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Democracy in Africa

Regression and Resilience

EDITORS
Laura-Stella Enonchong, Elvis Fokala and Adem Kassie Abebe

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Foreword

The late Chinua Achebe, one of Africa's renowned poets and novelists, is famous for his numerous quotes on democracy which are informed by African history and literature. Most of these quotes remain relevant in modern Africa societies and the prevailing political landscape. He once noted that,

> 'A functioning, robust democracy requires a healthy educated, participatory followership, and an educated, morally grounded leadership.'

Achebe underscored the importance of empowered citizens who are able to qualitatively and meaningfully participate in democratic processes on one hand, and the importance of trustworthy, committed, selfless and focused leadership on the other, moving towards a common goal, if democracy is to serve its purpose.

Achebe is also credited for stating that,

> 'Democracy is not something you put away for ten years, and then in the 11th year you wake up and start practicing again…'

This underscores the fact that, democratic process is not an event, but rather, an ongoing process hence the need for commitment and resilience.

These two quotes bring into perspective important ingredients of democracy, namely, the centrality of the people, the importance of leadership and the essence of time. This is true not only from the African perspective, but the world over.

It is against this backdrop that Konrad Adenauer Stiftung under the aegis of its Rule of Law Program for Anglophone Sub-Saharan Africa partnered with the African Network of Constitutional Lawyers (ANCL*)* and the School of Law of the University of Nairobi in convening an international conference (albeit virtually) titled '*Taking Stock of and Checking the Tide of Democratic Regression in Africa*' in 2021 the outcome of which has resulted in this publication.

This is in line with Konrad Adenauer Stiftung's overall objective of *inter alia*, promoting and protecting democracy around the world. This publication accords readers an opportunity to assess the state of democracy in Africa, the challenges it faces and the prospects ahead, as this was discussed in the aforementioned conference and the subsequent research and study undertaken by the authors.

In assessing the trends and developments in Africa, the publication highlights various components that have impacted democracy either progressively or retrogressively on the continent. For instance, it highlights the crucial roles played by various actors in Africa's democratisation process, among them, the increase in institutional and public resilience to retrogressive tendencies which

threaten to undermine democratic growth on the continent. In particular, the judiciary and the manner in which it has progressively interpreted various constitutional provisions, is one of the institutions regarded as becoming more resilient in the promotion and protection of democracy in Africa.

However, the existence of institutions without meaningful involvement and participation of the people in democratic processes is neither enough nor sustainable. In the foregoing, the publication acknowledges the role and place of the public in demanding democratic governance in various jurisdictions on the continent.

Recognising solidarity as an important virtue in Africa, the role of regional and supranational organisations such as the African Union (AU), the various regional economic blocs, namely, the Economic Community of West African States (ECOWAS), the East African Community (EAC), and the Southern African Development Community (SADC) have also been discussed in this publication.

It is our hope that this publication will inspire the people of Africa to relentlessly pursue the ideals and principles of democracy which serve their interests in conformity with their individual and community aspirations.

KAS would like to express its gratitude to our partners, the authors and the editors who worked tirelessly towards making this publication a reality.

Dr. Stefanie Rothenberger
Director
Rule of Law Program for Anglophone Sub Saharan Africa

Preface

Africa has a chequered history with democracy and democratic consolidation with some scholars expressing scepticism regarding the prospects of democratic projects in Africa. This scepticism is perhaps not entirely unfounded. At the same time, the last three decades have unveiled a diverse experience with democratic entrenchment throughout the continent, with some countries experiencing democratic progress, while others have stagnated or regressed. This divergence ignites recurring interests about the prospects for democracy on the continent. The last decade in particular has arguably seen more regression than progress although there are promising signs of democratic resilience.

This book explores the inherent challenges in embedding democracy in Africa. The contributors provide a diverse perspective on democratic governance in selected African states, highlighting the actors and factors responsible for democratic regression in Africa. The authors also reflect on the paradoxical and increasing popular demand for democratic governance at a time when authoritarian regimes are devising innovative strategies to circumvent democratic tenets. This situation is indicative of the continued relevance of democracy in African states and, as highlighted by some authors, demonstrates democratic resilience despite hostile political environments. The authors take this optimism further by exploring the role of regional supranational organisations and the courts in guarding democratic principles and acting as a bulwark against democratic regression. The authors draw from a diverse range of countries in Africa to explain some of the key causes and features of democratic regression and offer practical and contextual insights into measures aimed at strengthening democratic governance in specific African states.

Democracy in Africa will be a valuable resource for scholars interested in democracy, constitutional governance and human rights in Africa. It will be equally valuable to national, continental and international institutions and non-governmental organisations working in the area of democracy, governance and human rights.

Laura-Stella Enonchong is a Senior Lecturer at De Montfort University School of Law, UK. She is Programme Leader for the LLB in Law, Human Rights and Social Justice.

Elvis Fokala is a Project Manager for the Children's Rights Unit at the Centre for Human Rights, University of Pretoria. He holds an LLB (Buea, Cameroon), LLM (University of Pretoria) and PhD in Public International Law (Åbo Akademi University).

Adem K Abebe (LLD) supports constitution building and dialogue processes, particularly in transitions to peace and democracy in politically complex and fragile contexts as part of the Constitution Building Team of the International Institute for Democracy and Electoral Assistance (IDEA), Sweden. He is also extraordinary lecturer at the University of Pretoria, Centre for Human Rights.

March 2022

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A project of this nature usually succeeds with the contribution of many actors, too many to name them here. We would particularly like to express our immense gratitude to Ms Vanja Karth for overseeing all the administrative, logistical and financial aspects relating to this publication. Her expertise and commitment have been invaluable. Thanks also go to the Executive Committee of the ANCL, notably Ms Yvonne Oyieke, Prof Serges Kamga and Dr Azubike Onuora.

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Contributors

Kibet Brian is an LLB candidate at the University of Nairobi. He is also a trainee arbitrator with the Chartered Institute of Arbitrators (Kenya Branch). He has worked as a legal research assistant with the Rights and Resilience in Kenya project which aims to ensure secure and peaceful access to land for climate change adaptation and resilience in Kenya. For his works on Community Land, Kibet was awarded the prestigious C B Madan Award in 2021 in the student's category.

Jacqueline Chikakano is a lawyer currently working with an international development agency as a Media Law Advisor. She worked briefly as a Magistrate and thereafter on democracy, rights and governance issues in local NGOs and international development agencies. She has particular interest in comparative constitutional law, women, children and media related rights including digital law and technology. Jacqueline holds an LLM in Constitutional and Human Rights Law from the Midlands State University.

Olugbemi Jaiyebo is a Senior Lecturer at the College of Law, Achievers University, Owo, Nigeria. He has extensive litigation experience in Nigeria and in the courts of the State of New York, Federal Courts in Louisiana, New Jersey, New York and Pennsylvania. His law teaching and research experience include work at the Faculty of Law, Obafemi Awolowo University, the Faculty of Law, University of Lagos, Institute of African Studies, Columbia University in the City of New York and the College of Law, Osun State University, Nigeria. His research interests and publications include regional organisations, law and governance and business and human rights.

Tanveer Rashid Jeewa is an LLD candidate at the University of Stellenbosch under the South African Research Chair in Property Law, where she is also a research assistant. She holds an LLB and LLM in Public Law from the University of Cape Town, and a Graduate Diploma in Law (UK). She was previously the legal and communications officer at the Africa Regional Programme of the International Commission of Jurists, and a law clerk at the South African Constitutional Court.

O'Brien Kaaba is a Lecturer and Assistant Dean for research in the School of Law at the University of Zambia and a Senior Research Fellow at SAIPAR. Mr Kaaba holds an LLB with Honours from the University of London, an LLM from the University of Zambia and an LLD from the University of South Africa. He has formerly served as Elections Manager for the National Democratic Institute for International Affairs (NDI) in Zambia, Political Specialist for the US Department of State at the American Embassy in Lusaka (Zambia) and as a Human Rights and Rule of Law Advisor for the German Development Cooperation (GIZ) in Zambia.

Sibusiso Nhlabatsi is a human rights lawyer in Eswatini. He is an admitted attorney of the High Court of Eswatini. Sibusiso currently works at the University of Eswatini as Legal Clinic Principal. He is an LLM candidate at UNISA and he holds an LLB Degree and Diploma in Law from the University of Eswatini. In 2016 Sibusiso was meritoriously selected to be part of The Mandela Washington Fellowship for Young African Leaders which is the flagship programme of the Young African Leaders Initiative (YALI) supported by the US Department of States as an initiative of the then US President Obama. After the Fellowship he worked at the International Republican (IRI) Institute in Washington, DC as part of his Professional Development Experience (PDE). He has co-authored and authored various publications in the area of law.

Sfiso Benard Nxumalo is a DPhil Candidate at the University of Oxford. He holds an LLB degree from the University of the Witwatersrand and a BCL degree from the University of Oxford. He is currently the President of the Oxford Law Black Alumni Network and a research assistant. He worked at Bowmans (formerly Bowman Gilfillan) as a candidate attorney. Sfiso also worked as a law clerk at the South African Constitutional Court, under Justice Khampepe and Justice Majiedt.

Walter Khobe Ochieng is a Lecturer at the Department of Public Law, Moi University; Partner at BO Akang'o and Company Advocates; and an Associate Editor of the Platform Magazine. Mr Khobe holds an LLM degree from the University of Pretoria, an LLB (Hons) from Moi University, a Postgraduate Diploma in Legal Practice from the Kenya School of Law, and a Post Graduate Certificate in Constitution Building from the Central European University. He is a doctoral researcher in Constitutional Law at the University of the Witwatersrand. Mr Khobe is an Advocate of the High Court of Kenya.

Alimi Salifou is a visiting researcher at the Nigerian Institute of International Affairs (NIIA) in Lagos. He is a budding and versatile researcher with a focus on constitutionalism, democratisation, urban violence, international relations, AI governance, existential risks, longtermism and effective altruism. He holds an LLM and LLB in Political Science and International Relations, and a BA in British Studies from the University of Abomey-Calavi, Republic of Benin. He regularly shares his research at conferences and has presented papers at the 4th International Conference on the Right to Development 2021, the NIIA Seminar Series 2021, Search for Common Ground – Nigeria's National Stakeholders' Convening on Urban Violence and Emerging Security Challenges.

Introduction

LAURA-STELLA ENONCHONG
ELVIS FOKALA AND ADEM KASSIE ABEBE

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1 INTRODUCTION

Africa remains a puzzling theatre for democracy. In the early 1990s, the continent witnessed a wave of transition to more democratic systems repudiating the authoritarian tendencies that had come to characterise governance in the continent. That laudable effort at instituting more pluralistic democratic societies proved to be beneficial given that Africa recorded democratic progress in some bright spots around the continent, including an increasing number of changes in ruling parties and leadership, such as in Liberia, Sierra Leone, Malawi, and most recently Niger. Despite the progress made, there are still looming challenges affecting the diffusion and entrenchment of democracy as evidenced by the considerable diversity in the levels of democracy across the continent.

Three decades after the 1990s democratic revival, those challenges have impelled progress and the continent appears to be witnessing sporadic advancement with democracy. The overall trajectory on the continent now indicates that there are signs of regression. This pessimistic outlook is not unique to Africa. As noted by prominent democracy scholars, democracy is regressing worldwide.[1] The concern with the state of democracy in the world and in Africa in particular is due largely to the acceptance that democracy is an important value that promotes other values such as good governance, the rule of law and human rights. Democracy provides the conditions that support economic growth, accountability and fairness in the distribution of resources and

[1] J Gerschewski 'Erosion or decay? Conceptualising causes and mechanisms of democratic regression' (2021) 28(1) *Democratization* 43.

opportunities for citizens to flourish. The absence of democracy creates a chasm between sections of the population – between the privileged and less privileged – nurturing conditions for deep dissatisfaction that can eventually precipitate political instability such as protests or military coups. Africa has witnessed its fair share of both. This makes the current concern with the trend of regression of democracy in the continent even more pressing.

2 TRENDS IN DEMOCRATIC REGRESSION

It is important to state at the outset that democratic regression is understood here to mean a decline or loss in democratic quality.[2] Democratic quality is not a value-neutral concept and, as noted by Larry Diamond and Leonardo Morlino, there is no single way of deriving a universal framework applicable to all societies.[3] Nevertheless, they helpfully provide a framework of democratic quality which is composed of eight dimensions captured either under a procedural or a substantive criterion or both.[4] This is outlined below:

- Procedural: This includes rule of law, participation, competition, and vertical plus horizontal accountability.
- Substantive: This includes respect for civil and political freedoms, and the progressive implementation of greater political equality (including social and economic equality).
- Responsiveness: It is through this dimension that public policies can be assessed against the demands of society expressed through the political process. This dimension is both substantive and procedural.

The evidence from Africa unveils a trend of regressive practices which occupy both the procedural and substantive dimensions of the quality of democracy outlined above. A report from Freedom in the World in 2020 highlights a striking democratic decline in sub-Saharan Africa with beacons of democracy, such as Benin and Senegal dropping significantly from a previous rating of 'Free' to 'Partly Free' countries.[5] It appears that the progress gained since the 1990s democratic revival is being eroded due partly to regressive practices such as insidious executive attacks on the opposition, suppression of democratic

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2 Ibid.

3 L Diamond & L Morlino 'The quality of democracy: An overview' (2004) 15(4) *Journal of Democracy* 20 at 22.

4 Ibid.

5 J Temin 'Democratic trends in Africa in four charts' (Freedom House, 17 April 2020), available at https://freedomhouse.org/article/democratic-trends-africa-four-charts, accessed 13 March 2021.

freedoms and other repressive practices aimed at undermining genuine political competition and disenfranchisement of the populations. Regular elections have been a feature of most governments since the 1990s, yet these elections have served to maintain and provide formal legitimacy to the incumbents rather than usher in change in leadership, policy and the fortunes of Africa's billions.

Incumbent governments have sought to restrict democratic participation by undermining human rights through repressive practices such as arbitrary arrests and detention of civil society, media and opposition leaders and politically motivated prosecution on spurious charges, such as terrorism and corruption. In many cases, such actions further antagonise an already aggrieved population and lead to instability. For instance, in Burkina Faso in 2014, protests against undemocratic practices led to the collapse of the government and the exile of the president. In Mali, in 2012, protests also resulted in the collapse of the government and a continued dissatisfaction with the pace of democratic progress led to popular protests which culminated in a military coup in August 2020.

Another noticeable trend in the apparent democratic backsliding is the central role of the law in facilitating undemocratic practices. For instance, constitutional provisions have been amended as a means of extending presidential term limits, often through ordinary constitutional amendment rules.[6] The courts have sometimes been complicit in interpreting constitutional term limit provisions in ways that unconstitutionally extend the terms of office of authoritarian leaders. In 2020 alone, presidential term limits were contravened in at least four African countries.[7] These practices aimed at legitimising authoritarian leadership have weakened democratic consolidation by perpetuating the vices associated with incumbency advantages.[8]

In other instances, the executive has resorted to the adoption of legislative measures purportedly aimed at reforming electoral processes. Yet, many of these measures have the effect of undermining the opposition's ability to engage in the electoral process or to engage on a level platform. Recent electoral reforms in Benin, Burkina Faso, Guinea, Niger and Senegal have restricted political participation by, inter alia, requiring very high percentages of citizen endorsements for political candidates or high levels of endorsement by elected officials or other opponents in the same political contests, or exorbitant financial

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6 L Enonchong 'Unconstitutional constitutional amendment or constitutional dismemberment? A reappraisal of the presidential term limit amendment in Cameroon' (2022) *Global Constitutionalism* 1 at 2.

7 J Siegle 'The erosion of term limits in Africa reflects worrying trend' (Africa Centre for Strategic Studies, February 2021), available at https://africacenter.org/spotlight/erosion-term-limits-africa-reflects-worrying-trend, accessed on 20 September 2021.

8 Enonchong op cit (n6) 2.

deposit requirements for candidates.[9] In many cases, this has had the effect of eliminating opposition candidates from elections. For instance, in 2019, Benin adopted legislative measures requiring election candidates to be endorsed by 10% of parliamentarians or mayors.[10] Although the percentage appears to be small, it has the effect of ousting the main opposition parties from prospective elections, including the recent 11 April 2021 presidential elections given that the ruling party dominates both parliament and local councils.[11]

3 DEMOCRATIC RESILIENCE

Whilst there appears to be a democratic decline in Africa, there is paradoxically evidence of democratic resilience and wide public support for democracy within the continent. The 2020 Freedom in the World Report notes a decline in the number of countries categorised as 'Not Free'. This prompts further questions into whether the trend of democratic regression in Africa is more apparent than real. Or indeed whether democracy is enduring nonetheless. For instance, the recent military coups in 2021 in Chad, Guinea, Mali and Sudan have raised questions about the future of democracy itself given the military's poor history with democracy. Yet, in Guinea and Mali, it was the need for restoring democracy that prompted in part the intervention of the military and that intervention received wide public support for the same reason. These 'promissory coups' and the response of the public in particular indicate that there is still some faith in democracy and therefore its relevance to governance on the continent.

Moreover, despite invidious executive manipulations of the judiciary and attacks on judicial independence, judiciaries in some jurisdictions have firmly protected the rule of law and democracy, particularly in highly controversial elections. The unprecedented nullification of presidential election results by courts in Kenya and Malawi in 2017 and 2019 respectively provided cautious optimism in the potential of the judiciary to play a decisive role in enhancing the quality of democracy within the continent.[12] It also highlighted

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9 D Zounmenou & N Adam 'Electoral reforms are stifling democracy in West Africa' (Institute for Security Studies, 25 March 2021), available at https://issafrica.org/iss-today/electoral-reforms-are-stifling-democracy-in-west-africa, accessed on 13 March 2021.

10 Ibid.

11 D Zounmenou et al 'A third election without main opposition parties in Benin' (Institute for Security Studies, 08 April 2021), available at https://issafrica.org/iss-today/a-third-election-without-main-opposition-parties-in-benin, accessed on 13 March 2021.

12 Gathii & Akinkugbe provide an account of the ways that elections have been judicialised both at the national and regional levels and the reasons for the opposition's

the need for promoting judicial independence as a corollary to a successful democratisation process.

African supranational organisations have also played an important role in the democratisation process, particularly by setting relevant normative standards. It is worth highlighting the African Union and its efforts at norm creation, notably the African Charter on Democracy, Elections and Governance and the African Charter on Human and Peoples' Rights amongst others. Despite the potential for these instruments to revolutionise the way democracy is conceptualised and implemented, there have been significant weaknesses with regard to implementation.

Other organisations such as the Economic Community of West African States (ECOWAS) have made notable contributions to the promotion of democracy in West Africa. ECOWAS has successfully intervened in countries including Burkina Faso, Côte d'Ivoire, Mali, Niger and Guinea. In addition, ECOWAS was instrumental in the 'Operation Restore Democracy' in The Gambia which saw the eventual peaceful transfer of power from Yahya Jammeh to Adama Barrow in 2017.[13] Like ECOWAS, the Southern African Development Community and the East African Community are playing a growing role in initiatives on democracy building in their respective sub-regions. The extent to which these supranational organisations can effectively embed and protect a culture of democracy within African states is unclear. Their efforts are sometimes undermined by inadequate implementation mechanisms, lack of cooperation from member states and financial constraints.

Overall, while the African Union and regional organisations have sought to reject unconstitutional changes of government, they have been unable or slow to stem the tide of unconstitutional exercise and the unconstitutional retention of power, with a few exceptions.[14] These slow continental and sub-regional responses contrast with African aspirations for an open and competitive democratic sphere, generating disillusionment and potentially undermining continental objectives of peace and stability and economic development. Without success in the area of democratic progress, it is difficult to expect significant progress regarding economic integration aspirations captured in the African Continental Free Trade Area.

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resort to the courts in highly contested elections. See JT Gathii & OD Akinkugbe 'Judicialisation of electoral disputes in Africa's international courts' (2021) 84 *Law and Contemporary Problems* 181.

13 C Hartmann 'ECOWAS and the restoration of democracy in the Gambia' (2017) 52(1) *Africa Spectrum* 85.

14 A Abebe & C Fombad 'The African Union and the advancement of democracy: The problem of unconstitutional retention of governmental power' in C Fombad & N Steytler (eds) *Democracy, Elections and Constitutionalism in Africa* (2021) 61.

4 ABOUT THIS COLLECTION

The chapters in this collection originated from the joined African Network of Constitutional Lawyers and the University of Nairobi conference on *Taking Stock of and Checking the Tide of Democratic Regression in Africa*, held virtually on 28 and 29 October 2021. The conference provided an opportune moment to assess the state of democracy in Africa. The conference sessions engaged with debates on democratic developments in the continent, considering representative country experiences and the role of African and sub-regional supranational organisations in promoting and consolidating democracy as well as checking and addressing regressions in democracy on the continent. The conference also provided an opportunity to refine understandings of the concepts of democracy and regression and to consider whether Africa was actually witnessing a democratic regression and potential pathways to reverse the course. From the rich and evocative debates at the conference, a few papers were selected and the authors enthusiastically revised and refined their papers which now appear in this collection.

5 OVERVIEW OF CHAPTERS

The essays in this collection provide an overview of the manifestations of democratic regression and resilience in Africa. They present a diverse picture of contextual factors and actors that contribute to democratic regression and resilience in specific states across the continent. Against that background, the essays explore the effects of regression and what that portends for governance in Africa. The central insights from the collection of essays revolve around the failures of horizontal and vertical mechanisms of accountability in harnessing progressive democratic gains and they reveal the need for mechanisms to protect both procedural and substantive dimensions of democratic quality.

The eight chapters in the volume are divided into three parts. Part one is dedicated to an examination of the response of regional supranational organisations to unconstitutional changes of government. In this part, Olugbemi Jaiyebo's chapter 'The African Union and unconstitutional changes of government in Chad, Mali and The Gambia' analyses the rules of the African Union which prohibit unconstitutional change of government in its member states. In spite of the unequivocal declarations that transfer of power in AU member states must only be through the mechanism of free and fair elections, coups d'état occur periodically on the continent. The conflicting responses by the African Union to violations of democratic norms have been concerning, raising questions on the effectiveness of those norms. The disparate responses to the unconstitutional change of government in Chad, Mali and The Gambia are examined within the context of the different underlying factors responsible for the violations. While admitting the pragmatic approach of the AU to violations of the democratic

norms, the chapter recognises the role of strong sub-regional organisations in the effective implementation of the AU policy. Jaiyebo asserts that within the context of the governance crisis on the continent, attention should be given to the thin line between the norm prohibiting unconstitutional change of government and security of tenure for unresponsive and irresponsible government in Africa. Effective mid-term constitutional interventions and institutionalisation of civilian oversight of the military are recommended as stabilising factors for democratic experiments in Africa.

In part two, the authors explore the role of the judiciary in protecting democratic values and demonstrate how courts can either support or undermine democracy. This part begins with Walter Khobe Ochieng's chapter which argues that freedom of assembly and the right to demonstrate are part of the constituent elements necessary for the establishment of democratic societies. The chapter explores the theme of democratic regression within the context of the protection of the freedom of assembly and the right to demonstrate and the role that the judiciary should play in curbing attempts aimed at democratic regression. Ochieng recommends proportionality analysis of legislation as a suitable jurisprudential tool that can be used by courts to ensure public order legislations remain rights-friendly and thus curb attempts aimed at stifling the democratic space enjoyed by citizens. He takes this proposal forward through a critique of the approaches adopted by domestic courts in Kenya and South Africa in adjudicating cases involving attempts by the state to limit the freedom of assembly and the right to demonstrate. The chapter concludes that domestic courts across the African continent should see proportionality analysis as a doctrinal device or analytical tool that is available to them in rights adjudication in curbing legislative attempts to erode political rights that are essential to the functioning of the democratic system.

The following chapter by Sfiso Nxumalo and Tanveer Jeewa provide an insightful analysis of the role of courts in preventing democratic regression. The central argument of their contribution is that courts are theatres of accountability and uphold the rule of law by ensuring that the public office-bearers are held accountable for their actions. They assert that when public officials make unsubstantiated and unfounded attacks on the judiciary in an attempt to undermine its legitimacy and authority, such attacks are symptomatic of democratic regression and a threat to the rule of law. Their analysis is centred on the recent case of former South African President Jacob Zuma, which culminated in his imprisonment. This is used to support their argument that courts are a vital strut of any constitutional democracy. The authors further assert that the case was a test of the courts' authority and South Africa's commitment to the rule of law. The outcome of the case is conceived as a triumph for the rule of law in South Africa given the courts' assertion of their independence and legitimacy in the midst of a politically charged case. Against that backdrop,

the authors reiterate the relevance of the judiciary as the ultimate authority to check the constitutionality and legality of the executive's exercise of power and possibly, the final defence against democratic regression.

In the next chapter, O'Brien Kaaba highlights the potential impact on democracy when the judiciary fails to uphold the rule of law. His analysis is a reminder of the need to be alert to executive incursions on judicial independence. Kaaba discusses what he considers to be the inadvertent contribution of the newly established Constitutional Court to democratic backlisting in Zambia between 2016 and 2021. Instead of issuing progressive, contextually relevant and pro-democratic decisions, the Zambian Constitutional Court seems to be generating executive-minded jurisprudence which undermines the basic tenets of constitutionalism. Kaaba argues that due to that significant weakness, the Court appears not to be making any positive contribution to the country's democracy. Although the Court is modelled on that of the Constitutional Court of South Africa, Kaaba argues that the Zambian Constitutional Court has failed to model the exemplary approach of the South African Constitutional Court. He asserts that, instead the Zambian Constitutional Court has been a key contributor to democratic backsliding by giving a veneer of legitimacy to government decisions that violate constitutional norms. The chapter provides an analysis of some key decisions of the Court which illustrate the Court's timid response to the executive. It discusses some of the possible reasons for that approach and proffers recommendations aimed at reversing the Court's unsatisfactory contributions to embedding democracy in Zambia.

Part three discusses specific case studies that illustrate patterns of democratic regression in Africa. The chapters in this part complement the preceding part by offering more in-depth reflections on specific manifestations of regression, their causes and consequences.

The first chapter in this part by Alimi Salifou discusses the trajectory of democracy in Benin, once a beacon of democracy in Africa. He analyses the spate of constitutional amendments introduced by the Talon regime and their dismembering effects on Benin's constitutional democracy. These upheavals to the constitution that secured Benin's democracy highlight the innovative ways that some leaders in Africa are introducing undemocratic rules into the political space by manipulating constitutional amendment rules. Salifou argues that the Constitutional Court which had once upheld the rule of law has been instrumental in precipitating the collapse of democracy in Benin. Marred by issues of conflict of interest and lack of judicial independence, the Court has systematically endorsed Talon's legislative and constitutional amendments which have led to the shrinking of the political space and the emasculation of other institutions such as the Autonomous National Electoral Commission. Moreover, political opponents have been the targets of spurious corruption- and terrorism-related charges prosecuted in the Economic Crimes and Terrorism

Repression Court. With the opposition effectively ejected from political competition, Salifou argues that Benin is heading towards a one-party state. Ultimately, the stage is being set for a possible military intervention as has occurred recently in Chad, Burkina Faso and Mali in the guise of restoring democracy.

The next chapter by Sibusiso Nhlabatsi explores the rule of law and democracy in Eswatini against the background of the ongoing political tensions. This is cast in the context of the 'unique' *tinkhundla* system of government that is currently operating in the tiny Kingdom of Eswatini. The chapter provides a detailed, historical background of attempts made over the years to introduce democratic reforms in Eswatini and how the courts, in particular, have protected the traditional establishment. The chapter further analyses the events which led to the unrest of June 2021 and advances reasons to account for the recently amplified calls for democratic reforms after almost five decades of absolute rule. Nhlabatsi provides an interesting analysis of the difficulties inherent in synthesising traditional systems of governance with modern democratic ideals. This is evident in the *tinkhundla* system under which the King can be described as an absolute monarch. It operates alongside a constitution that simultaneously describes Eswatini as a democratic state. Yet, as Nhabatsi demonstrates, the King exercises unrestrained powers which have been used to suppress political freedoms. Nhabatsi contends that, given the recent uprising and growing aspirations of the people, supported by recommendations from regional institutions such as the AU and SADC, democratic reforms are inevitable in the Kingdom of Eswatini.

The following chapter by Kibet Brian offers an alternative account of democratic regression by exploring the role of elections in a democracy. As the chapter demonstrates, elections have often played a vital role in democracies and act as a mechanism through which citizens' views and interests are represented in a genuine democratic process. However, elections in and of themselves are not sufficient to embed democracy. Kibet Brian evaluates the receding quality of elections in Africa and how it has contributed to democratic regression. In doing so, he revisits the Ivorian elections of 2020 and the Ugandan elections of 2021. It is argued that elections held in an environment of violence and civil disobedience are farcical and only lead to poor governance and economic underperformance. He acknowledges that indeed, holding elections regularly is vital for democracy. Nevertheless, more needs to be done to support a robust democratisation process.

