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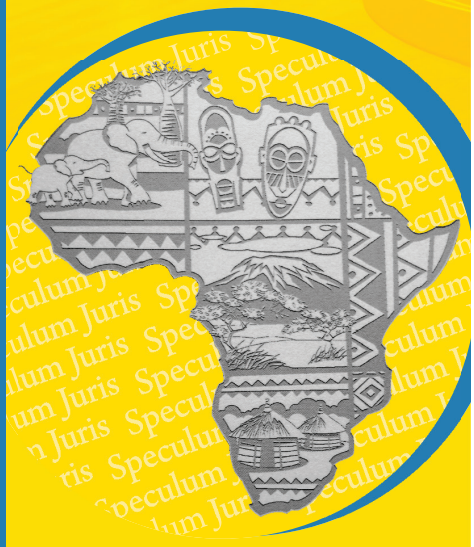

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The Constitutional Courts of South Africa and Zimbabwe: A contextual analysis

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Abstract

This paper is a contextual analysis of the Constitutional Courts of South Africa and Zimbabwe. Both Courts are founded on approximately identical constitutional provisions, but have proceeded on markedly different jurisprudential trajectories. Whilst the South African Court is celebrated for delivering on the "promise" of judicial review, the Zimbabwean Court is generally viewed as a captured institution, subject to the whims of the executive. This understanding of courts as a binary between those enabling of and those constraining against executive and legislative power risks generalizing and falsely homogenizing the process by which courts claim and exercise power. It also fails to account for the reasons why courts, even those in authoritarian regimes, remain productive sites of human rights enforcement. This also has the adverse effect of unduly crediting written law as the sole source of judicial power without accounting for contextual influences which enable or constrain the exercise of that power. This paper investigates judicial exercise of power in two countries in which different operating contexts resulted in markedly distinct approaches to judicial review in spite of largely similar constitutional frameworks. It posits that such a contextual approach allows for more accurate understandings of claims and use of judicial power which can inform efforts to enhance constitutionalism and rule of law beyond pedantic efforts at effecting constitutional transplants.

Keywords: Courts, Human Rights, Constitutional law, Legal history

1 INTRODUCTION

This paper engages in a contextual analysis of the Constitutional Courts of South Africa and Zimbabwe. Both Courts are founded on almost identical constitutional provisions but have proceeded on markedly different jurisprudential trajectories. Whilst the South African Constitutional Court is celebrated for delivering on the "promise" of judicial review, the Zimbabwean Constitutional Court is generally viewed as a captured institution, subject to the whims of the executive.[1] This understanding of courts as a binary between those enabling and those constraining executive and legislative power risks generalising and falsely homogenising the process by which courts claim and exercise power. It also fails to account for the reasons why courts, even those in authoritarian regimes, remain productive sites of human rights enforcement. This has the adverse effect of unduly crediting written law as the sole source of judicial power without accounting for contextual influences that facilitate or forestall the exercise of that power. In the words of Heinz Klug:

> Focusing on constitutional interpretation … fails to question how courts achieve the power, often in direct contradiction to a legislative majority or a popularly elected executive, to decide on issues of fundamental social importance. The doctrinal response is, of course, to point to the sections of the Constitution which explicitly grant the Court the power of judicial review, or failing which to refer to case law in which the power was assumed. This response, however, fails in the face of a history in which courts, even when explicitly granted powers of judicial review, have either been 'executive-minded' in their deference to the executive or just failed to exercise this authority.[2]

Tamir Moustafa and Tom Ginsburg further warn that the "assumption that courts serve as handmaidens of rulers obscures the strategic choices that judges make in authoritarian contexts, just as they do in democratic contexts".[3] This Paper investigates the judicial exercise of power in two countries in which different operating contexts resulted in distinct approaches to judicial review in spite of largely similar constitutional frameworks. It posits that such a contextual approach allows for more accurate understandings of claims and use of judicial power which can inform efforts to enhance constitutionalism and the rule of law beyond pedantic attempts at effecting constitutional transplants.

2 INSTITUTIONAL SIMILARITIES AND DIFFERENCES

South Africa established its Constitutional Court in 1994 as part of its transition from apartheid to democracy.[4] This was meant, in part, to restore confidence in a judiciary plagued by perceptions of complicity with the crimes of apartheid.[5] The court went on to distinguish itself in defending the Constitution of the Republic of South Africa, 1996 (Constitution) and remains one of the most consistently celebrated outcomes of South Africa's democratic transition.[6] The Constitutional Court was retained in the Constitution with a Bill of Rights which approximates to the Interim Constitution.[7] In 2013, Zimbabwe created a Constitutional Court as part of its constitution-making process.[8] Unlike the South African equivalent, the Zimbabwean Constitutional Court was criticised from the moment it delivered its first judgment for continuing the tradition of deference to the late President Robert Mugabe (as he then was).[9] As will be discussed in full below, the Zimbabwean Constitutional Court has consistently avoided confrontation with the executive, preferring to exercise its power only in areas peripheral to the core interests of the regime.

This difference in approaches to judicial review is noteworthy considering the institutional similarities between the two courts. They are both the highest courts in constitutional matters,[10] both preside over constitutional democracies granting them the power to declare any law or

2 Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) 139.

3 Moustafa & Ginsburg "Introduction: The Functions of Courts in Authoritarian Politics" in Ginsburg & Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) 1 14.

5 As above. See also Klug *The Constitution of South Africa: A Contextual Analysis* (2010) 228: "For the majority of South Africans, the law and the judicial system were directly implicated in the construction and daily functioning of the apartheid system."

9 See for instance, Matyszak "New Bottles: Old Wine – An Analysis of the Constitutional Court Judgement on Election Dates" https://researchandadvocacyunit.wordpress.com/2013/06/04/new-bottles-old-wine-an-analysis-of-the-constitutional-court-judgement-on-election-dates/ (accessed 30-11-2020).

