Constitution[133] in 2010, Kenyan Courts received numerous human rights petitions. It is, therefore, necessary to discuss the development of the Kenyan post- 2010 human rights jurisprudence, to map its trajectory and draw some lessons for Zimbabwe. Kenyan constitutionalism and respect for human rights is still work in progress, and the courts have played a significant part in shaping that country's transformative path as contemplated by the Constitution of 2010. The courts have used various interpretative methods to give life to the provisions of the Constitution. In some cases, the courts have also faced criticism from the State and in some instances, the judges are accused of judicial activism.

When courts engage in transformative adjudication, they are often viewed by critics and other arms of the state as trammelling of their judicial powers and acting as political arbiters. This creates a rift between the courts and political arms which needs careful management. Similarly, in Zimbabwe, the courts have made some progressive decisions that transform the civil and political rights, however, it remains to be seen whether the courts are in future willing to take up this challenge and set the country on a transformative path, establishing democracy, the rule of law and respect for fundamental human rights despite the potential threats from the political arms. In highlighting this, this section takes a cursory look at Kenyan constitutional history, the road to the 2010 Constitution, and then analyse some of the transformative landmark decisions of the Kenyan Courts to draw some lessons for Zimbabwean Courts.

4.3.1 Background

In contemporary African constitutional law and politics, one cannot discuss constitutional transformation and the role played by the courts in that process without referring to Kenya.

[133] Constitution of Kenya, 2010.

When Kenya adopted a new Constitution, it raised the prospects for transformation and constitutionalism in the country. The adoption of the new Constitution followed a period of human rights abuses, deep authoritarianism and a disputed election outcome. What is very clear about the Kenyan situation is its deep-seated troubles that need the intervention of the courts to constructively help the country engage in a more democratic progression. The adoption of a new Constitution in Kenya in 2010 presented it with an opportunity to sever its attachment with a culture of undemocratic politics.[134] The 2010 Constitution is 'lauded as one of the most progressive constitutions in the world.'[135] The Constitution of Kenya 'mandates a shift in legal culture away from the narrow literalism formerly prevalent to a more purposive and principled mode of argumentation.'[136] Essentially, there was or still is, a need for the Kenyan courts to adopt interpretative methods that give life to the values of its transformative Constitution.

Kenya was faced with various challenges including a deep-rooted authoritarian form of government characterised by election rigging, as well as unprecedented levels of corruption. This was made even worse by the existence of a judiciary system that lacked a moral compass and the integrity so necessary to keep the Executive branch in check. It should be noted that the 2010 Constitution was not the first Kenyan constitution, it, however, was the first one that had transformational provisions.[137]

The first post-Independence Kenyan Constitution was adopted in 1963 at Lancaster House in Britain.[138] According to scholars, this Constitution contained some significant liberal elements 'and offered a break in principle with the authoritarian and predatory practices of the colonial regime.'[139] Even though this Constitution may have brought a significant change, it did not get the institutional support that would have been necessary to bring about real transformation.

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[134] Before the adoption of the constitution, Kenya had successive undemocratic governments which prompted the need to redraw the Constitution and set the country on a new trajectory.

[135] B Aroko "The challenges of constitutionalism in Kenya" June 2012, Available at https://www.kenyaplex.com/resources/6523-the-challenges-of-constitutionalism-in-kenya.aspx [Accessed June 2018].

[136] J Oloka-Onyango. *When Do Courts Do Politics; Public Interest Law and Litigation in East Africa*. (2017). 255.

[137] W Mutunga "The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions." (2015) 1 (6) *Speculum Juris*

[138] M Mutua. *Kenya's quest for democracy: Taming leviathan*. (2008).

[139] J Harington and A Manji "Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013." (2015) 9 (2) *Journal of East African Studies.*

Successive post-colonial governments focussed on concentrating power in the Executive leading to the authoritarian rule that characterised Kenya for the past few decades.

During the period from the year 2007 to 2018 Kenyan courts have followed a path that has been met with mixed feelings.[140] Seen as a near-perfect example of a new wave of constitutionalism in Kenya in the period preceding 2010, and demonised in some parts in the period after 2013.[141] This is particularly because constitutions are often viewed, normatively, as representing a break or repudiation with or from the past and charting of the desired future. Article 1 provides that 'sovereign power lies with the people of Kenya.'[142] In addition the exercise of power by arms of the state, that is the Legislature, Judiciary and the Executive is subject to the provisions of the Constitution.[143] In addition to this, the courts were accorded the power to review Legislative and Executive action for unconstitutionality and declare them invalid if so determined. This raises several key questions and calls for a proper examination of the record of the Court in its transformational efforts if any.

Those who advocated for a new constitution argued that to deal with the authoritarian nature of the regime, the starting point had to be rewriting the constitution to curtail the power of the state through a system of checks and balances anchored in judicial review. According to Harrington and Manji 'there was considerable popular support for this position, as identified by the Constitution of Kenya Review Commission (CKRC) during its nationwide consultations in 2002.'[144] In addition to this, the Waki and Kriegler Commissions in 2007 and 2008, also found that there was a perceived 'subordination of the judiciary and the electoral machinery to the Executive [which] had made a significant contribution to the crisis.'[145] There was therefore a real need to safeguard the constitution through the separation of powers. It has been observed by scholars that, in light of this, the 2010 Kenyan Constitution 'does more than simply map the

[140] The formation of a government of national unity in 2007 saw renewed calls for a new Constitution and other significant institutional changes towards democratisation were made in Kenya, however, there are still a number of challenges associated with ethnicity and electoral violence. See *Kenya Human Rights Commission* "Ethnicity and Politicization in Kenya" 2018.

[141] Harington & Manji (n 139 above).

[142] Article 1 of the Constitution of Kenya, 2010.

[143] The supremacy of the Constitution is provided for in Article 2.

[144] Harington & Manji (n 139 above).

[145] Ibid.

distribution of power within the existing political-legal system or embody timeless precepts about the arrangement of good government.'[146]

Essentially the 2010 Constitution of Kenya sought to represent a break from the past and pave a new way for the desired future based on the rule of law and respect for the wishes of the people. According to Githuru, the Constitution is a transformative document because it 'lays the legal foundation for the transformation of the Kenyan society as a whole and introduces a radically different constitutional order from all the previous orders.'[147] The judiciary of Kenya has played a crucial adjudicative role in the realisation of these transformative aspirations. Githuru has allayed fears over the judiciary's failure 'to embrace the transformative potential of the Constitution.'[148] The importance of the Kenyan Constitution in its transformative efforts has been captured by the former Chief Justice of the Supreme Court of Kenya, Willy Mutunga;

> 'Some have spoken of the new Constitution as representing a second independence. This is when our institutions, and the people, are to come into their own, when the legislature will truly act as the representatives of the people, and the supervisors of the executive, when the executive will put the interests of the nation first, above the interests of tribe, individual and class and when the curse of impunity will be ended and the rule of law prevails. This will only happen if we all, including the judiciary, play our part, for the forces of resistance are strong.'[149]

To achieve this transformation, there is a need for a court that reads the Constitution in a historically conscious manner and adopts a progressive approach to interpretation. The sole objective would be to achieve the aspirations of the people of Kenya. Githuru, however, laments the prevailing legal culture and the partisan nature of the judiciary as being the real challenges to the aspirations for transformation.

4.3.2 Kenyan constitutional history

[146] Ibid at 177.

[147] F Githuru "Transformative constitutionalism, legal culture and the judiciary under the 2010 constitution of Kenya." (2015) PhD dissertation, *University of Pretoria.* (Unpublished), 3.

[148] Ibid.

[149] Ibid, at 5.

Kenya's post-colonial constitutional history can be divided into two. The first being the period between 1963 and 1991 and the second between 1992 and 2010.[150] These two periods were significant in shaping the current Kenyan constitutional dispensation. These periods present two distinct phases of constitutionalism in Kenya.

4.3.2.1 The period 1963 to 1991

Kenya gained its independence from British colonial rule in 1963. The period after 1963 was dominated by a one-party state in Kenya led by Jomo Kenyatta's KANU. Kenyatta's rule was characterised by the entrenchment of autocracy and personal rule after orchestrating significant changes to the post-colonial Kenyan Constitution. Some of the significant changes made to the Constitution included the abolition of the office of the prime minister thereby concentrating executive authority in the President.[151] This was effectively a change from a parliamentary to a presidential system of government.

The Independence of Kenya from Britain had raised the people's expectations for their social economic and political aspirations. The Kenyatta regime failed to deliver on those expectations.[152] The *Mau Mau* guerrillas had hoped that after independence, the country would see the equal redistribution of national resources, the realisation of full democratic rights for the people and preservation of the cultural heritage and the Kenyan people's history. To sum up the Kenyans' feelings after Independence, Kinyatti says:

> 'The popular understanding was that the independent Kenyan government would nationalize all the land occupied by foreign capitalists and divide it amongst the Kenyan poor and landless; that it would ensure full democratic rights of assembly, association and expression… the rich

[150] The period before 1992 did not have many constitutional changes save for those that aimed to entrench the President's power and the period after 1992 saw the abolition of a one party state and was characterised by a significant shift in the form of calls for a new constitution amid disputed elections and widespread electoral violence.

[151] The President thus became the head of state and government and commander in chief of the defence forces. The changes made to the Constitution, According to Githuru include, 'the Constitution Amendment No 16 of 1966, which increased the powers of the presidency with regard to the civil service; Act No 14 of 1975 added to the president's prerogative powers; and Act No 5 of 1969 vested the powers in the presidency with respect to the Electoral Commission.' See (n 147 above).

[152] See, D Branch, and N Cheeseman "The politics of control in Kenya: Understanding the bureaucratic-executive state, 1952–78." (2006) 33 (107) *Review of African Political Economy*. 11-31.

> indigenous cultural heritage rooted in our own history, tradition and national experience would be protected from harmful foreign influences and that he majority of African population, having borne the brunt of oppression and been disposed by colonialism, would receive preferential, remedial or compensatory considerations in all spheres of Kenya's political and social life.'[153]

The essence of this statement is that it captures the post-colonial aspirations of the Kenyans, what would, if given the chance, have formed the basis of their constitutional principles and values. There was a history of oppression, a struggle for a better future, and a government that was considered as having betrayed the people of Kenya. The Kenyan government after independence maintained the *status quo*.[154] According to Githuru, '[t]his move suited the Europeans, Asians and few Africans who had acquired wealth and investments and who were therefore not interested in changing the *status quo*.'[155] Kenyan society became polarized because of the political antics that were adopted by Kenyatta. To entrench his power, he started rewarding political patronage, which led to corruption, ethnicity and lack of accountability. The Kenyan society became polarized. All this, according to scholars, was enabled by the independence Constitution and the changes that were made to it.[156]

Sections 58 and 59 of the Constitution of Kenya gave the President the power to dissolve the Parliament when he deemed necessary. This concentration of power in the President led to an entrenchment of a repressive system of governance since the presidency and the Executive became more powerful than the other arms of the state. This had a direct impact on the separation of powers and an envisaged system of checks and balances. The mechanism for accountability was weakened. This, as Githuru notes, was blatant defacing of the constitution. It should be noted that despite these clear challenges to democracy, these moves were not contested. The lack of litigation on these issues is according to Githuru, owed to the fact that western democracy was new in Kenya and the people had not gained much understanding of their rights. Kenyatta was succeeded by Daniel Arap Moi who led Kenya for 24 years.

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[153] M wa Kinyatti. *History of Resistance in Kenya*. (2008).

[154] See, SD, Mueller "The Resilience of the Past: Government and Opposition in Kenya." (2014) 48 (2) *Canadian Journal of African Studies.* 333-352.

[155] Githuru (n 147 above) at 38.

[156] Ibid.

Under Moi's rule, the human rights situation deteriorated. According to Adar, '[t]here were widespread detentions, torture and persecution of political opponents.'[157] There was extensive control of the information disseminated from institutions of higher learning. Elections were also neither fair nor democratic. In addition to the human rights violations, a constitutional Amendment was made in 1982 effectively turning Kenya into a one-party state.[158] The constitutionality of this Amendment was challenged, but the case was dismissed.[159] During the period 1964 to 1990, a total of 29 amendments were made to the Constitution which had the effect of contracting civil and political rights and strengthening the powers of the Presidency. The police force was used as an agent of human rights violations: Ethnic cleansing and tribal disputes were instigated by the State to weaken the opposition. The judiciary was compromised and became a rubber stamp of Government decisions.[160]

4.3.2.2 The period 1992 to 2010

In the 1990s there were growing calls for a multi-party democracy. There was a lobby for the abolition of a one-party state with the hope of a return to constitutionalism, democracy and respect for human rights.[161] Eventually, after both internal and external pressure, section 2A of the Kenyan Constitution was repealed and the country returned to multi-party politics.[162] Regardless of these Constitutional changes, the people kept advocating for a new constitution; 'they needed a Constitution that would completely overhaul the independence Constitution and transform the society.'[163] To this end, the people of Kenya formed a constitution lobby group called Citizens for Constitutional Change.[164]

The increasing pressure for a new constitution resulted in many NGOs, secular groups and political parties joining the Citizens for Constitutional Change movement. In 1993, the Law

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[157] See, K Adar "The Internal and External Contexts of Human Rights Practice in Kenya: Daniel Arap Moi's Operational Code." (2000) 4 (1) *African Sociological Review,* 74-96.