The final chapter in this volume by Jacqueline Chikakano reflects the worrying trend of democratic regression witnessed by some states in Africa. It focuses on the apparent democratic regression of Zimbabwe, occasionally viewed from a comparative perspective. The chapter takes a closer look at some of the events that have undermined democratic gains made under the 2013 popularly adopted Constitution. The key issues highlighted relate mainly to dictatorial tendencies of the current government backed by an extremely weakened parliament and an overbearing military. Chikakano argues that the government has been able to

by-pass parliament to rule by regulatory means supported by a forced parliamentary recess in the guise of respecting Covid-19 measures. Moreover, the ruling party's supermajority in parliament has facilitated government's usurpation of power. The situation is exacerbated by the recall of some members of the parliamentary opposition. The overall situation has resulted in a parliament that simply rubberstamps the decisions of the government. According to Chikakano, the military has continued to play an influential role in politics and governance, a situation which she characterises as an assault on democracy. To substantiate her position, Chikakano compares the situation in Zimbabwe with the interminable presence of the military in countries like Egypt and Uganda and argues that Zimbabwe is likely to follow that trend. The chapter concludes with a pessimistic outlook for democracy in Zimbabwe ahead of the 2023 presidential election but acknowledges that the trend could be reversed in part by upholding the supremacy of the Constitution.

The chapters in this volume provide invaluable insights into the struggle for democratic governance in Africa. They demonstrate that despite repeated attempts by authoritarian governments to undermine democracy, there is popular demand for governments that are anchored on democratic principles. The chapters simultaneously reveal the factors and conditions undermining democracy in Africa and highlight mechanisms to reverse the trend with the ultimate objective of embedding democracy on the continent. This modest contribution should hopefully ignite further debates on theoretical and practical comparative perspectives on the future of democracy in Africa.

PART I

Regional Responses to Unconstitutional Changes of Government

CHAPTER 1

The African Union and unconstitutional changes of government in Chad, Mali and The Gambia

OLUGBEMI JAIYEBO*

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* LLB BL LLM Senior Lecturer, College of Law, Achievers University, Owo, Nigeria; +2348145465056; ojaiyebo@gmail.com

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ABSTRACT

Between the 1960s and 1980s, political instability was a hallmark of African politics, with unconstitutional changes of government, particularly through military coups d'état. 'Democratisation' as a pre-condition for foreign development assistance, amongst other factors, provided impetus for waves of transitions from military to civilian rule in the late 1980s. While the African Union (AU) and some sub-regional organisations prohibited unconstitutional changes of government, coups across the continent in the past decade, especially the conflicting responses by the African Union to those situations, raise questions on the effectiveness of democratic norms.

This chapter analyses the factors underlying the unconstitutional change of government in Chad, Mali and The Gambia and interrogates the extent to which differences in the relevant factors informed the implementation or lack thereof, of the norms prohibiting unconstitutional changes of government. The chapter acknowledges the pragmatic approach of the AU and brings into focus the role of strong sub-regional organisations mediating the implementation of the AU policy. It argues that the norms prohibiting unconstitutional change of government should not be implemented in ways that endorse security of tenure for unresponsive and irresponsible government in Africa.

1.1 INTRODUCTION

The choice of political, economic, social and cultural systems was traditionally considered to be matters exclusively within the internal affairs of the state,[1] an arena in which the principle of state sovereignty reigned supreme and other states or international entities could not interfere. However, the lines demarcating the boundaries of internal affairs of a state have become very blurred in contemporary times. On the African continent, transfer of power must be through the mechanism of free and fair elections. It is now generally agreed that democracy plays a critical role in fostering an environment where peace and development can flourish.[2] The Office of the United Nations High Commissioner for Human

[1] *Nicaragua v The United States* (1986) 14 ICJ 106.

[2] United Nations General Assembly Security Council 'The causes of conflict and the promotion of durable peace and sustainable development in Africa: Report

Rights (OHCHR) features democracy as one of the universal core values and principles of the United Nations.[3] In spite of disagreements on the content of democracy, holding periodic elections by universal suffrage has become an acceptable minimum criterion for democratic appearance.

The African state, during the first two decades of independence, became an object of contestation among its constituent elements – particularly between the new affluent governing elite and those groups that felt marginalised when it came to sharing the dividends of sovereign statehood. Gradually, political instability emerged as the hallmark of African politics, with unconstitutional changes of power, and military coups d'état, being the most popular pattern of regime change.[4] Between 1951 and mid-2020, 30 incumbent leaders were peacefully removed from power by their political opponents in elections, 28 heads of state voluntarily left office after serving their legally prescribed terms of office and over 90 coups occurred as the method of choice for changing governments.[5]

In the late 1980s waves of transitions from military to civilian governments swept across the African continent until it became unpopular to have military-led governments and multilateral financial (lending and donor) institutions introduced 'democratisation' as a pre-condition for foreign development assistance. Whether the transitions were democratic is debatable as many of the military regime leaders continued in office but changed their official titles and regalia from military to civilian. Notwithstanding, democracy in Africa was a work in progress and peaceful changes of government were emerging as a culture in many countries. The African Union and its sub-regional organisations established guidelines on democracy, especially on election matters.[6]

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of the Secretary-General on the work of the Organization' UN Doc S/1998/318, 13 April 1998. See also United Nations General Assembly 'Agenda for democratisation: Report of the Secretary General' UN Doc A/51/761, 20 December 1996.

3 Office of the High Commissioner for Human Rights 'Rule of law – Democracy and human rights', available at http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/Democracy.aspx, accessed on 31 May 2021.

4 FN Ikome & G le Pere 'The limits of the African Union's injunction on unconstitutional changes of power in Africa' in Institute for Global Dialogue *Good Coups and Bad Coups: The limits of the African Union's injunction on unconstitutional changes of Power in Africa* (2007) at 5, available at http://www.jstor.com/stable/resrep07759.4, accessed on 31 May 2021.

5 P Fabricius 'African coups are making a comeback' *Institute for Security Studies*, 15 October 2021, available at https://issafrica.org/iss-today/african-coups-are-making-a-comeback, accessed on 29 January 2022.

6 *The ECOWAS Protocol on Democracy and Good Governance* UN Doc A/SP1/12/01, 2001; Southern African Development Community 'SADC principles and guidelines governing democratic elections' Revised, 2015, adopted by the Ministerial

Following a period after the end of the Cold War in which coups were thought to be in decline as a result of the emergence of an international 'anti-coup' norm, recent coups have raised concerns that military takeovers are back in fashion.[7] Indeed, the AU has been faced with what could be described as a response dilemma over coup situations. It has had to choose between electing to uphold the letter and spirit of Lomé[8] or treating each coup according to the specific circumstances surrounding it, in what many have come to perceive as a policy of exceptionalism or simply double standards.[9]

This chapter analyses the African Union's (AU) implementation of the African Charter on Democracy, Elections and Governance (ACDEG) to the unconstitutional changes of government in Chad, Mali and The Gambia. The factors underlying the unconstitutional change of government in these three countries were different and this chapter interrogates the extent to which those differences informed the responses of the African Union. It brings into focus the role of a strong sub-regional organisation mediating the implementation of the AU policy. The chapter emphasises the ascendancy of African regional international law over domestic laws on change of governments, thereby shifting the subject from the domain of exclusive internal affairs of member states into the international law arena. It concludes that the AU has been pragmatic in its application of the prohibition of unconstitutional change of government but caution should be exercised to prevent it from becoming an endorsement of security of tenure for unresponsive and irresponsible government in Africa.

Committee of the Organ (MCO) on Politics, Defence and Security Cooperation on 20 July 2015, Pretoria; and the Model Law on Elections adopted by the SADC Parliamentary Forum Plenary Assembly on 4 December 2018, Maputo, Mozambique. See also the Great Lakes Region Protocol on Democracy and Good Governance, 1 December 2006.

7 P Conley 'African coups in the 21st century', available at http://democracyinafrica.org/african-coups-in-the-21st-century/, accessed on 29 January 2022.

8 Office of the High Commissioner for Human Rights 'Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government' AHG/Decl.5 (XXXVI), available at http://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/LomeDec.aspx, accessed on 16 January 2022.

9 FN Ikome 'Post-Lomé responses to coups: A constellation of dilemmas and complacency' in Institute for Global Dialogue *Good Coups and Bad Coups: The limits of the African union's injunction on unconstitutional changes of power in Africa* (2007) at 34.

1.2 PROSCRIPTION OF UNCONSTITUTIONAL TAKE-OVER OF GOVERNMENT BY THE AU

The conduct of elections and, by extension, acceptance of the outcomes have over the decades constituted flashpoints of violence in Africa.[10] The AU Peace and Security Council identified refusal to accept electoral defeat as one of the 'potent triggers of violent conflicts in Africa'.[11] In the early 2000s, it was agreed among the African heads of state that refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections constituted an unconstitutional change of government. It was further decided that whenever an unconstitutional change occurred, a clear and unequivocal warning shall be conveyed to the perpetrators of the unconstitutional change that, under no circumstances, will the illegal action be tolerated or recognised.[12] Article 30 of the Constitutive Act of the African Union provides that governments which come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

1.2.1 *The African Charter on Democracy, Elections and Governance*

The African Charter on Democracy, Elections and Governance (ACDEG)[13] was born out of the determination to promote and strengthen good governance through the institutionalisation of accountability and participatory democracy and also the realisation that unconstitutional change of government is one of the causes of insecurity, instability and violent conflict in Africa.[14] The Lomé Declaration on the framework for an OAU response to unconstitutional changes of government (Lomé Declaration) was a watershed document in tackling the problems of coups in Africa. In an attempt to undertake a comprehensive review of the Lomé Declaration, authors of the Charter took into account at least 12 different commitments, declarations, and decisions taken by African heads of state, relating to questions of governance, democracy, human rights, elections, and gender equality. The Charter can therefore be seen as a consolidation of

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10 African Union 'African Union Declaration on the Principles Governing Democratic Elections in Africa' AHG/Decl.1 (XXXVIII) 2002, available at http://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/AHG.aspx, accessed on 7 April 2021.

11 Lomé Declaration of July 2000 op cit (n8).

12 Lomé Declaration of July 2000 op cit (n8). See also African Charter on Democracy, Elections and Governance adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007, art 23.

13 Adopted by the African Union on 30 January 2007 and entered into force on 15 February 2012.

14 Preamble to the African Charter on Democracy, Elections and Governance.

various commitments by African governments to issues of governance which are perceived to be behind the continent's persistent political instability, and combining pre-emptive measures with appropriate 'post the act' responses.[15]

After a decade of the adoption of the ACDEG, it was observed that democracy seems to be stuck in the electoral fallacy, with a worrying lack of appetite among the political class for norm diffusion and implementation beyond elections. The liberal-democratic model is demonstrably under stress in certain quarters of the continent, owing to its inability to deliver inclusive development and prosperity for most Africans. It is vulnerable, but not at ground zero.[16]

1.2.1.1 *How unconstitutional change of government occurs*

The ACDEG outlines each of the following five scenarios as constituting an unconstitutional change of government:

- Any putsch or coup d'état against a democratically elected government;
- Any intervention by mercenaries to replace a democratically elected government;
- Any replacement of a democratically elected government by armed dissidents or rebels;
- Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
- Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.[17]

The first three scenarios prohibit the forceful disruption of the tenure of persons elected to administer government. In a military coup, the military or a section of the military decides to remove a sitting government through force because of their dissatisfaction with the government of the day. This is obviously dangerous to the democratic principle of rule by the people because it takes away the power of the citizens to freely choose who they wish to elect as their leaders.[18]

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15 FN Ikome 'From Lomé to The Gambia: Good coups and bad coups' in Institute for Global Dialogue *Good Coups and Bad Coups: The limits of the African Union's injunction on unconstitutional changes of power in Africa* (2007) at 42, available at http://www.jstor.com/stable/resrep07759.11, accessed on 21 January 2022.

16 T Hengari 'The African Democracy Charter At 11: Averting democratic deconsolidation' South African Institute of International Affairs, 2018, available at https://www.jstor.org/stable/resrep25946, accessed on 21 January 2022.

17 Article 23 of the Charter. The use of these means of accessing or maintaining power shall draw appropriate sanctions by the Union.

18 M Phakathi 'An analysis of the responses of the African Union to the coup in Burkina Faso (2015) and Zimbabwe (2017)' (2018) 3 *Journal of African Union Studies* 129.

With respect to forceful take-overs of government, there is a long history of military intervention in governments in Africa. It is estimated that there have been about 200 failed and successful coups in Africa between 1960 and 2022. The contributory factors behind military coups are complex and not easily discernible. In addition to problems of poor governance and institutional inefficiencies, political factionalism, and widespread corruption, many African economies continue to suffer from deep-rooted fragility.[19] The AU has made it abundantly clear that the military is not allowed to remove a democratically elected government from power and that coups have become unacceptable entry points into government. However, experience has shown that while the adoption of progressive peace, security, and democracy declarations is easy, it is more difficult to translate these instruments into legal frameworks and practice.[20] The recurring challenge that must be contained in contemporary times is the strategy of taking over power through unconstitutional means and then holding elections to give the military-imposed regime legitimacy.[21]

An apparent weakness of the Lomé Declaration was that it was not sufficiently vocal on the thorny question of the inadequacy and ineffectiveness of Africa's governance institutions, including the lack of respect for these institutions by both the governors and the governed on the continent.[22] The last two scenarios in s 23 of the ACDEG were designed to meet this challenge by prohibiting actions of government office holders geared towards illegally elongating their tenure. The response of ECOWAS and the AU to the 2016 Gambian election crisis, which will be analysed later in the chapter, remains a model in this regard.

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19 HB Barka & M Ncube 'Political fragility in Africa: Are military coups d'etat a never-ending phenomenon?' AfDB Chief Economist Complex, September 2012, available at https://www.afdb.org/en/documents/document/economic-brief-political-fragility-in-africa-are-military-coups-detat-a-never-ending-phenomenon-29430, accessed on 21 January 2022.

20 African Union Panel of the Wise 'Relevant AU instruments for peace, democracy, and credible elections' in *Election-related Disputes and Political Violence: Strengthening the Role of the African Union in Preventing, Managing, and Resolving Conflict* (2010) 28, available at http://www.jstor.com/stable/resrep09547.10, accessed on 29 January 2022.

21 Phakathi op cit (n18).

22 Ikome op cit (n9).

1.2.1.2 *Procedure for determining an unconstitutional change of government*

The procedure for establishing that an unconstitutional change of government has occurred in a member state is laid out in arts 24 and 25 of the Charter:

> When a situation arises in a state party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, hereinafter referred to as the Protocol.[23]
>
> When the Peace and Security Council observes that there has been an unconstitutional change of government in a state party, and that diplomatic initiatives have failed, it shall suspend the said state party from the exercise of its right to participate in the activities of the Union in accordance with the provisions of arts 30 of the Constitutive Act and 7(g) of the Protocol Relating to the Establishment of the Peace and Security Council. The suspension shall take effect immediately.[24]

1.3 ELECTION CRISIS IN THE GAMBIA

1.3.1 *President threatens not to relinquish power*

Adama Barrow was declared winner of the 1 December 2016 elections in The Gambia. President Jammeh conceded victory on 2 December, but reneged on the concession on 9 December and rejected the official election results. He ordered The Gambian Armed Forces to take over the Independent Electoral Commission on 13 December 2016 and on 18 January 2017. Parliament attempted to extend President Jammeh's term for three months beyond his mandate. By rejecting the outcome of the elections, threatening to not hand over to Mr Barrow and attempting to have his tenure extended, President Jammeh triggered the unconstitutional change of government clauses in both ECOWAS and the AU legal regimes. ECOWAS and the African Union rejected President Jammeh's retraction of concession and urged him to hand over to Mr Barrow on 19 January 2017, as required by law.

1.3.2 *ECOWAS, AU and UNOWAS offer joint resistance*

The ECOWAS Commission, the African Union Commission and the United Nations Office for West Africa and the Sahel (UNOWAS) called on the government of The Gambia to abide by its constitutional responsibilities and

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[23] Article 24 of the Charter.

[24] Article 25(1) of the Charter.

international obligations. They expressed strong support for the stand of the Senegalese Government calling for an emergency meeting of the United Nations Security Council. The joint statement urged Gambian stakeholders to reject violence, peacefully uphold the will of the people as clearly expressed through the ballot box and called upon the Gambian Defence and Security forces to live up to their republican duties.[19] ECOWAS, the AU and UNOWAS were unanimous that President Jammeh's rejection of the election results was a breach of Gambia's international obligations on elections and democracy.[25]

The 50th ordinary session of ECOWAS Head of States and Government mandated the authority to take all necessary measures to strictly enforce the results of the 1 December 2016 Gambian elections and obtain the endorsement of the AU and the UN on all decisions taken on the matter.[26] On 12 December 2016 the Peace and Security Council of the African Union (AU) commended the joint efforts led by ECOWAS, with the support of the AU and the UN to facilitate the speedy and peaceful transfer of power, in line with regional and continental instruments to which The Gambia is party, in particular the African Charter on Democracy, Elections and Governance. The Council stressed the determination of the AU to take all necessary measures, in line with the relevant AU instruments, with a view to ensuring full respect and compliance with the will and desire expressed by the people of The Gambia on 1 December 2016.[27]

In 2016, The Gambia signed the African Charter on Democracy, Elections and Governance and the ECOWAS Protocol on Democracy and Good Governance but neither of the instruments had been ratified. Both instruments had entered into force and their force of law extended to The Gambia irrespective of non-ratification. The issues of elections and acceptance of election outcomes have been fused into the frame of peace and security which lies at the core of the UN, the AU and ECOWAS. By grafting change of government into peace and security in Africa, elections have been elevated from the domain of democracy and form of government to the level of international security. The AU and ECOWAS are forging a synthesis of constitutional hand-over of power with

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25 'ECOWAS, African Union and UN statement on the political developments in the Gambia' *ECOWAS*, 10 December 2016, available at http://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-political-developments-in-the-gambia/, accessed on 16 April 2021.

26 ECOWAS Authority Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government 'Final communique on the situation in The Gambia' 17 December 2016.

27 African Union 'Communique of the Peace and Security Council on the post-election situation in the Islamic Republic of The Gambia' 13 December 2016, available at http://www.peaceau.org/en/article/peace-and-security-council-644th-meeting#sthash.SFnQxEF1.dpuf/, accessed on 16 April 2021.

peace and security on the continent. Theoretically, the supranational status of the AU and ECOWAS gives life to its laws within the jurisdiction of member states irrespective of domestic attitudes.

1.3.3 *ECOWAS threatens the use of force*

On 18 January 2017, ECOWAS leaders announced intentions to deploy forces to The Gambia, under the banner of the Economic Community of West African States Military Intervention in Gambia (ECOMIG), to enforce the election results.[28] Barrow was sworn in as President of The Gambia on 19 January in the Gambian Embassy in Dakar, Senegal. On 19 January, the United Nations Security Council passed a resolution on the situation in The Gambia.[29] It reaffirmed strong commitment to the sovereignty, independence, territorial integrity and unity of The Islamic Republic of The Gambia, recalled the importance of the principles of good-neighbourliness, non-interference and regional cooperation. The Council urged all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognised Adama Barrow as President-elect of The Gambia. The Security Council endorsed the decisions of ECOWAS and the African Union to recognise Adama Barrow as President of the Gambia and called on the countries in the region and the relevant regional organisations to cooperate with President Barrow in his efforts to realise the transition of power. It requested former President Jammeh to carry out a peaceful and orderly transition process, and to transfer power to President Adama Barrow by 19 January 2017, in accordance with the Gambian Constitution. It commended

> the initiatives of ECOWAS, including the visit of a ECOWAS/UN high level delegation in Banjul on 13 December 2016, led by Her Excellency Ellen Johnson Sirleaf, President of the Republic of Liberia and Chairperson of the ECOWAS authority, aimed at ensuring a peaceful and orderly transition of process in The Gambia, as well as the ECOWAS high level delegation in Banjul on 13 January 2017 and expressed its full support to the ECOWAS in its commitment to ensure, by political means first, the respect of the will of the people of The Gambia as expressed in the results of 1st December elections.

The resolution provides an interesting observation of what was expressly declared and the plethora of things to be read between the lines. The principle of non-interference had been radically modified by regional cooperation in

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[28] P Nantulya 'Special report: Lessons from Gambia on effective regional security cooperation' 2017, available at http://globalsentinelng.com/2017/03/29/special-report-lessons-gambia-effective-regional-security-cooperation/, accessed on 1 April 2021.

[29] United Nations Security Council Resolution 2337, S/Res/2337 (2017), adopted by the Security Council at its 7866th meeting, on 19 January 2017.

post-cold war Africa. Reaffirming non-interference and recalling the African Charter on Democracy, Elections and Governance and ECOWAS Protocol on Democracy and Good Governance were mixed signals. The Charter and the Protocol are treaties effecting significant changes to the international law principle of non-interference. Evidently, the Security Council was primarily concerned with respect for the will of the people as expressed in the 1 December election through a peaceful and orderly transfer of power to President Barrow. Was the 19 January UNSC Resolution an implicit acknowledgement and endorsement of the ECOWAS threat of use of force? Jammeh left The Gambia on 21 January 2017. Questions on the extent to which obligations created by the AU and ECOWAS treaties can be enforced in the member states have been largely answered through the handling of The Gambian crisis.

1.4 MILITARY COUPS IN MALI

Application of the AU's policy on the prohibition of unconstitutional change of government to the situation in Mali must go beyond the provisions of the Charter. Socio-economic factors, domestic and international implications must be carefully evaluated. In 2012, soldiers disgruntled with the handling of the insurgency in northern Mali organised a coup against the government of President Amadou Toumani Touré, as a result of which Mali was suspended from the African Union. The coup came as a surprise to observers because Mali had been viewed as a model for emerging democracies and presidential elections were just weeks away.[30] ECOWAS brokered an agreement to return Mali to constitutional rule and elections were conducted about a year later.

Mali sits at the heart of the Sahel, one of the regions that has been most seriously impacted by extremist violence. Stability of Mali is crucial to the stability of the Sahel region. The United Nations Security Council established the United Nations Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA) in 2013.[31] Since the 2012 coup, Mali has received significant security assistance from the United States, France, the European Union and other foreign donors to address violent extremism and insurgency and help stabilise the country. The security sector is not disconnected from other problems that are faced in the country, such as corruption and poverty. Consequently, in thinking

[30] K Yusuf 'ANALYSIS: Why world leaders' inconsistency on coups in Chad and Mali may spark more coups in Africa' *Premium Times*, 31 May 2021, available at https://www.premiumtimesng.com/news/headlines/464890-analysis-why-world-leaders-inconsistency-on-coups-in-chad-and-mali-may-spark-more-coups-in-africa.html, accessed on 29 January 2022.

[31] UN Security Council Resolutions 2100 of 25 April 2013 and 2164 of 25 June 2014.

about a response to the extremist insurgency, there is certainly a security response to protect people in the immediate term, but more importantly there is a need to re-establish a state–society relationship.[32] Critics allege that regional and international efforts to stabilise Mali focused more on security, neglecting decades of failed governance.[33]

1.4.1 *Internal forces*

After months of public protests expressing discontentment with the direction of the Keita government, a military coup toppled the government in August 2020. As it had been in some other instances, it was clear that while the holding of regular elections is a critical indicator of progress on democracy in Africa, the regularity and frequency of elections on their own are inadequate as measures of democratic advancement.[34] The dilemma was how to restore constitutional order without a return to the status quo prior to the coup.[35] ECOWAS and the AU had to contend with domestic reactions to coups through public jubilation and support for the coup plotters, to public demonstrations and opposition to the coup. These largely internal continental forces have been mediated by a confluence of international interests – that is, the stakes that a coup country holds for the powerful global powers. The ways these forces have tended to play themselves out suggests that some coups are acceptable, and therefore could be said to be good coups.[36]

ECOWAS imposed sanctions in response to the coup and requested that the military complies with its demands for a return to civilian rule. The M5-RFP opposition coalition also moved away from its initial optimism over the coup, demanding that the military hand over power to a civilian-led political authority.[37] With international pressure, a transition government was instituted with the understanding that the military would hand over to civilian constitutional government by February 2022. A cabinet reshuffle without the knowledge of

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[32] Susan Stigant on Mali's Military Coup, *United States Institute of Peace Podcast*, Wednesday, 26 August 2020, available at https://www.usip.org/publications/2020/08/susan-stigant-malis-military-coup, accessed on 1 April 2021.

[33] See also E Cole 'Five things to know about Mali's Coup' *United States Institute of Peace*, 27 August 2020, available at https://www.usip.org/publications/2020/08/five-things-know-about-malis-coup, accessed on 1 April 2021.

[34] African Union Panel of the Wise op cit (n20).

[35] Stigant op cit (n32).

[36] Ikome op cit (n9).

[37] A Bose & J Pinckney 'Mali's coup: Harbinger of hope or uncertainty' *United States Institute of Peace*, 10 September 2020, available at https://www.usip.org/publications/2020/09/malis-coup-harbinger-hope-or-uncertainty, accessed on 1 April 2021.

the military partners led to another coup in May 2021. The coup provoked swift negative reactions from the international community. The issue in Mali is very problematic because of the jihadist dimension that has constituted a major threat for over a decade. Care was being taken not to weaken the capacity of the Malian state and thus create opportunity for the jihadists to be even stronger.[38] In its September 2021 emergency meeting, ECOWAS heads of states demanded that Mali's transitional government stick to the agreement to organise elections for February 2022 and present an electoral roadmap by October 2021 or face the sanctions of frozen financial assets and travel bans.[39] A United Nations Security Council fact-finding mission visited Mali and Niger in October 2021. The military government in Mali is unwilling to commit to an immediate return to constitutional rule and ECOWAS has been insistent that return to civilian rule is non-negotiable.

1.5 THE DEATH OF THE CHADIAN PRESIDENT

President Idriss Déby had just won the sixth term re-election when he died from injuries sustained while fighting with rebel groups in April 2021. Rather than allow the speaker of parliament to serve as interim President as required by the Constitution, the army dissolved parliament, suspended the Constitution and named Idriss' son, Mahamat Déby Itno, interim president of the country.[40] This procedure constitutes an unconstitutional change of government. The Transitional Military Council (TMC) laid out an 18-month roadmap to restore civilian rule.

The Sahel region has engaged significant international attention in the past few decades primarily because it has been the launch pad for some terrorist groups and has been a major contributor to the large flows of migrants into Europe. The United Nations Integrated Strategy for the Sahel (UNISS) is built around three broad areas of support: Governance, Resilience and Security and operationalised through the UN Sahel Support Plan (UNSP).[41] The *Force conjointe du G5 Sahel* (FC-G5S) was established by Burkina Faso, Chad, Mali, Mauritania and Niger known as the Group of Five for the Sahel (G5 Sahel), to jointly combat terrorism and transnational organised crime in the region.

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38 Yusuf op cit (n30).

39 'ECOWAS resorts to sanctions over Guinea and Mali coups' *Aljazeera,* 16 September 2021, available at https://www.aljazeera.com/news/2021/9/16/guinea-coup-leaders-meet-mining-execs-as-ecowas-talks-next-steps, accessed on 21 January 2022.

40 Yusuf op cit (n30).

41 'Implementation of the United Nations Integrated Strategy for The Sahel' *United Nations Office for West Africa and the Sahel*, available at https://unowas.unmissions.org/implementation-united-nations-integrated-strategy-sahel, accessed on 1 April 2021.

The UN Security Council resolution authorised a technical agreement between the UN, the European Union (EU) and G5 Sahel States, to provide specified operational and logistical support through MINUSMA to the FC-G5S.[42] There is the Sahel and West Africa Club supported by the Organisation for Economic Cooperation and Development (OECD) which promotes regional policies to improve the economic and social well-being of people in the Sahel and West Africa.[43]

The announcement of the death of President Déby raised concerns in diplomatic circles of a 'Gaddafi moment'[44] where his exit could upset the security calculus across the Sahel region. Chad is a major security player in the Sahel and Lake Chad regions, contributing thousands of troops to the fight against extremist groups. It is also seen as a buffer, shielding central African countries from the security crisis arising out of the breakdown of order in Libya.[45] Chad has the most effective army in West and Central Africa. In 2012, when the Islamic jihadists threatened to take over Bamako, it was essentially France and Chad that were able to resist them. Both in Nigeria and Niger, the Chadian army, when they decided to help, have been very effective against Boko Haram.[46] These considerations weighed heavily on the initial responses to the military takeover by Mahamat Déby Itno.

1.5.1 *AU PSC fact-finding mission*

A fact-finding mission of the AU's Peace and Security Council (PSC) to Chad recommended that the PSC:

- Support the military transition as it stands, while appointing a special envoy to ensure the military keep their promise to organise elections within 18 months; or

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42 'Security Council considers measures to support regional force in the Sahel' *United Nations Department of Operational Support*, available at https://operationalsupport.un.org/en/security-council-considers-measures-to-support-regional-force-sahel, accessed on 21 January 2022.

43 'Sahel and West Africa' *Organisation for Economic Co-operation and Development*, available at https://www.oecd.org/swac/about/, accessed on 21 January 2022.

44 P Smith 'Why Chad's rebellion and Déby's demise could tip the region into chaos' *The Africa Report,* 23 April 2021, available at https://www.theafricareport.com/82614/why-chads-rebellion-and-debys-demise-could-tip-the-region-into-chaos/, accessed on 21 January 2022.

45 R Lwere 'Kato coups: Why the AU acted tough on Mali but ignored Chad' *AfricaNews*, 2 June 2021, available at https://www.africanews.com/2021/06/02/coups-why-the-au-acted-tough-on-mali-but-ignored-chad//, accessed on 21 January 2022.

46 Yusuf op cit (n30).

- Support the current military-led transition, while pressuring the junta to share power equally with a civilian government due to the security threats Chad faces from rebels and jihadi insurgents; or
- Pressurise the military to hand over power to a civilian president alongside a military vice president.