10 Section 167(3) of the Constitution; s 167(1) of the Zimbabwean Constitution.

conduct inconsistent with their respective constitutions invalid,[11] they both have jurisdiction to determine the constitutionality of legislation with finality,[12] to determine whether the President or Parliament have failed to fulfil a constitutional obligation,[13] and make the final decision regarding the constitutionality of the conduct of the President and Parliament.[14] Furthermore, they both determine the constitutionality of a bill on referral from the President,[15] have power to grant direct access to litigants and preside over expansive regimes of justiciable human rights subject to a general limitations clause.[16] The Bill of Rights in South Africa and Declaration of Rights in Zimbabwe generally traverse the same terrain of first- and second-generation rights and are enforceable by persons in the same five categories of those acting in their own interests, those acting on behalf of others who cannot act for themselves, a group or class of persons, anyone acting in the public interest and an association of members.[17]

The respective judicial appointment processes also share important commonalities. In South Africa, the President appoints Constitutional Court judges from a list submitted by the Judicial Service Commission (JSC) after consultation with the Chief Justice and leaders of political parties in the National Assembly.[18] In Zimbabwe, the President appoints judges to the court from a list submitted by the JSC.[19] In both instances, the JSC submits three nominees per vacancy and is required to provide a supplementary and final list if the President finds the first list unsatisfactory. In Zimbabwe, the President appoints the Chief Justice, Deputy Chief Justice, and Judge President of the High Court after consultation with the JSC.[20] In South Africa, the President appoints the Chief Justice and Deputy Justice after consultation with the JSC and leaders of political parties in the National Assembly, but only the JSC is consulted in the appointment of the President and Deputy President of the Supreme Court of Appeal.[21] Thus, South Africa incorporates political parties and the Chief Justice in the consultation process, barring which the appointment process is identical to that in Zimbabwe.

In certain respects, the two courts are quite different. For instance, the South African Constitutional Court has greater latitude when the President refers a bill, with the power to declare it unconstitutional.[22] The Zimbabwean Constitutional Court can only advise on such bill's constitutionality.[23] Both Courts allow direct access only when it is in the interests of justice[24] and also allow for direct appeals from other courts.[25] Unlike in South Africa, the Zimbabwean Constitutional Court also entertains cases referred directly from lower courts, to determine a constitutional question.[26] The South African Constitutional Court is also granted the vast power to rule on the validity of constitutional amendments.[27] Since Zimbabwe is a unitary state whilst South Africa is a federation but in name, the court in Zimbabwe determines disputes over elections of the President and Vice President[28] whilst the South African Constitutional Court deals with disputes between various organs of state in the national and provincial spheres.[29] In South Africa, minority members of the National Assembly can refer Acts of Parliament to the Constitutional Court,[30] whereas in Zimbabwe members of Parliament can only challenge the dissolution of Parliament.[31] The mandate of the South African Constitutional Court was

11 Section 172(1) of the Constitution; s 175(6) of the Zimbabwean Constitution.
12 Section 167(5) of the Constitution; s 167(3) of the Zimbabwean Constitution.
13 Section 167(4)(*e*) & 167 (3) of the Constitution; s 167(2)(*d*) of the Zimbabwean Constitution.
14 Section 167(3) of the Constitution; s 167(1) of the Zimbabwean Constitution.
15 Section 79(4) of the Constitution; s 110(2) of the Zimbabwean Constitution. However, whilst the South African Court can decide on constitutionality, the Zimbabwean Court can only advise.
16 Chapters 2 & 4 of the Constitution.
17 Sections 38 & 85 of the Constitution.
18 Section 174(4) of the Constitution.
19 Section 180 of the Zimbabwean Constitution.
20 Section 180(2) of the Zimbabwean Constitution.
21 Section 174(3) of the Constitution.
22 Section 79(4) of the Constitution.
23 Section 110(2) of the Zimbabwean Constitution.
24 Section 167(6)(*a*) of the Constitution; s 167(5)(*a*) of the Zimbabwean Constitution.
25 Section 167(6)(*b*) of the Constitution; s 167(5)(*b*) of the Zimbabwean Constitution.
26 Section 175(4) of the Constitution. The Interim Constitution of South Africa contained a similar provision: see s 102 of the Interim Constitution.
27 Section 167(4)(d) of the Constitution. See also Adebe "The substantive validity of constitutional amendments in South Africa" 2014 *South African Law Journal* 656.
28 Section 93 of the Zimbabwean Constitution.
29 Section 167(4)(*a*) of the Constitution.
30 Section 80 of the Constitution.
31 Section 143(4) of the Zimbabwean Constitution.

also recently expanded, making it the highest court in all matters, including non-constitutional matters which raise "an arguable point of law of general public importance".[32]

Despite these differences, the two courts still share a preponderance of similarities. Notwithstanding those similarities, the courts' exercise of judicial review has remained strikingly dissimilar. The first important judgment from the Constitutional Court of South Africa struck down the death penalty as unconstitutional.[33] The Court then went on to rule in favour of same-sex marriage,[34] determined that the government is required to provide housing to those in intolerable situations[35] and ruled that persons cannot be extradited to countries in which they would face the death penalty.[36] In sharp contrast, the Constitutional Court of Zimbabwe has been less confrontational, opting to deliver progressive outcomes in matters such as striking down child marriages,[37] granting the right of parole to prisoners serving life sentences,[38] allowing dual citizenship,[39] and striking down the law against criminal defamation.[40] The Zimbabwean Constitutional Court has dismissed claims for the legislative powers of the electoral commission to be independent from the Minister of Justice,[41] avoided ruling on the constitutionality of the death penalty,[42] upheld the constitutionality of HIV-based discrimination,[43] dismissed claims for the diaspora vote,[44] for implementation of constitutional devolution of powers[45] and has repeatedly avoided ruling on the constitutionality of the law against insulting the President.[46] If anything, the practice of the Zimbabwean Constitutional Court is congruent with Moustafa and Ginsburg's characterisation of a court that applies "subtle pressure for political reform only at the margins of political life".[47]

Jennifer Widner and Daniel Scher point out that the origins of an institution "may be highly idiosyncratic, based on contextually specific distributions of preferences and bargaining choices".[48] Given the importance of institutional origins in understanding strategic and methodological choices, the next section evaluates the early years of both courts when they were dealing with their newfound powers as ultimate arbiters of constitutional meaning. It is concerned with this interaction between institutional origins, contextual influences, and jurisprudential outcomes.