[158] The Constitution of Kenya Amendment Act No 7 of 1982.

[159] *Gitobu Imanyara v Attorney General, Misc*. Civil Application Number 7 of 1991 (unreported)

[160] Githuru (n 147 above).

[161] F Holmquist and M Ford. "Kenyan Politics: Toward a Second Transition?" (1998) 42 (2) *Africa Today.* 227-258.

[162] Multi-party democracy was effectively restored by the enactment of Act No 12 of 1991.

[163] Githuru (147 above) at 46.

[164] PLO Lumumba and L Franchesci. *The Constitution of Kenya 2010; An Introductory Commentary* (2010). 41

Society of Kenya, the International Commission of Jurists and the Kenya Human Rights Commission organised a Constitutional Convention. The Convention drafted a Constitution which was eventually launched in Nairobi at Ufungamano House. The draft was used as a basis for extensive consultations with all the stakeholders. The government bowed to the pressure for a new constitution by announcing plans to invite foreign experts to draft a constitution for the country. Civil society organisations opposed this move as they wanted a people-driven process. Opposition parties in Parliament formed the Inter-Parties Parliamentary Group. They aimed to deliberate on several constitutional reforms before the 1997 elections. Following this, the Constitution of Kenya Review Act (1997) was passed to substantially review the Constitution. However, after all these efforts, the government did not implement the reforms.

The 1997 elections were followed by further calls for constitutional reforms and implementation thereof. In 2000, the Constitution of Kenya Review Commission was established.[165] Professor Yash Pal Ghal was appointed as the Commissioner.[166] The Commission engaged in a consultative programme gathering views from all sectors of the society and drafted a Draft Constitution that was published in September 2002. A Constitutional Conference was scheduled to follow the draft; however, this could not happen because President Moi dissolved Parliament just before it was due to be held.[167] This effectively disrupted the constitution-making process. In 2002, Mwai Kibaki became President, and a National Constitutional Conference took place in 2003. The conference was well attended but the Draft Constitution was not submitted for adoption. In 2005 another Draft Constitution was prepared and subjected to a referendum but was rejected by the majority.[168]

The issue of the constitution was revisited after the 2007 election. The election process was marred by violence unprecedented in Kenyan history. The violence 'left about 1 300 people

[165] C Murray "Kenya's 2010 Constitution." (2013) 61 *Neue Folge Band Jahrbuch des Offentlichen Rechts* 747-788.

[166] Ibid.

[167] Kenya's President Moi dissolves parliament. (2002) *Irish Times*. 26 October. Available at *https://www.irishtimes.com/news/kenya-s-president-moi-dissolves-parliament-1.1102224* [Accessed 27 June 2018].

[168] Kenyans say no to new constitution. *(2005) The Guardian.* 22 November. *Available at https://www.theguardian.com/world/2005/nov/22/kenya.davidfickling* [Accessed 27 June 2018].

dead and 600 000 others displaced.'[169] This was the turning point in Kenya's history. Even stronger calls for a new constitution were made. Kenya had become a highly polarized society. If it was to see lasting peace, there was a need for real transformation and this could only be done through adoption a new constitution creating a new order, presenting a break from the past. Given the violence and the political impasse in the country, mediation efforts led to the enactment of the Constitution of Kenya Review Act of 2008.[170] This Act established a Committee of Experts to complete the work of the Constitution of Kenya Review Commission.[171] The dialogue that followed the violence also resulted in the enactment of the Constitution of Kenya (Amendment) Act of 2008 aimed at formalising the political agreements that had been reached between the main political parties.

The Committee of Experts began writing the new constitution in earnest using all the previous drafts as well as views gathered from the public. In 2010, the final Constitution was finally adopted following a referendum. The referendum voted overwhelmingly for the adoption of the new Constitution.[172] Kivuva aptly captures the reason for the overwhelming support for the new Constitution:

> 'Those clamouring for a new constitution did not just want to restructure the government and redefine their relationship to it, they also wanted to solve a number of governance problems associated with the country's previous governments. These included: rethinking the logic of state power *vis-a-vis* the citizenry; reasserting the correct relationships between the three branches of government; reforming state institutions; redefining the relationship between the central government, regional governance structures; and instituting a new culture of leadership oriented towards redressing social exclusion.'[173]

From the above, it is evident that the Constitution was adopted as a means of ushering in a new dispensation in which the aspirations of the people could be realised. It is now therefore necessary to turn to a discussion of how the constitution of Kenya captures these aspirations as a means of transformation in the country.

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[169] Githuru (n 147 above) at 49.

[170] W Kaguongo "Introductory Note on Kenya." (2012).

[171] Ibid.

[172] The Constitution of Kenya, 2010.

[173] J M *Kivuva* "Restructuring the Kenyan State" (2011) *SID Working Paper Series No. XX*

4.3.3 The 2010 Constitution and transformation in Kenya

The adoption of the new Constitution in Kenya was widely described as a dawn of a new era. There was a renewed hope for Kenyans, the Constitution presented a break from the past and an ushering in of a new dispensation. This hope lay in the transformative elements of the 2010 Constitution. The provisions of the Constitution as well as its values encouraged the development of a new democratic and prosperous country. The same holds for Zimbabwe under its 2013 Constitution. The Kenyan 2010 Constitution was drafted in the light of Kenyan history, and the need for a truly transformed political space. Several provisions of the Constitution have been identified as transformative.

The Preamble of the Kenyan Constitution sets out the 'values, principles and objects of the Constitution thereby bringing about assurances for better times.'[174] The aspiration to bring the people together, commitment to human rights and a pledge for the exercise of good governance, are the notable features of the Preamble. The Constitution also honours those who fought for the country's liberation from colonial rule, thereby bringing it closer to the people and inspiring patriotism among all Kenyans. According to Githuru '[i]t reflects on Kenya's historical events as a sure acknowledgement of the need for self-reflection from a historical perspective, and the need to confront the past in readiness for transformation into the future.'[175]

Apart from the Preamble, one provision that captures the importance of the Constitution is Article 1 (2) which entrenches the supremacy of the Constitution. It says that the Constitution is supreme and is binding on all people and organs of state alike.[176] The Constitution is also the only source of authority for the State.[177] The validity or legality of the Constitution cannot be challenged before any court or organ of the State.[178] Any law inconsistent with the Constitution is void to the extent of the inconsistency.[179] In addition to this, the Constitution gives power to the people. It refers to the people's right to exercise their sovereignty. The Constitution is

[174] Githuru (n 147 above) at 52.

[175] Ibid.

[176] The Constitution of Kenya, 2010. Article 2(1).

[177] Ibid Article 2(2).

[178] Ibid Article 2(3).

[179] Ibid Article 2(4).

binding on both the Kenyan people and the arms of the state, no one is above the law and all have a duty to defend the Constitution.

The Kenyan Constitution also guards against possible undermining by the politicians or a single political party enjoying a majority in Parliament by way of amendments. The Constitution, according to Githuru, 'include[s] the reservation of powers of constitutional amendments by way of referendum which mechanism is used as a direct exercise of authority.'[180] Article 255 says 'a proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257 and approved in accordance with clause (2) by a referendum.'[181] The Constitution then lists several provisions that can be amended by referendum and these include provisions related to the supremacy of the Constitution, sovereignty of the people, terms of office of the President and the independence of the judiciary, commissions and other independent offices among others. This is meant to guard against the arbitrary exercise of power by Parliament. The provision allows people to exercise their sovereignty in the Constitution. Perhaps the most progressive provision in the Constitution is Article 104 which gives the people the right to recall Members of Parliament for non-performance. The right to recall Members of Parliament was complemented by the right to access to parliamentary proceedings in terms of Article 118 of the Constitution.

The right to public participation contemplated in the Constitution was given meaning by the High Court in the case of *Moses Munyendo and 908 others v Attorney General and Minister for Agriculture.*[182] The Court in this case acknowledged the right of public participation in legislative processes and interpreted the meaning contemplated therein. On the facts, the Court held that public participation did not mean that every affected individual would have to participate. It was sufficient that the several consultations with some concerned people were made. According to Githuru, 'the Court however emphasized in this decision the need for Parliament to use means to facilitate public participation by seeking views from stake holders and public before enacting laws, as recognition of the sovereignty of the Kenyan people which is enshrined in the Constitution.'[183] Justice Majanja referred to the people's sovereignty as the golden thread running through the Constitution. The sovereignty of the people makes the public

[180] Githuru (n 147 above) at 53.

[181] Article 255 of the Constitution of Kenya.

[182] *Moses Munyendo and 908 others v Attorney General and Minister for Agriculture* Petition No. 16 of 2013.

[183] Githuru (n 147 above) at 54.

participation a national value. Articles 4 and 10 together with Chapter 7 of the Constitution provides for public participation to enhance good governance, integrity, accountability and transparency. The inclusion of these provisions was a progressive departure from the previous notion of parliamentary sovereignty.

The 2010 Constitution contains a comprehensive Bill of Rights which has also been described by scholars as "transformative."[184] According to Sikuku, the effectiveness of constitutions is judged by how they secure the fundamental human rights and freedoms.[185] The Bill of Rights in the 2010 Constitution is in stark contrast to the previous Bill of Rights which was "retrogressive and obsolete."[186] The previous bill of rights was criticized for providing for traditional civil and political rights replete with claw-back clauses which made it difficult for the full enjoyment of these rights.[187] These criticisms of the old Bill of Rights was one of the main reasons for the calls for a new constitution. In addition to expansive civil and political rights, like the South African Constitution, the Kenyan Constitution provides for socio-economic rights. This Bill of Rights is therefore an integral part of the democratization process as it provides a framework for social, cultural, political and economic policies in Kenya.[188] According to Githuru 'this is crucial in a country like Kenya where the majority of population still cannot access proper housing, health, sanitation and education facilities.'[189] The discourse being advanced here is that the Constitution of Kenya was crafted in a way that not only advances socio-economic rights but has the potential to preserve the dignity of the people, promotes civil and political rights as well as lead to the full realisation of the potential of all Kenyans regardless of race, tribe or political affiliation. The Kenyan courts have taken the initiative in interpreting the Constitution is a manner that guarantees the realisation of its full potential. It would be imperative to see how Zimbabwean Courts have also interpreted its 2013 Constitution and gauge whether there are any real prospects for transformation that would see a move towards more a more democratic society.

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[184] Ibid at 56.

[185] J Sikuku "Constitutionalism and judicial activism in Kenya." 4. Available at https://www.academia.edu/13896899/constitutionalism_and_judicial_activism_in_kenya [Accessed 18 May 2019].

[186] Githuru (n 147 above) at 56.

[187] The current Constitution has a centralized limitation clause under Article 24.

[188] Sikuku (n 185 above) at 4.

[189] Githuru (n 147 above) at 56.

The Supreme Court of Kenya, in the Advisory Opinion of *Speaker of the Senate and another v Attorney-General and Another and 3 Others*[190] held that;

> 'Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice and equality, devolution, human rights, the rule of law and democracy.'[191]

Some of the transformative elements contained in the 2010 Constitution include its wide *locus standi* provision which has basically augmented the right to access to justice even in public interest litigation matters.

4.3.4 The record of Kenyan courts and transformation of human rights

The judiciary must give full effect to the provisions of the Constitution, not only in terms of the letter but also the spirit. According to Kibet and Fombad, courts are the "midwives" of transformation.[192] The duty to transform is derived from the legal mandate of the courts to interpret and apply the law, and in so doing, the courts should give effect to the aspirations of the people. According to Thornhill, '…the responsibility for implementing democracy is ultimately attributed to the judicial branch, and high-ranking judges promote constructive jurisprudence as a primary force in the realization of transformative democratic values.'[193] This, however, cannot be achieved if the courts are not more assertive than they ordinarily are. The Constitution of Kenya does not specify whether it should be interpreted broadly or narrowly and this allows the judges of both the High Court and the Supreme Court to give meaning to its provisions in a manner that does not betray the intentions of the drafters of the Constitution. What is certain, however, is that the Supreme Court has previously noted, in the Advisory Opinion case of *Re Interim Independent Election Commission*,[194] that constitutional

[190] *Speaker of Senate and Another v Hon. Attorney-General & Another & 3 others* [2013] eKLR Advisory Opinion Reference 2 of 2013.

[191] Ibid.

[192] Kibet & Fombad (n 7 above).

[193] C Thornhill. *The Sociology of Law and the Global Transformation of Democracy*. (2018) 253.

[194] *Interim Independent Electoral Commission* [2011] eKLR Constitutional Application No. 2 of 2011.

interpretation does not favour formalistic or positivist approaches as set out in Article 20(4) and Article 259(1) of the 2010 Constitution.[195] In this respect, Mutunga has argued that,

> 'The [C]onstitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has the most modern Bill of Rights, that envisions a human rights based social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.'[196]

The Kenyan courts' jurisprudence is still developing, however, several cases can be used to explain the interpretative or adjudication techniques they have adopted.[197] The many objections in the petitions that characterise every Kenyan presidential election provide a point of reference for the precarious position that the courts often find themselves in. The decision of the Supreme Court in *Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 others*[198] involving a petition challenging Kenya's Independent Electoral and Boundaries Commission's Presidential Election results highlights the Court's interpretative approach. In paragraph 203 of the judgement, the Court said:

> '[W]e express the opinion that, in the special circumstances of this case, an insightful judicial approach is essential. There may be an unlimited number of ways in which such an approach guides the Court. But the fundamental one, in one our opinion, is fidelity to the terms of the

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[195] Ibid, at para 49. The Court also held that it should adopt 'an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; care should be taken not to substitute one for another.'