The mission noted that the transitional charter drafted by the military was 'wholly inadequate' and encouraged the drafting of a new, more inclusive national constitution, and a swift plan for fresh elections. It also recommended that rebel forces be demobilised and invited to participate in dialogue on forming any new government. The military council promptly rejected any suggestion of talks with the rebels.[47]

Albert Pahimi Padacké, who ran as a presidential candidate against the late Idriss Déby Itno and previously served as his prime minister, was appointed Prime Minister of President Mahamat Déby Itno's transitional government.[48] France, which maintains a military presence in Chad, initially supported the council but has since called for a civilian-led unity government. Opposition politicians and civil society have also denounced the military takeover as a coup.[49] The AU is closely monitoring developments in Chad and giving clear indications of its inclinations towards a civilian-led administration.

At the initial stages of the Chadian crisis, Nigeria and Rwanda[50] absolutely supported the Idriss government. The Idriss government was evidently an unconstitutional change of government and the AU had not taken a position, given a reprieve or set conditions for acceptability. It can be argued that both Nigeria and Rwanda triggered invocation of art 25(6)[51] of the ACDEG. Enforcement of these types of violations, especially by critical players, present complex political challenges.

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47 M Ramadane 'African union mission urges return to "constitutional order" in Chad' *USNews*, 12 May 2021, available at https://www.usnews.com/news/world/articles/2021-05-12/african-union-mission-urges-return-to-constitutional-order-in-chad, accessed on 21 January 2022.

48 V Duhem 'Chad: Albert Padacké lost the election to Idriss Déby. Now he is PM to Déby's son Mahamat' *The Africa Report,* 27 April 2021, available at https://www.theafricareport.com/83300/chad-albert-padacke-lost-the-election-to-idriss-deby-now-he-is-pm-for-his-son-mahamat/, accessed on 21 January 2022.

49 Ramadane op cit (n47).

50 J Afrique 'Rwanda-Chad: What did Kagame write in his letter to Déby?' *The Africa Report,* 23 August 2021, available at https://www.theafricareport.com/119407/rwanda-chad-what-did-kagame-write-in-his-letter-to-deby/, accessed on 21 January 2022.

51 The Assembly shall impose sanctions on any member state that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Art 23 of the Constitutive Act.

1.6 CO-ORDINATION BETWEEN ECOWAS, THE AU AND THE UNITED NATIONS

Chapter VIII of the United Nations Charter recognises regional arrangements or agencies dealing with matters relating to the maintenance of international peace and security. There is a growing partnership between the United Nations and the AU on the one hand and between the AU and the regional economic communities (RECs) on the other. The joint declaration (A/61/630) on the enhancement of the UN-AU cooperation signed on 16 November 2006 has metamorphosed into a UN Office to the AU, headed by an assistant secretary-general. There is also the United Nations Office for West Africa and the Sahel (UNOWAS) which works closely with the African Union, ECOWAS, the Mano River Union, the Lake Chad Basin Commission, the Gulf of Guinea Commission, the G5 Sahel, as well as other regional partners to support regional solutions to cross-cutting threats to peace and security. It leads the implementation of the United Nations Integrated Strategy for the Sahel, endorsed by the Security Council in June 2013.[52]

The relationship of the AU and RECs is regulated by the 2008 Memorandum of Understanding (MoU) on Co-operation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Co-ordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa. Even though the 2008 MoU provides an unclear legal basis for coordination of AU and REC activities in the peace and security arena,[53] in practical terms, there is acknowledgement of the overarching responsibility of the AU for peace and security on the continent, deference to the respective RECs and adherence to the principle of subsidiarity, complementarity and comparative advantage.[54] Under the rule of subsidiarity and comparative advantage, the AU cedes leadership to ECOWAS on matters in the sub-region. There has been remarkable co-ordination between the AU, UNOWAS and ECOWAS on the application of the rule on prohibition of unconstitutional change of government. The signals sent to Mali are consistent to the effect that the tenure of the military government has to be short-lived. On the problem of unconstitutional change of government, there has been remarkable co-ordination in the responses of ECOWAS, the AU and the UN. In The Gambia and Mali, ECOWAS, the AU and the UN had a unity of purpose and action.

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52 'UNOWAS mandate' *United Nations Office for West Africa and The Sahel,* available at https://unowas.unmissions.org/background, accessed on 21 January 2022.

53 K Striebinger *Coordination between the African Union and the regional economic communities* (2016).

54 J Olugbemi & A Victor 'RECs and peacebuilding in Africa: Analysis of legal frameworks and concerns for international law' in V Adetula, R Bereketeab & C Obi (eds) *Regional Economic Communities and Peace-building in Africa: Lessons from ECOWAS and IGAD* (2021) at Chap 2.

1.6.1 *ECOWAS and its Protocol on Democracy and Good Governance*

In December 2001, the Heads of States of ECOWAS signed the Protocol on Democracy and Good Governance.[55] ECOWAS Heads of State willingly constrained their respective state sovereignty and conceded remarkable access to the regional body on election issues and transfer of power. In ECOWAS, accession to power shall be through free, fair and transparent elections and there shall be zero tolerance for power obtained or maintained by unconstitutional means.[56] The party and/or candidate who loses the elections shall concede defeat to the political party and/or candidate finally declared the winner, following the guidelines and within the deadline stipulated by the law.[57] In the event that democracy is abruptly brought to an end by any means or where there is massive violation of human rights in a member state, ECOWAS may impose sanctions on the state concerned.[58]

The Gambia signed the ACDEG in 2008 but it was only ratified in 2018 after the tenure of President Jammeh. Chad signed the ACDEG in 2009 and ratified it in 2011, while Mali signed in 2007 and ratified it in 2013. The ECOWAS Protocol on Democracy and Good Governance was ratified by Mali in 2003 and by The Gambia in 2008.[59]

Citing the sharp difference in approach towards Mali and Chad,[60] it has been suggested that the first step in tightening up the Lomé Declaration and matching instruments in the regional economic communities (RECs) is to apply the measures consistently across different countries.[61]

ECOWAS has shown the capacity and capability to have an impact on the domestic order of member states through the imposition or restoration of democracy.[62] ECOWAS should be credited for neutralising the threats and attempts at unconstitutional change of government in The Gambia. The engagement of ECOWAS with the military authorities in Mali continues to exert pressure on

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55 A/SP1/12/01, December 2001. It was Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

56 Article 1 of the Protocol.

57 Article 9 of the Protocol.

58 Article 45 of the Protocol.

59 ECOWAS 'ECOWAS governance structure' Annexure to Annual Report, 2013, available at https://www.ecowas.int/wp-content/uploads/2017/11/2013-Annual-Report_Annexes_English.pdf, accessed on 21 January 2022.

60 Mali was suspended from the AU and ECOWAS after the 2020 and 2021 coups while Chad was allowed to remain in the AU pending a transition to elections and civilian rule.

61 Fabricius op cit (n5).

62 Hengari op cit (n16).

the government to yield to the norms on accessing and retaining governmental power in Africa. Conversely it can be argued that the absence of a strong sub-regional organisation in Central West Africa might have contributed to the disparate outcomes in Chad in spite of the comparability of the military action.

1.7 IMPLEMENTING THE LETTER AND SPIRIT OF THE ACDEG

The origins of the ACDEG are directly traceable to the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa, the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government and the 1999 Algiers Declaration on Unconstitutional Changes of Government. These Declarations were the direct consequence of pressure from donors insisting that African governments engage in political reforms as pre-condition for continued aid and development assistance. However, by 2012 when the ACDEG entered into force, it had acquired a character peculiarly African and distinct from its donor-driven origins. The AU strives to enforce the unconstitutional change in government clause and has provided support to sub-regional organisations thereby fostering a continent-wide political culture of change of government through elections.

1.7.1 *Consequences for unconstitutional change of government*

Under the ACDEG, the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their state and they may also be tried before the competent court of the Union. State parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government but shall encourage conclusion of bilateral extradition agreements as well as the adoption of legal instruments on extradition and mutual legal assistance and bring to justice the perpetrators of unconstitutional changes of government or take the necessary steps for their extradition. The AU Assembly shall impose sanctions on any member state that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Art 23 of the Constitutive Act and may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.[63]

[63] Article 25(4)–(10) of ACDEG.

1.7.2 *Publicity of the ACDEG*

Two studies[64] conducted by the West Africa Election Observers Network (WAEON)[65] suggest that the Charter has received little attention or recognition from governments and civil society in West Africa since it came into force in February 2012. The studies also revealed that there is an absence of political will to implement and enforce it, and few citizens are aware of it.[66] With respect to recognition by governments and commitment to enforce the Charter, the AU has successfully reversed unconstitutional changes of government in Niger, Mali, Guinea Bissau, Central African Republic and Burkina Faso. Also, countries such as Mauritania have used the ACDEG as a guide during difficult transitions and relied on its principles to negotiate a return to constitutional order.[67] Admittedly, in a few instances, such as in Egypt, Zimbabwe and Sudan, the AU was not effective in enforcing its Charter.[68] Low civil society and citizen awareness of the ACDEG would hardly be contestable.

1.7.3 *Government unrepresentative of the people*

In some purportedly established democratic countries democratic norms have eroded and democratic institutions have become sclerotic and unresponsive.[69] In Africa, it can be asserted that given the historical difficulties with embedding democracy, perhaps democratic theory is ready to squarely face the possibility that its subject of concern is less stable and less predictable.[70] In spite of about 22 presidential or legislative elections scheduled across the continent in 2021,[71] it is increasingly becoming a truism that regular elections are not synonymous with the democratic franchise becoming sufficiently diffused and entrenched as a mode of governance across political and social institutions.[72]

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64 The research looked separately at Anglophone and Francophone West African countries with the goal to determine if there was a way to make the Charter more effective in West Africa.

65 A coalition of nonpartisan citizen observation groups from 11 countries and supported by NDI.

66 'Promoting the AU Charter on Democracy, Elections and Governance in West Africa' *NDI*, 28 June 2013, available at https://www.ndi.org/WAEON-symposium, accessed 21 January 2022.

67 Ibid.

68 Kato op cit (n45).

69 L Frances & N McCarty (eds) *Can America Govern Itself?* (2019).

70 A Ali, David McIvor & JA Schlosser 'Democratic theory when democracy is fugitive' (2019) 6 *Democratic Theory* 27.

71 See '2021 African election calendar' *Electoral Institute for Sustainable Democracy in Africa*, available at https://www.eisa.org/calendar2021.php, accessed on 21 January 2022.

72 Hengari op cit (n16).

The concern, as has been observed in Keita's Mali, Conde's Guinea and Al Bashir's Sudan, is that governments frequently get out of touch with the peoples' aspirations and become a burden to them. In such situations, there should be avenues for constitutionally changing the government. These may include a recall or pressuring the government to resign rather than creating opportunities for the military to take advantage of the peoples' agitations. There is a growing consensus that the real focus of the AU, RECs and other external actors should be on addressing the causes of coups, which include the 'unconstitutional preservation of power'.[73]

President Keita initially deployed security forces to disperse protesters, leading to fatalities. The protests persisted and the government offered concessions. The president pledged to appoint a new slate of judges to the Constitutional Court, paved the way for partial legislative elections in the constituencies where the court overturned results, released members of the political opposition from custody, successfully pressured his son to resign from a powerful parliamentary committee, and promised a power-sharing government. The protest movement insisted that the president resign. Despite widespread regional and international condemnation of the coup, many Malians were celebratory and did not welcome ECOWAS's efforts to restore the Keita government.[74] The military took advantage of the situation as it had done on prior occasions. In the wake of the August 2021 military coup, it is clear that the failure of international security sector assistance to prioritise governance likely contributed to the conditions that led to the coup. They worked to develop Mali's security capacity, but neglected the governance of the security sector and beyond. [75]

1.8 CONCLUSION

In resolving the crisis in The Gambia, ECOWAS employed both the threat of the use of force and the actual use of force. The actions were pragmatic, expedient and in accordance with the spirit of the Charter. ECOWAS was in full consultation with the African Union and the United Nations Office for West Africa. Both the threat of force and the use of force were collective actions of the organisation taken in consultation with larger international organisations. The move by ECOWAS can be interpreted as its creative attempts to transform conflict in

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73 Fabricius op cit (n5).

74 Cole op cit (n33).

75 E Dion & E Cole 'How international security support contributed to Mali's Coup' *United States Institute of* Peace, 21 September 2020, available at https://www.usip.org/publications/2020/09/how-international-security-support-contributed-malis-coup, accessed on 29 January 2022.

The Gambia as envisaged in art 7 of the ECOWAS Conflict Prevention Framework (ECPF), a lawful exercise of the use of force in light of the changing concept of legitimacy of government and the doctrine of intervention by invitation.

In the case of Chad, the AU engaged in a tricky balancing act between the security and the stability of the Sahel region on the one hand and insistence on compliance with the Chadian Constitution, on the other. This dilemma would have been unnecessary if the concept of civilian oversight of security forces had become unquestionable in the African polity. Security governance in Africa demands urgent attention. The crisis in Mali indicates the necessity of investing more in the rule of law and governance when there is heavy security spending. Resilient democracies require good governance and good governance cannot be manufactured overnight. It is difficult to construct a social contract when a government is in crisis.[76]

It would, however, seem that the AU's responses to coups have been a product of the constellation of forces at a given time, and specific to each coup situation. The responses have depended on the states that have an interest in a particular coup country, as well as the power coalition patterns on the continent and in the AU.[77] Even though the prohibition of the unconstitutional change of government is no longer soft international law in Africa, the opposition must move away from the 'all or nothing' winner take all mindset. There must be genuine give and take negotiations. That is one of the principal ways of keeping the military away from unconstitutional change of government and consolidating the AU efforts to elevate adherence to democratic tenets over illegal occupation of government. Care must be taken to prevent prohibition of unconstitutional change of government from becoming a tool for security of tenure for unresponsive and irresponsible government in Africa. There is the need for effective interim/mid-term constitutional interventions in African democratic experiments and the institutionalisation of civilian oversight of the military in Africa. Effective sub-regional organisations to enforce the AU policy of constitutional change of power are indispensable tools as exemplified in The Gambia.

[76] Cole op cit (n33).

[77] Ikome op cit (n9).

PART II

Regression and Resilience: Courts as Guardians of Democracy

CHAPTER 2

The role of domestic courts in curbing democratic regression through the protection of freedom of assembly and right to demonstrate: A case study of judicial approaches in Kenya and South Africa

WALTER KHOBE OCHIENG*

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* LLM (University of Pretoria) LLB (Moi University), Lecturer, Department of Public Law (Moi University).

ABSTRACT

In order to usher in democratic governance in their polities, South Africa in 1996, and Kenya in 2010, adopted new constitutions which entrench the freedom and rights of peaceful assembly, and demonstration/picketing. They also established new apex courts, the Constitutional Court of South Africa and the Supreme Court of Kenya, to act as guardians of their new constitutional orders. These apex courts recently faced the question of interpretation and application of the right to assemble and demonstrate. This chapter critiques and contrasts the approaches adopted by the two apex courts and gives suggestions on the judicial role in the protection and promotion of democratic governance in the African context.

2.1 INTRODUCTION

The freedom of assembly and the right to demonstrate are part of the constituent elements necessary for the establishment of democratic societies.[1] These rights are closely associated with freedom of speech, expression, and association.[2] Taken together, they are crucial to the optimal functioning of liberal democracies as they enable citizens to gather and express their views without unreasonable restrictions.[3]

In order to usher in democratic governance, South Africa in 1996 and Kenya in 2010 adopted new constitutions that have come to be dubbed as 'transformative constitutions' representing the 'fourth generation' of constitutions on the African continent.[4] The idea of 'transformative constitutions' is derived from the concept of 'transformative constitutionalism', which has been defined as:[5]

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1 FO Owuor 'Election petitions and human rights in Africa: The role of the judiciary' paper presented at the Fourth Africa Judicial Dialogue, 30 October 2019, Speke Resort Munyonyo, Uganda, available at https://tanzlii.org/tz/ELECTION%20PETITIONS%20AND%20HUMAN%20RIGHTS%20THE%20ROLE%20OF%20THE%20JUDICIARY%20--%20Owuor.pdf, accessed on 25 September 2021.

2 In the case of *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* A/HRC/20/27 (12 May 2012) para 24, the African Commission on Human and Peoples' Rights observed that the three freedoms of assembly, expression and association share a 'close relationship'.

3 For example, the court in the Australian case of *Commissioner of Police v Rintoul* [2003] NSWSC 662 recognised that freedom of assembly is 'integral to a democratic system of government and way of life'.

4 See generally, GT Hessebon *Contextualizing Constitutionalism: Multi-party Democracy in the African Political Matrix* (2017).

5 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

> [A] long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political, legal and social institutions, and power relations in a democratic, participatory and egalitarian direction.

The implication is that the project of transformative constitutionalism envisages the instrumental use of constitutions to upend the status quo in governance and enable the well-being and flourishing of citizens.[6]

A key objective of the project of transformative constitutionalism in Kenya and South Africa is addressing governance ills, including authoritarianism.[7] This is relevant to freedom of assembly and the right to protest given that, like the rest of sub-Saharan Africa, Kenya and South Africa have had a history characterised by the restriction of the rights and the freedoms protecting liberty in the political sphere.[8] This took the form of requiring permits for holding processions and assemblies, normally from the district commissioners or police officers. In addition, the relevant laws gave wide-ranging powers to the police to break up assemblies whether or not they had been authorised.[9]

In response to the historical legacy of abuse and the denial of the freedom of assembly and the right to protest during the colonial and post-independence (apartheid in the South African context) periods, the constitutions of Kenya and South Africa give much weight to freedom of assembly, protest, and expression.[10] Given this historical context, it is expected that judicial interpretation and enforcement of these freedoms would be robust and progressive in order to protect the democratic space enjoyed by citizens.[11]

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6 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 352; see also *Speaker of The Senate v Hon Attorney-General* Advisory Opinion Reference 2 of 2013 [2013] eKLR at paras 51–53.

7 See E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.

8 See generally J Stevens 'Colonial relics I: The requirement of a permit to hold a peaceful assembly' (1997) 41 *Journal of African Law* 118.

9 Ibid.

10 Article 37 of the Constitution of Kenya, 2010 provides: 'Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.' Similarly, s 17 of the Constitution of the Republic of South Africa, 1996 states: 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'

11 This role has been explored in other contexts. See for example: S Issacharoff 'Judicial review in troubled times: Stabilizing democracy in a second-best world' (2019) 98 *North Carolina Law Review* 1; Y Roznai 'Who will save the redheads? Towards an anti-bully theory of judicial review and protection of democracy' (2020) 29 *William & Mary Bill of Rights Journal* 327; W Sadurski *Poland's Constitutional Breakdown* (2019).

Recently, the apex courts in Kenya (the Supreme Court of Kenya) and South Africa (the Constitutional Court of South Africa) had to determine whether their country's respective public order laws concerning assemblies were contrary to the constitutional rights of freedom of assembly and the right to demonstrate. The overarching question the two courts had to determine was whether the relevant public order legislation concerning assemblies violated the constitutional right of freedom of assembly and the right to demonstrate.

This chapter locates the project of exploration of the theme of democratic regression within the context of the protection of the freedom of assembly and the right to protest and the role that the judiciary should play in curbing attempts aimed at democratic regression. This theme is explored through the Kenyan and South African experience. The second section of this chapter establishes the link between democratic regression and the freedom of assembly and the right to demonstrate. The third section is a brief exploration of the historical evolution of the freedoms and rights under study in Kenya and South Africa. The fourth section introduces the court decisions which are the subject of the chapter. The fifth section is a critique of the approach adopted by the apex courts in Kenya and South Africa in the adjudication of disputes related to the freedom of assembly and the right to demonstrate. This section commends proportionality analysis of legislation as a suitable jurisprudential tool which can be used by courts to ensure public order legislations remain rights-friendly. The sixth section is the conclusion.

2.2 ESTABLISHING THE NEXUS BETWEEN DEMOCRATIC REGRESSION AND THE FREEDOM OF ASSEMBLY AND THE RIGHT TO DEMONSTRATE

Democratic governance is conceived as entailing the rule of law, separation of powers in governance, elections in a multiparty democracy and respect for human rights.[12] Important to the realisation of democratic governance are the electoral rights, that is the right to vote and the right to free and fair elections, which have implications on the conduct of the electoral process.[13]

However, beyond electoral rights, the freedom of assembly and the right to demonstrate are also implicated in any conceptualisation of democratic governance given that they are viewed as giving expression to direct democracy as they provide channels for communicating the grievances of the governed to

[12] NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209 at 1220.

[13] TM Franck 'The emerging right to democratic governance' (1992) 86 *The American Journal of International Law* 46 at 63.

those in position of governance.[14] Thus, the freedom of assembly and the right to protest are best seen as supplements to representative democracy as they bolster the legitimacy of representative institutions by helping to keep them open, accountable and responsive.[15]

Kälin and Künzli argue that the right of demonstrators should be protected because 'freedom to gather together with other persons is fundamental for the exercise of any form of democracy'.[16] Indeed, freedom of assembly and the right to demonstrate are basic liberties which are essential for the functioning of any democracy.[17] They serve this goal by enabling meaningful dissent and providing a buffer between the individual and the state in a manner that facilitates a check against centralised power.[18] This follows from the fact that the democratic process becomes meaningful and effective when political actors and other societal groups are able to criticise leaders and demonstrate in public without official intimidation. In this sense, the state of democratic governance within a state is to a large extent dependent on the guarantee and enforcement of the freedom of assembly and the right to demonstrate against the state.[19]

However, in recent times, democratic governance in much of the world has shown signs of regression and attempts to roll back or weaken the protection of the rights that enable democratic governance to flourish.[20] This phenomenon is also evident in Africa where there are signs that the post-1989 advancements in democracy in sub-Saharan Africa have halted and democratic erosion and backsliding is occurring.[21] Despite widespread support for multiparty democracy in the post-1989 era, the continent has not seen deepening respect for democratic norms and values. Countries such as Nigeria, Tanzania and Zimbabwe have witnessed presidential transitions accompanied by continued abuse of human rights resulting in what Nic Cheeseman has typified as 'changing of guards'

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14 B Olutola 'The right to peaceful assembly in a chaotic democracy: An analysis of Nigerian law' in M Addaney, MG Nyarko & E Boshoff (eds) *Governance, Human Rights, and Political Transformation in Africa* (2020) 217.

15 H Botha 'Fundamental rights and democratic contestation: Reflections on freedom of assembly in an unequal society' (2017) 21 *Law Democracy & Development* 221 at 228.

16 W Kälin & J Künzli *The Law of International Human Rights Protection* (2009) 474.

17 MG Nyarko 'The role of the judiciary in safeguarding the right to assembly and public protest in Ghana' in M Addaney, MG Nyarko & E Boshoff (eds) *Governance, Human Rights, and Political Transformation in Africa* (2020) 247.

18 JD Inazu *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012) 5.

19 T Ginsburg & AZ Huq *How to Save a Constitutional Democracy* (2018) 11.

20 See generally MA Graber, S Levinson & M Tushnet (eds) *Constitutional Democracy in Crisis?* (2018).

21 JT Gathii 'Term limits and three types of constitutional crisis in Sub-Saharan Africa' in Graber, Levinson & Tushnet op cit (n20) 313.

rather than democratic transformation of political systems.[22] In other countries, for example Kenya, Zambia, Burundi, Chad and Cameroon, authoritarian drift manifested through the state's adoption of repressive strategies to control the civil society and opposition parties.[23] A different group of countries that include Uganda, Rwanda, Cameroon and Eritrea have seen coercion of the political opposition and the extension of presidential term limits.[24]

The repression of opposition political parties and civil society has included attempts to constrain the space for assembly and protest against governmental actions or inaction. Tanzania, Guinea, Uganda, Cameroon, Zambia, Togo and Zimbabwe have in recent times witnessed the misuse of repressive legislation and the weaponisation of social distancing protocols introduced to combat the Covid-19 pandemic to criminalise political assembly and protest.[25]Against this context of authoritarian shift, it is noteworthy that regional response to this shift has not been effective. Although the African Union and other institutions within the African human rights system have normative standards in the form of the African Charter on Human and Peoples' Rights and the African Charter on Democracy, Elections and Governance, the effective enforcement of these regional instruments is hampered by a lack of political consensus on appropriate standards for intervention on the political practices of member states.[26] This makes it necessary to explore the viability of the options that are available at the domestic level for stemming the erosion of political rights that are key to the functioning of the democratic system.

2.3 HISTORICAL EVOLUTION OF FREEDOM OF ASSEMBLY AND THE RIGHT TO DEMONSTRATE IN KENYA AND SOUTH AFRICA

2.3.1 *The evolution of the freedom of assembly and the right to demonstrate in Kenya*

The colonial period in Kenya was characterised by gross violation of human rights, racial segregation and exclusion of the African majority from political participation.[27] It was against this backdrop that African protest movements began in earnest from the early 1920s.

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22 N Cheeseman *A Changing of the Guards or a Change of Systems? Regional Report Sub-Saharan Africa* (2020) 5.

23 Ibid.

24 Ibid.

25 N Cheeseman 'Africa's growing criminalization of the opposition' *The Africa Report*, 15 January 2021, available at https://www.theafricareport.com/59333/africas-growing-criminalization-of-the-opposition/, accessed on 30 January 2022.

26 N Cheeseman *A Divided Continent: Regional Report Africa* (2018) 13.

27 See generally D Anderson *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (2005).

Legal ordinances were passed against the freedom of assembly by the colonial government. Throughout this period, the authorities denied the people the right to assemble and other political rights with the justification that they might plot to remove the colonial government.[28] This serious repression of freedoms and rights forced the people to organise and rebel against the system. Armed resistance by the Mau Mau[29] played an important part in pressurising the British government to end its colonial rule in Kenya.

At independence, there was a quest for a constitution that could tackle the human rights laws in a proper manner, unlike during British colonial rule.[30] The incorporation of the Bill of Rights in the Independence Constitution was a compromise to secure the rights of minority groups and ensure a peaceful transition into independence.[31]

Nevertheless, the police were allowed to arrest without warrant anyone found in a public gathering, meeting or procession which was likely to breach the peace or cause public disorder in accordance with ss 5 and 8 of the Public Order Act, Chap 56. Under President Jomo Kenyatta, Kenya had not won independence with democracy, but self-rule without freedom. During Kenyatta's reign, security forces harassed dissidents, and were also suspected of the murders of prominent personalities such as Pio Gama Pinto, Tom Mboya and JM Kariuki to mention but a few.

During President Moi's reign, parliament enacted the Constitution of Kenya (Amendment) Act 4 of 1988 imposing limitations on the independence of the judiciary. This had far-reaching consequences on judicial protection from human rights violations including the violation of the right to assembly. The judicial system could not protect this right. Moi perceived human rights as an alien and Eurocentric concept inconsistent with African values and culture.[32]

In the build-up to the 1997 elections, opposition demonstrations in favour of constitutional reforms to ensure free and fair elections were met with police beatings. Under external donor pressure, some amendments were made. However, the police continued to violate the assembly right enshrined in the then constitution. The reform champions demanded repeal of the laws used to lock up and detain human rights campaigners and pro-democracy activists.[33]

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28 D Ciekawy 'Constitutional and legal reforms in the post colony of Kenya' (1997) 25 *A Journal of Opinion* 16.

29 F Furedi *The Mau Mau War in Perspective* (1989).

30 BJ Ratcliffe 'The spelling of Kenya' (1943) 42 *Journal of the Royal African Society* 42.

31 See generally YP Ghai & PWB McAuslan *Public Law and Political Change in Kenya* (1970).

32 KG Adar 'Human rights and academic freedom in Kenya's public universities: The case of the Universities Academic Staff Union' (1999) 21 *Human Rights Quarterly* 179 at 187.

33 Amnesty International Report 'Kenya: Violation of human rights' (1997).

Mwai Kibaki's government came into power in 2002 and the democratic space opened up with the government adopting a shift from the Moi government's open hostility to human rights. However, during the 2007–2008 post-election crisis, the government reacted to the public outrage that greeted its declaration of victory in the presidential poll by imposing a blanket ban on public demonstrations.[34] The government tried to defend the ban as necessary to prevent violence in the wake of the polls. The Office of the High Commissioner for Human Rights (OHCHR)[35] noted that the policing of demonstrations and crowds was conducted with excessive use of force, resulting in the death and injuries of many including children. Only one police officer was investigated for brutality.

Fast forward to the inclusion of a comprehensive Bill of Rights in the 2010 Constitution with art 37 of the Constitution providing for freedoms of peaceful assembly, demonstration and picketing as guaranteed fundamental rights.[36] This is in line with the general theme of the Constitution which has a strong rights-centric ethos.

2.3.2 *The evolution of freedom of assembly and right to demonstrate in South Africa*

South Africa's quest to overthrow the chains of apartheid and minority government was led by political parties and trade unions that used non-violent protests, strikes, boycotts and marches against the apartheid policy that had been introduced by the National Party government, which came into power in 1948.[37] In response, the government launched a crackdown, beating protestors to the extent that they were forced to call off the campaigns in some instances.[38]

During this era, the National Party government passed several legal sanctions aimed at suppressing political activity through restrictions of assemblies and gatherings which played a central role in bringing down apartheid.[39] In addition, security legislation governing the later period expanded the ministerial powers to

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[34] N Cheeseman 'The Kenya elections of 2007' (2008) 2 *Journal of Eastern African Studies* 164.