3 THE CONSTITUTIONAL COURT OF SOUTH AFRICA

3 1 Democratic transition and novelty

The South African Constitutional Court is a creature of the post-apartheid Constitutions of respectively 1993 and 1996. The two constitutions facilitated a "constitutional revolution" by replacing parliamentary sovereignty with constitutional democracy.[49] Prior to 1993, the Parliament of South Africa had plenary powers, which included the power to, "make any encroachment … upon the life, liberty or property of any individual subject to its sway, and that it … [was] the function of the courts of law to enforce its will".[50] Thus, the establishment of judicial review in the post-apartheid era was "a very new development".[51] It meant that the South African Constitutional Court was created coeval to the rejection of parliamentary

32 Section 167(3)(*b*)(ii) of the Constitution introduced by the Constitution of South Africa, Seventeenth Amendment Act, 2012.
33 *S v Makwanyane* 1995 3 SA 391 (CC).
34 *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).
35 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).
36 *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC).
37 *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs NO* (2015) CCZ 12/15.
38 *Makoni v Commissioner of Prisons* (2016) CCZ 8/16.
39 *Mawere v Registrar General* (2013) CCZ 27/13.
40 *Madanhire v Attorney General* (2015) CCZ 2/15. (This was rendered in terms of the old Constitution).
41 *Mavedzenge v Minister of Justice, Legal & Parliamentary Affairs NO* (2018) CCZ 5/18.
42 *Chawira v Minister of Justice, Legal & Parliamentary Affairs NO* (2017) CCZ 3/17.
43 *S v Mpofu* (2016) CCZ 5/16.
44 *Shumba v Minister of Justice, Legal & Parliamentary Affairs NO* (2018) CCZ 4/18.
45 *Nkomo v Minister of Local Government, Rural and Urban Development* (2016) CCZ 6/16.
46 *S v Sibanda* (2017) CCZ 4/17; *S v Mwonzora* (2017) CCZ 17/16; *S v Rusike* (2017) CCZ 17/17.
47 Moustafa & Ginsburg in *Rule by Law* 15.
48 Widner & Scher "Building Judicial Independence in Semi-Democracies: Uganda and Zimbabwe" in Ginsburg & Moustafa *Rule by Law* 258.
49 Klug *The Constitution of South Africa* 6.
50 *Sachs v Minister of Justice* 1934 AD 11, 37.
51 Klug *The Constitution of South Africa* 7.

sovereignty and acceptance of constitutional checks on the democratic majority.[52]

In other words, the South African Constitutional Court was an entirely new institution created as part of a transition from parliamentary sovereignty to constitutional democracy. The court increased its own symbolic authority by locating itself within a physical space accentuating its transformational role. It had originally been located in a business park in Johannesburg, but moved to a site which used to be a cluster of prisons, the Old Fort.[53] Parts of the court were built using bricks from the prison cells, underscoring the court's transformational role in the democratic transition. The court went on to implement "transformative constitutionalism" which is "a rejection of the negative past, a generous interpretation of rights and a commitment to "inducing large-scale social change through non-violent political processes grounded in law".[54]

The novelty of the court meant it was, at least institutionally, untainted by the sordid history of apartheid. This enabled it to galvanise its symbolic authority to strike down laws and practices as a consolidation of, rather than a threat against, democratic transition. Both the 1993 and 1996 Constitutions contained saving provisions for all laws in force when the constitutions came into effect.[55] This necessarily required the amendment, repealing or striking down of apartheid-era legislation to enable a departure from the apartheid era.[56] The historical association of draconian laws with apartheid reduced the likelihood of political backlash if the courts struck them down as unconstitutional. This emboldened the court, whose work in getting rid of such laws was embraced as "the triumph of human rights standards over the legacies of apartheid".[57]

3 2 Participation in constitution-making

The South African Constitutional Court was established prior to, and was integral in, the completion of the constitution-making process. Constitution-making was a two-stage process in South Africa, empowering the newly formed Constitutional Court to certify the final Constitution as compliant with the constitutional principles contained in the Fourth Schedule of the Interim Constitution. This unique power was perhaps emblematic of the negotiating parties' determination to limit parliamentary sovereignty. The outgoing government, which would have been partial to empowering the courts to protect their interests once they were out of power, would have given further impetus to this. Moustafa and Ginsburg have outlined this phenomenon in which "departing hegemons" turn to judicial review to "extend their substantive policies after prospective electoral loss".[58] This likely contributed to elite cohesion around the proposal for constitutional certification by the court.

The process of certification made the court an active participant in constitution-making. The court was able to bring its own institutional concerns to bear, particularly in the First Certification judgment, in which Klug notes that:[59]

> [M]any of the grounds upon which the Court declined to certify the text had institutional implications for the Court. For example, the Court's demands to strengthen the procedures and threshold for amendment of the Bill of Rights, its striking down of attempts to insulate the labour clause from judicial review, and the use of the presumption that a bill passed by the NCOP could be presumed to indicate a national interest overriding separate regional interests to tip the balance against the adequacy of the basket, or set, of regional powers. Thus, without explicit acknowledgement, the Court's approach to the new text indicated a profound concern with guaranteeing the institutional prerogatives of the Court as the institutional repository of the power to decide who decides.

Through this process of certification, the court provided authoritative feedback on the Constitution the content of which it would be entrusted with safeguarding. This likely generated a sense of ownership and responsibility within the court regarding the text of the Final Constitution.

52 Ibid.
53 Klug *The Constitution of South Africa* 241.
54 Klug *The Constitution of South Africa* 242.
55 Schedule 6, s 2 of the Constitution; s 2, 29 of theInterim Constitution.
56 Klug *The Constitution of South Africa* 15.
57 Klug *The Constitution of South Africa* 240.
58 Moustafa & Ginsburg in *Rule by Law* 12.
59 Klug *The Constitution of South Africa* 244–245.