[196] W Mutunga "Developing progressive African jurisprudence: Reflections from Kenya's 2010 Transformative Constitution" Lameck Goma Annual Lecture 2017 Available at https://www.themastonline.com/2017/09/10/developing-progressive-african-jurisprudence-reflections-from-kenyas-2010-transformative-constitution/ [Accessed 21 September 2018].

[197] See Thornhill, who notes that 'In Kenya, which clearly belongs to this constitutional family, the promotion of transformative jurisprudence by the superior courts has assumed unusual dimensions. During the process of constitutional transition first, the Kenyan courts adopted a living tree approach to constitutional interpretation.' Later however, this approach was expanded to generate a constructive reading of social rights contained in the 2010 Constitution. In particular, judges in the Supreme Court have commonly argued that they are entitled to reach rulings by taking non-legal facts and non-legal phenomena into consideration, by showing regard for the socio-logical context of cases brought to court.' Thornhill (n 170 above) at 191.

[198] *Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 others* [2013] eKLR

constitution, and of such other law as objectively reflects the intent and purpose of the Constitution.'[199]

In considering this, the Court adopted a narrow approach and exercised judicial restraint as the matter before it was more political than constitutional or legal. As a result, the Court was convinced that the standard of proof in Presidential election petitions should be higher than usual to avoid the risk of judicial intervention in cases of a political nature. According to Sikuku, this decision was in keeping with South African Judge Albie Sachs' decision in the case of *Prince v President of the Cape Law Society and Others*[200] where he said, 'undue judicial adventurism can be as damaging as excessive judicial timidity.'[201] However, it seems the judiciary has over the years been somehow inconsistent in its interpretative methods. In the case involving the enforcement of a warrant of arrest against a visiting foreign President AL Bashir, the High Court accepted that 'the International Crimes Act 2008, like the Rome Statute, does not recognize immunity on the basis of official capacity.'[202] The Judge, in this case, said 'the High Court in Kenya clearly has jurisdiction not only to issue warrant of arrest against any person, irrespective of his status, if he has committed a crime under the Rome Statute, under the principle of universal jurisdiction,'[203] as the South African Court did when a similar application was made. The decision of the Court was consistent with Article 2 of the 2010 Constitution which provides that international laws form part of Kenyan laws. This decision was met with political wrath from arms of government.[204] Kenya threatened to withdraw from the ICC and to repeal its Rome Statute implementation legislation, the International Crimes Act.

[199] Ibid, para 203.

[200] *Prince v President of the Law Society of the Cape of Good Hope and Others* (CCT36/00) [2000] ZACC 28; 2001 (2) SA 388; 2001 (2) BCLR 133 (12 December 2000)

[201] Sikuku (n 185 above) at 16.

[202] *Kenya Section of The International Commission of Jurists v Attorney General and Another* [2011] eKLR.

[203] Ibid.

[204] The Kenyan government aggressively condemned the ruling and said that the decision was unenforceable. 'The Kenyan government continues to condemn the decision strongly, belittling its rationale and arguing that it is unenforceable.' Kenya's High Court Makes a Landmark Ruling Against Sudan President al-Bashir. (2011) *Fair Observer*. December 20.

In the case *Famy Care Ltd v Public Procurement Administrative Board and 2 Others*[205] the Court was asked to outline the content of the right to information as contemplated in Article 35 of the Constitution.[206] In this case, the Court held that the right in question is a right that is reserved for the citizens, and may not be exercised by other entities such as corporations or foreigners.[207] In *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 Others*[208] the Court confirmed that the right to information can only be held by a natural person.

The Kenyan transformative jurisprudence is still developing. However, some commendable strides have been made. According to Kiebet and Fombat, constitutionalism, promotion, and respect for human rights are 'better than in any other time in the country's history.'[209] Notable cases in this regard include *Eric Gitari v Non-Governmental Organisations Co-ordination Board and 4 Others*,[210] *Kituo Cha Sheria v Independent Electoral Board, Coalition for Reform and Democracy (CORD)*,[211] *Kenya National Commission on Human Rights and Samuel Njuguna Ng'ang'a v Republic of Kenya and Another*[212] and *Trusted Society of Human Rights Alliance v Attorney General and Others*.[213] These cases indicate the lean towards a value-based approach to interpretation and enforcement of human rights. These cases can be used to illustrate the Courts' commitment to upholding the rule of law, democracy and

[205] *Famy Care Limited v Public Procurement Administrative Review board and Another and 4 others* [2013]eKLR; Petition 43 of 2012.

[206] Article 35 states that 1) 'Every citizen has the right of access to— (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the nation.'

[207] Section 32(1) of the Constitution of South Africa uses a broader wording which affords the same right to both citizens and foreigner. "Everyone" is used as opposed to "every citizen".

[208] *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 Others* [2013] eKLR; Petition 278 of 2012.

[209] Kibet & Fombad (n 7 above) at 357.

[210] *Eric Gitari v Non-Governmental Organisations Co-ordination Board and 4 Others* [2015], Petition 440 of 2013.

[211] *Kituo Cha Sheria v Independent Electoral Board, Coalition for Reform and Democracy (CORD)* [2013] eKLR.

[212] *Kenya National Commission on Human Rights and Samuel Njuguna Ng'ang'a v Republic of Kenya and Another* [2015] eKLR.

[213] *Trusted Society of Human Rights Alliance v Attorney General and Others* [2012] eKLR.

constitutionalism in Kenya.[214] It remains to be seen however if the courts will be able to sustain this approach in the long term in the face of political backlash. Transformative constitutionalism, therefore, largely depends on the interpretative methods adopted by the courts. It would be interesting to see the interpretative methods adopted by the Zimbabwean courts and assess whether there are any real prospects for transformation.

In *Trusted Society of Human Rights Alliance v Attorney General and Others*,[215] the Court, 'described itself as a "co-ordinate" and "co-equal" arm of government with the mandate to interfere with the decisions of the political arms which offend or exceeds limits of the constitution and the law generally.'[216] This essentially means that the courts are no longer subordinate or constrained by self-imposed limitations under the previous era. There is now an equilibrium in terms of governmental power. The courts had previously restrained themselves in terms of legal culture, 'particularly how judges and lawyers appreciate the spirit of the Constitution and its purposes.'[217]

Had the judges failed to free themselves from these restraints, the aspirations for a truly transformed society would have remained a pipe dream. In this case, the Court was also able to dispense the fears of interference by the Judiciary in Executive or Legislative powers thereby violating the doctrine of separation of powers. '[T]he Court emphasized that a review of the decisions of the political arms of government that do not meet constitutional standards does not violate the principle of separation of powers since the courts are the guardians of the meaning of the law.'[218] Kibet and Fombad elaborated this point; [r]elatedly, courts must reject undue attention to technicalities and a cursory approach to adjudication since […] substantive justice and real enjoyment of rights are the ultimate objectives of transformative constitutionalism.'[219]

[214] The courts in Kenya, though still developing their jurisprudence, have primarily adopted a value-based approach to interpretation of the Constitution to afford human right, respect for the rule of law and democracy.

[215] *Trusted Society of Human Rights Alliance v Attorney General and 2 others* [2012] eKLR; Petition 229 of 2012.

[216] Kibet & Fombad (n 7 above) at 357.

[217] Ibid.

[218] Ibid.

[219] Ibid, at 359.

The judiciary in Kenya has, therefore, managed to depart from the common law jurisdiction position that judges do not make law and has come to understand and appreciate that the constitutional design calls for them to develop the law;

> 'To put it differently, the judge is not merely a midwife; she is also a surgeon with the power to clip the existing law to bring it in conformity with the aspirations of the Constitution. Discourses on transformative constitutionalism suggest that the change in the judicial attitude and approach advocated by the concept is beyond the traditional role of the judges in Kenya and most other Commonwealth common law jurisdictions. However, the contours of this enhanced judicial power and how it relates to the powers of other arms of government may be hard to define. Nonetheless, this power is constitutionally mandated, and a failure to exercise it (sic) the adjudication of human rights and constitutional issues generally is tantamount to an abdication of judicial duty contrary to an oath of office.'[220]

Transformative constitutions require the use of some sort of judicial activism. The role of judicial activism in transformative constitutions was aptly summed up by Mutunga where he distinguished between the role of an active judge and that of an activist judge:

> 'An active judge regards herself, as it were, as trustee of state regime power and authority. Accordingly, she usually defers to the executive and legislature; shuns appearance of policy-making; supports patriarchy and other forms of violent exclusion; and overall promotes 'stability' over 'change.' In contrast, an activist judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, dispossessed, and the deprived. She does not regard adjudicatory power as a repository of the reason of state; she constantly re-works the distinction between legal and political sovereign, in ways that legitimate judicial action as an articulator of the popular sovereign.'[221]

Therefore, to give credence to activist postures adopted in transformative adjudication, judges make use of the constitution as a symbol of the popular sovereign by representing the aspirations of the people. In interpreting it, judges give due regard to the country's history to paint a clear picture of what people's aspirations are. As South African Courts have done, in *S v Zuma* where Kentridge J noted that transformative adjudication requires paying regard to

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[220] Ibid, at 360.

[221] W Mutunga "Developing progressive African jurisprudence: Reflections from Kenya's 2010 Transformative Constitution" Lameck Goma Annual Lecture 2017 Available at https://www.themastonline.com/2017/09/10/developing-progressive-african-jurisprudence-reflections-from-kenyas-2010-transformative-constitution/ [Accessed 21 September 2018].

'legal history, traditions and usages of the country concerned.'[222] This means, when interpreting the constitution in a transformative manner, there is a need to look into the past injustices and make a decision that carves a new path for the country. The Kenyan Supreme Court has weighed in on the significance of the country's history in the interpretation of the Constitution. In *Speaker of the Senate and Another v Attorney-General and 4 Others*, the Court said, the Supreme Court Act, 'allows the Court to explore interpretive space in the country's history and memory… even beyond the minds of the framers…'[223] This means that the Courts are free to look into the history when seeking guidance on the meaning of the letter and spirit of the Constitution. In this case, the Court also said:

> 'Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. As a result, "constitution making does not end with its *promulgation*; it continues with its *interpretation*.'[224]

In the *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others,*[225] the Supreme Court held that the values in Article 10 of the Constitution, among others include 'sustainable development' and 'the use of sustainable development as a vision and a concept in the Constitution requires that we at least link it to the vision of the Constitution which is transformative and mitigating.'[226] The Court has therefore used this vision to interpret the Constitution cognisant of the aspirations of the people that can only be given effect through transformative adjudication. In interpreting this core value, the Court said:

> 'It is clear that sustainable development under the constitution has the following collective pillars: the sovereignty of the Kenyan people; gender equality and equality; nationhood; unity in diversity; equitable distribution of political power and resources; the whole gamut of rights; social justice; political leadership and civil society that has integrity; strong institutions rather than individuals, an independent judiciary, and fundamental changes in land. Public

[222] *S v Zuma* 1995 (2) SA 642 (CC) para 15.

[223] *Speaker of the Senate and Another v Attorney-General and 4 Others* Advisory Opinion Reference 2 of 2013; [2013] eKLR.

[224] Ibid.

[225] *Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others* [2014] eKLR

[226] Ibid, at para 375.

participation the cornerstone of sustainable development and it is so provided in the Constitution.'[227]

In the *Eric Gitari v Non-Governmental Organisations Co-ordination Board and 4 Others*[228] case, the High Court of Kenya determined a case in which the Applicant sought to register a non-governmental organisation (NGO) with the Non-Governmental Organisations Co-ordination Board. The NGO's objective was to protect and seek redress for violence and human rights abuses suffered by the Gays and Lesbians Community in Kenya. The Applicant sought to be registered under the names "Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy or Gay and Lesbian Human Rights Organization." The Respondent rejected the proposed names. A second attempt was made to register under a different name, that is, "Gay and Lesbian Human Rights Commission, Gay and Lesbian Human Rights Council, or Gay and Lesbian Human Rights Collective" and the Respondent Board rejected these names. The Board rejected the registration based on sections 162, 163, and 165 of the Penal code which criminalizes same-sex conduct.[229] In addition, the Respondent also relied on regulations 8(3) (b) of NGO Regulation of 1992 which regulates which states that the Board has power to reject any name if 'such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable.'[230] The Applicants sought relief because constitutional rights to freedom of association as contemplated under Article 36 and freedom from discrimination under Article 27 of the 2010 Constitution had been violated. The Court held that the Constitution gives every person the right to form an association of any kind. The Court also held that rights cannot be limited based on moral beliefs no matter how strong. For a country with a history of denying the right to freedom of sexual orientation, the judges were bold in making this decision in the face of possible social repercussions.[231] As shown earlier, the South African Courts have faced similar challenges in the past especially in cases that evoke public opinion such as that of *Makwanyane*.[232]

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[227] Ibid, at para 379.

[228] *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR; Petition 440 of 2013.

[229] Ibid.

[230] NGO Regulations of 1992.