[35] United Nations High Commissioner for Human Rights 'Report from OHCHR Fact-finding Mission to Kenya, 6–28 February 2008' (2008) 15.

[36] Article 37 of the Constitution of Kenya, 2010.

[37] G Klein 'Nederland tegen apartheid: The role of anti-apartheid organizations 1960–1990' 29 *Journal for Contemporary History* 42.

[38] Ibid.

[39] See generally S Woolman 'Freedom of assembly' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2ed (2013) Chap 43.

prohibit gatherings. Public participation in convening, promoting or organising a prohibited gathering and even mere attendance constituted a criminal offence.

The Sharpeville massacre in March 1961 marked the start of armed resistance in South Africa and prompted worldwide condemnation of apartheid policies. Under pressure from the international community, the National Party government of PW Botha unsuccessfully sought to institute some reforms, including abolition of pass laws and the ban on interracial sex and marriage. When he stepped aside, FW de Klerk took the reins and his government subsequently repealed most of the laws that racially discriminated against black South Africans and also loosened its stance on the right to freedom of assembly.

The Regulation of Gatherings Act 205 of 1993 provided a new legal framework which entrenched the right to peaceful public expression and peaceful assembly and the right to state protection in the enjoyment of these rights. The new policy moved away from crowd control to crowd management as a conceptual framework for the role of the police with respect to public gatherings.

The post-apartheid era of South Africa saw the birth of a new constitution whose values are founded on the principles of democracy and respect for human rights and fundamental freedoms. As in the Kenyan case, s 17 of the Constitution of the Republic of South Africa, 1996 protects the freedom of assembly, picketing and demonstration. The Bill of Rights in its protection of freedom of assembly and other rights shows a keen interest in repudiating all forms of rights violations that were previously experienced during the apartheid era.[40] Public protests and demonstrations have since become ingrained as part of political action in South Africa, with people frequently going to the streets to protest over inadequate public service among other things.[41]

2.4 THE BACKGROUND OF THE CASES AND THE JUDICIAL DETERMINATIONS

2.4.1 *Supreme Court of Kenya:* Hussein Khalid v Attorney General[42]

On 14 May 2013, the appellants, Hussein Khalid and others, took to the streets to protest the actions of Members of Parliament to inflate their salaries and benefits. This demonstration, dubbed 'Occupy Parliament', was dispersed by the police and the appellants were arrested. After being held at Parliament Police Station for five hours, they were informed that they would be charged with the offence of cruelty to animals contrary to the Prevention of Cruelty to Animals Act,

[40] CM Fombad 'African Bill of Rights in a comparative perspective' (2011) 17 *Fundamina* 33.

[41] Botha op cit (n15) 225.

[42] *Hussein Khalid v Attorney General* [2019] eKLR.

2002 and were released on free bond. On arraignment, the appellants were also charged with the offence of conduct likely to cause a breach of peace and taking part in a riot contrary to the Penal Code, Chap 63.

The appellants filed a petition to the High Court claiming their rights had been infringed because the trial at the Magistrate's Court started and continued as a result of an illegal arrest, that the manner of arrest, detention and taking of plea was in violation of their rights and that some of the provisions they were charged under were unconstitutional for vagueness and lack of *mens rea* (the intention of knowledge or wrongdoing that constitutes part of a crime). The High Court dismissed the petition. The appellants appealed this decision to the Court of Appeal, which dismissed it.

Dissatisfied with the decision, they further appealed to the Supreme Court, which delivered a judgment on 18 October 2019. The Supreme Court addressed the three main issues: whether the actions of the respondents during the demonstrations and in arresting, detaining, and charging the appellants violated the constitutional rights of the appellants; whether the provisions under which the appellants were charged were unconstitutional; and whether the failure of the Magistrate's Court to consider constitutional questions was unconstitutional.

On the first issue of whether the arrest, detention, and charging of the appellants violated their constitutional rights under arts 32, 33, 36, 49, and 50 of the Constitution, the Court found that the freedoms of assembly, demonstration, picketing, and petition are not absolute rights. They held that these rights are justifiably limited in the Public Order Act and the Penal Code. Any determination of whether the limitation was illegal in this particular case is a factual issue to be determined by the trial court on a case-by-case basis.[43] Additionally, any constitutional challenge to the Public Order Act would need to be pleaded with greater specificity to have any merit.

Turning to art 49 on the rights of arrested persons, the Court found that the appellants were promptly informed of the reason for arrest in the circumstances and that although 'promptly' is not defined, art 49(1)(f) provides a reasonable time of 24 hours within which an arrested person should be brought before a court. The appellants in this case were charged and released within approximately five hours. The Court also found that it is an acceptable practice for the prosecution to amend a charge sheet to include new charges or exclude others. It is not required that an accused person be informed of the offence immediately upon arrest and that the police only be able to proceed on that charge alone. However, the Court left questions relating to how the appellants were arrested to the trial court to determine.[44]

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[43] *Hussein Khalid v Attorney General* supra (n42) at para 76.

[44] *Hussein Khalid v Attorney General* supra (n42) at paras 79–81.

With regard to art 50 on fair hearing, the Court made a distinction between a fair hearing and a fair trial. The right to a fair hearing speaks to the right to access a court of law that is independent and impartial. It was found that the appellants have been able to access courts. The rights under art 50(2)(j), to be informed in advance of the evidence the prosecution wishes to rely on and have reasonable access to the evidence, the Court held, are to be enjoyed in the course of a trial. The appellants must transform from 'arrested persons' to 'accused persons' to fall within the protection of this article. For this to occur, they must first take a plea and let the trial process commence.[45]

With regard to the unconstitutionality of ss 78(1), 78(2), and 94(1) of the Penal Code and s 3(1)(c) of the Prevention of Cruelty to Animals Act, the Court held that the appellants did not make submissions on the constitutionality of the Prevention of Cruelty to Animals Act at either the High Court or Court of Appeal; therefore it was inappropriate for parties to raise new arguments at an appellate stage at the Supreme Court. For the constitutional challenge to ss 78(1), 78(2) and 94(1) of the Penal Code, the Court found that the allegations were without merit. The ingredients of the offences are not vague and uncertain, and many cases set out what constitutes a breach of peace. A blanket condemnation of the provisions would be overreaching. Additionally, there is recourse in the civil justice system for an accused arrested and charged with an offence unknown in law.[46]

Ultimately, the petition was disallowed. This judgment of the Supreme Court was in line with the findings of the High Court and the Court of Appeal.[47]

2.4.2 *Constitutional Court of South Africa:* Mlungwana v S[48]

The criminal provisions of South Africa's Regulation of Gatherings Act 205 of 1993 were rarely used until Jacob Zuma became President in 2009. In 2013, ten activists from the Social Justice Coalition decided to challenge the law's validity, after being arrested during a peaceful protest outside Cape Town's Civic Centre.

The applicants in this case, the civil society movement, the Social Justice Coalition (SJC), challenged the constitutionality of s 12(1)*(a)* of the Regulation of Gatherings Act, which required the conveners of a gathering to notify municipalities of their intention to stage a gathering; failure to do so was a criminal offence for the convener. They argued that this section of the Regulation of Gatherings Act deterred the exercise of the right to assembly. The impugned provision provided for criminal penalties, including fines and up to one year's

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45 *Hussein Khalid v Attorney General* supra (n42) at paras 86–87.

46 *Hussein Khalid v Attorney General* supra (n42) at para 106.

47 *Hussein Khalid v Attorney General* supra (n42) at para 122.

48 *Mlungwana v S* 2019 (1) SACR 429 (C).

imprisonment, for failure to give proper notice to the authorities of a planned gathering of 15 or more people.

On 19 November 2018, the Constitutional Court handed down the judgment in *Mlungwana v S* and declared s 12(1)*(a)* of the Regulation of Gatherings Act unconstitutional because it unjustifiably limited the right of everyone to peacefully and unarmed, assemble, demonstrate, picket and present petitions as provided for in s 17 of the Constitution. Section 12(1)*(a)* of the Act was found constitutionally invalid to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convenes a gathering a criminal offence. In arriving at its decision, the Court held that the limitation imposed by s 12(1)*(a)* of the Act on the right to freedom of assembly did not meet the requirements in s 36 of the Constitution of South Africa.

The Court found that criminalisation was an unjustifiable limitation on freedom of assembly, and a less restrictive means could be used to incentivise notification, which it recognised served important public purposes. The Constitutional Court's unanimous judgment emphatically recognised the importance of the right to protest:[49]

> People who lack political and economic power have only protests as a tool to communicate their legitimate concerns. To take away that tool would … frustrate a stanchion of our democracy: public participation.

The Court reasoned that while the notice requirement was a limitation on the right, the state had failed to establish the link between the administrative measure (giving notice) and the reduction of violent protests. It argued that the provision could lead to conveners of innocuous assemblies that posed no public safety risks, being criminalised, which could have calamitous effects on their lives and deter assemblies in future, and potentially catch child conveners in its wide net.[50]

The judgment notes the chilling effect criminalisation has on all people, and children in particular:[51]

> For children, who cannot vote, assembling, demonstrating, and picketing are integral to their involvement in the political process ... exposing children to the criminal justice system – even if diverted under the Child Justice Act – is traumatic and must be a measure of last resort.

The judgment concluded that criminal sanctions for protests that do not pose a danger to the public are disproportionate and thus unconstitutional. The South African Court suggested that even administrative fines might be unconstitutional.

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[49] *Mlungwana v S* supra (n48) at para 69.

[50] *Mlungwana v S* supra (n48) at paras 82–89.

[51] *Mlungwana v S* supra (n48) at para 72.

The Court cited laws and jurisprudence from other jurisdictions in support of its conclusion that 'there is no reason to think why the less restrictive incentives identified by the applicants and *amici* will not work just as well as criminalisation, without the far-reaching consequences flowing from a conviction'.[52]

2.5 A COMPARATIVE STUDY AND CRITIQUE OF THE *HUSSEIN KHALID v ATTORNEY GENERAL* AND *MLUNGWANA v S* DECISIONS: THE PROMISE OF PROPORTIONALITY ANALYSIS IN COMBATING DEMOCRATIC REGRESSION

Transformative constitutions are founded on the promise of infusing a 'culture of justification' in governance.[53] This means that all government actions must be justifiable in terms of public reason to the individuals burdened by it. Proportionality analysis provides courts with a rights-friendly analytical framework that is useful in determining the validity and legitimacy of a limitation of a right including on a public order basis.[54] It is on this basis that this section interrogates the divergent approaches adopted in limitation analysis by the Supreme Court of Kenya and the Constitutional Court of South Africa.

2.5.1 *The role of courts in considering limitations to rights*

In *Hussein Khalid v Attorney General*, the Court failed to critique the 'reasonableness and justifiability' of the impugned statutes in terms of the command in the limitation clause (art 24 of the Constitution of Kenya). The fact that the freedom of assembly and the right to demonstrate are not absolute rights under the Constitution of Kenya does not mean that any law enacted by parliament limiting those rights automatically passes constitutional muster as implied in the decision. The limitation clause imposes an obligation on the courts to undertake a thorough and rigorous analysis of the 'reasonableness and justifiability' of the legislative enactment in question.

Moreover, art 24(1) of the Kenyan Constitution demands that the court ascertains whether the limitation of the rights is by law which must meet the test

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[52] *Mlungwana v S* supra (n48) at para 99.

[53] E Mureinik 'A bridge to where?: Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 32. See also D Dyzenhaus 'Law as justification: Etienne Mureinik's conception of legal culture' (1998) 14 *South African Journal on Human Rights* 11.

[54] I Porat & M Cohen-Eliya *Proportionality and Constitutional Culture* (2013) 111; see also S Gardbaum 'Proportionality and democratic constitutionalism' in G Huscroft, BW Miller & G Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 259.

of legality. In addition, the court under art 24(3)(2) of the Kenyan Constitution must ensure that such legislation does not derogate from the core or essential content of the rights implicated in the dispute. This is an analysis that the Supreme Court failed to undertake.

In contrast, in *Mlungwana v S*, while analysing its role under s 36 of South Africa's Constitution (the limitation clause in South Africa's Constitution), the Court appreciated that it has a role of carrying out a justification analysis. Specifically, courts must conduct a weighing-up of the nature and importance of the right that is limited with the extent of the limitation weighed against the importance and purpose of the limiting enactment. Secondly, the weighing-up must 'give way to a "global judgment on [the] proportionality" of the limitation'.

The second worrying determination in *Hussein Khalid v Attorney General* is that the court shielded the impugned criminal laws from constitutional scrutiny. The Court in exercising the constitutional review function must scrutinise criminal laws and criminal procedure laws for compliance with the values and principles embodied in the Bill of Rights. Given that the body of Kenyan criminal laws and criminal procedure laws predate the enactment of the 2010 Constitution, the courts have a special role in scrutinising both the pieces of legislation and common-law decisions founded on them for constitutional compliance. In this case, the Supreme Court failed to perform this role.

In carving out the judicial role when a statute is challenged as unconstitutional, the Court in *Mlungwana v S* reiterated its position that the court's duty in such instances entails 'examining the content and scope of the subject right and the meaning and effect of the impugned enactment to see whether there is any limitation of a right'.[55] In addition, given that the subject legislation pre-dated the 2010 Constitution of Kenya and the 1996 Constitution of South Africa, the courts have an obligation to reappraise the preexisting laws to ensure their conformity with the values and ethos of the new constitutional norms.[56]

2.5.2 *The principle of legality*

The principle of legality is designed to protect citizens against state arbitrariness and abuse of power. It speaks to the rule of law requirement that individuals deserve foreseeability and calculability in the exercise of their rights. The African Court on Human and Peoples' Rights (ACtHPR) has affirmed this requirement for limitation of rights analysis in the case of *Lohe Issa Konate v Burkina Faso*,[57]

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[55] *Mlungwana v S* supra (n48) at para 42.

[56] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 2. See also HK Prempeh 'A new jurisprudence for Africa' (1999) 10 *Journal of Democracy* 135 at 139.

[57] *Lohe Issa Konate v Burkina Faso* (Application 004/2013) [2018] ACHPR 10 (4 October 2013) at para 128.

where it was established that to be considered as 'law', norms must be drafted with sufficient clarity to enable the individual to adapt his behaviour to the rules.

In *Hussein Khalid v Attorney General*, the appellants raised a question on the legality of the impugned legislation given the edict in art 24(1) of the Constitution of Kenya that limitation of rights should be by 'law'. The Supreme Court failed to answer this question. The underlying question before the court, therefore, was what was to be considered 'law' within the terms of the Constitution.

A law that is too vague as to fail to give a clearly discernible indication of what is prohibited and what is not prohibited is not law. The European Court of Human Rights has on a number of occasions considered the meaning of the word 'law' in the context of permissible restrictions to fundamental rights. In *Sunday Times v The United Kingdom*,[58] the court was of the view that:

> [A] norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Not only must the 'law' be foreseeable, it also must be compatible with 'the rule of law' in order to safeguard against arbitrary measures, so that where a discretion is conferred, adequate guidelines as to its exercise must be provided.

Embodied in the principle of legality is the requirement of certainty, which serves to ensure that criminal conduct is defined in such a manner that the individual knows from the wording of the definition of the criminal conduct which acts or omissions are prohibited.[59]

The principle of legality is designed to protect citizens against state arbitrariness and the exigencies of power. It provides individuals with foreseeability and calculability in the exercise of their rights. This protection is crucial within the realm of criminal law because this body of law expresses the highest legal condemnation of acts in a society and provides for the highest legal sanctions.[60] The Supreme Court, however, avoided a nuanced analysis of whether the impugned legislation met the test of legality in art 24(1) of the Kenyan Constitution.

Second, the Supreme Court of Kenya adopted an indefensible approach on the question regarding the unconstitutionality of ss 78(1), 78(2), and 94(1) of

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58 *Sunday Times v The United Kingdom* IHRL 21 (ECHR 1979) at 33.

59 *Agnes Uwimana-Nkusi & Saidati Mukakibibi v Rwanda* (Communication 426/12) [1970] ACHPR 1 (10 November 2019) at para 140.

60 Permanent Court of International Justice 'Consistency of certain Danzig legislative decrees with the Constitution of the Free City' (Advisory Opinion of 4 December 1935) 56; see also L Fuller *Morality of Law* (1964).

the Penal Code, when the Court found that the ingredients of the offences are not vague and uncertain as many cases set out what constitutes a breach of peace.

From a comparative perspective, the approach of the Supreme Court of the United States is relevant in illuminating the correct approach to vagueness in such circumstances. In *United States v Davis*,[61] Associate Justice Neil Gorsuch wrote that:[62]

> In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

The United States Supreme Court held that overly vague criminal laws offend due process (by failing to give individuals notice of forbidden conduct) and separation of powers (by forcing the judiciary, not Congress, to define criminal conduct).[63] The Court emphasised that the prohibition of vagueness in criminal statutes is an 'essential' element of due process, required by both 'ordinary notions of fair play and the settled rules of law'. The void-for-vagueness doctrine, as the Court called it, guarantees that ordinary people have 'fair notice' of the conduct a statute prescribes.

The *Hussein Khalid v Attorney General* decision fails to undertake a similar analysis and does not evince an appreciation that the term 'breach of peace' is an overly vague notion that does not accord citizens 'fair notice' with regard to whether their conduct would violate the law.

2.5.3 *The application of the proportionality test*

While considering the legitimacy of the limitation of rights, the core test is whether a limitation is proportionate. As emphasised by the African Commission on Human and Peoples' Rights in the case of *Media Rights Agenda, Constitutional Rights Project v Nigeria*,[64] 'the reasons for possible limitations must be based on

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[61] *United States v Davis* 588 US (2019) at Opinion of the Court. See also *Sessions v Dimaya* 584 US (2018).

[62] *Sessions v Dimaya* supra (n61) at 1.

[63] *Sessions v Dimaya* supra (n61) at 23.

[64] *Media Rights Agenda, Constitutional Rights Project v Nigeria* (Communications 105/93–128/94–130/94–152/96) [2000] ACHPR 200 (31 October 1998).

legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained'.

Put differently, the question is whether the state has used the least restrictive means to achieve a legitimate goal.

In *Hussein Khalid v Attorney General*, on whether the impugned legislation was 'reasonable and justifiable' in terms of art 24(1) of the Kenyan Constitution, the Supreme Court did not engage in the 'proportionality' analysis envisaged in art 24 of the Constitution. The requirement that the limitation envisaged in the impugned legislation must be reasonable means that such a mechanism must be no more than necessary to achieve the objectives of the legislation.

The application of the proportionality analysis in the context of freedom of assembly was considered by Zimbabwe's Constitutional Court in *Democratic Assembly for Restoration and Empowerment v Saunyama*.[65] The petitioners in this case were challenging the constitutionality of s 27 of the Public Order and Security Act, 2002, which gave the police commissioner powers to bar a protest. The court found that the provision was not proportionate and therefore unconstitutional. The court held that:[66]

> Clearly, the effect of s 27 is to give wide discretion to a regulating authority to abridge the two rights. He or she can impose a blanket ban for up to one month if he or she believes on reasonable grounds that he will not be able to prevent violence from breaking out. During the currency of the ban, the two rights are completely negated. In my view, it matters not that the ban may be imposed only in relation to a class of demonstrations. The effect remains the same in relation to that class of demonstrations. They are all banned. This is regardless of the purpose, size or organisation of the demonstration. The ban has a dragnet effect and like most dragnets, it catches the big and the small, the innocent and the guilty.

The mechanism of enforcement used, in this case of criminal sanctions, must be the least restrictive means available to the state to regulate public assemblies. In other words, any hindrance to assembly must be proportionate to the legitimate aim pursued. If alternative means are available which properly address a permitted objective, but which impinge on constitutionally guaranteed rights, then such legislation cannot be held to be 'reasonably required'.[67]

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[65] *Democratic Assembly for Restoration and Empowerment v Saunyama* [2018] ZWCC 9.

[66] *Democratic Assembly for Restoration and Empowerment v Saunyama* supra (n65) at 9.

[67] See the decisions of the European Court of Human Rights in *Oya Ataman v Turkey* (Application 74552/01) [2006] ECHR 493 (5 March 2007); *Bukta v Hungary* (Application 25691/04) [2007] ECHR 610 (17 July 2007); and *Yılmaz Yıldız v Turkey* (Application 4524/06) [2014] ECHR 1060 (14 October 2014).

It behooved the Supreme Court of Kenya to engage with the question as to whether under art 24(1)(e) of the Constitution of Kenya the use of criminal sanctions is the least restrictive means for regulating assemblies. This is important as criminal sanctions have been recognised as imposing a 'chilling effect' on the enjoyment of rights; hence where alternative means of regulation of enjoyment of a right/freedom are available, then such alternative mechanisms ought to be explored before resorting to criminal sanctions.[68]

Comparatively, in *Mlungwana v S*, the Constitutional Court gave the proportionality test a pre-eminent role. Firstly, it was the Court's finding that the restrictions were blanket in nature and the criminalisation of gatherings was an end in itself and cannot be legitimate. Secondly, that the criminalisation has 'a "calamitous effect" … deleterious consequences of criminalisation severely discourage – and thus limit – the exercise of the section 17 right'. Thirdly and most importantly, that the criminalisation has a widespread chilling effect that extends beyond those who convene assemblies without notice.

In summary, the approach to proportionality analysis adopted in *Mlungwana v S* is laudable for placing emphasis on the right rather than the limitation. It has the potential of serving as a useful guide to courts on adopting rights-friendly approaches to questions relating to public order laws that are being used to curb freedom of assembly and the right to protest. In the context of judicial adjudication of disputes concerning freedom of assembly and the right to demonstrate, there can be little doubt that *Mlungwana* advanced freedom of assembly and the right to demonstrate in South Africa.[69] The court in *Mlungwana* is alive to the need to protect assemblies as one of the few expressive vehicles available to poor and marginalised people.[70]

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[68] On the availability of alternative mechanisms of limitation of the right to protest see M Kamunyu & EK Murimi 'Advancing the right to demonstrate in Kenya through negotiated management' in M Addaney, MG Nyarko & E Boshoff (eds) *Human Rights, and Political Transformation in Africa* (2019) 175. See also the Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies UN Doc A/HRC/31/66 (2016) to the effect that no person should be held criminally, civilly or administratively liable for the mere act of organising or participating in a peaceful protest.

[69] J Duncan 'South Africa's doctrinal decline on the right to protest: Notification requirements and the shift from fundamental right to national security threat' (2020) 10 *Constitutional Court Review* 227 at 229; GN Barrie 'Section 12(1)*(a)* of the Regulation of Gatherings Act 205 of 1993 declared unconstitutional – Criminal sanction an unjustifiable limitation on the exercise of the right to assemble' (2019) 2 *TSAR* 405; and O Fuo 'Rethinking the regulation of university students' protests in light of *Mlungwana v The State* 2018 ZACC 45' (2020) 53 *De Jure Law Journal* 369.

[70] Duncan supra (n69) 230.

2.6 CONCLUSION

There are many 'colonial relics' and relics from the authoritarian post-independence African state which, in a number of countries, have 'escaped' reform and continue to be utilised on a regular basis to stall the growth of democracy on the African continent. Constitutional reforms in places like Kenya and South Africa have given birth to transformative charters that offer better prospects for the judicial protection of political rights including through the proportionality analysis of legislation that limits rights. However, courts must play their part in ushering in this transition to democratic governance.

As argued in this chapter, the Court in *Hussein Khalid v Attorney General* did not play its role in stemming the tide of democratic regression in the country. The lesson from Kenya is that judges must wake up to the realisation that demonstrations and protests are a legitimate and vivid way for the public to express its views. In contrast, the experience to be drawn from the *Mlungwana v S* decision is that rigorous application of proportionality analysis to legislation limiting rights can serve a positive role in protecting democratic space. Thus, other domestic courts across the African continent should see proportionality analysis as a doctrinal device or analytical tool that is available to them in rights adjudication in curbing legislative attempts to erode political rights that are essential for the functioning of the democratic system.

CHAPTER 3

Courts as a bulwark against democratic regression: Theatres of accountability

SFISO BENARD NXUMALO*
TANVEER RASHID JEEWA†

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ABSTRACT

The Constitution, and not parliament, is supreme, but not self-executing. It is incumbent on the legislature, the executive, and the judiciary to give effect to it. Ideally, the three arms of government must discharge their constitutional duties without undermining each other's mandates. Hence, a test for constitutional democracies is their reaction when one arm of the government actively undermines another. Recently, a slew of public utterances has been made by public officials in South Africa who form part of the executive, questioning the legitimacy of the judiciary, on the basis that judges are unelected and tend to make decisions that go against the wishes of the majority, thus eroding democracy. Former President Zuma is one such public official who, even during his term as President, was critical of the judiciary's legitimacy. The attacks against the judiciary continued unabated as the Constitutional Court ordered his imprisonment for contempt of its court order. In this chapter, we analyse the Constitutional Court's Contempt of Court judgment and argue that courts perform a crucial function by serving as transparent theatres of accountability. Consequently, unsubstantiated attacks

* LLB (University of Witwatersrand), BCL (University of Oxford), DPhil in Law Candidate (University of Oxford).
† LLB (University of Cape Town), LLM in Public Law (University of Cape Town), LLD Candidate (University of Stellenbosch).

by public officials on the judiciary are a threat to the rule of law and are symptomatic of democratic regression.

> The majesty of law is to achieve what centuries of blood and iron were not capable of.[1]

3.1 INTRODUCTION

At the core of any constitutional democracy is the rule of law. It is a doctrine that prevents the despotism of Parliament and the unbridled commands of the political leaders.[2] Perforce, in constitutional democracies, the Constitution, and not Parliament, is supreme. Under the rule of law, no one is entitled, by virtue of their office, to disregard or ignore the law.[3] Underpinning this doctrine is the notion that the law is a bulwark between leaders and the led, which is intended to safeguard and shield persons from the antagonistic and adverse discrimination of those who wield power.[4] Axiomatically, courts are institutionally built to uphold the rule of law.

The three arms of government (that is, the executive, the legislature, and the judiciary) should complement each other and operate together to enhance the freedoms and well-being of the public. They should be able to discharge their constitutional duties, while holding each other accountable, without impermissibly usurping the functions and the duties of the other. However, what happens when one arm of government actively and deliberately undermines another arm? More specifically, what is the effect and the impact of attempts by the officials who form part of the executive to dismantle the judiciary by calling into question its independence and legitimacy?

Over the past few years, South Africa has come to realise the bitter truth that the rule of law is always at risk.[5] Former President Zuma is one such public official

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1 W Hallstein *Die Europäische Gemeinschaft* 5ed (1979) 53.

2 A Sajó & R Uitz *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (2017).

3 AV Dicey *Introduction to the Study of the Law of the Constitution* (1885) 193.

4 TRS Allan 'Legislative supremacy and the rule of law' (1985) 44 *Cambridge Law Journal* 111 at 113.

5 H Kawadza 'Attacks on the judiciary: Undercurrents of a political versus legal constitutionalism dilemma?' (2018) 21 *PER* 1; L du Toit 'The performance of the judiciary' (2016) in IDEA Report *Assessing the Performance of the South African Constitution* (2016), available at https://constitutionnet.org/sites/default/files/assessing_the_performance_of_the_south_african_constitution_abridged_report.pdf, accessed on 11 February 2022; K Maughan 'Sisulu echoes Zuma in baseless attack on "mentally colonised" black judges' *News24*, 8 January 2022, available at https://www.news24.com/news24/columnists/karynmaughan/karyn-maughan-sisulu-

who, even during his term as President, was critical of the judiciary's legitimacy.[6] The attacks against the judiciary continued unabated as the Constitutional Court of South Africa, in its commitment to discharge its constitutional duties, ordered the imprisonment of Zuma for contempt of its court order.[7] This chapter contends that the unsubstantiated claims that gnaw at the legitimacy and independence of the judiciary form the abyss of democratic regression. We argue that courts perform a crucial function by serving as transparent theatres of accountability and enhance democracy. Attacks on the judiciary are a threat to the rule of law and, ultimately, democracy. These attacks strike at the heart of the rule of law and the legal system which underpins it.

To advance our central contention, the chapter will be structured as follows: First, we discuss the relationship between the rule of law and democracy; secondly, we canvass the role of courts (the judiciary) as theatres of accountability and enhancers of democracy; and lastly, we dissect the South African Constitutional Court's Contempt of Court judgment, which led to the imprisonment of former President Jacob Zuma, as an example of a court acting as a theatre of accountability and upholding the rule of law.

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echoes-zuma-in-baseless-attack-on-mentally-colonised-black-judges-20220108, accessed on 11 February 2022; and H Corder 'Rule of law in South Africa protects even those who scorn it' *The Conversation*, 27 January 2022, available at https://theconversation.com/rule-of-law-in-south-africa-protects-even-those-who-scorn-it-175533, accessed on 11 February 2022.