3 3 Composition of the new court

Prior to 1993, the highest court in South Africa was the Appellate Division of the Supreme Court,[60] with the judiciary overwhelmingly white and male. One of the reasons for establishing the Constitutional Court was to address this lack of diversity.[61] However, the then Chief Justice Michael Corbett argued that the new court should be a special chamber within the existing Appellate Division of the Supreme Court.[62] This was opposed by some members of the multi-party negotiations who eventually settled for a compromise between "change and continuity".[63] It was agreed that the new court would be entirely separate but comprised of both new and old judges. The newly elected President was to appoint the Judge President of the Constitutional Court in consultation with Cabinet and the Chief Justice.[64] Four members of the new court were to be existing Supreme Court judges appointed by the newly elected President after consultation with Cabinet and the Chief Justice.[65] The other six members were to be appointed by the newly elected President in consultation with Cabinet and the President of the Constitutional Court from a short-list submitted by the newly formed JSC.[66]

The new appointment process ensured that the majority of the Constitutional Court judges were new appointees. As already highlighted, the judiciary was considered complicit in the crimes of apartheid.[67] Plagued by "popular suspicion and limited legitimacy", scholars noted that the court in the early 1990s had "not yet developed a broad stock of institutional legitimacy".[68] This increased the need for appointment of new judges to bolster institutional legitimacy. It was also necessary to ensure that the incoming government could exercise the core executive function of appointment of judges and thus obviate counter-revolutionary suspicions of the bench. As described by Widner and Scher:[69]

> [W]here a high proportion of the senior members of the judiciary share important background traits with those in government, the likelihood of infringement (to judicial independence) may be lower, simply because communication is better and the judiciary is less likely to be viewed as foreign.

Therefore, the South African Constitutional Court was not only a brand-new institution but had a majority of new appointees, was more diverse and was "largely untainted by apartheid".[70]

3 4 Pragmatic approach

The first significant decision of the South African Constitutional Court was that of *S v Makwanyane* where the court declared the death penalty unconstitutional.[71] The judgment has been used as evidence of the court's "generous and purposive" approach to constitutional rights.[72] The court argued that whilst its decision could be contrary to public opinion, the need to dissociate from the practices of the apartheid era justified its decision. It held[73]

> In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. 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, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.

This is can be interpreted as an appeal from the court. Faced with the need to strike down a

60 Klug *The Constitution of South Africa* 230.
61 Constitutional Court of South Africa "Why did South Africa need a Constitutional Court?" https://www.concourt.org.za/index.php/about-us/history (accessed 30-11-2020).
62 Klug *The Constitution of South Africa* 231.
63 Klug *The Constitution of South Africa* 232.
64 Klug *The Constitution of South Africa* 233.
65 Ibid.
66 Ibid.
67 Klug *The Constitution of South Africa* 225.
68 Klug *The Constitution of South Africa* 228.
69 Widner & Scher in *Rule by Law* 259.
70 Klug *The Constitution of South Africa* 241.
71 *Makwanyane*'s case.
72 Klug *The Constitution of South Africa* 239.
73 *Makwanyane* para 261.

practice which presumably enjoyed popular support, the court grounded its reasoning in the context of the democratic transition. As Klug explains:[74]

> [D]espite what might have been general support for the death penalty, here the Court was, as a new post-apartheid institution, striking down the practice of the old regime, a practice which had been laden with racial disparity and seen as a tool used against those who fought against apartheid.

Even when empowered to strike down unconstitutional law and conduct, the court still referred to the transition from apartheid to justify its decision. It went beyond its constitutionally ordained powers and reached out to the historical context and racial implications of death penalty enforcement to ground its decision against it.

The pragmatism of the court is also evident in the *First Certification* case where the court declined to certify the first draft of the Final Constitution.[75] This was a remarkable decision, more so since it was against the work of South Africa's first democratically elected majority. The court used several devices to justify its decision and placate the nation's elected representatives. It, once again, reached out to the historical legitimacy immanent in the democratic transition, insisting that limiting the powers of the majority was necessitated by the departure from parliamentary sovereignty.[76] To assuage the constitution-makers, the court praised the Constitutional Assembly for having met its constitutional obligations "in general and in respect of the overwhelming majority of its provisions".[77] The court was also cautious in its diction and tone, with a deliberate effort to emphasise that it was not usurping the function of democratic representatives:[78]

Instead of trumpeting its constitutional duty to review the work of the Constitutional Assembly, the Court was careful to point out that the Constitutional Assembly had a large degree of latitude in its interpretation of the principles and that the role of the Constitutional Court was judicial and not political.

This pragmatism can also be gleaned from the court's first decision against the late President Nelson Mandela (as he then was).[79] Just three months after the *Makwanyane* decision, the court declared section 16A of the Local Government Transition Act 209 of 1993 (LGTA) an unconstitutional delegation of legislative power.[80] It implicated President Mandela's use of presidential powers to reverse racially motivated local government demarcations in the Western Cape.[81] The actions of the President were challenged on the basis of provincial autonomy, yet the court opted to evaluate the constitutionality of the legislation conferring such presidential powers.[82] The court followed the approach by the US Supreme Court in *Marbury v Madison*, dealing with the constitutionality of the enabling law rather than the substantive controversy.[83]

This was the court's first decision against an "intensely politicized legislation passed by a democratically elected Parliament and a highly popular President".[84] The court was praised for its willingness to confront the African National Congress (ANC) dominated legislature and executive whilst fulfilling "the promise of judicial review."[85] The *dictum* of the court shows that it "carefully crafted its assertion of constitutional authority so as to placate all the contending parties".[86] The provincial authorities in the Western Cape were content with the decision reversing the President's actions.[87] The court assuaged the executive through tacit approval of the central government's regulatory powers over local government, whilst the legislature was mollified by the court order giving them time to remedy the offending parts of the Act. This strategy of deferring remedies for constitutional breaches to the democratic majority has been

74 Klug *Constituting Democracy* 149.
75 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgement)* 1996 4 SA 744 (CC) para 13.
76 Klug *The Constitution of South Africa* 245.
77 *First Certification Case* para 31.
78 Klug *The Constitution of South Africa* 155.
79 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC).
80 Ibid.
81 Klug *Constituting Democracy* 149.
82 Klug *Constituting Democracy* 150.
83 *Marbury v Madison* 5 US 137 (1803).
84 Klug *Constituting Democracy* 149.
85 Klug *Constituting Democracy* 150.
86 Klug *Constituting Democracy* 148.
87 Klug *Constituting Democracy* 150.