[231] The cultural attitudes towards same sex relationships in Kenya do not make it easy for one to advocate for gay right.

[232] *S v Makwanyane* 1995 (6) BCLR 665 (CC).

In the case of *Kituo Cha Sheria v Independent Electoral and Boundaries Commission*,[233] the Kenyan High Court was faced with a question of whether prisoners have the right to vote under the Constitution and whether this right had been violated by the Respondents' failure to facilitate prisoners' voter registration. The Applicants averred that prisoners have a right to register to vote in terms of Article 38(3)(a) and (b) which reads that every citizen has the right, without unreasonable restrictions to be registered as a voter and to vote by secret ballot in any election or referendum. The Court held that the right to vote is an incident of the Kenyan people's sovereignty as contemplated in the 2010 Constitution; 'This sovereignty is exercised through voting for representatives in the National and County governments who exercise the delegated authority of the people in accordance with Article 2…, the Constitution, with its emphasis on the people's vote guaranteed under Article 38 and the qualification of voters provided under Article 83 does not exclude prisoners from being registered to vote and consequently voting in an election.'[234] The Court further held that the right for prisoners to vote should not be construed in the same manner as the diaspora right to vote is construed. Whereas the diaspora right to vote is subject to progressive realisation, the prisoners right to vote is immediately realisable.[235] The significance of this case is that it demonstrated that the Courts are willing to protect and promote the civil and political rights of all persons in Kenya.

In the case of another civil and political right, the High Court of Kenya delivered a judgment in the case of *Coalition for Reform and Democracy and Samuel Ng'ang'a and Another v Republic of Kenya and Others*[236] in which the Applicants challenged the constitutionality of the Security Laws (Amendment) Act No 19 of 2014 that was enacted in the wake of terrorist attacks in the country. The application challenged both the content and processes leading to the enactment of the Act. With regard to the contents and scope of the Act, the Applicants contended that several provisions violate the right to freedom of expression and of the media.[237] The Court held that 'the importance of the right to freedom of expression and of the media cannot be disputed. It is a right that is essential to the enjoyment of other rights, for implicit in

[233] *Kituo Cha Sheria v Independent Electoral and Boundaries Commission and Another* [2013] eKLR; Ptition 574 of 2012.

[234] Ibid, para 13.

[235] Ibid, para 29.

[236] *Coalition for Reform and Democracy and Samuel Ng'ang'a and Another v Republic of Kenya and Others* Petition No 628 of 2014 consolidated with Petition 630 of 2015 ad Petition 12 of 2015.

[237] Guaranteed under Articles 33 and 34 of the Constitution of Kenya, 2010.

it is the right to receive information based on which one can make decisions and choices.'[238] The Court found that provisions of Sections 12 and 64 of the Security Act and section 66A of the Penal Code and section 30A and 30F of the Prevention of Terrorism Act are unconstitutional 'for being too vague and imprecise.'[239]

The Supreme Court also illustrated its boldness when it handed down a decision regarding the 2017 Presidential Election Petition in *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission*.[240] In this case, the Court was called upon to determine:

> 'i) Whether the 2017 Presidential Election was conducted in accordance with the principles laid down in the Constitution and the law relating to elections.
>
> (ii) Whether there were irregularities and illegalities committed in the conduct of the 2017 Presidential Election.
>
> (iii) If there were irregularities and illegalities, what was their impact, if any, on the integrity of the election?
>
> (iv) What consequential orders, declarations, and reliefs should this court grant, if any?'[241]

The Court held that, in respect of the first issue, the Independent Electoral and Boundaries Commission failed to conduct elections under Articles 10, 38, 81 and 86 of the Constitution as well as Sections 39(1C), 44, 44A and 83 of the Elections Act. As such, the Court was satisfied that the irregularities, illegality and conduct of the Independent Electoral and Boundaries Commission substantially affected the integrity of the Presidential Election. The Court, therefore, nullified the election results and invalidated the declaration of Uhuru Kenyatta's declaration of the presidency. A fresh election was ordered. This perhaps is one of the greatest decisions of the Supreme Court, in which the Court demonstrated an unprecedented boldness by declaring the election of the incumbent invalid.

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[238] *Coalition for Reform and Democracy and Samuel Ng'ang'a and Another v Republic of Kenya and Others*, at para 248.

[239] Ibid, at para 279.

[240] *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and 2 others* [2017] eKLR.

[241] Ibid, para 1.

4.4 Chapter Summary

This Chapter has highlighted the interpretative means through which the courts in both Kenya and South Africa have given life to the provisions of their respective constitutions according to the aspirations of the people. It is clear from this Chapter new constitutions are normally preceded by unjust or periods characterised by authoritarianism and blatant disregard for human rights. It has been shown that in South Africa and Kenya, the courts have been at the fore of breaking with the past and developing a new path based on human rights, the rule of law and democracy. The work of the courts in the transformative agenda is commendable as evidenced by the jurisprudence that has been discussed in this Chapter. Having said that, it is necessary to now turn to a detailed investigate the trajectory that the Zimbabwean Constitutional Court has taken and analyse whether there is hope for any real transformation especially concerning civil and political rights in that country.

CHAPTER 5

PROSPECTS FOR CONSTITUTIONALISM AND TRANSFORMATIVE ADJUDICATION IN ZIMBABWE

5.1 Introduction

The introduction of the new Constitution of Zimbabwe[1] in 2013 provided a glimmer of hope for human rights protection and promotion in the country. The adoption of the Constitution was anticipated to usher in a new era based on democracy, human rights and constitutionalism.[2] However, so far, the prospects for the realisation of these aspirations of the people have been met with mixed feelings. On the one hand, the Legislative arm has not done much to align several laws with the new Constitution and on the other, the Constitutional Court's interpretative method is not easy to ascertain.

As shown in Chapter 2, the road to a new constitution in Zimbabwe was characterised with a lack of political will, deadlocks and clandestine drafts. In as much as the people, as authors of the Constitution, may have completed their job through the adoption of the Constitution in 2013, transformative constitutionalism is still far from reality. Constitutionalism in constitutional democracies goes beyond just having a constitution as the supreme law, but includes the actual practice of the values and principles of the Constitution.[3] In Zimbabwe, the complexity of the constitutional and the legislative framework requires the significant drive to align various legislation with the Constitution and to shift the attitudes of the judges of the courts towards a form of adjudication based on constitutionalism and transformation. This means the legislative branch must enact, repeal, and amend the laws, and the courts must transform the same through their adjudication on a case by case basis. If left entirely to the legislative branch to carry out this task, real transformation will remain a dream in Zimbabwe.

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

[2] C Ncube and U Okeke-Uzodike "Constituting Power and Democracy: Zimbabwe's 2013 Constitution Making and Prospects for Democracy." (2015) 12 (3&4) *Africa Renaissance* 129-157.

[3] Q Zhang "A Constitution without Constitutionalism? The Paths of Constitutional Development in China" (2010). 8 (4) International *Journal of Constitutional Law*, 950–976.

During the past few years, there has been an obvious lack of political will to repeal unconstitutional laws especially those related to civil and political rights.[4]

The argument made here is that the Zimbabwean courts have the power to see through the transformation of civil and political rights by drawing lessons from the Constitutional Court of South Africa and the Supreme Court of Kenya's rights jurisprudence. It is argued that through the interpretation of the Constitution in a transformative manner, adopting a new legal culture, judicial activism or other forms of adjudication, the Court can play a significant role in the realisation of constitutional values in Zimbabwe. The 2013 Constitution itself substantially presents the courts with a perfect tool through which this objective can be realised. According to Tsabora, '… the new Constitution sets an interesting platform for the transformation of society through judicial activism, adjudication and constitutional interpretation.'[5]

To make a case for this, this Chapter discusses the Constitutional Court of Zimbabwe's civil and political rights jurisprudence to ascertain how the South African and Kenyan designs can be incorporated into the Zimbabwean system to bring about change. Tsabora has argued that 'a useful measure in determining the potential of the new constitutional framework is to consider the judiciary's treatment of cases of constitutional import that come before superior court[s].'[6] In Zimbabwe, this would be an ideal measure because the adoption of the Constitution was coupled with the establishment of a Constitutional Court. Regardless, several rights continue to be undermined despite the adoption of a new constitution that extensively protects them.

It is submitted that the courts' duty to transform the legal and political landscape cannot be abdicated and the courts 'cannot wait for the other social forces to lead the transformation agenda.'[7] The political arms have already shown reluctance to lead the transformation process.[8]

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[4] G Dzinesa "Zimbabwe's Constitutional Reform Process: Challenges and Prospects." (2012).

[5] J Tsabora "The challenge of constitutional transformation of society through judicial adjudication: *Mildred Mapingure v Minister of Home Affairs and Ors* SC 22/14." (2004) 1 *Midlands State University Law Review.* 54

[6] Ibid, at 57.

[7] Ibid.

[8] In 2013 the Legislature adopted the General Laws Amendment Act and it is said about 128 pieces of legislation were aligned, however, Makamure observes that 'these amendments, on overall analysis, were simply textual corrections not very material to the spirit and letter of alignment.' Alignment of laws can't be delayed any longer. (2018) *Newsday* 28 September, available at https://www.newsday.co.zw/2018/09/alignment-of-laws-cant-be-delayed-any-longer/ [Accessed 28 September 2018].

It is acknowledged that the Constitution of 2013 creates a *trias politica*, however, the courts can use constitutional powers to make pronouncements on the constitutionality of government action or inaction. In addition to this, developing the law is a constitutionally guaranteed power of the courts and there is no doubt that if adequately exercised, the complexities and irregularities within the socio-legal and political set up can be addressed. According to Tsabora '…transformation through constitutional interpretation ensure that society and the law move in tandem and that the values and principles defining the constitutional framework are put to action.'[9]

Looking at the record of the Constitutional Court, it remains questionable whether there is a transformative trajectory or not. The Court has previously made decisions that one may contest as progressive in part. Little research has been conducted on the record of the Constitutional Court of Zimbabwe, however, a careful reading of some of the decisions shows that it has continued with the old tradition, primarily premised on a textual interpretation of the constitution. This textual approach, 'places premium on political considerations and uses the law as a proxy to mask what are latently political decisions.'[10] This was indeed the case in *Mawarire v Robert Mugabe and others.*[11] With respect, the Court gave a somewhat bizarre interpretation of the Constitution as will be shown below. Progressive decisions have also been made, and these include the cases of *Democratic Assembly for Restoration and Empowerment and Others v The Police Commissioner and Others,*[12] *Madanhire and Another v Attorney General*[13] and *Mwonzora v The State*[14] among others.

5.2 Towards the judicialization of politics in Zimbabwe

To discuss the attitudes of the Constitutional Court of Zimbabwe in civil and political rights cases, it is necessary to discuss how the courts have previously approached politically charged cases. Zimbabweans have since independence turned to courts to intervene or address core

[9] Tsabora (n 5 above) at 57.

[10] M Kika. "Returning to the rule of law in Zimbabwe - The Role and Attitudes of the Constitutional Court, 2013-2017" 2017 *Harvard University*. (Unpublished LLM Thesis), at 5.

[11] *Mawarire v Robert Mugabe N.O. & Others* CCZ 1/13 (2013).

[12] *Democratic Assembly for Restoration and Empowerment and Others v The Police Commissioner and Others* HH-589-201

[13] *Madanhire and Another v Attorney General* ZWCC 78/12 (2015).

[14] *Mwonzora v The State* CCZ 09/15 (2015).

moral predicaments, or public policy, when human rights are violated. The courts have largely been reluctant to make pronouncements on key political issues. However, the decision of *Mawarire v Robert Mugabe* [15] signalled a new trajectory.

The courts in Zimbabwe have previously refused to take cases with political implications. In a speech delivered at the opening of the 2006 legal year in the Masvingo High Court, Justice Bhunu stated that:

> 'It must be appreciated that as members of the judiciary, it is our unpleasant duty to resolve bitter conflicts. We deal with angry, furious people almost all the time. It is not surprising that in most cases wherever there is conflict or contest, there is bound to be a loser and most losers will always have a complaint. We in the judiciary are not unduly perturbed or disturbed because of the knowledge that they will be only letting out steam for they will have had a fair trial. It is, therefore, necessary to remind everyone concerned at this juncture that the courts are neutral arbiters. They are neither for nor against anyone. The courts will not help spring anyone into power nor help anyone to remain in power. Those who desire political office must go to the people and not the courts. The courts have neither the power nor desire to usurp the function of the people. It is the people who are kingmakers, not the courts.'[16]

The above quote shows that the courts are not interested in politically charged cases and require that political matters be resolved politically. This made it difficult for any form of civil and political rights transformation to take place through the courts since the judges would not even accept such cases. The status of political cases in courts before the *Mawarire* judgement was aptly summed up by Gomwe as follows:

> 'Our courts since then under Chidyausiku CJ led Supreme Court have deliberately taken a "hands off" approach with regards to highly politically charged cases, coupled with demonstrating a tendency in high profile and electoral cases to lend its process to the service of the State.'[17]

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[15] *Mawarire v Robert Mugabe N.O. & Others* CCZ 1/13 (2013).