6 For instance, then President Zuma questioned the correctness of the Constitutional Court's decisions since the courts themselves have divergent views on the case. See C Hoexter 'The importance of dissent: Two judgments in administrative law' (2015) *Acta Juridica* 120 at 121 and Staff Reporter 'Zuma eyes ConCourt changes' *Mail & Guardian*, 13 February 2012, available at https://mg.co.za/article/2012-02-13-zuma-eyes-concourt-changes/, accessed on 11 February 2022. Further to this, Zuma, unhappy with some of the Constitutional Court's judgments, called for a review of the powers of the judiciary on the belief that it had too much power and abused its judicial powers. See Sapa & Sowetan Reporter 'Zuma wants Constitutional Court powers reviewed' *Sowetan Live*, 14 February 2012, available at https://www.sowetanlive.co.za/news/2012-02-14-zuma-wants-constitutional-court-powers-reviewed/, accessed on 11 February 2022; and J Klaaren 'Transformation of the judicial system in South Africa' (2015) 47 *George Washington International Law Review* 481.

7 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 (9) BCLR 992 (CC) (Contempt of Court judgment).

3.2 THE SYMBIOTIC RELATIONSHIP BETWEEN THE RULE OF LAW AND DEMOCRACY

The rule of law is a perennial doctrine and is the cornerstone of contemporary constitutional democracy.[8] It has, over the years, come to mean different things in different legal traditions. Waldron posits that it is a multifaceted ideal.[9] Dicey proffered three possible meanings of the rule of law, which he considered to be a fundamental principle underlying a constitution.[10] First, the rule of law may refer to the absolute supremacy of the law, instead of arbitrary power. Secondly, the rule of law encapsulates the notion that the law of the constitution is a result of the rights of individuals, which are administered and enforced by courts. Thirdly, it refers to equality before the law and equal subjugation of everyone to it, without exception.[11] This article is premised on Dicey's third proposition.[12] In technical parlance, the rule of law is a legal principle of general application which affirms the supremacy of the law and no person, regardless of their rank, status, or office, is above or below the law.[13]

In short, the rule of law requires everyone to act in accordance with the law and that everyone is subject to the same law. Day asserts that the value of the rule of law lies in the fact that it establishes and maintains a legal system within a particular jurisdiction, and this legal system is upheld by the judiciary.[14] The role of the judiciary in a legal system underpinned by the rule of law cannot be overstated. O'Donnell explicates that the rights and freedoms of the public are threatened and precarious where there is no rule of law, which is defended and upheld by an independent judiciary.[15] We will say more about the role of the judiciary and the rule of law later.

Plato, in his seminal work *The Republic*, posits that the rule of law, democracy and good governance are important ingredients for the ideal state.[16] Anuye et al assert that democracy is succoured by the rule of law and the rule of law

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8 AH Garrison 'The traditions and history of the rule of law' (2014) 12 *Georgetown Journal of Law Public Policy* 565 and E Ferioli 'Rule of law and constitutional democracy' (2015) 46 *Turkish Yearbook of International Relations* 91 at 91.

9 J Waldron 'The concept and the rule of law' (2008) 43 *Georgia Law Review* 3 at 6.

10 Dicey op cit (n3) 202–203.

11 Ibid.

12 There are other concepts of the rule of law which have been advanced by various theorists. See Lon L Fuller *Morality of the Law* (1968); J Locke *The Second Treatise of Government* (1689); and T Hobbes *Leviathan* (1651).

13 Allan op cit (n4) 113.

14 JP Day 'Civil liberty and the rule of law' (1983) 31 *Political Studies* 194.

15 G O'Donnell 'Why the rule of law matters' (2004) 15 *Journal of Democracy* 32 at 32.

16 Plato *The Republic* (1471) and see also FL Lisi 'Plato and the rule of law' (2013) 26 *Méthexis* 83.

flourishes in a democratic environment.[17] The claim that democracy and the rule of law are intimately intertwined should not be controversial.[18] The rule of law, argue Anuye et al, is the basis of democracy.[19] The rule of law provides the requisite mechanisms that ensure that elected officials are held accountable and their powers are legally constrained. The liberties and equalities guaranteed to the public are safeguarded from arbitrary decisions made by public officeholders. The principle of separation of powers is embraced by the rule of law and is crucial for the optimal functioning of a democracy. The separation of powers may represent the implementation of the rule of law in a democratic society in that it places restraints on the power of government by dividing such power into three separate arms of government—the executive, the legislature, and the judiciary.[20] The separation of powers doctrine reminds us that structure is important. Structure in this sense ensures the proper distribution of powers with checks and balances in place. Its objective is to curtail the abuse of political power.[21] As Seedorf and Sibanda argue, the separation of powers is a crucial component of constitutional democracies.[22]

Without the rule of law, democracy is fragile and vulnerable.[23] Accountability, transparency and civil liberties become merely of academic interest. Where the rule of law is disregarded and ignored, there is democratic regression. Democratic regression has no single definition but may be identified by various factors. For instance, democratic regression may be seen where elected political leaders, propelled by the attainment of wealth and greed, dismantle and subvert institutions that are meant to hold them to account and restrict their power. A successful attempt at dismantling an institution was the disbandment of the SADC Tribunal following a ruling against the Zimbabwean government for being in breach of the SADC Treaty. Regarding the ruling as an intolerable interference with Zimbabwe's domestic affairs, late President Mugabe dismissed the ruling as

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17 SP Anuye, AE Ityavkasa & AM Deji 'The doctrine of the rule of law: A necessity to democratic governance' (2017) 17 *Global Journal of Human Social Science* 1 at 17.

18 We should not be understood to suggest that the rule of law and democracy are inseparable. We recognise that some aspects of the rule of law may exist without democracy.

19 Anuye et al op cit (n17).

20 S Seedorf & S Sibanda 'Separation of powers' in S Woolman et al (eds) *Constitutional Law of South Africa* 2ed (2008) chap 12; and K O'Regan 'Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8 *PER* 5.

21 Seedorf & Sibanda op cit (n 20).

22 Ibid.

23 Anuye et al op cit (n17).

an 'exercise in futility'.[24] Other instances of democratic regression include the use of the military to overthrow a government, and rampant corruption.[25]

Diamond defines democratic regression or recession as the decline and erosion of liberal democracy or the erosion of the democratic institutions within countries that once had high civil liberties and democracy.[26] Tudor further contends that democratic regression also occurs when dissent is undermined and repressed.[27] We submit that generally the dismantling of the judiciary through unfounded allegations, aimed at its credibility and legitimacy, by the executive or the legislature is an attack on the rule of law and ultimately on democracy. This is because the rule of law cannot function without an independent, impartial judiciary to uphold and enforce the law and ensure that political actors are held accountable.

3.3 COURTS AS THEATRES OF ACCOUNTABILITY

Montesquieu once characterised the judiciary as *la bouche de la loi* (the mouthpiece of the law).[28] This statement is no longer particularly accurate. The judicial system is no longer what Hamilton described as 'the least dangerous branch' of government on account of it not having an army or spending power.[29] Increasingly, issues once considered to be political have become judicial questions, which courts have been called upon to resolve.[30] Commercial, political, and moral issues have found themselves brought before courts. As Cartabia argues, the judiciary has gained traction and popularity in the public life and has become one of the significant actors in constitutional democracies.[31] This is because any

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[24] L Nathan 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35 *Human Rights Quarterly* 1 at 7.

[25] L Diamond 'Democratic regression in comparative perspective: Scope, methods, and causes' (2021) 28 *Democratization* 22 at 30.

[26] L Diamond 'Facing up to the democratic recession' (2015) 26 *Journal of Democracy* 141.

[27] M Tudor 'How India exemplifies the world's democratic recession' *Medium,* 16 March 2021, available at https://medium.com/oxford-university/how-india-exemplifies-the-worlds-democratic-recession-14e71cdc0fe0, accessed on 23 September 2021.

[28] KM Schönfeld 'Rex, Lex et Judex: Montesquieu and *la bouche de la loi* revisited' (2008) 4 *European Constitutional Law Review* 274; and I Griss 'How judges think: Judicial reasoning in tort cases from a comparative perspective' (2013) 4 *Journal of European Tort Law* 247.

[29] A Hamilton 'The Federalist No 78' in Rossiter (ed) *The Federalist Papers* (1961) 464. See also MS Flaherty 'The most dangerous branch' (1996) *Yale Law Journal* 1725.

[30] This was recognised by A de Tocqueville in *Democracy in America* (Book 2) (1838) 8.

[31] M Cartabia 'The rule of law and the role of courts' (2018) 10 *Italian Journal of Public Law* 1 at 4.

constitutional democracy which embraces judicial review of the discharge of public performance and exercise of public power invariably places the Court in the political arena. It then requires the Court to adjudicate decisions made by a president and other members of her cabinet and examine them against the backdrop of the Constitution. The increasing reliance on courts to resolve contentious social and political issues (the judicialisation of politics) has become referred to as lawfare.[32] There is also a tendency for internecine rivalries within the political parties to play themselves out in the courts. This occurs where political parties are weak and factionalised. This, too, can undermine the legitimacy of the judiciary, which is seen as supporting a political faction depending in whose favour it rules, rather than as an independent arbiter of disputes.

However, the increasingly powerful role of courts has not been met with a warm welcome. In fact, the opposite is true. Whenever the courts have found against the executive or the legislature, there tends to be a vilification of the courts, bringing into question their legitimacy.[33] For instance, in South Africa, former President Zuma characterised the Constitutional Court as a threat to democracy and the Constitution.[34] This criticism is primarily premised on the view that judges are unelected and therefore should not have the power to overturn or set aside the decisions of an elected body such as the legislature or the executive. Underpinning this view is that judges are not better placed than the executive or the legislature to oversee or monitor their decisions.[35] In short, courts are seen as being inherently undemocratic and counter-majoritarian.[36] This view demonstrates a lack of understanding of the role of the courts in a constitutional democracy.

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[32] H Corder & C Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *African Journal of Legal Studies* 105 at 106–107; and H Corder 'Are critics of the judiciary legitimate or dangerous?' *Mail & Guardian*, 26 August 2019, available at https://mg.co.za/article/2019-08-26-are-critics-of-the-judiciary-legitimate-or-dangerous/, accessed on 23 September 2021.

[33] 'Criticism of the judiciary: Attacking the authority of the courts' *Judges Matter,* 16 August 2019, available at_https://www.judgesmatter.co.za/opinions/criticism-of-the-judiciary/, accessed on 23 September 2021.

[34] L Bhengu 'Zuma says SA is becoming "constitutional dictatorship" after he loses in court' *News24*, 20 September 2021, available at https://www.news24.com/news24/southafrica/news/zuma-says-sa-is-becoming-constitutional-dictatorship-after-he-loses-in-court-20210920, accessed on 23 September 2021.

[35] AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 4.

[36] J Waldron *Law and Disagreement* (1999) 213; and J Waldron 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346 at 1406.

We differ from this argument for three reasons. The first point is that judicial appointments are political choices and are not isolated from political influence. Judges are themselves chosen after a political process, and often by the incumbent president.[37] Secondly, democracy should not be reduced to merely the 'rule of the majority'.[38] A broader conception is necessary. Under this broader conception of democracy, which is described below, there are certain mechanisms and constraints in place which regulate the will of the people.[39] Most of these constraints will be found in a constitution. Courts play an indispensable role in ensuring that democracy functions properly by upholding and administering the checks and balances ingrained in a legal system.[40] The legislature and Parliament should not, and cannot, govern themselves and control their own powers, without any external institution to safeguard against potential abuse.[41] An independent judiciary is crucial to a functional and thriving democracy.[42]

A third and important point is that courts are theatres for accountability. The legislature and the executive are required to account for their decisions and policies. These decisions are made accessible to the public and for their scrutiny, save for a few exceptions. Public office-bearers are obliged to justify their actions and provide explanations that can be assessed against the Constitution or relevant legislative framework. Moreover, courts provide the public (especially those adversely affected by governmental decisions) with a platform to participate in the political decision-making process outside of only casting a vote during the election period. They thus enhance the deliberative process between the elected and the electee and those who are marginalised. This establishes and strengthens a culture of justification (as opposed to a culture of authority).[43] Axiomatically,

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37 RN Daniels & J Brickhill 'The counter-majoritarian difficulty and the South African Constitutional Court' (2016) 25 *Penn State International Law Review* 370 at 377. For a breakdown of South Africa's judicial appointment process, see L Siyo & JC Mubangizi 'The independence of South African judges: A constitutional and legislative perspective' (2015) 18 *PER* 817 at 820–828.

38 A Lijphart 'Majority rule versus democracy in deeply divided societies' (1977) 4 *Politikon: South African Journal of Political Studies* 113; and SA Umezurike & CG Iwu 'Democracy and majority in South Africa: Implications for good governance' (2016) 8 *Acta Universitatis Danubius* 38.

39 S Holmes 'Precommitment and the paradox of democracy' in J Elster & R Slagstad (eds) *Constitutionalism and Democracy* (1993) 195.

40 R La Porta et al 'Judicial checks and balances' (2004) 112 *Journal of Political Economy* 445.

41 Daniels & Brickhill op cit (n37) 578.

42 S Ellman 'Separation of powers in post-apartheid South Africa' (1992) 8 *American University Journal of International Law and Policy* 455 at 481.

43 A culture of justification is a culture whereby every performance of a public function and exercise of a public power must be justified and defended. A culture of authority

in light of the separation of powers principle, the role of the courts is to ensure and facilitate accountability, responsiveness and openness.[44] Of course, there is a fine line that courts must tread between ensuring their own legitimacy through well-reasoned decisions and respecting the powers and functions of the other arms of government.

In the end, it comes to this: Democracy encompasses more than just the rule of the majority. It encapsulates processes and mechanisms that constrain political power and safeguard against potential abuses. An integral part of democracy is the rule of law with its underlying premise that everyone is subject to, and accountable to, the law. Everyone must operate within the confines of the law. It directs how political power should be exercised. Democracy and the rule of law are entwined and mutually reinforcing. This, in turn, requires an independent judiciary. In a democratic society, the rule of law, as upheld by an independent judiciary, defends the rights and freedoms of the public, and their dignity and equality. Courts uphold the rule of law and hold those who exercise power accountable. Political power has to be exercised within the discipline of the law.[45]

Occasional attacks directed at individual judges in South Africa by political parties are not necessarily genuine threats to the independence and legitimacy of the judiciary. As is discussed later, critique of the judiciary and its judgments are necessary for a healthy democracy. However, not all critique is genuine. An example of sinister attacks followed the al-Bashir judgment,[46] when political

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refers to a culture in which the government relies on force and coercion to implement its decisions. See E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 32.

44 *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC) at paras 2–3.

45 PK Tripathi 'Rule of law, democracy, and the frontiers of judicial activism' (1975) *Journal of the Indian Law Review* 17.

46 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) (Al-Bashir judgment). This was invariably a politically charged case in that it involved the detention of a foreign head of state by the South African authorities. Sudanese President Omar al Bashir was wanted by the International Criminal Court on several counts and issued an arrest to this effect. Al Bashir was in South Africa and the South African Litigation Centre, a non-profit human rights organisation, approached the High Court of South Africa to request the South African government to implement the arrest warrant against the Sudanese President. This sparked a number of criticisms against the role of the judiciary and its legitimacy to interfere in what some characterised as a political matter to be resolved through the political process by the South African and Sudanese states. See A Mudukuti 'judicial integrity and independence: The South African Omar Al Bashir matter', available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Mudukuti.pdf, accessed on 23 September 2021; and UC Mokoena

leaders publicly claimed that the judiciary was biased against the legislature and the executive, motivated by the need 'to create chaos', contradicting and at odds with the 'interests of the State' and was essentially 'overreaching'.[47] These leaders also strongly suggested that the judiciary had acted in dereliction of its duties in that the courts had the disposition to reach particular outcomes in certain cases, abandoning legal principles.[48]

Recently, Lindiwe Sisulu, a member of the National Executive Committee of the governing party (the African National Congress (ANC)) and a long-serving member of Cabinet, penned an opinion piece and mounted a frontal attack on the rule of law, the Constitution and the judiciary.[49] She claimed that the black judges within the judiciary are 'mentally colonized Africans', who perpetuate the suffering of black people in Africa. She then called for 'an overhaul of a justice system that does not work for Africa and Africans'. She described the Constitution as 'palliative' because it has not changed the material (socio-economic) conditions of black people. Black people, she argued, are 'victims of the rule of law'.

There were no facts provided to substantiate this rhetoric. The vitriol and spite of her comments are seriously concerning.[50] Her comments are not only dangerous but they are unfounded and invert the function and purpose of the Constitution and the judiciary. The lack of transformation of the material

& O Jegede 'Politics or law: Reflections on the aftermath of the Omar Al-Bashir saga and South Africa's intended withdrawal from the ICC' (2018) 5 *Journal of African Foreign Affairs* 91.

47 V John 'Chief Justice hammers "gratuitous criticism"' *Mail & Guardian*, 8 July 2015, available at http://mg.co.za/article/2015-07-08-chief-justice-hammers-gratuitous-criticism, accessed on 23 September 2021.

48 Ibid.

49 L Sisulu 'Hi Mzansi, have we seen justice?' *IOL*, 7 January 2022, available at https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3, accessed on 11 February 2022.

50 See also M Msimang 'Lindiwe Sisulu's extraordinary attack on South Africa's Constitution' *Daily Maverick*, 9 January 2022, available at https://www.dailymaverick.co.za/article/2022-01-09-lindiwe-sisulus-extraordinary-attack-on-south-africas-constitution/, accessed on 11 February 2022; R Davis 'Lindiwe Sisulu's F-you to Ramaphosa should surprise no one – here's why' *Daily Maverick*, 21 January 2022, available at https://www.dailymaverick.co.za/article/2022-01-21-lindiwe-sisulus-f-you-to-ramaphosa-should-surprise-no-one-heres-why/, accessed on 11 February 2022; and F Cachalia 'Lindiwe Sisulu's debased, deeply offensive vitriolic campaign start sickens me to the core' *Daily Maverick*, 17 January 2022, available at https://www.dailymaverick.co.za/opinionista/2022-01-17-lindiwe-sisulus-debased-deeply-offensive-vitriolic-campaign-start-sickens-me-to-the-core/, accessed on 11 February 2022.

conditions of many South Africans is due to a lack of political will.[51] It is the executive and the legislature, that are responsible for the deepening of poverty and inequality.

This political tension has recently resurfaced in contempt proceedings concerning former President Zuma. It has tested the legitimacy of the judiciary and South Africa's commitment to the rule of law.

3.4 CONTEMPT OF THE COURT AND THE RULE OF LAW: A CONSTITUTIONAL CRISIS

This matter has a long and contorted history. Since 2018, South Africa has been subjected to a protracted commission of inquiry (the Commission), which was tasked to investigate allegations of state capture, corruption, and fraud in the public sector including organs of state.[52] Former President Jacob Zuma was implicated in several witnesses' testimonies, which pointed to him being involved in the web of state capture and facilitating corruption during his presidency.[53] He appeared before the Commission but then refused to continue giving testimony on the basis that his appearance before the Commission was defective and that he was being cross-examined by the Commission's lawyers when he was merely 'invited' to 'give his side of the story'.[54] The Commission and Zuma reached an impasse and the Commission eventually issued a summons against Zuma.[55] In response, Zuma applied to have the Chairperson of the Commission, then Zondo DCJ, recuse himself from hearing his evidence on the basis that Zondo DCJ would be biased on account of their previous friendship.[56]

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[51] L Dougan 'Land Reform: What is really missing is lack of political will' *Daily Maverick*, 11 September 2018, available at https://www.dailymaverick.co.za/article/2018-09-11-land-reform-whats-really-missing-is-political-will/, accessed on 14 February 2022.

[52] Commission of Inquiry into State Capture 'Our mandate', available at https://www.statecapture.org.za/site/about/mandate, accessed on 23 September 2021.

[53] K Maughan 'Jacob Zuma shrugs off testimony implicating him in state capture' *Business Live*, 4 September 2018, available at https://www.businesslive.co.za/bd/national/2018-09-04-jacob-zuma-shrugs-off-testimony-implicating-him-in-state-capture/, accessed on 23 September 2021.

[54] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 (5) SA 1 (CC) (*Zuma I*) at paras 34–37.

[55] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (*Zuma I*) supra (n54) paras 37–49.

[56] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (*Zuma I*) supra (n54)

Zondo DCJ dismissed the recusal application and in turn, Zuma refused to participate further in the Commission's proceedings.[57]

As a result of Zuma's refusal to participate, Zondo DCJ elected to approach the Constitutional Court seeking an order, inter alia, to compel Zuma to appear before the Commission and give evidence on certain dates. Zuma decided not to participate in the hearing and did not make further submissions to the Court.[58] In a unanimous judgment, the Court found in favour of the Commission and ordered Zuma to appear and give evidence before the Commission.[59] Zuma publicly stated his intention not to appear before the Commission.[60] At the relevant time, Zuma, in defiance of the Constitutional Court's order, indeed failed to appear before the Commission. Zuma's contempt of a court order directing him to appear before the Commission was just the proverbial tip of the iceberg.

After Zuma defied the Constitutional Court's order, Zondo DCJ returned to the Constitutional Court seeking an order finding Zuma guilty of the crime of contempt of court as he failed to comply with the order in *Zuma I*.[61] Again, there was no participation by Zuma – he did not oppose the application and did not furnish any submissions.[62] Instead he authored a letter where he noted

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para 50. See also S Mavuso 'Jacob Zuma formally asks Zondo to recuse himself when he appears at State Capture Commission' *IOL*, 28 September 2020, available at https://www.iol.co.za/news/politics/jacob-zuma-formally-asks-zondo-to-recuse-himself-when-he-appears-at-state-capture-commission-c36c83ae-2473-428a-aa60-e9a41b1afd06, accessed on 23 September 2021.

57 S Smit 'Zondo dismisses Zuma's recusal application' *Mail & Guardian*, 19 November 2020, available at https://mg.co.za/politics/2020-11-19-zondo-dismisses-zumas-recusal-application/, accessed on 23 September 2021.

58 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (*Zuma I*) supra (n54) para 29.

59 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma (Zuma I)* supra (n54) paras 4 and 5 of the order.

60 Letter by Zuma entitled 'Statement on Constitutional Court decision compelling me to appear before the Commission of Inquiry into Allegations of State Capture', annexed in the founding affidavit of the applicant in the Contempt of Court judgment, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36746/01Applicant%27s%20Notice%20of%20Motion%20and%20Founding%20Affidavit.pdf?sequence=3&isAllowed=y, accessed on 11 February 2022, 95.

61 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 40.

62 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 127.

that he was 'ready to be a prisoner of the Constitutional Court',[63] questioned the legitimacy of the Court,[64] and criticised it for partaking in political gimmicks.[65] The involvement of the Court, Zuma argued, was nothing but a furtherance of the violation of his constitutional rights to freedom, his dignity and his right to life.[66]

The Court agreed with Zondo DCJ and unanimously found that Zuma was undoubtedly in contempt of court. However, the dissenting judgment (per Theron J) disagreed with the majority judgment (per Khampepe ADCJ) on the issue of the appropriate sanction.[67] The majority judgment held that the dictates of the rule of law, as a foundational value of the Constitution, demand that the dignity and authority of the courts be upheld, and that disregarding and disobeying court orders would have the effect of undermining the authority of the courts.[68] Zuma's conduct constituted an egregious affront on judicial integrity and the rule of law.[69] The majority judgment asseverated:

> Mr Zuma's conduct that led to and has persisted throughout these proceedings is all the more outrageous when regard is had to the position that he once occupied. Although Mr Zuma is no longer President, his conduct flies in the face of the obligation that he bore as President. It is disturbing that he, who twice swore

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[63] Letter by Zuma entitled 'RE: DIRECTIONS DATED 9 APRIL 2021: CASE NO. CCT 52/21' para 5, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36746/Letter%20from%20Mr%20JG%20Zuma%20dated%2014%20April%202021.pdf?sequence=19&isAllowed=y, accessed on 11 February 2022.

[64] This can be discerned from reading the letter as a whole.

[65] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court Judgment) supra (n7) para 9.

[66] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court Judgment) supra (n7) para 5.

[67] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court Judgment) supra (n7) paras 143 and 145. The dissenting judgment is discussed further below.

[68] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court Judgment) supra (n7) paras 25–27. See also *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) paras 1–2; and *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) para 61.

[69] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court Judgment) supra (n7) para 30.

> allegiance to the Republic, its laws and the Constitution, has sought to ignore, undermine and, in many ways, destroy the rule of law altogether.[70]

Khampepe ADCJ opined that the Court needed to interfere and address the continuing assault on the integrity of the judicial process.[71] The conduct and persistent recalcitrance had to be confronted and addressed as soon as possible.[72] She concluded that a finding of contempt of court was the only appropriate ruling that would vindicate the rule of law and uphold the dignity and authority of the court.[73] This was rendered more egregious by the fact that Zuma is a former President of the country and a pre-eminent political leader. The majority ordered Zuma to serve 15 months in prison.[74] Zuma remained defiant, delaying handing himself over until he was arrested at the 11th hour of the Court-set deadline at his personal residence.[75] In another letter, Zuma's official Foundation characterised the majority judgment as 'judicially emotional', 'angry' and inconsistent with the dictates of the Constitution.[76]

The import of the Court's judgment is that ignoring court orders is destructive to the rule of law and its legitimacy. It illustrates that in a robust democracy, deeply rooted in and entrenched in the rule of law, no one is above the law, regardless of the position they hold in society. It also reaffirms the view that courts are theatres of accountability. Undermining the judiciary and disobeying lawfully given court orders is antithetical to the rule of law. We submit that this

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70 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 100.

71 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) paras 82.

72 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) paras 30–35.

73 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 62.

74 In terms of paras 4 and 5 of the order of the Contempt of Court judgment, Zuma was sentenced to 15 months' imprisonment and had to submit himself to the South African Police Service within five calendar days from the date of the order.

75 J Eligon 'Jacob Zuma, former South African president, is arrested' *The New York Times*, 7 July 2021, available at https://www.nytimes.com/2021/07/07/world/africa/jacob-zuma-arrested-south-africa.html, accessed on 11 February 2022.

76 Letter from the Jacob G Zuma Foundation entitled 'JGZF RESPONSE TO JG ZUMA'S CONCOURT JUDGEMENT', available at https://twitter.com/JGZ_Foundation/status/1410351874637709314/photo/1, accessed on 11 February 2022.

goes further. It illustrates the erosion of democratic values. The imprisonment of Zuma has been identified as one of the numerous causes of the violence and looting that engulfed South Africa between June and July 2021.[77] His political faction within the ANC publicly threatened and instigated unrest, calling for Zuma to be released.[78] Undoubtedly, Zuma's recalcitrance when faced with court orders, and the political support that he received, is symptomatic of a failure of democracy and adherence to the rule of law by political leaders. Alive to this failure, Khampepe ADCJ remarked that:

> Within their purview of functions, courts are pillars of democracy and the keepers of our Constitution. As Dicey once wrote, 'no [person] is above the law' and 'every [person], whatever be [her or] his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'. An act of defiance in respect of a direct judicial order has the potential to precipitate a constitutional crisis: when a public office-bearer or government official, or indeed any citizen of this Republic, announces that he or she will not play by the rules of the Constitution, then surely our Constitution, and the infrastructure built around it, has failed us all.[79]

While the focus of the Contempt of Court judgment was the plausible erosion of the rule of law caused by the contempt of court orders, we argue that Zuma's scurrilous extra-curial statements also have the potential to contribute to that erosion. Throughout the legal proceedings, Zuma challenged the authority and legitimacy of the judiciary. In a string of extra-curial letters and statements sent to the Constitutional Court and the public, he expressed his view that the judiciary as a whole treats him in an extraordinarily unfair manner and has conspired against him to the detriment of democracy and the erosion of the separation of powers.[80] He has publicly claimed that there is an emergence of 'judicial dictatorship in South Africa'.[81] This term suggests that courts have

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77 Report of the Expert Panel into the July 2021 Civil Unrest (29 November 2021), available at https://www.thepresidency.gov.za/download/file/fid/2442, accessed on 12 February 2021.

78 Ibid.

79 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 140.

80 See the letters op cit (nn 60, 63 and 76). See also N Ngatane & M Lindeque 'Zuma warns of "judicial dictatorship", claims judges taking power to themselves' *Eye Witness News*, 26 March 2021, available at https://ewn.co.za/2021/03/26/zuma-warns-of-judicial-dictatorship-claims-judges-taking-power-to-themselves, accessed on 23 September 2021.

81 A Hyman '"Judicial dictatorship" is emerging, Jacob Zuma complains' *Business Live*, 26 March 2021, available at https://www.businesslive.co.za/bd/national/2021-

usurped the powers of the legislature and actively pushed political ideologies in their judgments. Zuma went further to compare the judiciary to the apartheid regime.[82] He remarked that the Court was 'captured' and that the various justices were political actors, driving a political agenda against him, rather than applying legal principles as they should.

These unsubstantiated statements, which would have been scandalous in their own right, presented a more serious threat given Zuma's position in society. His position of influence, as a former President of the Republic, in tandem with his forceful attack on the independence of the judiciary, created a precarious situation where some members of the public, as with the looting, could have been emboldened to undermine the judiciary or could have lost their trust in the institution. As the Constitutional Court highlighted in *S v Mamabolo*,[83] the rule of law heavily depends on public trust and respect for the courts:

> Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state.
>
> …
>
> In the final analysis it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly; and where the judiciary cannot function properly the rule of law must die.[84]

This is not to say that the general public, or politicians in particular, should abstain from critiquing the judiciary. In many instances, criticism of the judiciary paradoxically succours a more robust judiciary by keeping judges accountable for their reasoning and ruling. However, it is important to distinguish between constructive critique and vitriol spewed at the judiciary. While criticism of the judiciary is not new, if unfounded and unabated, it may have an adverse impact on the independence of judges. In the United States, such criticism has in the past

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03-26-judicial-dictatorship-is-emerging-jacob-zuma-complains/, accessed on 23 September 2021; and *City Press* staff reporter 'Zuma: Let's rise up against the "corrupt, judicial dictatorship"' *News24*, 26 March 2021, available at https://www.news24.com/citypress/news/zuma-lets-rise-up-against-the-corrupt-judicial-dictatorship-20210326, accessed on 23 September 2021.