noted as a way of reducing political backlash by giving the majority the final word.[88] It has been formalised into a "weak" form of judicial review in such jurisdictions as New Zealand, Canada and Great Britain.[89] By inviting other branches of government to the remedial process, the Court in South Africa has tailored rulings which draw "acceptance if not unqualified support from all the parties".[90]

This strongly suggests that the success of the Constitutional Court of South Africa is a product of a multiplicity of factors which go beyond the court's legal framework. The democratic transition made it easier for the court to strike down laws and practices from the apartheid era without the fear of counter-majoritarian backlash. The court was a new institution constituted by a majority of new judges and was thus untainted by the history of apartheid. It enhanced its symbolic authority through a strategic geographic location, was involved in constitution-making and used a pragmatic form of judicial review in several politically charged cases. This is not to suggest the court has been entirely free of controversy.[91] However, the court has carefully negotiated "its way through conflicts which could elicit direct attacks on the independence of the judiciary or the tenure of individual judges, and even attempts to restructure the Court's jurisdiction so as to limit the institution's power".[92] The foundation of the court's legitimacy has, according to Klug, been strategic judicial deference in "wielding the power of institutional choice" coupled with assertion of the supreme role of constitutional adjudication.[93]

4 THE CONSTITUTIONAL COURT OF ZIMBABWE

4 1 Composition

The Constitutional Court of Zimbabwe was established in 2013 following a constitutional reform process. Prior to 2013, the Supreme Court was the highest court in constitutional matters.[94] The 2013 Constitution created a Constitutional Court comprising the Chief Justice, Deputy Chief Justice and seven other Supreme Court judges sitting for the first seven years post-Constitution.[95] After this period, the Chief Justice, Deputy Chief Justice and five other Constitutional Court judges will constitute the Constitutional Court.[96]

In South Africa, efforts to create the Constitutional Court as a division of the predominantly white Appellate Division of the Supreme Court were rejected. In Zimbabwe, the Supreme Court judges, who were predominantly appointees of the late President Robert Mugabe, were all retained as the new Constitutional Court judges. There was no corresponding compromise between change and continuity. This resulted in seamless continuity of jurisprudence despite the new procedure for appointment of judges and the introduction of an expansive declaration of rights. The opposition Movement for Democratic Change (MDC) party had sought the retirement of all sitting judges before re-applying in terms of the new appointment procedures.[97] The failure to secure new judicial appointments to the new court was a triumph for legal continuity. Whilst the written law became reformative, the law in action remained decidedly deferential. Thus, similarity of constitutional provisions with South Africa was not likely to result in similarity of jurisprudential outcomes when the pre-2013 judiciary was retained in *toto*.

88 Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013) 26–27.
89 Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008) 24–33.
90 Klug *Constituting Democracy* 153.
91 Klug *The Constitution of South Africa* 236–237. (Detailing the Judge Hlope saga).
92 Klug *Constituting Democracy* 158.
93 Klug *Constituting Democracy* 159. See also Roux "Principle and pragmatism on the Constitutional Court of South Africa" 2009 *International Journal of Constitutional Law* 106.
94 Sections 24(4) & 80(1) of the Zimbabwean Constitution.
95 Schedule 6, s 18(2) of the Zimbabwean Constitution.
96 Section 166(1) & 80(1) of the Zimbabwean Constitution.
97 Magaisa "Five myths behind ZANU PF's proposed constitutional amendment. Big Saturday Read" https://www.bigsr.co.uk/single-post/2016/12/14/Five-myths-behind-ZANU-PF's-proposed-constitutional-amendment (accessed 30-11-2020):
"In fact, we wanted the entire bench to be retired so that all candidates would reapply for judicial office. This is what they had done in Kenya upon adoption of their new Constitution. The judges, who had a permanent representative in the constitutional negotiations and ZANU PF strongly resisted these propositions."

4 2 Absence of democratic transition

The Constitutional Court in Zimbabwe was not established at the cusp or in the aftermath of democratic transition. The opposition parties had lobbied for the establishment of the court anticipating democratic transition and hoping for a Constitutional Court as a "forum in which to seek goals or protections that are at least temporarily otherwise politically unattainable".[98] The ruling party, ZANU-PF, looked to the court as an institution to entrench its incumbency through what Moustafa and Ginsburg describe as social control and the ability to delegate controversial reforms to the judiciary.[99] In this way, ZANU-PF could use the court to "make controversial policies that political elites approve of but cannot publicly champion".[100] These underlying reasons for the bipartisan support in establishing the court are evident in the ways that political party activists sought to leverage the new court for their own interests.

The first judgment of the court was in *Mawarire v Mugabe*,[101] a case dealing with the date of the next elections. Zimbabwe was, at that point, governed by a coalition government under the aegis of the Southern African Development Community (SADC) and the African Union (AU). The late President Robert Mugabe (as he then was) was in a power-sharing arrangement with opposition leader and Prime Minister, Morgan Tsvangirai.[102] Following the enactment of the 2013 Constitution on 22 May 2013, President Mugabe had expressed his desire for an early election.[103] Conversely, the opposition politicians, together with SADC, insisted on electoral reforms prior to the next elections.[104] This left President Mugabe in a fix. He could not dissolve Parliament and set the date of the next elections without the consent of his Prime Minister or indeed his sub-regional peers. However, a litigant, later revealed to be a ZANU-PF activist, approached the Constitutional Court for an early election date. Unsurprisingly, President Mugabe's official response was in support of the activist's assertions. In a highly controversial decision, the court decided, by a vote of seven to two, that the election had to be held no later than on 31 July 2013.[105] The decision was roundly criticised by academics, more so since the court had avoided the plain meaning of the Constitution.[106] It is an apt example of the delegation of controversial decisions to the courts. Faced with political gridlock and potential confrontation with regional peers, it was left to the courts to render a decision which would leave the ruling elites without blemish.