[16] Justice Chinembiri Earnest Bhunu "Judiciary on interprets the law" Speech Delivered at the opening of the 2006 legal year in the High Court's Masvingo Circuit. (February 15, 2006). Available at http://archive.kubatana.net/html/archive/opin/060215ceb.asp?sector=legal&year=2006&range_start=31 [Accessed 15 March 2017].

[17] G Gomwe "A critical analysis of the advent of judicialisation of politics in Zimbabwe in light of *Jealousy Mbizvo Mawarire v Robert Mugabe N.O. & Others* CCZ 1/13" 2013 (Unpublished LL.B. Thesis) *University of Zimbabwe.*

However, since the advent of the new Constitution, the courts have accepted several politically charged cases. This has opened avenues for litigation in political and civil rights cases something which was nearly impossible before 2013 due to the "hands-off" approach taken by the courts. In the year 2013, in the first-ever case in the Constitutional Court, the Court heard the case of *Mawarire v Robert Mugabe* wherein an application was made to the Constitutional Court by one Jealous Mawarire seeking an order compelling the President to proclaim election dates. Mawarire argued that the President was constitutionally obliged to announce the election dates. This is despite the fact that there was an existing agreement by the Principals within the Government of National Unity on what would be an appropriate time to announce the dates. One would have expected the Court to either reject the application altogether or to distinguish between legal and political questions and only to address legal questions as was the previous tradition. The Court's departure from this norm can be said to have signalled the turn towards a new trajectory whereby the Court rose above the constraints of judicialization of politics or the issue of separation of powers. According to Gomwe, the Court made, 'an about turn from previous Court policy alluded to above with regard to highly sensitive political matters, abrogating to itself the [task] of resolving this crucial political question of election dates.'[18]

It is not within the scope of this work to discuss the merits in *Mawarire* case, however, how it was handled and the decision that was made gave rise to several legal questions, including the amount of confidence that can be placed in the Court processes, especially in political cases. One critic of the judgement submits that 'Chidyausiku CJ, who penned the majority judgement, embarked on a wholesale use [of] legal sophistry to arrive at what was, with respect, an incorrect judgment.'[19] It can be argued that the Chief Justice adopted this approach to make a decision that would not be opposed by the President whose political party was not opposed to the *Mawarire* Application. The significance of this decision, however, is that it paved the way for judges to entertain political decisions[20] regardless of the political implications they may

[18] Ibid, at 9.

[19] Ibid.

[20] Even though the questions before the court were primarily legal, the issue of election dates should have been decided under the same mediation arrangement that had led to the formation of the GNU or could have been referred to the Joint Monitoring and Implementation Committee (JOMIC) which was established to monitor the implementation of the Global Political Agreement.

give rise to.[21] Had the *Mawarire* decision been any different, the Court would have faced reprisals from the Zanu PF party which had very significant influence in the Government of National Unity. It can be argued that the fact that the court arrived at an incorrect decision to avoid political backlash is not something that can be celebrated. The judges could have made a correct judgment without upsetting the political arms through the use of various techniques drawn from the South African Constitutional Court rights jurisprudence. Politically sensitive cases can be resolved legally without upsetting the political arms.

5.3 Rights adjudication in landmark cases in Zimbabwe

Since the *Mawarire* decision, the Constitutional Court has received several cases. The decision opened avenues for the adjudication of cases including those of a political nature which the courts had previously refused to hear. Given Zimbabwe's history of state-led civil and political rights violations, it is necessary to discuss how the courts have handled cases involving human rights.

5.3.1 Freedom of expression jurisprudence

The right to freedom of expression in Zimbabwe has been severely constrained despite being a constitutionally guaranteed right. This makes it necessary to discuss how the courts have handled cases involving freedom of expression violations in light of the new constitutional dispensation. It is apparent, from the discussion above that this right has been constrained by the existence of draconian laws such as the Criminal Code[22] and the AIPPA.[23]

The Criminal Code was put to test for the first time under the old Constitution[24] in the Constitutional Court in the case of *Madanhire and Another v Attorney-General.*[25] The facts of the case were that two applicants were charged with criminal defamation. The two were the Editor and the Reporter of *The Standard Newspaper*, a prominent independent weekly

[21] The decision led to further political polarisation: The MDC argued that it was too early to proclaim election dates before all and electoral and political reforms were made, and Zanu Pf argued that the adoption of the Constitution created a perfect opportunity for fresh elections.

[22] Criminal Law (Codification and Reform) Act [Chapter 9:23].

[23] [Chapter 10: 27].

[24] Constitution of Zimbabwe, 1980.

[25] *Madanhire and Another v Attorney General* ZWCC 78/12 (2015).

newspaper in Zimbabwe. It is on record that sometime in November 2011 the two published a story in which they accused a prominent politician and businessman who served as a chairperson of a medical insurance company, Green Card Medical Aid Society, of financial mismanagement. In the context, it was alleged that the medical insurance was on the brink of collapse and that it was struggling to pay its staff and to cover its clients.[26] The two were arrested and charged with criminal defamation on the basis that they had published the story with intention of causing alarm and to harm the reputation of the politician and the medical insurance company. The matter was first heard in the Trial Court and referred to the Constitutional Court for the determination of the constitutionality of the provisions of the Criminal Code, section 96.[27]

The Applicants sought to have the offence of criminal defamation as defined under section 96 of the Criminal Law Code to be declared unconstitutional. The charges, if found

[26] Ibid.

[27] Section 96.

'(1) Any person who, intending to harm the reputation of another person, publishes a statement which—

(a) when he or she published it, he or she knew was false in a material particular or realised that there was a real risk or possibility that it might be false in a material particular; and

(b) causes serious harm to the reputation of that other person or creates a real risk or possibility of causing serious harm to that other person's reputation;

shall be guilty of criminal defamation and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding two years or both.

(2) In deciding whether the publication of a statement has caused harm to a person's reputation that is sufficiently serious to constitute the crime of criminal defamation, a court shall take into account the following factors in addition to any others that are relevant to the particular case—

(a) the extent to which the accused has persisted with the allegations made in the statement;

(b) the extravagance of any allegations made in the statement;

(c) the nature and extent of publication of the statement;

(d) whether and to what extent the interests of the State or any community have been detrimentally affected by the publication.

(3) Subject to subsection (4), a person accused of criminal defamation arising out of the publication of a statement shall be entitled to avail himself or herself of any defence that would be available to him or her in civil proceedings for defamation arising out of the same publication of the same statement.

(4) If it is proved in a prosecution for criminal defamation that the defamatory statement was made known to any person, it shall be presumed, unless the contrary is proved, that the person understood its defamatory significance.'

unconstitutional, to be struck down as null and void.[28] The offence was committed under the 1980 Constitution and the case was decided in terms of section 20(1) of the old Constitution which provided that:

> '[E]xcept with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.'[29]

In light of this, the Court held that 'it certainly cannot be gainsaid that the offence of criminal defamation operated to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution.'[30] In addition to this, the Court determined whether the limitation to freedom of expression in section 96 of the Criminal Code is justifiable in a democratic society. In making this decision, the Court, enquired into two aspects; 'firstly, what are the consequences of criminalising defamation and, secondly, is there an appropriate and satisfactory alternative remedy to deal with the mischief of defamation?'[31]

In addressing the first question, the Court held that the offence of criminal defamation has a "stifling and chilling effect" on the right to speak and right to know, especially given the important role that newspapers play in unearthing corruption and fraudulent activities in our society. In addressing the second question the Court held that there is an alternative in the form of a civil remedy under the *actio injurium*.

The significance of this judgement is the emphasis that was placed on the individual rights *vis a vis* interests of the State. According to Kika 'the Court emphasized that freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection.'[32] The Court, in this case,

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[28] *Madanhire and Another v Attorney-General*; 'The application before this Court, as originally posited, was for the offence of criminal defamation as defined in s 96 of the Criminal Law Code to be declared unconstitutional and struck down as being null and void. The same relief was initially propounded by Adv. Morris at the hearing of the matter. However, after it was observed by the Court that the application in its original form did not address the relevant provisions of the new Constitution, the application was confined to the consistency of the offence with the former Constitution.' p 2.

[29] Constitution of Zimbabwe, 1980.

[30] *Madanhire and Another v Attorney General* ZWCC 78/12 (2015).

[31] Ibid.

[32] Kika (n 10 above) at 49.

referred to the legal duty that Zimbabwe has in terms of international law in the promotion and protection of the right to freedom of expression. This was a positive step in the protection of human rights through litigation in Zimbabwe.

The *Madanhire* decision even though decided under the previous Constitution, was progressive in that it showed that the newly established Constitutional Court was willing to interpret the Constitution in such a manner that transforms the civil and political rights of the individuals. This case was widely commended by civil rights organisations and scholars.[33] The Court was of the view that it was not necessary to discuss the constitutionality of the provision in respect of the new Constitution and said this would be left for determination in a future case as and when such an application is made. The Court explained that the reason for this is that freedom of expression in section 61 of the 2013 Constitution is framed differently. The Court, however, said section 61(5)(c) of the 2013 Constitution 'expressly excludes malicious injury to a person's reputation or dignity from the ambit of the freedom of expression and freedom of the media.'[34] The Court also observed that section 61 must be interpreted more narrowly and that the offence of criminal defamation may be justifiable under the limitations enshrined in section 86 of the 2013 Constitution. It is submitted that this interpretation is erroneous and retrogressive. The courts should always interpret the Constitution in a manner that affords more rights under the new constitutional dispensation. If the courts are to adopt such a narrow interpretation, they risk losing interpretative credibility, and the realisation of the ideals of constitutional democracy will remain a pipe dream in Zimbabwe. Transformative constitutionalism requires judges to favour the interpretation that affords more rights than the one that restricts them. The courts in South Africa have been bold enough to make such interpretations even in the face of potential opposition from the political arms. It suffices to note here that criminal defamation had been used to silence political opposition therefore the declaration of its invalidity was not well received within the political circles.

The decision left a great deal of confusion and uncertainty regarding whether criminal defamation as outlawed under the old Constitution would consequently also be invalid under

[33] Media Institute of Southern Africa, Zimbabwe said "MISA Zimbabwe welcomes the ConCourt judgment that vindicates its incessant calls for the scraping of this law from the statute books. It has always been the position of MISA Zimbabwe that such laws have no place in a democratic society given that there are alternative civil remedies available to aggrieved parties outside criminal defamation." Available at https://www.ifex.org/zimbabwe/2016/02/04/criminal_defamation/

[34] Kika (n 10 above) at 51.

the new Constitution. The Media Institute of Southern Africa made application to the Constitutional Court in *MISA Zimbabwe and others v Minister of Justice and Another*[35] to seek confirmation of the status of criminal defamation under the new Constitution. This came after the Minister of Justice had made remarks on record that criminal defamation was still valid and would be used in appropriate circumstances.[36] The Minister's statement consequently revived fears of prosecution under criminal defamation and continuous violations of the right to freedom of expression. Regardless of the Minister's statement, which could be deemed as a threat to the independence of the judiciary, the Court ruled that criminal defamation is void and no longer a part of the law.[37] In light of this decision, in a statement aimed at the Zimbabwe Government, the African Commission on Human Rights Chairperson Advocate Pansy Tlakula said;

> 'I call on your government to support the decision of the Constitutional Court in light of the potential of this ruling to promote and protect the right to freedom of expression as guaranteed by Article 9 of the African Charter on Human and Peoples' Rights, and as elaborated in the Declaration of Principles of Freedom of Expression in Africa.'[38]

The decision of the Court was bold in that it uncharacteristically defied political sentiments on freedom of expression and the validity of criminal defamation in the law. Criminal defamation and other provisions of the Criminal Code such as section 33(2)(a) have traditionally been used as a means of suppressing diverse views and silencing political opponents.

Another case arising from the Criminal Code and decided under the auspices of section 20(1) of the 1980 Constitution which protected the right to freedom of expression, is that of *Mwonzora v The State*.[39] In the Trial Court, Mr Douglas Mwonzora, a prominent opposition political figure, had been charged under section 33(2) (a) which prohibits statements that

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[35] *MISA Zimbabwe and others v Minister of Justice and others* CCZ 7/15.

[36] VP Mnangagwa defends criminal defamation. (2015) *The Herald* 16 April.

[37] *MISA Zimbabwe* "Analysis: Facts and implications of Zim ruling on criminal defamation" (05 February 2016) available at http://misa.org/issues/analysis-facts-and-implications-of-zim-ruling-on-criminal-defamation/ [Accessed 18 March 2018].

[38] MISA Zimbabwe "AU Hails Scrapping of Criminal Defamation in Zimbabwe." (06 March 2016) available at http://misa.org/issues/free-expression-the-law/au-hails-scrapping-of-criminal-defamation-in-zimbabwe/ [Accessed 18 March 2018].

[39] *Mwonzora v The State* CCZ 09/15.

undermine the authority of the President or insult the President. Section 33(2)(a) of the Criminal Code reads:

> '33. Undermining the Authority of or insulting President;
> ….
> (2) any person who publicly, unlawfully, and intentionally-
> (a) makes any statement about or concerning the President or any Acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may –
> (i) engender feelings of hostility towards, or
> (ii) cause hatred, contempt or ridicule of; the President or any Acting President, whether in person or in respect of the President's Office.
> (b) makes any abusive, indecent or obscene statement about or concerning the President or an Acting President, whether in respect of the President personally or the President's Office;
> shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.'[40]

Mwonzora was charged with the criminal offence after he referred to former President Mugabe as a "goblin", and also insinuated that the President was corrupt while addressing a political rally. An application was made to the Constitutional Court challenging the constitutionality of section 33(2)(a). The Court did not address the crucial question of whether the provision was unconstitutional but dwelt on the applicant's right to the protection of the law. Some scholars, however, argue that the Court's decision not to determine the constitutionality of section 33(2)(a) was correct as 'the prosecution of the applicant had been declared unlawful,' therefore there was no need to determine the constitutionality of the crime.