82 'Defiant Jacob Zuma compares South African judges to apartheid rulers' *The Guardian,* 5 July 2021, available at https://www.theguardian.com/world/2021/jul/05/defiant-jacob-zuma-compares-south-african-judges-to-apartheid-rulers, accessed on 23 September 2021.

83 *S v Mamabolo* 2001 (3) SA 409 (CC) paras 16 and 19.

84 Ibid.

caused judges to reconsider their cases and reverse prior rulings.[85] In light of this, it was said that the ability of a court to be effective depends 'on the notion that [judges] will not be subject to retaliation for [their] judicial acts'.[86]

Whereas the principle of separation of powers ensures the insulation of the judiciary through a lack of interference from the executive concerning judges' benefits, we posit that retaliation may also take the form of public disfavour and distrust. 'In contrast to the institutional independence guaranteed to … judges by the Constitution, most … judges are not so insulated from outside pressures.'[87] Accordingly, while it is commonplace that the legality of a ruling is independent of its popularity, one cannot simply ignore that judges are human too and are capable of being affected by ostracisation, a potential consequence of statements such as those made by Zuma. The effect of this is twofold. First, it creates the perception that the judiciary lacks independence. Second, it may cause judges to make decisions that will find favour with the majority, rather than remaining impartial.

Before concluding, the dissenting judgment of Theron J needs to be discussed. At the level of principle, judges are (or ought to be) engaged in robust deliberations. These deliberations may lead to judges disagreeing with either the reasoning or the outcome of certain cases. They are constitutionally enjoined to pen their disagreement. Divergent judicial views are crucial to a healthy judiciary with rigorous jurisprudence. Dissents may sometimes be reflective of some views held by the broader society. As Mahomed CJ held:

> The orthodoxy of yesterday often becomes the heresy of tomorrow. It is therefore necessary that even in the case of very deeply held and common convictions about what is moral or immoral, just or unjust, the voice of the dissident, the unorthodox and even the apparent maverick must not be suppressed.[88]

Langa CJ remarked that judicial dissents may affect the law, either directly or indirectly.[89] Furthermore, he noted that sometimes dissents may later transform into law because dissents 'plant the seed for courts to re-evaluate the law in

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85 *United States v Bayless* 913 F Supp 232 (SDNY 1996), overruled by *United States v Bayless* 921 F Supp 211 (SDNY 1996).

86 Editorial 'Injudicious intimidation' *Detroit Free Press*,16 April 2006.

87 Judge PL Friedman 'Threats to judicial independence and the rule of law' (2019) *American Bar Association*, 18 November 2019, available at https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/, accessed on 23 September 2021.

88 I Mahomed 'The Second Bram Fischer Memorial Lecture' (1998) 11 *Consultus* 69 at 72.

89 P Langa 'The emperor's new clothes: Bram Fischer and the need for dissent' (2007) 23 *SAJHR* 362 at 369.

the future'.[90] Beyond this, even if the dissent does not morph into law over time, it still preserves and keeps alive the opinions of others within society.[91] It serves as a reminder that there is no single correct answer to the law and that legal debates must continue.[92] The Constitution espouses values of openness and transparency[93] and demands that the judiciary is independent and impartial.[94] All these elements give judges the freedom to dissent and articulate their views in judgments, whether they are popular or not. Thus, judicial dissents are not a sign of democratic regression but are paramount to a robust constitutional democracy. They foster public trust as dissents indicate that the judiciary is diverse in its thinking and independent and that judges will 'tell the truth about the emperor's robe, no matter the consequences'.[95]

This brings us to Theron J's dissent. The dissent was primarily concerned with the inappropriateness of imprisonment as a sanction. It held that to imprison Zuma without a trial violated a number of constitutional rights.[96] It reasoned that a coercive order of suspended imprisonment or a referral to the National Prosecuting Authority (NPA) was more appropriate.[97] The reasoning employed by this dissent, to justify its proposed order, may be criticised on a myriad grounds. For instance, how does a suspended coercive order cure the unconstitutionality it complains of (the lack of a trial)? If Zuma simply disobeys the coercive order, he would still be imprisoned without a trial. The logical consequence of the dissent's proposed order was aptly highlighted by Khampepe ADCJ when she argued that it

> would only operate upon future non-compliance, which is essentially to say that it would be that act of further non-compliance, as opposed to the already existing non-compliance, that would become punishable.[98]

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90 Ibid.

91 Hoexter op cit (n6) 122.

92 Ibid.

93 Section 1 of the Constitution entrenches the constitutional value of openness; whereas s 195(1)(*g*) of the Constitution sets out the value of transparency.

94 Section 165 of the Constitution.

95 Langa op cit (n89) 372.

96 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 220.

97 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 268.

98 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 52.

The alternative of referring the matter to the NPA will lead to a circular outcome. There are two reasons for this. First, a court has the power to punish a contemnor. To refer a matter to the NPA would denude the court of this power because the NPA has the discretion to decide whether to prosecute or not. Secondly, the dissent reasoned that since it is the Constitutional Court's order that has been ignored, it 'would be inappropriate for the matter to be brought to the High Court'.[99] This reasoning is surprising given that the dissent places considerable weight on the fact that Zuma cannot appeal the Constitutional Court's decision and that the matter had not been adjudicated by the lower courts.[100] Surely, even if the matter is referred to the NPA, it would directly come before the Constitutional Court. Thus, Zuma would still not be able to appeal the decision.

More concerning, the dissent accused the majority judgment not only of being bad but also unconstitutional.[101] It characterises the conclusion of the majority as 'illogical'.[102] It is this sort of reasoning that planted a seed for the rescission application by Zuma, which contended that:

> [T]he unprecedented announcement that the Constitutional Court had acted unconstitutionally and therefore irrationally or has exceeded its judicial authority and mandate.[103]

Prior to that, Zuma had relied on the dissenting judgment to denounce the authority of the majority and alleged that it had violated the Constitution and the judicial oath of office.[104] This was a logical denouement of the minority judgment, which went beyond just addressing the merits (or lack thereof) of the

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[99] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 211.

[100] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) paras 209–211.

[101] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 191.

[102] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (Contempt of Court judgment) supra (n7) para 216.

[103] Founding Affidavit by Zuma, available at https://collections.concourt.org.za/handle/20.500.12144/36786?show=full, accessed on 11 February 2022. Zuma applied to have the Contempt of Court judgment rescinded. His application was dismissed. See *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC).

[104] Zuma Foundation letter op cit (n76).

majority judgment and unfortunately labelled it unconstitutional. The accusation is not only damaging to the Court itself and the judiciary, but it is untenable. The Constitutional Court is the final arbiter of what is constitutional[105] and thus, if the majority judgment determines that certain conduct is constitutional, that is the end of the matter. The dissenting judgment can of course criticise the majority's reasoning as flawed or wrong, but it simply cannot claim that it is unconstitutional.

3.5 CONCLUSION

The judiciary is often a bulwark against the abuse of political power. It acts as the defender and enforcer of the rule of law. It plays a crucial role in holding the legislature and executive accountable to the general public for the exercise of its power. It is institutionally and structurally well placed to be a theatre of accountability in any country that is founded on democratic values. However, it is not rare that the judiciary is attacked and vilified by the other arms of government and accused of being anti-democratic in an effort to delegitimatise it and render it a paper tiger. This chapter argues that such statements, when unfounded and unabated, must be seen for what they are, a symptom of democratic regression. For the flourishing of a robust democracy, the rule of law requires a legal culture safe of vitriol and unsubstantiated attacks on the judiciary, one that allows the judiciary to adjudicate without fear, favour, or prejudice.

Upholding the rule of law and the Constitution is vital to preventing democratic regression. The rule of law is antithetical to arbitrary government action that is not founded in law. It is precisely because of this that the rule of law and the Constitution are an antidote to an unaccountable government.[106] It also demands that the judiciary acts independently to uphold the Constitution. The judiciary is, in many instances, the last check for the constitutionality and legality of the executive's power. When scurrilous and spurious accusations are made by members of the executive or the legislature against the judiciary, those allegations must be dealt with seriously. Section 165(4) of the Constitution requires that organs of the state must assist and protect the dignity, impartiality, independence and accessibility of the judiciary. Without this, democracy is under threat.

The fact that Zuma approached the Court again at his own volition to ask it to rescind its decision demonstrates that he actually believes that the Court

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[105] F Dube 'Separation of powers and the institutional supremacy of the Constitutional Court over parliament and the executive' (2020) 36 *SAJHR* 293 at 316.

[106] T Ngcukaitobi 'Legal systems can be used to rectify the wrongs of the past' *Sunday Times*, 16 January 2022.

was not illegitimate and that it would consider his case impartially without conforming to political gimmicks, contrary to what he previously claimed. Of note, in the rescission application, he contended that he did not participate in the proceedings because he was so advised by his lawyers that the applications would be dismissed.[107] Notwithstanding this change of tactic, if Zuma genuinely held the view that the judiciary is indeed corrupt, he must present evidence and facts to sustain these claims and furnish the evidence to the relevant authorities, such as the South African Police Service or the Judicial Service Commission.[108] Better yet, since judges are principally held accountable through their judgments, Zuma could have appeared before the Court and raised all of his arguments and reservations before the Court. The Court's response to Zuma's specific allegations would then be addressed by the Court head-on. Its response, through its judgment, would be subject to public scrutiny.

In concluding, the words of Kirby are fitting:

> Unless there is a measure of mutual restraint, the judicial institution will be damaged and judicial integrity undermined … [W]hen judges are submitted to unrelenting political attacks by people who should know better, there is a danger that the public will draw from the silence of the judges an implication that the criticism was justified. Yet silence is ordinarily imposed by judicial convention. Generally, judges cannot answer back.[109]

[107] Founding affidavit supra (n103) paras 39–40.

[108] The Judicial Service Commission is a constitutionally created body which holds the judges accountable for their performance and judgments. See section 177, read with section 178, of the Constitution and sections 14–17 of the Judicial Service Commission Act 9 of 1994.

[109] Hon Justice M Kirby 'Attacks on judges - A universal phenomenon' *American Bar Association*, 5 January 1998, available at https://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_maui.htm, accessed on 13 February 2022.

CHAPTER 4

Democratic backsliding and constitutional adjudication in Zambia, 2016–2021

O'BRIEN KAABA*

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ABSTRACT

In 2016 Zambia established a new Constitutional Court, largely modelled on the South African Constitutional Court. However, unlike the latter, which has a remarkable reputation across the African continent for its well-reasoned decisions, its prowess in articulating constitutional values and its ability to hold the government accountable, the Zambian Constitutional Court seems to be generating executive-minded jurisprudence. It does not seem to be making any positive contribution to the country's

* LLD (University of South Africa), LLM (University of Zambia), LLB Hons (University of London). Lecturer in law at the University of Zambia and senior research fellow at the Southern African Institute for Policy and Research (SAIPAR).

democracy and may in fact be a key contributor to democratic backsliding by giving a veneer of legitimacy to government decisions which violate constitutional norms. Although democratic backsliding in Zambia is complex and should not be blamed on one institution, it is ironic that Zambia has lost its democratic credentials under the watch of the Constitutional Court, without any serious jurisprudence from the Court articulating disapproval of government excesses in cases brought before it. This chapter will provide an overview of the establishment of the Zambian Constitutional Court, review some of its key jurisprudence to demonstrate its inability to hold government accountable and explore factors that may inhibit the Court from being an effective enforcer of constitutional norms. Finally, suggestions are offered on mechanisms to enhance the Court's role as an effective guardian of constitutionalism.

4.1 INTRODUCTION

Constitutional courts have come to characterise the entrenchment of the rule of law and liberal democracy following their spread around the world, from the time they appeared in Europe in the early 20th century, and they are now spread all over Asia, Latin America and Africa.[1] They have been hailed as enforcers of democratic norms and mediators of democratic allocation of constitutional power in a manner that thwarts excessive accumulation of power in one individual or entity, thereby maintaining a reasonable balance between the key branches of government. Constitutional courts have been seen as symbols of constitutionalism and the rule of law.[2]

The South African Constitutional Court seems to have lived up to this standard. The reputation and influence of this Court goes beyond its borders. Its model has been adopted by some Anglophone countries such as Zambia (in 2016) and Zimbabwe (in 2013) that recently adopted new or extensively amended constitutions.[3] One of the characteristics that has made the South African Constitutional Court appealing is its ability to articulate a progressive and context-relevant jurisprudence that holds the government accountable and thus fosters the realisation of constitutional values.

Zambia established a designated Constitutional Court in 2016. An analysis of its jurisprudence suggests that it is not making any meaningful contribution to constitutionalism. This article explores possible reasons why the Zambian Court is failing to emulate its South African counterpart.

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1 See N Tebbe & RL Tsai 'Constitutional borrowing' (2009) 108 *Michigan Law Review* 461; S Choudhry 'Migration as a new metaphor in comparative constitutional law' in S Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 13; and H Spector 'Constitutional transplants and the mutation effect' (2008) 83 *Chicago-Kent Review* 129.

2 Ibid.

3 Constitution of Zambia (Amendment) Act 2 of 2016; Constitution of Zimbabwe 2013.

It is important not to overlook the fact that the failure of the Constitutional Court to hold government accountable is happening in the context of increased autocratisation, characterised by a shrinking political space, gross violation of human rights and widespread corruption. The country's return to multiparty democracy and abolishment of the one-party state in 1991 commendably set the country on a democracy consolidation trajectory. Indeed, from 1991 to 1993, Freedom House[4] rated Zambia as 'free'.[5] Politically, Zambia has long been an oasis of peace in the sub-region and an example of respect for human rights and democratic transition, having peacefully changed government three times since independence.[6] These credentials have, however, been eroding over the last few years.[7] Although Zambia was never a fully developed liberal democracy,[8] available data points to increased autocratisation, with the consequence of escalating human rights violations and shrinking political space.[9]

Increased intolerance, corruption and abuse of power under former President Fredrick Chiluba saw Zambia's Freedom House rating slide to 'partly free' from 1993 onwards.[10] While the presidency of Levy Mwanawasa (2001–2008) promised a strong anti-corruption crusade and respect for human rights, as well as promising a democratic revival, this was undercut by his untimely demise in 2008.

President Mwanawasa's successor, Rupiah Banda, abandoned the crusade against corruption, which coincided with a renewed decline in Zambia's democratic indicators. While Banda's successor, Michael Sata, had a mixed legacy as he showed some commitment towards eradicating corruption, his government had very limited respect for civil and political rights such as freedom of expression and assembly.[11] Zambia's democracy has continued to steeply plummet under the presidency of Edgar Lungu (2015–2021).[12] Lungu's rule was characterised by

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4 Freedom House is an international organisation that provides indicators on how a country is faring in its democracy.

5 Freedom House 'Freedom in the World: Zambia Country Report 2020' (2020), available at https://freedomhouse.org/country/zambia/freedom-world/2020, accessed on 22 February 2022.

6 In 1991 from the UNIP to MMD and in 2011 from MMD to UNIP.

7 A Fraser 'Post populism in Zambia: Michael Sata's rise, demise and legacy' (2018) 34 *International Political Science Review* 456.

8 T Banda et al *Democracy and Electoral Politics in Zambia* (2020).

9 A Lührmann et al 'Autocracy surges – Resistance grows: Democracy report 2020' Varieties of Democracy Institute (2020). See also Freedom House op cit (n5).

10 Ibid.

11 Fraser op cit (n7); see also Freedom House 'Freedom in the World: Zambia Country Report 2015' (2015).

12 Freedom House data shows a gradual decline since 1993, with a steep decline in recent years. See Freedom House op cit (n5).

unprecedented levels of human rights violations such as extrajudicial killings and the violent targeting of opposition and critics, state-sanctioned corruption and a clampdown on the media. As a result of the decline in the rule of law, Varieties of Democracy in 2020 named Zambia among the top ten most autocratising countries in the world.[13] A new government was elected in August 2021, under the leadership of Hakainde Hichilema. It is yet to be seen if it will undertake serious governance reforms.

This chapter is organised in four parts. After this introduction, the second part discusses the transplant and establishment of the Constitutional Court in Zambia, this includes an analysis of four cases decided by the Zambian Constitutional Court, to determine the effectiveness of the new Court in enforcing constitutional values. The third part explores possible reasons why the Zambian Court is failing to be an effective enforcer of constitutional norms. The fourth part is the conclusion.

4.2 THE ZAMBIAN CONSTITUTIONAL COURT MODEL: NOT YET *UHURU*

This section is organised into three parts. The first part discusses the importation or transplant of the South African Constitutional Court model and its establishment in Zambia, while the second part analyses two case examples rendered by the Zambian Constitutional Court in order to assess the capability of the Zambian Court to hold the government accountable. The third part explores the reasons for the likely failure of the Zambian Court to hold the government accountable.

4.2.1 *Transplantation of the South African Constitutional Court model into Zambia*

In 2016 the Zambian Constitution was extensively amended with the goal of crafting a Constitution that fosters democracy, accountability and inclusiveness, among other values. One of the new institutions introduced by the amended Constitution is the Constitutional Court. The establishment of the Constitutional Court in Zambia was largely inspired by perceptions in Zambia about the success and reputation of the South African Court to hold government accountable.[14] It is an example of what Perju refers to as a voluntary borrowing or transplantation of a foreign model.[15] Several submissions during various constitution-making processes and academic support for establishment of a Constitutional Court were

[13] Lührmann et al op cit (n9) 6.

[14] See Tebbe & Nelson op cit (n1); Choudhry op cit (n 1); and Spector op cit (n1).

[15] V Perju 'Constitutional transplants, borrowings and migrations' in M Rosenfeld & A Sojo *Oxford Handbook of Comparative Constitutional Law* (2012) 1304–1327.

based on the admiration of the South African Court's reputation in terms of its expertise and ability to effectively hold government accountable.[16] Although the idea of establishing a Constitutional Court goes back to the 1991 constitution-making process in Zambia, and therefore predates the establishment of the South African Constitutional Court, these initial suggestions did not elaborate in detail how the proposed Constitutional Court would relate with existing courts,[17] nor did the idea seem to have wide support. But once the South African Court was established, its success and reputation had a major influence on establishing a similar, separate and dedicated Court in Zambia.[18]

As already noted, the Constitutional Court in Zambia was finally established following an extensive amendment of the Constitution.[19] The Court has an establishment of 13 judges (including the president and deputy president of the Court).[20] The Court has original and final jurisdiction to hear any matter relating to the interpretation of the Constitution; violation or contravention of the Constitution; the election of the president and vice president; appeals relating to the election of members of parliament; and any matter regarding the Court's jurisdiction.[21] The Constitutional Court, however, does not have jurisdiction to enforce the Bill of Rights in the Constitution. This is because the Bill of Rights was not amended in 2016 and the provision on the enforcement of the Bill of Rights, art 28, still vests this jurisdiction in the High Court and the Supreme Court. This was an unintended consequence arising from the manner in which the Constitution was amended. The draft Constitution vested the Constitutional Court with jurisdiction over the draft Bill of Rights, which was expanded to include economic, social and cultural rights. While the rest of the Constitution was amended through an Act of Parliament, the draft Bill of Rights was subjected to a referendum in August 2016. For several reasons beyond the scope of this paper, the draft Bill of Rights was rejected in the referendum. Had it passed, it would have been enforced by the new Constitutional Court.

When a constitutional matter, within the jurisdiction of the Constitutional Court, arises in any other court, that court is required to refer such matter to the Constitutional Court.[22] A decision of the Constitutional Court is final and not appealable to the Supreme Court.[23]

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16 J Sakala *The Role of the Judiciary in the Enforcement of Human Rights in Zambia* (2015) 173–175.

17 Mvunga Commission Constitution Report (October 1990) 39–42.

18 In fact, the team that drafted the rules of the Zambian Constitutional Court first visited the South African Constitutional Court in 2016 to learn from that Court.

19 Constitution of Zambia (Amendment) Act 2 of 2016.

20 Article 127 of the Constitution of Zambia (Amendment) Act.

21 Article 128 of the Constitution of Zambia (Amendment) Act.

22 Article 128(2) of the Constitution of Zambia (Amendment) Act.

23 Article 128(4) of the Constitution of Zambia (Amendment) Act.

4.2.2 *Evaluating the performance of the Zambian Constitutional Court: A review of case examples*

The Zambian Constitutional Court has only been operational for about six years. It may therefore be felt that it is too early to pass judgment over its performance. While this view is defendable, the Zambian Court has already handled significant disputes that are a good test of where its loyalty and commitment lie. These cases are equally a test of the skill and expertise of the judges of the Constitutional Court. Moreover, the first cases decided by the Court will establish its jurisprudence. Therefore, the decisions already made by the Court, however few, mark a direction the Court may continue to take. They provide an indication that the court is prepared – or not – to assert its power in favour of the rule of law, exercise oversight of the government and entrench constitutionalism. Four cases have been chosen for analysis here. The choice is informed by their political significance and implications; they provide a basis for assessing a court's commitment to the rule of law and oversight of the government due to the high stakes potentially affecting the retention of power and privileges.[24]

4.2.2.1 Milford Maambo v The People[25]

To appreciate the significance of this case, it is important to point out that the office of the Director of Public Prosecutions (DPP) in Zambia has been used by various regimes as a tool for harassing opposition leaders and other critics of the government, usually prosecuted on trumped up charges. Although the office of the DPP is established as an independent institution, in practice it is an office completely beholden to the President.

The three applicants in this case were charged before the Livingstone Subordinate Court on 25 counts relating to corrupt practices under the Anti-Corruption Act 3 of 2012. When the matter came up for trial, the prosecutor presented a *nolle prosequi* to discontinue the criminal proceedings. The defence objected to the discontinuance of the proceedings in such a manner, arguing that the entry of the *nolle prosequi* did not meet the conditions set out in art 180(4)(*c*) and (7) of the Constitution, since no reasons were given to the Court for the discontinuation of proceedings. Consequently, the defence requested an interpretation of the impugned provisions by the Constitutional Court.

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[24] P von Doepp 'The judiciary: Courts, judges and the rule of law' in N Cheeseman (ed) *Institutions and Democracy in Africa: How Rules of the Game Shape Political Developments* (2018) 311.

[25] *Milford Maambo v The People* 2016/CC/R001 [2017]. I have previously commented on this case in O Kaaba '*Milford Maambo v The People*' (2018) 1 *SAIPAR Case Review* 48.

The issue for determination was whether the DPP still has unfettered powers to discontinue criminal proceedings pursuant to art 180(4)(*c*) and (7) of the 2016 Constitution.

By a majority of four to one (Munalula JC dissenting), the Constitutional Court held that once the DPP informs the Court of his/her intention to discontinue proceedings pursuant to art 180(4)(*c*), the Court cannot object to that exercise of power nor can it ask the DPP to furnish it with reasons for the discontinuation. Therefore, the DPP had unfettered discretion to discontinue criminal proceedings.

In arriving at this conclusion, the Constitutional Court used the literal interpretation approach. It is contended that the reasons advanced by the Constitutional Court for choosing the literal rule have no merit and in fact the use of the literal approach in constitutional adjudication is unconstitutional. The Zambian Constitution gives guidance on how it should be interpreted. Article 267(1) of the Constitution states that:

> This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that–
>
> (a) Promotes its purpose, values and principles;
>
> (b) Permits the development of the law; and
>
> (c) Contributes to good governance.

It must be noted that these provisions were borrowed from the 2010 Kenyan Constitution, word for word. The significance of these provisions, as the then Kenyan Chief Justice Willy Mutunga stated, is that 'the Constitution is complete with its mode of its interpretation'.[26] The Constitution being self-contained with tools for its interpretation, and these provisions being mandatory, there was no legal basis for the Constitutional Court's reversion to the common law in order to circumvent the theory of interpretation required by the very Constitution. Surprisingly, the Court seemed to be unaware of these provisions as nowhere in the judgment by the majority did it make reference to them. South African Constitutional Court Judge Kentridge J rightly stated that when a court ignores the language of the law giver, what results 'is not interpretation but divination'.[27]

Article 267, which provides for the construction of the Constitution, is value laden, entailing that constitutional interpretation is teleological and not mechanical. It should be geared towards realisation of those constitutional values, standards and collective aspirations of the people. Invariably, only a purposive interpretation is consistent with this standard which the Constitution has set for

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[26] *In the Matter of the Principles of Gender Representation in the National Assembly and Senate Advisory Opinion 2 of 2012* [2012] eKLR.

[27] *Zuma v The State* 1995 (2) SA 642 (CC).

its interpretation. Contrary to the assertion of the Constitutional Court that the literal rule is the approach taken in many jurisdictions, the purposive approach is actually what seems to be the standard approach to constitutional interpretation in countries with written constitutions.[28] Mahomed J, for example, considers a purposive and generous interpretation of the constitution as an 'international culture of constitutional jurisprudence'.[29]

A constitution is an organic document. Although it is enacted in the form of a statute, it is *sui generis*. It must be broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legislation, so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and disciplining its government.[30]

In holding that the DPP enjoys absolute discretion in discontinuing criminal proceedings, the Court also relied on the legislative history of the provision. It noted that the first draft Constitution of 2012 had provisions that trammeled the discretion of the DPP, but that these provisions were removed in the final draft, and therefore the framers of the Constitution never intended the DPP's discretion to be constrained. Again, this approach is by itself an impoverished approach to the determination of a constitutional matter. While understanding the decisions and choice of words used by framers of the Constitution is important in order to understand the larger context and meaning of specific words, that in itself should not be determinative of a constitutional issue. This is because, logically, the Constitution is not the product of the few individuals who framed it, but is, in the words of Mahomed AJ, 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people'.[31] A Constitution, therefore, should not be interpreted simply to reflect its drafting history but to reflect the collective values and ideals of the people. Interpretation should be forward and not backwards looking. Chaskalson P, the former President of the South African Constitutional Court, once stated that a constitution should be interpreted as the product of a 'multiplicity of persons' and therefore 'caution is called for in respect of the comments of individual

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[28] See the following case examples: *Affordable Medicines Trust v The Minister of Health of the Republic of South Africa* 2006 (3) SA 247 (CC); *In the Matter of the Principle of Gender Representation in the National Assembly and Senate Advisory Opinion* supra (n26); *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 487 (CC); *Economic Freedom Fighters v Speakers of the National Assembly* 2016 (3) SA 580 (CC); *S v Makwanyane* 1995 (3) SA 391 (CC); *S v Mhlungu* 1995 (3) SA 867 (CC); *Republic of Namibia v Cultura 2000* 1994 (1) SA 407 (NmSC); and *Zuma v The State* supra (n27).

[29] *S v Mhlungu* supra (n28).

[30] *Government of the Republic of Namibia v Cultura 2000* supra (n28).

[31] *S v Acheson* 1991 (2) SA 805 (NM).

actors in the process, no matter how prominent a role they might have played'.[32] The views of the Technical Committee that drafted the 2016 Constitution should, therefore, not have been determinative of the outcome of the Court's decision.

Taking a literal approach, the Court is divested of any oversight role to play in the manner the DPP exercises his/her discretion. In the view of the majority, this position is consistent with art 180(7), which states that the DPP shall not be subject to the direction or control of a person or an authority in the discharge of his/her office.

However, a careful reading of the Constitution shows no merit in this position. First of all, art 180(7) has a qualification to the effect that in the discharge of his/her duty, the DPP 'shall have regard to the public interest, administration of justice, the integrity of the judicial system and the need to avoid abuse of the legal process'. It is obvious that this qualification is a fetter on the manner in which the DPP exercises his/her discretion. If he/she contravenes these standards, he/she would be acting unconstitutionally. But not so for the Constitutional Court. The Constitutional Court simply considered this qualification as a mere guide to the Director of Public Prosecutions 'in the performance of the functions of that office'. The Court, however, gave no reasons for making that conclusion.

The decision of the Constitutional Court is further contradicted by art 267(4), which clearly states:

> A provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or authority in the performance of a function, does not preclude a Court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws.

The net effect of art 267(4) is that as long as the DPP derives his/her authority from the Constitution, the manner in which he/she exercises that power cannot escape the scrutiny of the Court as the guardian of the Constitution and the rule of law. The exercise of any power that issues under the Constitution is subject to constitutional control and judicial oversight. This is the standard approach in a constitutional democracy. Power is never arbitrary. As the South African Constitutional Court stated, where power derives from the Constitution, its exercise must be 'rationally related to the purpose for which power was given'.[33]

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[32] *S v Makwanyane* supra (n28) para 18.

[33] *Affordable Medicines Trust v The Minister of Health of the Republic of South Africa* supra (n28).