The 2013 Constitution requires challenges of the presidential election to be filed with the Constitutional Court within seven days of the declaration of the winner.[107] This is likely meant to accord such a monumental decision with higher status by granting access to the highest court in constitutional matters. It is also meant to ensure that the matter is determined urgently and with finality. Put differently, the court is meant to exert social control to ensure the electorate is not subjected to a prolonged state of uncertainty. Following the elections of 31 July 2013, Robert Mugabe was declared the winner of the presidential poll. The former Prime Minister filed his challenge in the Constitutional Court whilst also filing an urgent High Court application for the provision of voters' rolls and other materials to support his electoral challenge. When the High Court dismissed his urgent application, he informed the Constitutional Court that he was withdrawing his challenge since he had been denied access to the necessary voting

98 Klug *Constituting Democracy* 156.
99 Moustafa & Ginsburg in *Rule by Law* 10.
100 Ibid.
101 *Mawarire v Mugabe* (2013) CCZ 1/13.
102 Constitution of Zimbabwe (1979) 19th Amend. of 2009.
103 Matyszak "New Bottles: Old Wine – An Analysis of the Constitutional Court Judgement on Election Dates" https://researchandadvocacyunit.wordpress.com/2013/06/04/new-bottles-old-wine-an-analysis-of-the-constitutional-court-judgement-on-election-dates/ (accessed 30-11-2020) .
104 Matyszak "New Bottles: Old Wine – An Analysis of the Constitutional Court Judgement on Election Dates" https://researchandadvocacyunit.wordpress.com/2013/06/04/new-bottles-old-wine-an-analysis-of-the-constitutional-court-judgement-on-election-dates/ (accessed 30-11-2020) .
105 It would be the first and, at the time of writing, last Constitutional Court decision with dissenting judgments in Zimbabwe.
106 Manyatera & Hamadziripi "Electoral democracy in Africa: A critique of Jealousy Mbizvo Mawarire v Robert Gabriel Mugabe N.O. and 4 Others CCZ 1/13" 2013 *University of Botswana Law Journal* 55, 64; See also Matyszak "New Bottles: Old Wine – An Analysis of the Constitutional Court Judgement on Election Dates" https://researchandadvocacyunit.wordpress.com/2013/06/04/new-bottles-old-wine-an-analysis-of-the-constitutional-court-judgement-on-election-dates/ (accessed 30-11-2020).
107 Section 93(1) of the Zimbabwean Constitution.

materials.[108] The court ruled that such withdrawal was itself unconstitutional, insisting that "truth or falsity of allegations of invalidity of an election of a President …(are) given primary recognition and effect at the expense of the individual right of the petitioner or applicant to withdraw the petition or application at any time".[109]

Therefore, the court insisted on exercising its powers even when it was no longer faced with a live controversy. It carried out its role of social control by arguing that the case needed "effective and urgent determination on the merits," to avoid any "simmering political tension and potential disturbance of public peace and tranquillity".[110] Thus, the 2013 Constitution established a new court constituted by old judges, who in turn proactively endorsed the new term of an old president; ensuring that the rapport between the executive and the judiciary would persist, the new constitutional provisions notwithstanding.

In 2018, the court determined the next challenge to the presidential election.[111] Even though the court ruled that the petition had been filed out of time, it still granted audience to the petitioner before dismissing his petition. The court ruled that the petitioner had failed to prove the allegations of electoral impropriety.[112] The refusal to allow a withdrawal in 2013, coupled with the willingness to grant hearing outside of the legally required time frames five years later, strongly suggests that the Zimbabwean Court is keen to exercise its role as its role of social control as the arbiter of the legitimacy of the presidential election.

4 3 Legal continuity

Similar to South Africa, the Zimbabwean Constitution has a saving provision for all laws in force prior to the enactment of its Constitution.[113] However, without new judges or a new president, the provision did not have the same empowering effect. Instead, it redounded in favour of an increasingly lethargic executive tasked with the process of alignment of laws with the Constitution.[114] If the South African Constitutional Court has shown strategic deference in building its institutional legitimacy, then the court in Zimbabwe has adopted such deference as its primary mode of operation. The charge of deference does not necessarily mean the court is or has reneged its constitutional obligations. The full context of the provenance of judicial review in Zimbabwe is important in understanding the methodological preferences of the court.

Like several African British colonies, the Independence Constitution of Zimbabwe was negotiated at Lancaster House.[115] The British played a central role in the discussions, with the resultant draft containing many provisions meant to protect the interests of the white minority. These ranged from reserved parliamentary seats to the enactment of a justiciable declaration of rights.[116] A justiciable declaration of rights had been introduced in the 1961 Constitution, but was largely ineffectual and was consequently removed in 1969.[117] Its reintroduction at independence was highly disputed, more so since it was to be entrusted to the same judges who were complicit in the enforcement of racist colonial laws.[118]

After independence and with a new government formed by the black majority, the predominantly white judiciary shed its pre-colonial reticence. The Supreme Court asserted its powers of judicial review with renewed fervour, stating that it had "wide and unfettered discretion to remedy any proven breach of fundamental rights," whilst adopting a liberal interpretation to fundamental rights.[119] The court upheld the rights of detained persons in spite

108 Matyszak *On the correct path or lost in the forest? An assessment of State Compliance with the New Constitution* (2014) page no?
109 *Tsvangirai v Mugabe* (2017) CCZ 20/17.
110 *Mawarire*'s case.
111 *Chamisa v Mnangagwa* (2018) CCZ 42/18.
112 Ibid.
113 Schedule 6, s 10(4) of the Zimbabwean Constitution; Sched 6, s 2 of the Constitution; s 229 of the Interim Constitution.
114 See for instance, "The Mandate of the Inter-Ministerial Taskforce" https://zimlii.org/system/files/blog/IMT-Newsletter-Edition%20March2017.pdf (accessed 30-11-2020).
115 White *Unpopular Sovereignty Rhodesian Independence and African Decolonization* (2015) 255.
116 Davidow *A Peace in Southern Africa: The Lancaster House Conference on Rhodesia, 1979* (1984) 56.
117 Ncube "The courts of law in Rhodesia and Zimbabwe: Guardians of civilization, human rights and justice or purveyors of repression, injustice and oppression?" in Bhebhe & Ranger (eds) *The Historical Dimensions of Democracy and Human Rights in Zimbabwe Volume One: Pre-colonial and Colonial Legacies* (2001) 99, 108.
118 Karekwaivanane *The Struggle Over State Power in Zimbabwe: Law and Politics Since 1950* (2017) 208.
119 Ncube in *The Historical Dimensions of Democracy* 114.