This case had presented the Court with an opportunity to deal with the constitutionality of section 33(2)(a) in line with the transformative nature of the Constitution and the role of the Court in developing the law. The Court's decision, however, fell short of the expectations for transformative adjudication. A judge with a transformative mind would have dealt extensively with the issue because it is important to emphasize constitutionalism, the rule of law and the protection and promotion of fundamental rights and freedoms. Transformative constitutionalism would have required the court to use some formulaic tests to determine the constitutionality of the section in question. The Court could have done this, not because it was

[40] Section 33 (2)(a) and b).

a legal question before it but because of its moral and legal duty to make such pronouncements and bring about change in society.

5.3.2 Freedom of assembly jurisprudence

With the declining economic and political situation in Zimbabwe over the past few years, citizens have resorted to airing their grievances through mass protests and other forms of organised gatherings. However, those who choose to engage in this are met with the wrath of the law through the infamous Public Order and Security Act[41] and some sections of the Criminal Law (Codification and Reform) Act.[42] When courts intervene, they are met with hostility and often receive severe criticism from the political arm. For example, former President Mugabe is on record condemning judges who allow the people to exercise their right to freedom of assembly. He has accused the judges of being reckless; '[o]ur courts, our justice system, our judges should be the ones who understand even better than ordinary citizens. They *dare* [my emphasis] not be negligent in their decisions when requests are made by people who want to demonstrate.'[43]

The right to freedom of assembly is a constitutionally guaranteed right under section 58 (1) of the 2013 Constitution.[44] 'Freedom of assembly is a fundamental human right. It is a vehicle that enables citizens to collectively express, promote, pursue, and defend their common interests.'[45] Corollary to this right is the section 67 right to political participation. In terms of this right, everyone has a right to individually or collectively engage in peaceful activities to influence, challenge or support policies of the government. This right has traditionally been subverted by the provisions of the Criminal Code[46] prohibiting any conduct that may be seen to be a subversion of the authority of the State, overthrowing or attempting to overthrow the

[41] [Chapter 11:17].

[42] [Chapter 10:27].

[43]Zimbabwe's Mugabe says judges reckless for allowing protests. 2016 *Reuters*. 04 September, available at https://www.reuters.com/article/us-zimbabwe-mugabe/zimbabwes-mugabe-says-judges-reckless-for-allowing-protests-idUSKCN11A0GL [Accessed 27 March 2018].

[44] Section 58(1).

[45] Freedom House "Joint Civil Society Statement: Zimbabwe Must Respect Freedom of Assembly and Human Rights." December 28, 2016 available at https://freedomhouse.org/article/joint-civil-society-statement-zimbabwe-must-respect-freedom-assembly-and-human-rights [Accessed on 17 September 2017].

[46] [Chapter 9: 23].

government by unconstitutional means. In 2016, civil society organisations made a joint statement calling upon the Government to drop charges against those arrested whilst exercising their right to assembly, to ensure that those in future who choose to exercise this right are not arbitrarily arrested, detained or prosecuted and to ensure the protection of people from abduction and thoroughly investigate such unlawful acts committed against anyone.[47]

The Court had the opportunity to determine the permissible limitations of the right to assembly and the application of the criminal offence of subversion to demonstrations, petitions and other forms of gathering in the case of *S v Mawarire*.[48] The accused, Evan Mawarire, a prominent clergyman made videos calling on the people of Zimbabwe to engage in peaceful protests against the Government, and the introduction of Statutory Instrument 64, as well as the adoption of Bond Notes as a form of currency. The people responded to this call by engaging in several protests across the country.[49] He was charged with two counts of subverting a constitutional government in terms of section 22(2) (a) of the Criminal Code.[50] In the alternative, he was charged with the crime of incitement to commit public violence in terms of section 187(1)(a) as read with section 36(1) of the Code.[51] In his defence, Mawarire argued that the charges violated his right to freedom of assembly in terms of section 58, and his right to demonstrate and petition in terms of section 59 of the 2013 Constitution. The Court held that it was well within the accused's rights to call for passive resistance against the State, per Chigumba J:

> '[H]e urged prayers for peace. How can prayers for peace be considered unconstitutional means of removing a constitutional government?' His criticism of government policies is permissible in terms of the Constitution, and there is no evidence that he urged a violent removal of the government.'[52]

This judgment was widely celebrated for protecting the right of protestors to freedom of assembly and guarding against future abuse of the Criminal Code to violate this constitutionally

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[47] Freedom House (n 123 above).

[48] *S v Mawarire* HH 802-17.

[49] Public must be part of 'incredible change' in Zimbabwe, says dissident pastor. 2017 *The Telegraph UK* 16 November, available at https://www.telegraph.co.uk/news/2017/11/16/dissident-pastor-calls-zimbabweans-rise-take-streets/ [Accessed 16 May 2018].

[50] [Chapter 9:23].

[51] *S v Mawarire* HH 802-17, p 2-3.

[52] Ibid.

guaranteed right. However, a careful reading of the judgement shows that it was devoid of any interpretation of the content and the extent of the protection of the right to freedom of assembly. A constitutional interpretation of the right to freedom of assembly within the context of the 2013 Constitution would have gone a long way in developing the rights jurisprudence in Zimbabwe. The case was largely decided on the facts, and the Court did not refer to any progressive precedents on the extent of the protection of the right to freedom of expression nor any legal texts on those rights.

As noted earlier, freedom of assembly under the 2013 Constitution has continued to be subverted through the continuous application of the POSA.[53] Provisions of the POSA allow the police to issue statutory instruments banning public gatherings. For example, following a series of demonstrations, in Harare in 2016, the police published a statutory instrument in terms of POSA banning demonstrations for 14 days. In response to this, a conglomerate of political parties under the banner Democratic Assembly for the Restoration and Empowerment (DARE) made an urgent chamber application to the High Court challenging the validity of the statutory instrument.[54] Chigumba J heard the application and granted a provisional order invalidating the statutory instrument.[55] The order was granted on the basis that the police had not followed the correct procedure in issuing the ban in terms of section 27 of POSA.[56]

The Applicants then made another application in the High Court in *Democratic Assembly for Restoration and Empowerment (DARE) v The Commissioner of Police Others; Zimbabwe Divine Destiny v Saunyama and Others*[57] seeking a final order setting aside the police ban. The first question before the High Court was 'whether section 27 of the Public Order and Security

[53] [Chapter 11: 17].

[54] Statutory Instrument 101A of 2016.

[55] "Interim Relief 1. That, forthwith, the operation of Statutory Instrument 101A of 2016 be and is hereby suspended. 2. That the 2nd respondent shall process and deal with all notifications for public gatherings and processions or meetings in the manner lawfully prescribed in section 12 of the Public Order Security Act [Chapter 11:17] 3. That the 2nd and 3rd respondents be and are hereby interdicted from unlawfully interfering with the rights of citizens to exercise their right defined by s 59 of the Constitution read together with s 12 of the Public Order Security Act."

[56] *Democratic Assembly for the Restoration & Empowerment (DARE) & Ors v The Commissioner of Police & Ors* HH-554-16.

[57] *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors; Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-201.

Act violated sections 58, 59, 60, 61, 62 and 67 (2) of the Constitution.'[58] The second question was 'whether the derogations from the right to protest fell within the permissible limitations provided for in section 86 of the Constitution.'[59] In respect of the first question, the Court held that 'there can be no doubt that the provisions of section 27 constitute a derogation from the rights accorded citizens in terms of section 59 of the Constitution. Having said that, the Court then turned to the second issue and determined whether section 27 would pass the limitation of rights test set out in section 86(2) of the Constitution. The Court adopted a two-stage test; 1. Is POSA a law of general application? This point could not be contested, POSA was held to be a law of general application. 2. 'Are the provisions of section 27 (1) of POSA a fair, reasonable, necessary and justifiable derogation or limitation in a democratic society?'[60]

Concerning the second part, the respondents contended that the 2013 Constitution does not fundamentally change how this section should be construed in respect of its constitutional validity. The Court also held that because there is no fundamental difference in the content of the right in the new Constitution and the old Constitution, the *interpretative methods adopted in the previous constitutional dispensation should be adopted* [my emphasis]. It also held that '…. cases decided by our courts under the old Constitution remain relevant in the interpretation of the present Constitution, including section 59.'[61] In construing the provisions of section 59 of the Constitution, the Court adopted 'a purposive and general interpretation, one that endeavours to give citizens the full measure of that fundamental right and freedom.'[62] And on the other hand, the Court interpreted the provisions that sought to limit the rights narrowly and restrictively to allow the barest minimum limitation.

The Court, in interpreting the Constitution, took a teleological/purposive approach and held that the liberation struggle was fought to ensure that the people of Zimbabwe enjoy these civil

[58] G Feltoe, G Linington and F Mahere "Worlds Apart: Conflicting narratives on the right to protest; Case Notes on 1. *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors* HH-554-2016 2. *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors*; *Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-2016." (2016). *The Zimbabwe Electronic Law Journal.*

[59] Ibid.

[60] *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors; Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-201.

[61] Ibid, at 9.

[62] Ibid.

rights. It held further that these rights form the core of democracy and that they are sacrosanct. Having made such an interpretation, the Court made a ruling that some scholars find perplexing. Chiweshe JP went on to say, 'it is pertinent to observe that no democracy can function or thrive in an environment of public disorder and anarchy. The security and well-being of any community is of paramount importance.'[63] The Court reasoned that section 27(1) seeks to ensure public order and security, therefore, it does not unreasonably, and unjustifiably limit the constitutional rights in section 59, therefore such a limitation is permissible in terms of section 86. Somehow, the Court failed to attach any weight to the purpose, rationale or utility of the provision guaranteeing freedom of assembly.

According to Feltoe *et al*, 'the blanket ban on all demonstrations upheld by Chiweshe JP clearly constitutes a negation of a right rather than a mere limitation.'[64] What is surprising in this judgment is that the Court acknowledged that section 27 (1) has 'the effect of imposing greater restrictions than necessary to achieve its purpose;'[65] and went on to ignore the weight of this point. It is respectfully submitted that had the Court purposively interpreted the provision as it claimed it did, it would have arrived at a different conclusion. Feltoe *et al* observe that if a restriction goes beyond what is necessary for the circumstances, it should be considered unconstitutional.[66]

The Applicants in *DARE* appealed to the Supreme Court of Appeal seeking a reversal of the High Court decision. The Supreme Court of Appeal acting in terms of section 175(4) of the Constitution referred the case to the Constitutional Court for a determination of the constitutionality of the contested provision. Makarau JCC, in the unanimous decision, considered the importance of the wording in section 59 and noted; 'every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully.'[67] In the analysis of this provision, the Court said it is worth noting that the Constitution makes the admonition that the rights in section 59 be exercised peacefully. Correctly, it is submitted, in

[63] *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors; Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-201. 12.

[64] Feltoe, Linnington and Mahere (n 58 above).

[65] *Democratic Assembly for Restoration and Empowerment (DARE) & Ors v The Commissioner of Police & Ors; Zimbabwe Divine Destiny v Sauyama & Ors* HH-589-201. 13.

[66] Feltoe, Linnington and Mahere (n 58 above).

[67] *Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama & Ors* CCZ 09/18.

respect of this provision, the Court held that 'the rights and the admonition must be placed on an equal footing and must be read together as giving complete content of the rights.'[68]

In addition to this, the Court explained the rationale for the rights in section 59, in particular the right to demonstrate. As per Makarau JCC:

> 'I may add on a general note that protests and mass demonstrations remain one of the most vivid ways of the public coming together to express an opinion in support of or in opposition to a position. Whilst protests and public demonstrations are largely regarded as a means of political engagement, not all protests and mass demonstrations are for political purposes. One can take judicial notice of, in the recent past, a number of public demonstrations that were not political but were on such cross-cutting issues as the environment, and/or the rights of women and children. Long after the demonstrations, and long after the faces of the demonstrators are forgotten, the messages and the purposes of the demonstrations remain as a reminder of public outrage at, or condemnation or support of an issue or policy.'[69]

Hence in construing the limitation placed by section 27 of the right to freedom of assembly, the Court held that the section 27 ban has a 'dragnet effect.' As such, it bans demonstrations indiscriminately, both the 'innocent and the guilty.' On the facts, the Court considered that the ban that was imposed was a blanket ban and during its operation, all peaceful demonstrations are nullified:

> 'This includes demonstrations already planned at the time the ban is imposed and those that are yet to be planned. [T]o the extent that the ban does not discriminate between known and yet to be planned demonstrations, the limitation in s 27 has the effect of denying rights in advance and condemning all demonstrations and petitions before their purpose or nature is known. [T]he limitation in s27 of POSA stereotypes all demonstrations during the period of the ban and condemns them as being unworthy of protection. Stereotyping is a manifestation of bias without any reasonable basis for that bias.'[70]

Based on this reasoning, the Court could therefore not find any reason upon which the limitation in section 27 of POSA could be justified. It held that the limitation is not fair, reasonable or necessary to satisfy the requirements of section 86 of the Constitution. The Court also pointed out that it found it disturbing that POSA has no limitation as to the number of

[68] Ibid at 4.