Recent jurisprudence from the South African Supreme Court of Appeal is in line with this view. On the powers of the DPP, the South African Constitution has comparable provisions to the Zambian Constitution. The South African National Prosecution Authority had, in 2009, dropped charges against President Zuma, and it was argued by the prosecution that this was within its discretion. The Court rejected this argument and held:

> It is incumbent on prosecutors to disclose to a court any fact which, in their view, may impact negatively on the prosecution and in favour of the accused. This is in line with constitutional values. …[34]

The majority of the Zambian Constitutional Court held that the DPP has unfettered discretion to discontinue proceedings at any stage before judgment is delivered. But is 'unfettered discretion' tenable in law? What exactly is discretion? Ronald Dworkin addressed the concept of discretion in his theory of adjudication.[35] The word 'discretion' is appropriately used in one context only, that is, when a person is in general charged with making decisions which are subject to standards set by a particular authority. As Dworkin states, 'discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction'. Discretion therefore, at least in law, is always relative to the power under which it is given. Otherwise it does not exist. According to Dworkin, it is always legitimate to ask, 'discretion under which standards?' or, 'discretion as to which authority'? If, therefore, someone can do as they please, that is not discretion. It is simply lawlessness.

The effect of the decision of the Constitutional Court is to effectively place the DPP above the law as he/she is not accountable in any way in the manner in which he/she utilises prosecutorial powers.

4.2.2.2 Hichilema v Lungu[36]

This case followed the Zambian general elections of 11 August 2016. On 15 August 2016, the Electoral Commission of Zambia (ECZ) declared the then incumbent, Edgar Lungu of the ruling Patriotic Front (PF) party, the winner, beating his closest rival, Hakainde Hichilema of the main opposition United Party for National Development (UPND). Official figures indicate that Lungu garnered 1 847 855 votes (50.35 per cent), while Hichilema got 1 760 347 votes (47.6 per cent).[37] By obtaining over 50 per cent, Lungu secured an outright

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[34] *Zuma v DA* 2018 (1) SA 200 (SCA) para 91. For a detailed analysis of this case in the Zambian context, see O Kaaba op cit (n25).

[35] R Dworkin *Taking Rights Seriously* (1986) 14–34.

[36] *Hichilema v Lungu* (2016/CC/0031) Ruling 33 of 2016.

[37] 'General elections 2016' *Electoral Commission of Zambia, (2016)* available at https://www.elections.org.zm/general_elections_2016.php, accessed on 22 February 2022.

victory, narrowly avoiding a runoff by a paltry 13 022 votes.[38] The opposition UPND disputed the results, alleging, inter alia, that the ECZ colluded with the ruling PF to manipulate the results in favour of the incumbent.

On 24 August 2016, the Constitutional Court gave directions that the hearing of the petition would commence on 2 September 2016 and end on 8 September 2016.[39] However, after representations from the respondents, the Court on 1 September 2016 informed the parties that the hearing would commence and end the following day, 2 September 2016.

On 2 September 2016, the Court informed the parties that the hearing will commence and conclude the same day at 23h45. However, most of the time was consumed in hearing and determining preliminary motions, which were only concluded around 19h00, leaving just about four hours to hear the petition. The Court allocated each side two hours to present their case. At this time, lawyers for the petitioners walked out of the Court, protesting that the nature of the proceedings made it impossible to defend the Constitution and effectively represent their clients.[40] The petitioners were, therefore, left to address the Court by themselves. After hearing the petitioners, the full bench of the Court capitulated and unanimously ordered trial to commence the following Monday on 5 September 2016 and that each party will be given two days to present its case.[41]

However, on 5 September 2016, instead of hearing the petition as ordered on 2 September 2016, the Court, by a majority of three to two judges, unmoved and without any representations from the petitioners, decided not to proceed with the petition. The majority were of the view that the time frame within which to hear the petition was rigid and allowed for no discretion to extend it. This was in view of arts 101(5) and 103(2) of the Constitution, which placed a duty on the Court to hear the petition within 14 days of the filing of the petition.[42] They opined that the time limit was put in place to overcome the mischief where election petitions in the past took several years to be determined.[43]

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38 'Guide to calculation Of 50%+1 for August 11th 2016 Elections' *Electoral Commission of Zambia,* 16 August 2016, available at http://ecz-news.com/news/%22%80%8bguide-to-calculation-of-501-for-august-11th-2016-elections/, accessed on 22 February 2022.

39 *Hichilema v Lungu* supra (n36) para 9. See also 'Presidential election petition to start on Friday and conclude on Thursday next week' *Lusaka Times,* 30 August 2016, available at https://www.lusakatimes.com/2016/08/30/presidential-election-trial-to-start-on-friday-and-conclude-on-thursday-next-week/, accessed on 22 February 2022.

40 'Live petition updates: proceedings and discussions' *PostZambia,* available at http://postzambia.com/news.php?id=19946, accessed on 22 February 2022.

41 *Hichilema v Lungu* supra (n36) Dissenting Judgment of Justice Chibomba, paras 4 and 5

42 *Hichilema v Lungu* supra (n36) para 15.

43 The case of *Anderson KambelaMazoka v Levy Patrick Mwanawasa* (2005) ZR 138, for example, took four years to conclude.

But since under art 104 the president-elect could not assume office until the matter was determined, the set time limit was unchangeable and therefore the Court could not hear the petition outside that period.[44] According to the majority, once the time limit set for the petition lapsed, then the petition stood dismissed on that technicality.[45]

It is contended that the construction of the constitutional provisions preferred by the majority is unconscionable and invariably leads to unsolvable absurdities. The Court took a simplistic approach by simply isolating arts 101(5) and 103(2), which prescribe the time limit within which to hear the petition, from other related provisions within the Constitution. But even then, a careful reading of the two provisions in isolation still shows that the approach taken by the Court was wrong. Article 101(5) provides that: 'The Constitutional Court *shall hear* an election petition filed in accordance with clause (4) within fourteen days of the filing of the petition', while art 103(2) reads: 'The Constitutional Court *shall hear* an election petition relating to the president-elect within fourteen days of the filing of the petition'.[46] Isolated as they are, these provisions place a responsibility on the Court to hear the petition. It is the Court which 'shall hear' the petition. The behaviour of lawyers is immaterial. The Court has a constitutional and inescapable duty to ensure the petition is heard.

The provisions do not clothe the Court with the power to vacate a validly filed petition without hearing it. The Constitution in fact contemplates no other way of concluding an election petition apart from hearing it and determining it on merits. It cannot even be withdrawn by a petitioner once filed. This is well illustrated by the decision of the Zimbabwean Constitutional Court in 2013 where opposition leader Morgan Tsvangirai sought to withdraw the petition. The Court held that:

> [O]nce such an application or petition is launched it can only be finalized by determination of the Constitutional Court by either declaring the election valid, in which case the president is inaugurated within forty-eight hours of such determination, or alternatively by declaring the election invalid, in which case a fresh election must be held within sixty days. Without the said determination there can be neither an inauguration of the president nor the holding of a fresh election.[47]

The decision by the majority to 'dismiss' the petition without it being heard was an abdication of their constitutional duty as provided under the same provisions

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[44] *Anderson KambelaMazoka v Levy Patrick Mwanawasa* supra (n43) para 15.

[45] *Anderson KambelaMazoka v Levy Patrick Mwanawasa* supra (n43) para 16.

[46] Emphasis added.

[47] *Tsvangirai v Mugabe* (CCZ 20/17, Constitutional Application CCZ 71 of 2013) [2017] ZWCC 20 (20 August 2013).

they relied on to abandon the petition. The majority's decision, as pointed out in Justice Munalula's dissenting judgment, not to hear the petition ostensibly due to the set time limit led to the absurdity of complying with a deadline but without the purpose or intended event having taken place.[48] A judgment that purports to comply with a legal technique, dissociated from the intended substance of the law, to borrow Professor Ben Nwabueze's words, 'is like a person embarked upon a journey and yet with no clear direction as to which way to go and no idea where he is going … it is like a boat adrift in the sea'.[49]

The decision not to hear the petition has generated some legal absurdities which are worth pointing out here. Articles 101(6) and 103(3) indicate the outcomes of a validly filed petition. Article 101(6) states:

> The Constitutional Court may, after hearing an election petition –
>
> (a) Declare the election of the presidential candidate valid;
>
> (b) Nullify the election of the presidential candidate; or
>
> (c) Disqualify the presidential candidate from being a candidate in the second ballot.

Article 103(3), in almost identical terms, states:

> The Constitutional Court may, after hearing an election petition –
>
> (a) Declare the election of the president-elect valid; or
>
> (b) Nullify the election of the president-elect and vice president-elect.

These are the only outcomes of a validly filed petition contemplated under the Constitution. The Constitution has no provision entitling the Court to abandon a validly filed petition without coming to any of the above outcomes. This view is augmented by art 105(2)(b), which regulates the assumption of office by the president-elect where there has been a presidential election petition. It states: 'The President-elect shall be sworn into office on Tuesday following – (b) the seventh day after the date on which the Constitutional Court *declares the election to be valid*.'[50]

It is clear from this provision that a president-elect whose election was challenged cannot assume office without the court hearing the petition and making a finding that his/her election was valid. The Constitutional Court in this case did not do that. It simply abandoned the petition. The president was therefore sworn into office in violation of the Constitution. The constitutional basis for inaugurating a president whose election was challenged through a petition was not met.

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48 *Hichilema v Lungu* supra (n36) para 7.

49 B Nwabueze 'Strengthening the foundations and institutions of democracy in Africa' Lecture delivered in Lagos, Nigeria, on 10 December 2009.

50 Emphasis added.

Finally, questions may be raised about the validity of the majority judgment. On 2 September 2016, the five judges of the Court made a unanimous decision to allow the petition to be heard starting on 5 September 2016 and allocated each side two days to present its case. On 5 September, however, three of the five judges capitulated without any new representations made to them, and issued a judgment to the effect that they had no jurisdiction to hear the case further. There was no Court sitting between 2 and 5 September 2016 as it was a weekend.

It is an established practice in the common-law tradition that the minority cannot subvert the decision of the full court. Otherwise where a case is heard by more than one judge and the court is not unanimous, there could be no definitive determination of disputes. In this case the three judges could not legally reverse the unanimous decision of the whole Court ordering trial to proceed on 5 September 2016. The majority decision suggests judicial arbitrariness and complete disregard for the rule of law. Judges are considered the guardians of the rule of law. When they act inconsistently with established laws, practices and principles, that negates the rule of law. Justice Michael Kirby was correct in observing that: 'It would be corrosive of the rule of law, if judges did not themselves conform to and uphold, clearly settled rules of law.'[51] The decision by the majority had no basis in law. Ndulo has argued forcefully that the majority judgment is invalid as it was a subversion of the judicial process and therefore the unanimous decision of the Court made on 2 September 2016 to hear the petition is still the valid decision of the Court.[52] The three judges cannot legally undo the collective decision of five judges. In any case, the decision by the majority was rendered out of the 14 days and therefore, applying the same logic by the Court, would be a nullity.

4.2.2.3 Mutembo Nchito v Attorney General[53]

The Constitutional Court on 27 October 2020 rendered its judgment in the case of *Mutembo Nchito v Attorney General*.[54] The petitioner, Mutembo Nchito, was appointed Director of Public Prosecutions (DPP) in 2011 by President Sata (who later died in office in October 2014 and was succeeded by Edgar Lungu). In March 2015, President Edgar Lungu suspended Nchito from office and established a Tribunal to investigate his suitability for remaining in office. The terms of reference for the Tribunal revolved around two categories of allegations.

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51 Justice M Kirby 'Lord Denning and judicial activism' (1999) *Denning Law Journal* 132.

52 M Ndulo 'The judicial crisis in Zambia and a flawed election' *Zambian Eye*, 11 September 2016, available at http://zambianeye.com/archives/51931, accessed on 22 February 2022.

53 *Mutembo Nchito v Attorney General* 2016/CC/0029 (2020).

54 Ibid.

The first category impugned his irregular entry of *nolle prosequi* allegedly in abuse of his power, including in a criminal case against him. The second category related to taking over and subsequently discontinuing the prosecution of criminal cases in matters in which he allegedly had a personal interest. The Tribunal had three members, retired Chief Justices Annel Silungwe (as Chairperson), Mathew Ngulube, and Ernest Sakala. Following the Tribunal's conclusion of its work, the President in August 2016 wrote Nchito a letter to the effect that he had relieved him of his duties, on the recommendation of the Tribunal, pursuant to art 144 of the Constitution. The Tribunal's findings or report were never made public and Nchito himself was not given access to the report. On that basis alone, it is impossible to know whether or not the President exercised his powers to remove the DPP on proper motives. Nchito challenged his removal but the Constitutional Court ruled that the President acted constitutionally in removing him.

A reading of the *Nchito* judgment makes one wonder where the Court is considering the country in terms of constitutional jurisprudence. It should be recalled at this stage that the terms of reference for the Tribunal empaneled to probe Nchito relate to his granting of the *nolle prosequi* and the taking over and discontinuance of the trials he is alleged to have had a personal interest in. The Constitutional Court had a golden opportunity to develop progressive jurisprudence which would ensure the DPP would be accountable for the exercise of his/her constitutional powers when it considered the case of *Milford Maambo v The People*,[55] but squandered it. It instead held that the DPP enjoyed absolute or unfettered discretion in the exercise of his/her powers, and was not even answerable to the courts. Although one might not agree with this decision (because in a constitutional democracy power is given for purposes consistent with underlying constitutional values), it represents the current position of the 'law' until a future court reverses it. This being the 'law', it follows that how the DPP exercises his/her power under the Constitution is unassailable. Taking the *Milford Maambo* decision to its logical conclusion would actually mean that it was unconstitutional to set up a Tribunal to probe how the DPP exercised his unfettered discretion. Ironically, whatever the findings of the Tribunal, the precedent of *Milford Maambo* suggests that Nchito was removed from office for doing no recognisable wrong under the Constitution. Perhaps that is why the *Nchito* judgment does not point at any wrong he committed. In granting *nolle prosequi* and discontinuing criminal matters, Nchito as the then DPP was simply exercising his unfettered discretion, as propounded by the very Constitutional Court!

[55] *Milford Maambo v The People* supra (n25).

In arriving at the conclusion that the President acted constitutionally in removing Nchito, the Court refused to consider the process leading to his removal. The Court actually went out of its way to preclude him from producing witnesses before it on the pretext that the matters he raised were purely legal in nature. By concluding that the President acted constitutionally in removing Nchito, the Court simply relied on its interpretation of art 58 of the Constitution (now repealed).

There are at least three grounds on which to object to the way the Court dealt with the process leading to the removal of the DPP. First, the Tribunal findings were never made public. But more significantly, the petitioner was not furnished with a copy of the Tribunal's report. The petitioner had actually applied to the Court to order that he should be furnished with the report. A single judge of the Court in a ruling on 19 October 2016 declined to grant the application on the pretext that ordering the release of the report would require the interpretation of the Constitution, which power, according to his reading of art 129(1) and (2) of the Constitution, a single judge did not have. This is mere casuistic sophistry. It is logically impossible to reach the conclusion the judge reached without actually interpreting the Constitution. In arriving at the conclusion that he could not grant the order as a single judge, the judge was actually interpreting the text of the Constitution. His decision was based on the interpretation of provisions he believed divested him of jurisdiction to interpret the Constitution.

There is actually no provision in the Constitution that divests a single judge from interpreting the Constitution in order to resolve an interlocutory matter. In any case, considering that the Constitution is the supreme law that gives life to all other laws, it is impossible to conceive of an interlocutory ruling a judge can give in a constitutional matter that does not directly or indirectly involve interpretation of the Constitution. All the interlocutory rulings made by single judges of the Court so far actually demonstrate that they were interpreting the Constitution. Otherwise what else could have been the source of their authority to make those rulings?

The full bench of the Constitutional Court later considered the issue of the petitioner not being furnished with the Tribunal report. Surprisingly it placed the blame on the petitioner in not renewing the application for discovery of the report before the full bench of the Court. Although the Court ordered that the petitioner was entitled to the report, it made no consequential orders arising from that finding. Put simply, this Court's finding did not alter the fate of the petitioner. If the petitioner was entitled to a copy of the report but did not get one, that is a violation of his rights, for which the Court should have provided redress. Strangely, the Constitutional Court did not link this to the violations of any constitutional norms, not even any of the basic national values and principles

enshrined in art 8 and decreed to 'apply to the interpretation of the Constitution and enactment and interpretation of the law' by art 9 of the Constitution.

Comparative jurisprudence shows that failure to furnish a concerned person with reasons for an adverse decision affecting them should be fatal to the process. For example, a three-member panel of the Kenyan High Court in the case of *Mutava v Attorney General*[56] considered a similar situation where the Judicial Service Commission commenced the process of the removal of a judge and escalated the process to the President to suspend the judge without giving the concerned judge a report of their findings. The Court not only considered that this was a violation of the judge's right to fair administrative action, but also that this was a violation of fundamental constitutional values. It stated:

> In addition to implementing the provisions of the Constitution, the Commission is guided by the values of Article 10 which include the value of good governance, transparency and accountability. Giving reasons for actions undertaken by a constitutional body is in our view a key hallmark of good governance, transparency and accountability. In this case, it is our finding and we hold that the Commission had a duty to furnish the Petitioner with the reasons for its decision that it abdicated this constitutional duty.[57]

The Court considered this fatal to the process and ordered another more transparent process to start. The Zambian Constitution contains similar constitutional values to those of the Kenyan Constitution. These are enshrined under art 8 of the Constitution and include democracy, constitutionalism, good governance and integrity. Article 9 demands that these values and principles are binding and should be considered when interpreting the Constitution and other laws.

The second issue the Court ducked in relation to the procedure leading to the removal of the DPP relates to the alleged bias of two of the three Tribunal members. These are Justices Mathew Ngulube and Ernest Sakala. The petitioner considered that he would not get fair treatment from the two because he had previous negative encounters with both of them. In relation to Justice Ngulube, the petitioner indicated that he played a role in exposing the ring of corruption and abuse of public resources during the Chiluba Presidency (1991–2001), which led to the resignation of Justice Ngulube, following an exposure to the effect that he (Justice Ngulube) was a beneficiary of secret payments from an account operated by security agencies. (The British High Court in the case of *Attorney General of Zambia v Meer Care and Desai*[58] did actually confirm these allegations.) In relation to Justice Sakala, the petitioner indicated that he had made a personal complaint against him to the Minister of Justice about his

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[56] *Joseph Mbalu Mutava v Attorney General* [2014] eKLR.

[57] *Joseph Mbalu Mutava v Attorney General* supra (n56) para 124.

[58] *Attorney General of Zambia v Meer Care and Desai* [2007] EWHC 952.

improper involvement in a case involving Nchito's business interests. That being the case, the Constitutional Court was duty bound to establish that the alleged bias did not affect the integrity and findings of the Tribunal. Procedural fairness is a sacred standard in a constitutional democracy. The importance of this was articulated by the South African Constitutional Court in the case of *Janse van Rensburg v Minister of Trade and Industry*[59] when it held:

> Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.

More specifically in relation to bias, the South African Supreme Court of Appeal in *S v Roberts*[60] established a four-stage test of bias, as follows:

1) There must be a suspicion that the judicial officer might (not would) be biased;
2) The suspicion must be that of a reasonable person in the position of the accused or the litigant;
3) The suspicion must be based on reasonable grounds; and
4) The suspicion is something that the reasonable person would (not might) have.

Assuming the facts were as the petitioner alleged, then the Tribunal members complained against would manifestly not meet the requisite standard of impartiality.

If the allegations of bias were taken into account and established, it would be clear that the DPP was not subjected to a fair removal process. The Constitutional Court, however, avoided dealing with this issue. In a ruling of 18 April 2019, the Constitutional Court held that the issue of bias was improperly before it as it was a matter which should have been commenced via judicial review in the High Court and not through the petition before it. The Court therefore did not consider the alleged bias of the commissioners. Despite this, the Court went ahead to decide that the President acted constitutionally in removing the DPP. Considering that the report of the Tribunal was not before the Court and that the Court never considered the process leading to the removal of the DPP, the finding of the Court that the President acted constitutionally is problematic as it is not based on any proved facts. In fact, it is a finding not based on anything. Such an approach would give credence to suggestions that the whole process of the removal of the DPP was predetermined.

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[59] *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC) para 24.
[60] *S v Roberts* 1999 (4) SA 915 (SCA) at 924.

This reasoning of the Constitutional Court is manifestly troubling. How was the Court able to determine that the President acted constitutionally in removing the DPP from office without delving into the process leading to his removal? The exercise of constitutional power cannot be divorced from the manner by which that power is exercised. Constitutional power is given in order to further and not undermine constitutional values and goals. It follows that there must be a rational connection between the process and the exercise of constitutional power. The two cannot be splintered and dealt with in isolation, as did the Constitutional Court in this matter. This is the approach the South African Constitutional Court, for example, has taken in many cases. For instance, in the case of *Ryan Albutt v Centre for the Study of Violence and Reconciliation*,[61] the Court asserted that:

> [C]ourts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.

The Court took the same approach in the case of *Democratic Alliance v President of the Republic of South Africa*,[62] when it stated: '[I]t also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.' That the Zambian Constitutional Court reached the decision that the President acted constitutionally on a mere reading of art 58, without consideration of the process leading to the President's invocation of the power to remove the DPP, is shocking.

The third issue that is troubling about the decision of the Court is that the petitioner had sought several reliefs from it, including a determination on the issue of bias and conflict of interest by two of the members of the Tribunal. The Court of its own motion urged the petitioner to consider amending the petition in order to redact some reliefs sought but the petitioner did not see the need to do so. In a ruling of 30 May 2018, the Constitutional Court decided to proceed to hear the matter on the basis of the petition as filed. However, at the instance of the Attorney General, in a ruling of 18 April 2019, the Court capitulated and struck off several reliefs that the petitioner sought. The effect was that the main issues the petition was mounted around, such as compliance with the procedural requirements under which the petitioner was removed as well as

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61 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51.

62 *Democratic Alliance v President of the Republic of South Africa* 2012 (12) BCLR 1297 (CC) para 40.

the bias of the Tribunal members, were no longer under consideration by the Court. Only two relatively innocuous claims remained, to do with access to the Tribunal's report and the constitutionality of the exercise of the power of the President in removing the petitioner.

4.2.2.4 Chishimba Kambwili v Attorney General[63]

The Constitutional Court on 18 February 2020 rendered its judgment in the case of *Chishimba Kambwili v Attorney General*. The petitioner, then an estranged Member of Parliament for the ruling Patriotic Front (PF), had his parliamentary seat declared vacant by the Speaker of the National Assembly, Patrick Matibini, on the pretext that by acting as a consultant for an opposition party (under which he was not elected to parliament), he had crossed the floor. Despite finding that the Speaker acted unconstitutionally in unseating the petitioner, the Constitutional Court dismissed the petition and declined to grant any remedy.

One of the first things that is shocking about the judgment is the apparent failure to understand the remedy sought by the petitioner. Page 2 of the judgment lists the remedies sought by the petitioner. The first and arguably most important remedy is stated as 'a declaration and order that the ruling of the Speaker dated 27 February 2019 is null and void ab initio'. It is clear from this that the petitioner sought the remedy of a declaration of invalidity, whose effect would be to render null and void the Speaker's decision to unseat the petitioner. Nowhere in its entire judgment does the Constitutional Court discuss this remedy. For reasons not stated in the judgment, the Constitutional Court instead discussed the remedy of a declaratory judgment and proceeded to assert that it had discretion to decline to grant it. The two remedies – a declaratory judgment and a declaration of invalidity – are completely different.

On the one hand, a declaratory judgment simply defines the rights of the parties relative to the legal question under consideration. It indicates whether the parties may seek or are entitled to the relief they desire. In the words of Professor Borchard, 'their distinctive characteristic lies in the fact that they constitute merely an authoritative confirmation of the already existing relations'.[64] Such declaratory judgments at common law are granted at the discretion of the Court. From the record, it is clear that this is not the remedy the petitioner sought from the Constitutional Court.

On the other hand, a declaration of invalidity as a constitutional remedy nullifies any law or action that violates the provisions of the Constitution. Once the Constitutional Court arrives at the conclusion that a provision of

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63 *Chishimba Kambwili v Attorney General* 2019/CCZ/009.

64 As cited in J Schoonmaker 'Declaratory judgment' (1921) *Minnesota Law Review* 1548.

the Constitution has been violated, it retains no discretion, and must issue a mandatory order of invalidity. The mandatory order or declaration of invalidity is premised on the supremacy of the Constitution for the reason that anything done in violation of the Constitution is a nullity. This is the unambiguous import of art 1(1) and (2) of the Constitution of Zambia, which provides that the Constitution is the supreme law of the Republic of Zambia and any other written law or practice that is inconsistent with its provisions is void to the extent of the inconsistency. Further, art 1(2) unequivocally provides that any act or omission that contravenes the Constitution is illegal. The consequences of any illegality, more so in violation of the Constitution, must be remedied.

As Pierre de Vos has asserted, it is mandatory for the Court to issue an order of invalidity against laws or actions that violate the provisions of the Constitution and further that this 'obligation to declare law or conduct that is inconsistent with the Constitution to be invalid flows logically from the fact that the Constitution is supreme'.[65] In relation to the granting of an order of invalidity as a constitutional remedy, the Constitutional Court, therefore, enjoys no discretion and should have unambiguously declared the Speaker's action null and void.

It would seem that the Constitutional Court was apprehensive of the political consequences of invalidating the Speaker's unconstitutional decision. The Constitutional Court cited two potential 'disruptions' it sought to avoid. First, the Constitutional Court took the view that the petitioner was already replaced as a Member of Parliament in a by-election; and secondly, that nullifying the Speaker's decision would mean having two Members of Parliament for the same constituency, which, in the eyes of the Constitutional Court, would result in a constitutional crisis.

Two observations can be made about the approach taken by the Constitutional Court. First, when a Court is overly concerned about the political consequences of its decisions, and makes decisions on the basis of its interpretation of supposed consequences without elaborating any objective standard test for its action, such a Court opens itself to perceptions of acting in furtherance of personal inclinations and against the rule of law. Having judicial officers who make decisions that tie their findings to political consequences basically invites them to make a subjective evaluation of the consequences of their prospective decisions. Such an approach to constitutional adjudication, warned retired Ugandan Supreme Court Judge Professor George Kanyeihamba, 'transports the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment'.[66]

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[65] P de Vos *South African Constitutional Law in Context* (2014) 393.

[66] *Kizza Besigye v Yoweri Kaguta Museveni* Presidential Election Petition 1 of 2006. See the dissenting opinion of Kanyeihamba JSC, at 304. See also O Kaaba *The*

Second, the position of the Constitutional Court that there would be a constitutional crisis as the by-election had resulted in the replacement of the petitioner cannot be supported. Where a law or an Act offends the Constitution, it becomes wholly invalid, or void *ab initio*. In this case, it would have meant reverting to the status quo prior to the Speaker's decision. There would therefore be no other Member of Parliament for the concerned constituency except the petitioner in the eyes of the law. There is a lot of comparative academic literature and jurisprudence that the Constitutional Court could have explored to arrive at a more informed decision. The Nigerian case of *Amaechi v Independent National Electoral Commission*,[67] involving a state governorship election, is illustrative. The Nigerian Constitution and electoral laws required parties to have primary elections for selecting candidates. Those who won primaries were the legally recognised political party candidates. The petitioner stood as a candidate for a governorship primary and won the election and, was therefore, by law, supposed to be the concerned party's candidate in the election. His political party, however, declined to adopt him and gave the adoption certificate to another person who was not selected through primaries. This new person stood as a state governor and won the election. In the ensuing legal battle, the Nigerian Supreme Court held that the person who was declared the winner of the state governorship position was in fact not the rightful winner and therefore annulled his election and declared the petitioner as the legitimate governor. The Nigerian Supreme Court reasoned that the replacement of the petitioner was illegal and a nullity as his candidature was in violation of the Constitution and the law. Consequently, in the eyes of the law, the petitioner was the one who was adopted as a candidate, and therefore, the rightful governor.[68]

The approach taken by the Nigerian Supreme Court is the more legally and procedurally correct one because no act that violates constitutional provisions must be given validity. As noted already, this derives from and gives effect to the doctrine of the supremacy of the Constitution. To hold otherwise is to desecrate the Constitution. This, however, is not to argue that orders of invalidity cannot be disruptive. They can and there is well-developed comparative jurisprudence on how judges can tailor orders of invalidity to specific contexts in order to contain the consequences of invalidity.[69]

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challenge of adjudicating presidential election disputes in Africa: Exploring the viability of establishing an African Supranational Elections Tribunal LLD thesis (University of South Africa) (2015) 105.

67 *Amaechi v Independent National Electoral Commission* (2008) JELR 56286 (SC).

68 Ibid.

69 For a detailed discussion of constitutional remedies, see De Vos op cit (n65) chap 11.

4.3 EXPLORING POSSIBLE REASONS FOR THE CONSTITUTIONAL COURT'S DECISIONS

When asked why the South African Constitutional Court had made a major contribution towards the development of progressive and democracy enhancing jurisprudence, former Constitutional Court Judge Albie Sachs stated that it was because the Court from the start was staffed by judges who were 'in total sympathy with the values of the Constitution'.[70] The deployment of judges committed to constitutional values ensures that judges will carry out their role in fidelity to those values and not see themselves as an extension of the executive. The commitment of a court to the constitutional values therefore depends in large measure on the disposition of the judges staffing that court.

It therefore follows that the mechanism and procedure adopted for appointment of judges is as important as the court itself. As Sujit Choudhry has argued, if that process is politicised, 'institutional independence, no matter how well designed, will be meaningless'.[71] It is cardinal that the appointment system of judges is insulated from being based mainly on partisan political considerations, as former Chief Justice of Zimbabwe PT Georges stated, 'no one should be appointed a judge for purely political reasons when he [or she] is not otherwise [fit] for office'.[72] Judges appointed for purely political reasons are more likely to see themselves as agents of the ruling regime and not enforcers of constitutional values.