of the continued state of emergency, insisted on the authority to review ministerial powers and struck down indefinite detention without justification.[120] Whilst this was commended as the enforcement of the rule of law and constitutionalism, the historical dynamics at play set the judiciary and executive on a collision course, as can be gleaned from the words of the Minister of Home Affairs, Herbert Ushewokunze:[121]

> But even after this[,] recalcitrant and reactionary members of the so-called benches still remain masquerading under our hard-won independence as dispensers of justice or, shall I say, injustice by handing down pieces of judgment which smack of subverting the people's government. We inherited in toto the Rhodesian statutes which these self-same magistrates and judges used to avidly and viciously interpret against the guerrillas. What is so different now apart from it being majority rule? Our posture during constitutional negotiations with the British … that the judiciary must be disbanded, can now be understood with a lot of hindsight.

The core executive function of judicial appointments, used to facilitate democratic transition in South Africa, was highly constrained in post-independence Zimbabwe. The government made a conscious effort to reform a bench dominated by non-black judges in all important positions. However, the Supreme Court's consistency in rendering judgments objectionable to the government increased hostility between the executive and the judiciary. Anthony Gubbay CJ publicly berated parliament for constitutional amendments meant to reverse Supreme Court findings.[122] Several Supreme Court and High Court judges also petitioned the President and Cabinet Ministers when the army illegally detained and tortured journalists contrary to court orders.[123] These actions drew sharp criticism from the executive which continued to view the courts as agents of outmoded neo-colonial nostalgia.[124]

The judgments of the Supreme Court, together with its bold actions in defence of the rule of law, boosted the international standing of the court.[125] Nevertheless, regional peers were wary of this strong form of judicial review as noted by Widner and Scher:[126]

> However, chief justices in neighbouring countries occasionally expressed worry that their Zimbabwe counterparts were too public, too visible – that they provoked the ire of the executive and would eventually find themselves closed down. They knew too well the difficulty of dealing with authorities unversed in law who were often highly self-interested and very intolerant of criticism.

The Supreme Court's ruling against President Mugabe's ouster of the jurisdiction of the courts in election petitions proved to be the final straw, with Anthony Gubbay CJ forced to resign shortly thereafter. Subsequently, seven more senior judges resigned within an eighteen-month period.[127] The government radically changed the composition of the Supreme Court and this marked the end of the Gubbay-led Supreme Court.

120 Ibid.
121 Karekwaivanane *The Struggle Over State Power in Zimbabwe* 208.
122 Karekwaivanane *The Struggle Over State Power in Zimbabwe* 212.
123 Karekwaivanane *The Struggle Over State Power in Zimbabwe* 228.
124 Karekwaivanane *The Struggle Over State Power in Zimbabwe* 208. (President Mugabe described this as 'an act of utter indiscretion … an outrageous and deliberate act of impudence').
125 Widner & Scher *Rule by Law* 248.
126 As above.
127 Karekwaivanane *The Struggle Over State Power in Zimbabwe* 232–233.

This historical account supports the assertion that the pre-2000 Supreme Court was not as pragmatic as the South African Constitutional Court, a fact exacerbated by its limited diversity and historical ties to colonialism. The post-2000 court exercised its powers in matters which would not place the judiciary in direct confrontation with the executive. They had witnessed first-hand the pitfalls so strenuously avoided by the Constitutional Court of South Africa in *Executive Council of Western Cape* and the US Supreme Court in *Marbury*, that is, undermining of the judiciary to the point that court orders are ignored and the court's legitimacy is openly questioned. This was also the fate of the SADC Tribunal which, after a stinging judgment against the Government of Zimbabwe, was suspended and stripped of its human rights mandate.[128] In Russia, the First Constitutional Court was disbanded two years into existence after delivering rulings regarding federalism and executive power in a highly charged political context.[129] The Second Constitutional Court of Russia, established in 1995, was far less pro-active in federalism and executive powers, focusing on less controversial issues like "certain individual rights".[130]

Much like the Second Constitutional Court of Russia, the post-2000 Supreme Court was more deferential to the government, as exemplified by its certification of the government's land reform programme.[131] That is not to say that it did not render important decisions in some human rights cases. Indeed, it condemned some police holding cells as unconstitutional,[132] granted women the right to acquire passports for minor children without a male spouse,[133] struck down a part of the laws against publishing falsehoods prejudicial to the state,[134] and stayed prosecution against a prominent human rights activist because she had been tortured.[135] The court delivered these rulings whilst steadfastly protecting the land reform exercise and steering away from matters involving core regime interests.[136] By the time the Constitutional Court was created, the judiciary had been sufficiently reformed with "a high proportion of the senior members of the judiciary…(sharing) important background traits with those in government".[137] Given this history, the court was not likely to revisit the strong form of judicial review which resulted in the demise of the Gubbay-led Supreme Court.

4 4 Participation in constitution-making

The failure to provide an opportunity for participation in constitution-making has been seen as a hindrance to the legitimacy and implementation of constitutional text.[138] In Zimbabwe, the constitution-making process concluded in 2013 and was led by the legislature through the Constitutional Parliamentary Committee (COPAC). This body established outreach teams which included civil society, churches, and other groups. The judiciary participated in constitution-making and was given permanent representation in COPAC proceedings.[139] However, they were not accorded the same veto powers as the Constitutional Court in South Africa. There were no constitutional principles, and the draft was not sent to the judiciary for approval. Instead, it was conferred with popular approval through a referendum. Compared with the South African process, it is fair to say that the judiciary in Zimbabwe participated in, but was peripheral to, the constitution-making process.