[69] Ibid at 6.

[70] Ibid at 10-11.

times that section 27 can be invoked. '[T]hus, despotic regulatory authority, could lawfully invoke these powers without end.'[71] Based on that, section 27 of POSA was found to be unconstitutional. However, the Court suspended the invalidity of section 27 for six months to allow for the Legislature to correct the defect in terms of section 175 of the 2013 Constitution.

The reasoning in this judgment is significant. The Court afforded the applicants the right to freedom of assembly as contemplated in the Constitution. The Court broadly interpreted Section 59 to afford the rights, and narrowly construed the limitations provisions in section 86. The Court adopted an interpretation that restricts the operation of the limiting provision as necessarily possible thereby transforming the civil and political rights discourse in Zimbabwe. The Court adopted a rights-based approach to interpreting the relevant provisions including section 27 of the POSA and by finding it unconstitutional. In addition, the Court was bold enough to exercise its constitutional powers to check the constitutionality of legislation as well as the conduct of the State. To avoid confrontation with the Legislature, it cautiously deferred the constitutional invalidity to allow for the Legislature to exercise its law-making function in terms of section 175(6)(b) of the Constitution.[72]

5.4 Chapter Summary

In conclusion, it can be said that this Chapter has shown that the Constitution of Zimbabwe is a transformative document, whose ideals are informed by the aspirations of people. The people aspire to have a society founded on democracy, the rule of law, good governance and respect for fundamental rights. These fundamental rights include civil and political rights that are cardinal to the full development of a democratic society. These are the rights to freedom of assembly and expression. History shows that these rights were often violated by the State and other State agencies. In addition to this, there were, and still are, many other statutes that are inconsistent with the Constitution. For Zimbabwe to achieve a truly transformed society, interpretation of the Constitution in a purposive manner should be the starting point. As shown above, where political arms feel threatened by the Court's judgments, they are likely to direct reprisals against the judiciary. South African Constitutional Court has managed to navigate around this, and the Zimbabwean Constitutional Court is also capable of doing the same. The Courts have had the opportunity to decide on these and a few notable landmark judgments have

[71] Ibid.

[72] Section 172 (1)(b) of the Constitution of South Africa has a similar provision.

been made, for example in the *Mawere*,[73] *DARE*[74] and *Madanhire*[75] cases. It should be noted, however, that most of these judgements, though progressive, have not contributed substantially to the development of the interpretation and adjudication methods of the Constitutional Court. Judiciary-led transformative processes require judges who are bold enough to adjudicate in politically sensitive matters regardless of popular political sentiments.

[73] *Mutumwa Dziva Mawere v Registrar General* CCZ 4/15.

[74] *Democratic Assembly for Restoration and Empowerment and Others v The Police Commissioner and Others (DARE)* HC8940/2016.

[75] *Madanhire & Another v Attorney General* (Const. Application No CCZ 78/12) [2015] ZWCC 02 (19 February 2015).

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The conclusions made in this thesis are based on the discussions in the previous Chapters and the aims and objectives of the study. The discussions in Chapters 2 to Chapter 5 complement each other and were aimed towards answering the research questions set out in the first chapter of the study. The broad aim of this thesis is to examine the role that can be played by the judiciary in Zimbabwe in the transformation of human rights, in particular civil and political rights. This is based on the understanding that the constitution of any country stands at the centre of constitutionalism, democracy, good governance, respect for human rights and the rule of law. With the adoption of the 2013 Constitution,[1] Zimbabwe was expected to chart a new trajectory in this regard. However, unaligned laws have remained an obstacle to this. If the laws in Zimbabwe are aligned with the Constitution, there will be a substantive change in the application of human rights and the rule of law. Not only will this advance human rights, but it will also help instil much-needed investor confidence in the economic sphere.

The findings made in this study are aligned to the research question, and it is hoped that it will make a significant contribution towards the advancement of constitutionalism and a culture of human rights in Zimbabwe. Presently, Zimbabwe is operating with a disjointed legal system. A Constitution that is founded on the principles of democracy, human rights and the rule of law on the one hand, and a set of repressive legislation such as Public Order and Security Act (POSA)[2] and the Access to Information and Protection of Privacy Act (AIPPA)[3] on the other. These laws have been responsible for violations of fundamental human rights such as freedom of expression and freedom of assembly. The law has also been used as a tool to persecute perceived enemies of the State, whether imaginary or real. The major finding is that the

[1] Constitution of Zimbabwe, 2013.

[2] Act of 2002 [Chapter 11:17].

[3] Act of 2003 [Chapter 10:27].

Zimbabwean judiciary has not taken a solid position to indicate whether it appreciates its role in the delivery of real transformation of the lives and human rights of the people.

This work critically analyses the role that the Constitutional Court of Zimbabwe should play in ensuring constitutional democracy. An analysis of how the Court has so far fared in construing the wording of the Constitution is made. The thesis takes into account the risks associated with judicial craftsmanship and the possible threat on the independence of the judiciary and brief analysis of how the Court can avoid backlashes from the political arms is made. Lessons are drawn from the jurisprudence of the South African and Kenyan Courts. In this regard, it is suggested that, in as much as such a jurisprudential basis is desirable, the Zimbabwe Constitutional Court should not be a clone of the South African Constitutional Court. Zimbabwe should develop its unique transformative jurisprudence drawing from the South African experience.

Through its recommendations, the thesis intends to contribute, from a socio-legal perspective, the extent of the influence which judicial enforcement of civil and political rights in Zimbabwe could make as a complementary strategy to the achievement of the much-needed transformation in an otherwise polarized society.

The first chapter of this thesis is an overview outlining the main research problem, theoretical assumptions as well as the research objectives and questions. Chapter 2 is a detailed discussion of the constitutional history of Zimbabwe. It sets out the background on the adoption of the new Constitution in 2013. This background serves to highlight the rationale behind the adoption of the 2013 Constitution and how it carries the hopes and aspirations of the people of Zimbabwe. This lays the basis for the argument that the adoption of the new Constitution was meant to bring about transformation within the legal and political spheres of Zimbabwe. The substance and processes leading to the adoption of the 2013 Constitution bring to the fore the idea of transformative constitutionalism. The pre-2013 civil and political rights violations, the inclusion of a comprehensive Bill of Rights, the establishment of the Constitutional Court, and the involvement of the people of Zimbabwe in the making of the Constitution, justifies the call for real transformation. It is upon this basis that the thesis argues for court-led transformation.

To allow for discussions on how the courts in Zimbabwe have interpreted civil and political rights and to make a case for their transformation, Chapter 3 explores the nature and extent of the application and limitations for the rights to freedom of association and freedom of assembly. These rights are used because they are the ones that are primarily affected by the

legislation and conduct of the State and have been at the centre of much controversy. Chapter 3 shows that civil and political rights are protected at both domestic and international level. The main submission here is that states have the primary responsibility to promote and protect these rights. By acceding to the various international human rights frameworks, states undertake to abide by the provisions contained therein. The argument is that where domestic constitutions provide for these rights, the courts, as the guardians of the constitutions, have a duty to promote and protect the rights through interpretation and adjudication.

Chapter 4 examines how the South African Constitutional Court and the Kenyan Supreme Court have interpreted human rights in a transformative manner. Both jurisdictions have passed landmark decisions, using transformative interpretation methods to give life to the values and principles contained in their constitutions in ways that aim to achieve the aspirations of the people. It is acknowledged that courts appreciate the role of political actors, and contrary to popular belief, adjudicating in such matters or exercising judicial activism as opposed to judicial restraint, does not amount to a violation of the doctrine of separation of powers. The courts must guard jealously the values and principles of the constitution. Transformative adjudication has been used in both jurisdictions to better the lives of the people and to achieve the constitutional goals and national aspirations. This thesis is framed on the assumption that the Zimbabwean judiciary will draw lessons from the transformative adjudication of the Kenyan and South African courts. South African courts have adopted broad purposive interpretation and the Kenyan courts have adopted a value-based interpretation of the constitution in a manner that has ushered notable human rights transformation. In this regard, *Makwanyane*,[4] *Soobramoney*,[5] *Treatment Action Campaign*,[6] and *Fourie*[7] in South Africa and *Eric Gitari*,[8] *Kituo Cha Sheria*,[9] and *Trusted Society of Human Rights Alliance*[10] in Kenya have been particularly instructive.

Chapter 5 examines the jurisprudence of the Zimbabwe judiciary. This is aimed at exposing the opportunities and challenges of transforming civil and political rights as contemplated in

[4] *S v Makwanyane* 1995 (6) BCLR 665 (CC).

[5] *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC).

[6] *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

[7] *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC)

[8] *Eric Gitari v Non-Governmental Organisations Co-ordination Board and 4 Others* [2015], Petition 440 of 2013.

[9] *Kituo Cha Sheria v Independent Electoral Board, Coalition for Reform and Democracy (CORD)* [2013] eKLR.

[10] *Trusted Society of Human Rights Alliance v Attorney General and Others* [2012] eKLR.

the new Constitution.[11] The Chapter begins by discussing the transformative elements of the Constitution. It is observed that the Constitution is endowed with provisions that signal a need for a departure from the old and usher in a new era founded on democracy, the rule of law and respect for human rights.[12] This thesis concedes that carrying out the transformation process for a relatively new court may result in conflict between the judiciary and other arms of state. The backlash that the High Court judge for her decision in the case *Democratic Assembly for Restoration and Empowerment and Others v The Police Commissioner and Others (DARE)*[13] received from President Mugabe demonstrates this. However, there are several lessons to be learned from examples of the adjudication techniques used by the South African Constitutional Court and the Kenyan Supreme Court.

6.2 Reflections on the prospects for judiciary-led transformation in Zimbabwe

Transformation of civil and political rights in Zimbabwe is a realistic possibility. This, however, is likely to be hindered by two main distinct but related factors. These are the existence of a) lack of sufficient independence of the judiciary and b) implications for reliance on courts as means of addressing political questions.

a) It is a universally accepted truth that the independence of the judiciary is one of the 'principal building blocks of the rule of law.'[14] According to Bridge, independence of the judiciary has three main characteristics. These are judges own personal interests in the outcome of a case, decisions, once passed, must be respected and judiciary free from interference.[15] The independence of the judiciary is important to guard against abuse of executive power, to halt legislative erosion of fundamental rights and to assure the public that the judges are impartial and fair in the discharge of their duties.[16] Even though the Constitution of Zimbabwe provides

[11] It has been shown in this study that the constitution is endowed with transformative provisions which can be interpreted in a manner that advances the rights of the people.

[12] Chapter 5 of this thesis is instructive in this regard.

[13] *Democratic Assembly for Restoration and Empowerment and Others v The Police Commissioner and Others* HC 8940/2016.

[14] J Bridge "Constitutional Guarantees of the Independence of the Judiciary" (2007) 11 (3) *Electronic Journal of Comparative Law* at 1

[15] Ibid

[16] DT Hofisi and G Feltoe "Playing Politics with the Judiciary and the Constitution." (2016) *Zimbabwe Electronic Law Journal.*

for the independence of the judiciary, the changes brought about through Amendment 1 discussed in Chapter 2 cast doubts on the sufficiency of this provision. Statements of judicial independence are not sufficient to ensure that the judiciary is indeed independent. The enactment of Amendment 1 brought forth this reality. Zimbabwe has judiciary independence in the Constitution but all powers of nomination and appointment vest in the executive. This undermines actual independence.[17]

Before Constitution Amendment number 1, the procedure of the appointment of judges was considered to be international best practice.[18] The process was meant to be open and transparent as it included the use of public interviews after nominations from all stakeholders. This had the effect of diminishing executive influence. However, Amendment 1 now makes the process of appointing judges neither open nor transparent and the presidency now has more sweeping powers and influence which practically diminishes the independence of the judiciary This is one aspect that needs to be cured as a matter of urgency if the transformation envisaged in the constitution is to be realised. However, it should be acknowledged that some judges, in cases such as *DARE* have demonstrated boldness through passing judgements detrimental to executive and legislative authority. This somewhat gives hope that with the right tools, the judges are capable of discharging their duties without fear or favour.

b) Judicial review mechanisms in various jurisdictions have resulted in public policy and political questions being brought before the courts. These include questions relating to government conduct violating civil and political rights and election results disputes. While these have not caused many problems for the judiciary in Kenya and South Africa, in Zimbabwe, the government has made threats against judges who allow demonstrations and public processions. In as much as the possibility of threats is real, the courts have not openly abdicated on their judicial review function. The decision by Justice Makarau in *DARE* is an indication that there exists some hope in the judiciary that where the opportunity arises, decisions of a transformative nature can be made.

Having outlined the above, it is necessary to now turn to the conclusions and these will be followed by the necessary recommendations.

[17] Ibid.

[18] Ibid.

6.3 Summary of main findings and conclusions

Given the need for transformation in Zimbabwe, it remains to be seen whether the Zimbabwe Constitutional Court as the apex court will adopt a value-based interpretative approach. Zimbabwe's judiciary has been largely inconsistent in terms of its operation. The jurisprudence examined in this thesis has exposed several interpretative inconsistencies and a general lack of a transformative agenda. Since its inception in 2013, the Zimbabwe Constitutional Court has not taken a meaningful progressive approach to interpret wording and purport of the Constitution. In the very few cases in which the Court has protected civil and political rights, it has not developed the jurisprudence to ensure the protection and enjoyment of those rights in future. The courts in general have adopted an approach that confines their legal interpretation to texts of rules of law and avoided any approaches or pronouncement of ethical or moral views in civil and political rights cases. The Zimbabwean courts must appreciate that they are duty-bound to give full effect to the value-laden Constitution in a manner that transforms society.

One would have expected the courts to make pronouncements that encompass a transformation process and creation of spaces in which dialogue and political contestations may be acceptable. The 2013 Constitution has been presented throughout this thesis as a progressive document that allows the citizens to claim what is owed to them by the State. However, this has not been realised due to lack of political will. This study, therefore, finds that for transformation to occur, there should be either political or legal processes ready to accomplish it. In the absence of political will to do so, the judiciary should be the driving force in the attainment of constitutional objectives through a transformative interpretation of the Constitution.

Drawing from the South African and Kenyan experiences, it is concluded that transformation does not come through legislative means only, but also through courts that develop a rich jurisprudence in the betterment of the lives of the people. This has been particularly possible due to the independence of the judiciary that currently exist in these jurisdictions. In Zimbabwe, such an approach is currently stifled by the political arms that have previously questioned and defied the decisions of the Court and has threatened the independence of the judiciary.[19] Zimbabwean judges can be criticized for failing, in many circumstances, to find

[19] Zimbabwe's Mugabe says judges reckless for allowing protests. 2016 *Reuters*. 04 September, available at https://www.reuters.com/article/us-zimbabwe-mugabe/zimbabwes-mugabe-says-judges-reckless-for-allowing-protests-idUSKCN11A0GL [Accessed 27 March 2018].

room for the judicial advancement of human rights in the present political order. Given the continued operation of the Public Order and Security Act[20] and the Access to Information and Protection of Privacy Act[21], the current legal order is hostile to human rights.

Kenyan jurisprudence has also been used to illustrate that the courts can adopt transformative adjudication and restore constitutionalism, democracy, the rule of law and respect for fundamental rights and freedoms. This has been done by reading the Constitution in a manner that consciously adopts a progressive approach to interpreting its letter and spirit. The Kenyan courts have avoided adjudicating in a manner that mortifies or betrays the vision of the drafters of the Constitution.[22] In addition to this, the Kenyan courts have departed from the formalistic or positivist approaches to adjudication and have taken non-legal factors into account in interpreting the Constitution. This is done through appreciation of the fact that the Constitution envisages a social-justice-oriented state. As a result, the Preamble to the Kenyan Constitution has been instrumental in giving meaning to the provisions of the whole document.

This thesis shows that using the judiciary to discharge of duties conventionally belonging to other arms of state can be damaging. In Zimbabwe, the Constitutional Court has not appraised the other arms of the State of its duty to develop the law. As such, its decisions have consistently been met with hostility from the State. The judiciary must develop the existing law and bring it in conformity with the aspirations of the Constitution.

6.4 Recommendations

The South African Constitutional Court and the Kenya Supreme Court have, comparatively, made some tremendous progress into the transformation project. It is conceded that the South Africa story has had its shortcomings especially in respect of the eradication of poverty. However, commendable progress has been made in the realisation of various minority rights through its dignity and equality jurisprudence. Kenya has made commendable strides in the adjudication of rights-based cases. This has been made possible by both their constitutional design as well as legal culture. In addition to this, the judiciary in these jurisdictions enjoys a great deal of support from the political arms even where they do not make decisions favourable

[20] [Chapter 11: 17].

[21] [Chapter 10: 27].

[22] The Constitution of Kenya, 2010.

to the state. South Africa, in particular, places the notion of democracy at the heart of government business, therefore there has not any real threat against the judiciary as they share a common goal. South African Constitutional Court and Kenyan Supreme Court have placed the notion of transformation at the centre of their adjudication and this has been widely received by the political arms.

Given that the current approaches and methodology used in constitutional interpretation and adjudication in Zimbabwe are inadequate to achieve the goals of transformation, it is necessary to make some recommendations. The following recommendations are made regarding both legal and policy interventions.

6.4.1 Constitutional interpretation

- The need for a paradigm shift from literalism to purposivism in interpreting civil and political rights.[23]

The purposive theory of interpretation requires the court to shift from a literal to the purposive mode of giving meaning to the wording of the statute. According to Singh, '[t]he determination of the purpose of the legislation requires a purpose-oriented approach, which gives due consideration to the contextual framework right from the outset.'[24] This means that the Zimbabwe courts must consider the purpose of the Constitution as an overarching legislative instrument. The purpose of a Constitution is found in the country's history. The judges will have to therefore engage with the historical context and give life to the 2013 Constitution. This is necessary to optimize the transformation process in Zimbabwe. There is need to interpret the Constitution in a manner that is cognisant of the social, economic, political and cultural experiences of the country.

This will need to be developed with a consideration of the transformative framework anchored in the interpretation and adjudication of human rights cases. There is need for the

[23] Willy Mutunga captures this: 'Our Constitution cannot be interpreted as a legal-centric letter and text. It is a document whose text and spirit has various elements built within its content, as amplified by the Supreme Court Act that is not solely reflective of legal phenomena. This content reflects historical, economic, social, cultural, and political setting of the country and also its traditions.' W Mutunga "The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme court's decisions" (2015) 1 (6) *SPECJU* 13.

[24] A Singh "The Impact of the Constitution on Transforming the Process of Statutory Interpretation in South Africa." PhD Thesis. *University of KwaZulu-Natal*. (Unpublished). (2014). 47-48.

Judges to build a consensus around such a framework to develop the country's legal and political space in a direction that is informed by the rule of law, human rights and democracy.

- Using a value-based/teleological approach

The spirit and the values of the Constitution must be at the centre of all legal interpretation in Zimbabwe. The idea of constitutionalism must be manifested through the decisions of the Court as the guardian of the Constitution. This involves a change of attitude by the judiciary and synchronising their conduct with the hopes and aspirations of the people. There is no doubt that the Zimbabwe people aspire for a transformed society, and this value should always be at the centre of all the Courts' decisions. Zimbabwe has a tainted human rights record, arising from a history of authoritarianism and a culture of political violence. The Constitution[25] could not do much to curtail these. Thus, in interpreting the 2013 Constitution, the Court must examine the events leading up to its adoption and ascertain meaning accordingly. This is achieved by attaching 'less than the usual weight to linguistic and purposive considerations and more than the usual weight to general legal values.'[26] The Constitutional Court's interpretation of sections 59 and 86 in the case of *DARE v Newbert Saunyama*[27] can be used as the basis upon which a new interpretation trajectory can be founded. In the *DARE* case, the Court broadly interpreted Section 59 which affords rights, and narrowly interpreted section 86 which limits rights. This has the effect of widening the enjoyment of the constitutional rights and restricting the operation of the limiting provisions, because of the human rights values found in the Constitution.

6.4.2 Constitutional adjudication

- Tactical adjudication

Beyond just interpretation, to achieve transformation, the way a judgement is delivered or crafted is just as important as the decision itself. It has been observed throughout this thesis that the main challenge inhibiting transformation is the backlash that may arise from the

[25] The Constitution of Zimbabwe, 1980.

[26] Mureinik "Administrative Law in South Africa" (1983) 3 *South African Law Journal* cited by Singh (n 19 above) at 54.

[27] *Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama & Ors* CCZ 09/18.

political arms towards the judiciary. As a consequence of the adoption of a constitution as the supreme law, judicial intervention in politics becomes inevitable.[28] According to Roux 'by exploiting ambiguities in the normative structure governing their decisions, courts can manage their relationship with the political branches to a considerable degree.'[29] It is thus important that the Zimbabwe Constitutional Court be prepared to manage its relationship with the political branches. The most important thing for a Constitutional Court is to stay 'in business long enough to give meaningful effect to constitutional rights.'[30] In so doing a court has to enlist several techniques during its adjudication. Lessons can be drawn from the South African where the Courts have been able to freely adjudicate on matters that ordinarily would be dealt with by the Executive and Legislature. This is despite the existence of "separation of powers" as one of the guiding principles in the country. In terms of the Constitution, the power to declare any law or conduct of the State as unconstitutional is vested in the Constitutional Court. Transformative adjudication requires that the courts embrace transition as was envisioned by the drafters of the Constitution. In South Africa, one of the ways that have been used by the courts to avoid confrontation with the State is by acknowledging that social transformation is a duty which primarily rests with the State.

It is recommended that in the discharge of its duties, the Constitutional Court must not lose its independent reasoning and judgment. The Constitutional Court should make decisions that are conscious of Zimbabwe's peculiarities and context. In particular, the Zimbabwe people longstanding yearn from the respect of human rights, advancement of rule of law and struggle for democracy should be at the centre of the court's reasoning.

Drawing from Roux's tactical adjudication, it is recommended that the Zimbabwean courts develop their own model of adjudication. Roux's analysis of South African courts adjudication may not fit squarely into the Zimbabwean context but this may be used as a foundation of reasoning of a similar nature. Flowing from that, the following is recommended;

[28] T Roux. "Legitimating transformation: political resource allocation in the South African Constitutional Court." (2003) 10 (4) *Democratization*. 92-111 at 92.

[29] Ibid at 93.

[30] T Roux "Tactical adjudication: How the Constitutional Court of South Africa survived its first decade" [unpublished].

a) 'Doctrinally redundant language to set the tone of its judgements.'[31]

This is done by using scene-setting language, the tone or register will justify the decision made. According to Roux, the tone or register used in a judgment are as important as legal reasoning in the decision itself. As such, the court has to be wary of its word choice and the language framing its language.[32] The South African Constitutional Court has particularly used this in order to maintain its institutional role. Roux notes that 'in other cases, when finding in favour of the state, it (the Court) will resoundingly endorse the policy in question, often going quite far beyond what is necessary for purposes of making its decision.'[33] This indicates that the tone or register used in a decision may help deliver a message in a way that is not confrontational thereby avoiding political backlash.

b) 'Preference for formulaic tests over substantial moral reasoning.'[34]

The decisions of the South African Constitutional Court are particularly instructive in this regard. They have often 'eschewed substantive moral reasoning in favour of casuistry or the articulation of formulaic tests.'[35] This involves designing tests for the application of certain rights guided by moral premises that seek to expand the application of the right in question. This is done by means of interpreting legal texts, the constitution in particular, in a way that does not invite substantial moral reasoning. Roux acknowledges that this is not always applicable in all, there are some rights whose 'philosophical dimensions cannot be sidestepped.'[36]

c) 'The conversion of conceptual tests into discretionary standards.'[37]

This is especially important in helping the Court to avoid being stuck on pre-conceived meanings and to use its discretion to determine what should be within the confines of the Constitution. As used in South Africa, such adjudicative moves 'are not unconscious or whimsical. They are a part of a deliberate strategy on the part of the CCSA [Constitutional

[31] Ibid at 12.

[32] Roux (n30 above).

[33] Ibid at 13.

[34] Ibid at 16.

[35] Ibid at 17.

[36] Ibid at 18

[37] Ibid at 19.

Court of South Africa] to make the performance of its adjudicative function more context-sensitive.'[38] 4

d) 'Interpreting constitutional texts so as to ensure pragmatic outcomes.'[39]

This strategy complements the recommended purposive and teleological methods of interpretation. It is pragmatic in the sense that the provisions are construed in a way that gives effect to the purposes and values that underly the new constitutional dispensation. This strategy is aligned with the notion that transformative constitutions should be afforded generous or broad purposive interpretation. According to Roux, the purposive approach requires that 'any ambiguity in the constitutional text must be resolved in favour of the interpretation that would best give effect to the purposes and values underlying the new constitutional order.'[40] This however can mean different things for different jurisdictions. In more democratic jurisdictions, broad interpretation can be used to afford more rights and in authoritarian jurisdictions, broad interpretation can be used to yield adverse results.

6.4.3 Restoration of judicial independence

Given the perceived impact of Constitutional Amendment 1 on the independence of the judiciary, the Amendment must be repealed or amended and provisions relating to the appointment of judges be restored to their original form. Amendment 1 currently impedes the judges from executing their role without fear or favour which is fundamentally detrimental to transformation project envisaged in the Constitution. Zimbabwe needs to draw lessons from the experience of Kenya and South Africa on how strong state institutions can be used to build or support an independent judiciary. From a political point of view, striking a balance of power between the Executive and Legislature would be a starting point for the restoration of judicial independence.

I hope that this work will spark a more rigorous debate on the role of the Constitutional Court of Zimbabwe in the transformative agenda espoused in the Constitution. The precarious position that the Court finds itself in should not be underestimated, both legally and politically. Despite the odds, a more adventurous court would be more desirable than

[38] Ibid at 21.

[39] Ibid at 22.

[40] Ibid at 23.

a timid one because the stakes are too high. There is a genuine need for transformation in Zimbabwe in respect to the promotion and protection of civil and political rights.

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