130 Gilbert & Guim *Active Virtues* 20 (29 May 2018) (unpublished draft).

The absence of a decisive role for the judiciary in constitution-making may have increased tension between some constitution-makers and its authoritative interpreters. This is a particularly salient point considering the fact that the previous constitution-making exercise in Zimbabwe had been led by a High Court judge.[140] After the enactment of the Constitution, it became apparent that some constitution-makers believed or at least were willing to advance the argument that they had entrusted their constitutional understanding to the bench, and thus remained the ultimate repositories of its meaning. In other words, what appeared to be a parliamentary led process of eliciting the public's views to be safeguarded by the courts was unravelled to have been a process of seeking public endorsement of elite decision-making. In a latent version of American constitutional originalism, some COPAC members would later file constitutional cases and make authoritative assertions not just as litigants or litigators, but referring to themselves in the abstract as "Founding Fathers".[141] A considerable number of opposition politicians who had been members of COPAC approached the Constitutional Court as litigators and litigants,[142] drawing on the South African experience to argue that the 2013 Constitution represented a radical break with the past and was fully justiciable.[143]

Since the judiciary was not part of the constitution-making process, it was highly unlikely that judges would defer their authoritative role to "Founding Fathers". Appeals to the constitutional framers are probably relevant in a context in which there is widespread popularity of constitutional origins such as in the US.[144] As Klug points out, judicial review is anchored on the "judiciary's seizing of a supreme role in the interpretation of constitutional rights, which is both historically consistent with the judicial function and is premised upon the self-allocation of the interpretive power".[145] Dejonge Matthias explains the limits of the principal-agent relationship of trusteeship in constitutional adjudication:

> In systems of constitutional trusteeship, political elites are never principals in their relation with constitutional judges, because the only way to overturn their decision is by amending the constitution, which is practically impossible in many countries. It is true that officials are still able to influence the constitutional courts by appointing the judges, but ultimately the power to control constitutional development has shifted to the judges themselves.[146]

The power having so shifted to the judges, the court proceeded to stamp its authority and insist on legal continuity at the expense of those constitution-makers who believed they had introduced a break with the past. Just as the Court in South Africa used the First Certification case to address its own institutional concerns, the Court in Zimbabwe used constitutional adjudication to assert its own understanding of judicial review. The efforts to increase democratic space and liberalise constitutional interpretation have, to this extent, suffered due to this tension.

This was also the fate of the justiciability of the Constitution. The power of courts to invalidate any law or conduct inconsistent with the Constitution has been used in South Africa even when the alleged infringement is outside the Bill of Rights.[147] The Zimbabwean Court has rebuffed appeals to exercise this power in similar circumstances, ruling that the Constitution is only justiciable to the extent it provides enforcement mechanisms for the specific provision.[148] In other words, it is only such sections of the Constitution as the Declaration of Rights and the right to a free and fair presidential election which are justiciable. Whilst some litigants and litigators have made every effort to pull the court in the direction of the more liberal jurisprudence from South Africa, the court has insisted on an approach informed by its own unique history and constitutional philosophy.

To the extent illustrated above, the Court in Zimbabwe was limited by the absence of democratic transition and the retention of judicial officers whose tenure pre-dated the constitution's enactment. The demise of the Gubbay-led Supreme Court, together with the absence of an authoritative role for the judiciary in constitution-making may have also encouraged the court to remain steadfastly deferential to the executive. According to Gilbert and Guim, exercising such "passive virtues" is not necessarily a bad practice, particularly in "new and faltering democracies, where judicial independence and the rule of law are aspirational".[149] Even the US Supreme Court has used these passive virtues, more poignantly after its finding in *Brown v Board of Education*[150] when it was inundated with cases to do with racial segregation. According to Gilbert and Guim, many such cases were avoided, in part to defend the gains of *Brown* by allowing people to "adjust to the concept of non-segregated public education".[151] This does not mean that avoidance is a universal good. It can potentially stunt the development of law and undermine the court's reputation.[152] Courts can also be guilty of "leisure-seeking judicial behavior" through which they use the device of avoidance only to reduce their workload or focus exclusively on issues they are familiar with rather handle more controversial or complex cases.[153]

However, context remains crucially important in understanding approaches to judicial review. In the words of Moustafa and Ginsburg, referring to authoritarian settings:[154]

> Judges are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime.

It seems counter-intuitive to recommend or require courts to exercise a strong form of judicial review before their legitimacy is as well established as that of the courts which popularised it. The words of Widner and Scher ring true in respect of this strong form judicial review exercised in the pre-2000 era: [155]

> The Zimbabwe judgments, which were often elegant, tended to be more hardhitting, and sharp public statements by judges in the years before the clash may have aggravated relationships. Human rights lawyers might disagree with this assessment, but it is always well to remember that the U.S. Supreme Court issued the murky Marbury in a charged atmosphere and exercised restraint subsequently, gradually building a reservoir of trust.

5 CONCLUSION

Even though the South African and Zimbabwean Constitutional Courts are founded on almost identical constitutional provisions, their historical and political contexts are markedly different. The Zimbabwean Constitutional Court and the country's 2013 Constitution may have been modelled to aspire to the success story south of the Limpopo River, but the constitutional transplant has been, thus far, largely ineffectual due to many factors including the absence of a democratic transition and continuity of the same judicial officers. Faced with the reality of legal continuity after the promise of change, the opposition politicians tried to leverage the new court to effect hard reforms which were unattainable in the political sphere. This proclivity for strong judicial review in the absence of sufficient institutional legitimacy led to the demise of the Gubbay-led Supreme Court, the SADC Tribunal and First Russian Constitutional Court. On the other hand, the South African Constitutional Court, used a pragmatic approach in important cases to reduce the likelihood of political backlash whilst building its own institutional legitimacy. This presents an important comparator for courts such as those in Zimbabwe, especially since the progressive judgments from the Zimbabwean Constitutional Court provide evidence that it remains a productive site of human rights enforcement. The Constitutional Court of Zimbabwe will be formally separated from the Supreme Court in 2020.[156] The ruling ZANU-PF party's dominance over the judicial appointment process means this separation will not likely result in a disconnect with its ideological preferences. However, the need to strategically build institutional legitimacy in a jurisdiction with a dominant political party is probably the most important lesson from the South African Constitutional Court as the Zimbabwean Constitutional Court approaches the new epoch following formal separation.