A look at the mechanism for appointment of judges in Zambia demonstrates that the process leaves a lot of room for appointment of executive-minded judges as the President has a free hand in the appointment of judges. Article 140 of the Constitution governs the appointment of judges. The President appoints judges 'on the recommendation' of the JSC. The use of the word 'recommendation' has been defined by the Supreme Court in the case of *Minister of Information and Broadcasting v Chembo*[73] narrowly. According to the Court, to recommend 'implies discretion in the person to whom it is made to accept or reject the "recommendation"'. Thus understood, it means the President has a free hand,

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[70] 'Albie Sachs Interview: Constitutional Court Oral History Project' (2011–2012), available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-S77-001-jpeg.pdf, accessed on 22 February 2022.

[71] S Choudhry '"He had mandate": The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 56.

[72] As cited in J Hartchard, M Ndulo & P Slinn *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2009) 155.

[73] *Minister of Information and Broadcasting v Chembo* (76 of 2005) [2007] ZMSC 11 (14 March 2007).

untrammelled by any requirements of integrity, impartiality, commitment to constitutional values and competence in constituting the judicial bench. This can be contrasted with the situation under the South African Constitution where, in appointing judges of the Constitutional Court (except the Chief Justice and his/her Deputy), the President is limited to the candidates listed by the JSC.[74]

Further, the appointment process lacks transparency. Vacancies are never advertised and the whole recruitment and appointment process is shrouded in secrecy. As a result, it is impossible to know what qualified one candidate above another for the office of a judge. The reported response of one judge to a parliamentary committee question about his suitability for office is revealing. *Africa Confidential* reported that when Judge Martin Musaluke was asked about his suitability for office he answered as follows: 'I did not apply for the position I am being considered for … The fact that I have been recognised by the Appointing Authority [President Edgar Lungu] is evidence of my competence and suitability.'[75]

Articles 219 and 220 deal with the Judicial Service Commission (JSC), which is an important institution in the appointment of judges. Article 220(2)(*b*) indicates that it is the duty of the Judicial Service Commission to 'make recommendations to the president on the appointment of judges'. As already noted above, the use of the word 'recommend' entails discretion to whom the recommendation is made.

Further, the provisions leave the composition and structure of the JSC to be prescribed in subordinate legislation. This is dangerous as it allows for circumventing the Constitution through subordinate legislation. Section 5 of the Service Commissions Act 10 of 2016 provides for the composition of the JSC in its current form. The members include the chairperson, who is appointed by the President, a judge nominated by the Chief Justice, the Attorney General, the Permanent Secretary responsible for public service management, a magistrate nominated by the Chief Justice, a representative of the Law Association nominated by the Association, the Dean of a Public law school nominated by the minister, and another person appointed by the President. As can be seen, the JSC is mainly made up of persons who either directly or indirectly owe their office to the President and, therefore, does not give the impression of a truly independent JSC. This can be contrasted with the South African JSC, which seems to have wider representation.[76]

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[74] Section 174(4) of the Constitution of the Republic of South Africa, 1996.

[75] 'Opposition MPs accuse the President of putting an unqualified judge on the Constitutional Court' (2018) 59 *Africa Confidential* 3.

[76] Section 178(1) of the Constitution of South Africa.

Although the mechanism through which judges are appointed is the principle tool that a regime would use to pack the court, the life of the court can also be affected by the kind of mechanism that is in place for the removal of judges. Choudhry argues that the power of removal is directly related to the power of appointment for at least two reasons.[77] First, the power of removal allows the appointing regime to remove individuals who may have been appointed on a non-partisan basis or have behaved independently in order to pave the way for a partisan appointment. Second, the power to remove judges may serve as a tool to enforce 'the principal–agent relationship' between the appointing regime and the appointed judge.

In the case of Zambia, the power to remove judges is shared between the President and the Judicial Complaints Commission (JCC). Previously, the President could of his/her own motion initiate the process of the removal of a judge but this was departed from under the 2016 constitutional amendment. Currently art 144 governs the removal of judges from office. A judge is removable for mental or physical disability which impedes the performance of their work, gross misconduct, incompetence, and bankruptcy.[78] The removal process can be embarked on by the JCC acting on its own initiative or by being seized of a complaint made to it.[79] Where the JCC investigates and finds against the judge concerned, the JCC recommends the removal of the judge to the President, who shall remove such judge immediately.[80] Although on the face of it, it appears the President only plays a peripheral role, it is actually the President who has a free hand in constituting the Judicial Complaints Commission. Its members are not appointed by the Judicial Service Commission but are directly appointed by the President.[81] As Hatchard et al argued, leaving such power in the hands of the President 'provides a potential weapon through which to intimidate judges and thus help create or maintain a pliant judiciary'.[82] By simply wielding that power, even when not invoked, it sends a clear message to judges that the President has the levers of power over them.

The emerging picture is that of a court that is failing to make a difference to the growth of democracy by developing 'progressive' jurisprudence that ensures constitutional values are upheld, especially against the narrow political interests of ruling politicians, because the mechanisms for constituting the Court and the removal of judges do not ensure that only the best and most committed judges are appointed or remain in office. The situation is further compounded by the

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77 Choudhry op cit (n71).

78 Article 143 Constitution of Zambia 2016.

79 Article 144(1) of the Constitution of Zambia 2016.

80 Article 144(5)(*b*) of the Constitution of Zambia 2016.

81 Section 20(2) of the Judicial (Code of conduct) (Amendment) Act 13 of 2006.

82 Hartchard, Ndulo & Slinn op cit (n72).

fact that the Constitutional Court is completely new, created through the 2016 constitution-making process, and therefore does not have judges who may have been appointed under former regimes. This has allowed the packing of the Court by one president.

4.4 CONCLUSION

The chapter has discussed the transplantation of the South African Constitutional Court model to Zambia. It has argued that the Zambian Court is failing to live up to the national expectations as a bulwark of democracy as its jurisprudence insulates the ruling elites rather than holding them accountable. Although the Zambian Court has only been in existence for about five years, it has had an opportunity to handle important constitutional matters. A review of the decisions of the Zambian Court, however, shows a court that has completely failed to develop jurisprudence which enforces constitutional values and disciplines the government or ruling elites in line with those constitutional values.

The chapter explored possible reasons for this failure and has argued that the appointment and removal of judges is not insulated from political interference. The mechanisms give the President unchecked discretion in appointing and removing judges. Under such a situation, it is very unlikely that the Court will not be staffed by executive-minded judges. Further, the creation of a new court, instead of enhancing constitutionalism, actually provides a rare opportunity for the ruling party to pack the whole court with pliant judges who may sympathise with the executive and view themselves primarily as agents of the ruling regime.

PART III

Case Studies

CHAPTER 5

Democratic backsliding in sub-Saharan Africa: The rise of autocracy in the Republic of Benin?

ALIMI SALIFOU*

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* MA in Political Science and International Relations, Research intern, The Nigerian Institute of International Affairs, 13/15 Kofo Abayomi Street, Victoria Island, Lagos, Federal Republic of Nigeria.

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ABSTRACT

In the early 1990s, the wind of democratisation set off from the tiny territory of the Benin Republic and spread to the rest of Africa. This process of democratisation allowed countries to adopt, adapt and institutionalise constitutionalism and multipartyism as remedies against dictatorship and autocracy in statecraft. In Benin, the National Conference of the Active Forces created a sense of inclusion and harmony among the political class while stabilising the political atmosphere. As a result, Benin became a beacon of democracy where the rule of law, social cohesion, freedom of expression and association, respect for human rights, peaceful elections and political stability are the currency. For 25 years, Benin was seen as a model of democracy in West Africa. But from 2016 to 2021, the country has regressed in terms of socio-economic, civil and political rights. This chapter aims to highlight the issues, actors and victims of the eroding democratic norms and the political manipulations with which Benin's democracy is currently bedevilled.

5.1 BACKGROUND OF DEMOCRATIC PRACTICE IN BENIN

5.1.1 *Introduction*

Benin, a former colony of France, has a turbulent political history. It is worthy to note the Kings of Dahomey and Borgou had firmly engaged in anti-imperial battles against French dominion prior to colonisation. But the superiority of guns and material resources of the French military depleted local resistance in Dahomey. Ultimately and sadly, Dahomey and its neighbouring kingdoms (in the northern part of modern Benin) became a French protectorate in 1894.[1] This inferior position of the Kingdoms of Dahomey paved the way for establishing a French colony called French Dahomey from 1905 to 1958. In the late 1950s, the yearnings for self-determination in the world became stronger and decolonisation took effect in Africa. In 1960, French Dahomey became fully independent as the Republic of Dahomey on 1 August 1960. The post-colonial era was marred by political instability stemming from ethnic strife, lack of consensus and the colonial legacy of divide and rule.

The new republic became 'Enfant malade de l'Afrique'[2] due to the reoccurrence of regime changes and incessant coups. On 26 October 1972,

[1] CW Newbury 'A note on the Abomey Protectorate' (1959) 29 *Africa* 146.

[2] 'Sick child of Africa' because of the political instability and lack of maturity at that time.

Lieutenant Colonel Mathieu Kerekou overthrew the three heavyweights[3] of the Beninese political ring and ruled Benin from 1972 to the late 1980s. During these periods, a simulation of elections was held in 1979 to legitimise his grip on power and to consolidate Marxist-Leninist ideology as a form of government. With the help of the Revolutionary Military Council and the Peoples' Revolutionary Party of Benin, Kerekou heavy-handedly led the country to its knees. As a result, the economic situation worsened, wages went unpaid, dissidents were detained and tortured, and popular uprising ensued with the demand for change in leadership, democracy and the rule of law. Kerekou's government bent to *vox populi* and the country made a smooth transition to democracy through the historic Conference of the Active Forces of the Nation, thus leading waves of democratisation in Africa wherefrom other countries took cue.

5.1.2 *Constitutionalism and democratic renewal*

The advent of democratic renewal in Benin in the early 1990s was due to growing internal and external pressures. Internally, Kerekou's regime and his Marxist-Leninist government became economically and financially crippled,[4] and socially unpopular. Consequently, his regime could not remunerate civil servants especially teachers, students demanded better learning conditions[5] and trade unions followed suit. Externally, the need for economic and political reforms required Cotonou to align with the imposed policies of the International Monetary Fund to bring the country back to its feet. Also, the declining influence of the Soviet Union in the late 1980s was among the pressures Kerekou succumbed to, albeit after some reluctance and political machinations.

On 7 December 1989, a joint governmental session decided to convene a national conference on the first semester of the year 1990.[6] This paved the way for a kind of glasnost for democratisation in the 1990s. As a result, the National Conference of the Active Forces of the Nation was held from 19 to 28 February 1990, with the sole aim of drafting a working constitution subject to referendum by the people of Benin. The Conference catalysed the democratisation process in two ways. On the one hand, the Conference laid the foundation for a smooth dive into democracy by building consensus for a transitional government.

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3 Hubert Maga, Justin Ahomadegbe and Sourou Migan-Apithy.

4 E Vittin Théophile 'Le Benin a l'heure du renouveau démocratic' *Magazine* (1990).

5 S Ouitona 'Benin, 30 years after the Conference of the Living Forces of the Nation: "Render to Caesar", according to Professor Sébastien Sotindjo' *Afrik*.com, 19 February 2020, available at https://www.afrik.com/benin-30-ans-apres-la-conference-des-forces-vives-de-la-nation-rendre-a-cesar-dixit-le-pr-sebastien-sotindjo, accessed on 18 February 2022.

6 FE Boulaga *Les Conférences Nationales en Afrique Noire: Une affaire à suivre* (2009) 229.

On the other hand, it concretised constitutionalism by opening a political window for the adoption of a draft constitution through referendum on 2 December 1990.[7] As alluded to in a speech by President Mathieu Kerekou, 'the outcomes of this Conference must yield concrete results, up to the legitimate yearnings of our people'.[8] Consequently, the immediate outcomes of the Conference were the establishment of the High Council of the Republic[9] to oversee the implementation of the decisions of the Conference[10] and an inclusive transitional government led by Nicéphore Soglo. Among other decisions were the adoption of a new Constitution guaranteeing fundamental freedoms and human rights, respect for the rule of law, and a multiparty system with more political representation and participation. The Constitution also provided for the establishment and functioning of various institutions as well as the recognition of a strong separation of powers among the three arms of government. Thanks to the 1990 Constitution, Benin had for the most part enjoyed political stability for two and half decades where citizens' demand for democracy was met favourably by the government. Among institutions established by the 1990 Constitution were the Constitutional Court (*Cour Constitutionnelle*), the High Authority of Audiovisual and Communication (HAAC), the Economic and Social Council, and the Supreme Court. For two and half decades, these institutions essentially regulated political operations in Benin and guaranteed a reasonable level of checks and balances while consolidating democratic principles and values. However, like all systems, the Beninese system had evolved and revealed some weaknesses which the current administration[11] has been taking advantage of, thus causing democratic regression in Benin.

5.2 FACTORS OF DEMOCRATIC REGRESSION

In Benin, the system put in place in the early 1990s, as a legacy of the National Conference of the Active Forces of the Nation, failed to evolve with time in order to resist the political expediencies of Benin's political actors. Attempts

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7 La Constitution du 11 décembre 1990 (République du Benin).

8 S Loumedjinon '19 February 1990 – 19 February 2015: 25 years ago the National Conference of the Active Forces of the Nation of Benin' La Nation, 15 February 2015, available at https://lanation.bj/19-fevrier-1990-19- fevrier-2015-il-y-a-25-ans-la-conference-nationale-des-forces-vives-du-benin/, accessed on 15 September 2021.

9 Le Haut Conseil de la République as a transitional assembly.

10 JR Heilbrunn 'Social origins of national conferences in Benin and Togo' (1993) 31 *The Journal of Modern African Studies* 277.

11 President Patrice Talon's administration.

made by Boni Yayi's administration, in 2012 and in 2013,[12] to amend the 1990 Constitution were met with a strong opposition from civil society organisations, both the majority and minority political parties, seeing the move as a ploy to extend his term in office.[13] The amendment of the 1990 Constitution became a reality under his successor, President Patrice Talon, who initially vowed to serve a single term as president. Under his tenure, Benin has been experiencing an unparalleled erosion of democratic principles and values due to several factors. Below are some of the salient factors.

5.2.1 *The amendment of the 1990 Constitution*

The 1990 Constitution has served as the epitome of Benin's political life after the historic National Conference, which laid the institutional framework for a participatory democracy in the former French colony. Specifically, arts 154 and 155 of the 1990 Constitution provided for some vigorous checks and balances which foiled the opportunistic amendment of the Constitution under President Kerekou in 2005 and under President Yayi in 2012 and 2013. Accordingly, the Constitution witnessed many peaceful, fair, free and transparent municipal, legislative and presidential elections for two and half decades, staving off political unrest in Benin. Thanks to the same Constitution, Patrice Talon became the fourth President after the April 2016 Presidential elections. Afterwards, the new President embarked on political and institutional reforms with the amendment of the 1990 Constitution at the top of his agenda in June 2016.[14] This move met with rejection from members of parliament on 24 March 2017.[15]

On 7 November 2019, the administration of President Talon slyly and successfully amended the 1990 Constitution. It is noteworthy to point out the stiff opposition the first attempts of constitutional amendment met with, and it failed because the 1990 system resisted such a move thanks to the independence

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[12] NP Aguehounde 'Revision of the Constitution of December 11, 1990: A full-bodied procedure passed after six attempts' *La Nation*, 4 November 2019, available at https://lanation.bj/revision-de-la-constitution-du-11-decembre-1990-une-procedure-corsee-franchie-au-bout-de-six-tentatives/, accessed on 9 February 2022.

[13] C Hessoun 'Blockage in the revision of the Constitution: Boni Yayi had underestimated the stakes' *La Nouvelle Tribune,* 4 April 2012, available at https://lanouvelletribune.info/2012/04/revision-constituion-yayi-avait-sous-estime-enjeux, accessed on 15 September 2021.

[14] 'Benin: The constitutional reform wanted by the president before the deputies' *RFI*, 24 March 2017, available at https://www.rfi.fr/fr/afrique/20170324-benin-reforme-constitution-patrice-talon-projet, accessed on 15 September 2021.

[15] 'CONSTITUTIONAL REFORMS IN BENIN: Talon like Erdogan?' *Le Pays*, 26 March 2017, available at https://lepays.bf/reformes-constitutionnelles-benin-talon-erdogan, accessed on 15 September 2021.

of parliament. But the success of the November 2019 amendment was due to the process and the composition of the members of parliament. The process failed to meet the requirement of democratic principles of popular consultation and participation as stipulated in the Constitution on the one hand[16] – namely, s 155, which required popular approval for the amendment of the 1990 Constitution[17] via referendum if necessary. On the other hand, the configuration of the national assembly, whose membership is made up of the two political parties affiliated to President Talon,[18] facilitated the amendment procedure of the 1990 Constitution at the expense of national cohesion and consensus. Here it is worthy to point out that the amendment procedure is legal as provided for in art 154 of the Constitution, but the membership of parliament has been a bone of contention due to the exclusion of opposition parties in the preceding legislative elections. As a result, the parliament that stamped the constitutional amendment was seen as illegitimate because of its composition. With the 1990 Constitution (as amended in 2019), a post of vice presidency has been institutionalised, the functioning and funding of political parties instituted, a pre-requirement of 10 per cent backing by local councillors or members of parliament before running for presidential elections among others are novelties in the amended constitution.[19] A core virtue of the 1990 Constitution is its promotion of independent candidacy for electoral competition,[20] but with the constitutional amendment it is unlikely for an independent candidate or party to run for the presidency.[21] A controversial issue, this amendment catalysed political divide in Benin, dwindled demand for democracy and delegitimised[22] the current legislature stemming from the provisions of the new Electoral Code and the Charter of Political Parties.

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16 'Joel Avivo on the revision of the constitution during the Rupture "… The process of the revision of the constitution in Benin is the longest, the most obscure and most opaque that I have known"' *La Tempeté,* 24 January 2021, available at https://quotidienlatempete.com/joel-aivo-a-propos-de-la-revision-de-la-constitution-sous-la-rupture-le-processus-de-la-revision-de-la-constitution-du-benin-est-le-plus-long-le-plus-obscur-et-le-plus, accessed on 15 September 2021.

17 Article 155 de la Constitution du 11 Decembre 1990.

18 TS Bidouzo, EO Koukoubou & AV Ague 'The ruptured parliament' *Civic Academy for Africa's Future*, 21 September 2019, available at https://www.ciaaf.org/note-analyse/le-parlement-de-rupture/, accessed on 15 September 2021.

19 Note the disqualification of Prof Joel Aivo and his running mate for want of political backing by MPs and councillors.

20 All the presidents since democratic renewal run for election as independent candidates.

21 *Houngue Eric Nouddehouenou v Republic of Benin* (Application 003/2020) ACtHPR (4 December 2020), available at https://www.african-court.org/en/images/Cases/Judgment/003/2020, accessed on 14 February 2022.

22 'Revision of the constitution of Benin: Do not touch my constitution, an exclusivity of Professor Tomety' *L'oeil Republicain*, 31 October 2019, available at https://loeil

5.2.2 *The new Electoral Code and the Charter of Political Parties*

Since Benin's democratic renewal, this was the first time the multiparty system bequeathed by the National Conference underwent a violent upheaval.[23] In 2019, the 28 April legislative elections had seen less political participation and representation with 27.12 per cent voter turnout,[24] and more political exclusion of opposition parties. As expected, the Charter complicated requirements for founding political parties,[25] made eligibility to legislative and presidential elections more difficult, and confounded rules for the attribution of seats in parliament by requiring a threshold of 10 per cent nationwide.[26] Also, the Constitutional Court started requiring a certificate of conformity to stand as candidate for legislative elections, which had no legal basis in both the Electoral Code and the Constitution.[27]As a result, only two parties[28] affiliated to the executive were allowed to run while many political parties were barred from partaking in the 28 April elections. As a corollary, those legislative elections were pre-planned in a particularly tense atmosphere, giving rise to unwarranted violence in the country before, during and after elections. It is necessary to point out that the procedures for passing laws under Talon's administration are mostly rubber stamps, smearing the reputation of the parliament and discrediting its purpose while confirming allegations of the parliament being at the mercy of the executive.[29]

republicainblog.wordpress.com/2019/10/31/revision-de-la-constitution-du-benin-ne-touche-pas-a-ma-constitution-une-exclusivite, accessed on 15 September 2021.

23 Bidouzo, Koukoubou & Ague op cit (n 18) 15.

24 'One year before the presidential election in Benin, a democracy under construction' *Jeune Afrique*, 24 February 2020, available at https://www.jeuneafrique.com/mag/899707/politique/benin-democratie-en-danger-ou-en-chantier/, accessed on 23 September 2021.

25 Article 16 de la Loi N° 2018-23 du 17 septembre 2018 portant charte des partis politiques en République du Bénin.

26 Article 242 alinéa 4 de la Loi 2018-31 du 9 octobre 2018 portant Code électoral en République du Bénin.

27 Décision EL 19-001 du 1er février 2019. Cette décision fait suite à un recours des sieurs Gaétan Sadodjou et Gérard Gaounga, en inconstitutionnalité du décret n°2019-012 du 9 janvier 2019 portant convocation du corps électoral pour l'élection des députés à l'Assemblée nationale, huitième législature.

28 The Bloc Républicain and l'Union Progressiste.

29 Bidouzo, Koukoubou & Ague op cit (n 18).

5.3 ACTORS OF DEMOCRATIC REGRESSION

5.3.1 *The Constitutional Court*

According to the 1990 Constitution (as amended in 2019), the Constitutional Court, which is the highest jurisdiction for constitutional matters, is the guarantor of fundamental rights and freedoms, and the regulator of the functioning of institutions and the activities of government agencies, amongst others.[30] With impartiality, the Court had fulfilled its missions for two and half decades until recently.[31] Its decisions are not subject to appeal, and it guarantees the constitutionality of all new and old laws. Made up of seven members, of which three are nominated by the president and four by parliament, this Court is expected to be impartial in guaranteeing the rule of law and regulating the functioning and activities of government agencies. Currently, the composition of the court is marred by conflict of interest and allegiance. Its chief judge, Professor Joseph Jogbenou, was (is) a lawyer and friend to President Talon. This delicate position puts the Constitutional Court at a greater risk of partiality towards pro-government rulings and insensitivity to the violations of the rights and freedoms of dissidents and opposition figures. On constitutional reforms, Jobgenou had strongly and vehemently opposed the move during Yayi's administration. Also, he stood against the ban on the right to strike for public-sector unions in Benin. But when Jogbenou changed position, he reversed the right to strike and approved the amendment of the 1990 Constitution under President Talon. Moreover, the Constitutional Court contributed to the exclusion of opposition parties from the April 2019 legislative elections[32] by imposing the production of a certificate of conformity which the minister of interior refused to issue to candidates before partaking in elections. Such a requirement was never mentioned in the new Electoral Code, the Charter of Political Parties,[33] or the 1990 Constitution. In Benin, this situation created an unprecedented sense of a pro-government constitutional court which is at the mercy of the executive and

[30] Article 114 of the 1990 Constitution of Republic of Benin.

[31] 'Decisions of the Djogbénou court on sponsorship and extension of the mandate: Reaction of two academics' *La Nouvelle Tribune*, 8 January 2021, available at https://lanouvelletribune.info/2021/01/decisions-de-la-cour-jogbenou-sur-le-parrainage-et-la-prorogation-du-mandat-reaction-de-deux-universitaires/, accessed on 14 February 2022.

[32] 'Legislatives 2019 au Benin: Le piege Fatal?' *Civic Academy for Africa's Future* April 2019, available at https://www.ciaaf.org/storage/2019/04/CiAAF_Note_danalyse_Crise_electorale_Benin_2019.pdf, accessed on 19 February 2022.

[33] 'Benin tests the limits of democracy' *Institute for Security Studies*, 10 May 2019, available at https://issafrica.org/iss-today/benin-tests-the-limits-of-democracy, accessed on 18 February 2022.

to the detriment of the rule of law and the principles of separation of powers, thus eroding democratic norms.

5.3.2 *The Autonomous National Electoral Commission (CENA)*

The Autonomous National Electoral Commission manages elections in Benin.[34] In carrying out its mission, it is independent from the executive, the legislative and the judiciary subject to arts 33 and 97 of the 1990 Constitution and arts 42, 52 and 54 of 1991 Constitutional Court's Organic Law (as amended in 2001). In this capacity, the Commission had managed elections in Benin. And thanks to its independence, the April 2016 Presidential elections brought Patrice Talon to power. Upon assuming office, the President-elect, knowing the lapses of Benin's system, which included the inability of political parties to produce a president in office since democratic renewal in 1991,[35] undertook political reforms to his own advantage while discarding political opponents from political representation and participation. As a result, the April 2019 legislative elections, 2020 local elections and April 2021 presidential elections saw the exclusion of opposition parties from political competition.[36] By instrumentalising the Autonomous National Electoral Commission, Talon's administration chooses who will run for elections in Benin. The April 2019 elections saw the lowest voter turnout since 1990.[37] According to the chairman of the Commission, '[t]he legislative elections left us an unfinished taste. It was in complete u-turn with what has been until now, the democratic principle which allows both majority and opposition to participate in vote.'[38]

5.3.3 *The Criet*

The Economic Crimes and Terrorism Repression Court (Criet) was created by Act 2018-13 of 2 July 2018, modifying and completing Act 2001-37 of 27 August 2002, on the organisation of the judiciary in the Republic of Benin. This court has exclusive jurisdiction in cases of economic and financial crimes and

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[34] Article 13 of the November 2019 Electoral Code of Benin.

[35] 'Revision of the Constitution in Benin: What will change?' *Jeune Afrique*, 7 November 2019, available at https://www.jeuneafrique.com/852953/politique/revision-constitutionnelle-au-benin-mandats-ticket-presidentiel-elections, accessed on 18 February 2022.

[36] Exclusion of Sebastian Adjavon from political participation in May 2020.

[37] 'Legislative elections in Benin: Participation rate below the threshold of 25 per cent according to preliminary results' *Jeune Afrique*, 1 May 2019, available at https://www.jeuneafrique.com/769501/politique/legislatives-au-benin-le-taux-de-participation-sous-le-seuil-des-25-selon-les-resultats-preliminaires/, accessed on 22 February 2022.

[38] *Jeune Afrique* op cit (n24).

terrorism. Since its establishment, it has ruled over high-profile cases involving politicians.[39] In its proceedings, there seems to be no due process of law,[40] fair hearing, presumption of innocence or the right to appeal its decisions, causing a legal quandary in the judicial system of Benin under Talon's administration. A kangaroo court, the Benin Bar Association likened its functioning to those of dictatorial regimes.[41] As a result, this court has become an instrument of political repression of political opponents and dissidents, at the mercy of President Talon.[42] Also, on the rulings of the court against Lionel Zinsou, former Chief Justice of the Constitutional Court, Robert Dossou confirmed the instrumentalisation of the court in the following terms: 'Justice has been instrumentalized in this case.'[43] Moreover, the sentencing[44] of Rekiya Madougou and Professor Joel Aivo to 20 and 10 years' imprisonment, respectively, corroborates the intention of Talon to exclude key political opponents from participating in political competition in 2026 and 2031. After their sentencing, the defendants had not deemed it fit to appeal because they had lost hope in the judiciary. In the same vein, defence council Mario Stasi wondered 'how does one trust judges who are neither free nor impartial and who are asked to convict even without evidence?'[45] In addressing the judges who pronounced her sentencing, Madougou proclaimed: 'I offer myself to my country's democracy if my sacrifice can make your court independent.'[46]

5.3.4 *The executive*

The 1990 Constitution adopted the presidential system of government in the Republic of Benin. The rationale for choosing this system was to allow for

[39] Sebastian Adjavon, Lehady Soglo and Reckya Madougou.

[40] Arrest and detention of Prof Joel Aivo.

[41] 'Benin: Creation of the Criet, the bar association denounces it' *Benin Espoir*, 19 November 2018, available at https://beninespoir.com/benin-creation-de-la-criet-lordre-des-avocats-en-denonce/, accessed on 23 September 2021.

[42] 'Talon, this president who is wobbling Beninese democracy' *Mali-Web*, 22 October 2018, available at https://mali-web.org/afrique/talon-ce-president-qui-fait-vaciller-la-democratie-beninoise/, accessed on 23 September 2021.

[43] 'Benin: Lionel Zinsou sentenced to 5 years of ineligibility and 6 months suspended prison sentence' *Jeune Afrique*, 2 August 2019, available at https://jeuneafrique.com/811892/politique/benin-lionel-zinsou-condamne-a-5-ans-dineligibilite-et-6-mois-de-prison-avec-sursis/, accessed on 20 September 2021.

[44] 'Benin: Joel Aïvo and Reckya Madougou, sentenced, do not appeal' *Africanews*, 21 December 2021, available at https://fr.africanews.com/2021/12/21/benin-joel-aivo-et-reckya-madougou-condamnes-ne-font-pas-appel/, accessed on 10 February 2022.

[45] Ibid.

[46] Ibid.

strong independence in the functioning of the three branches of government. The judiciary, the legislature and the executive cohabited constructively for two and a half decades while consolidating democratic practices. But under President Talon, a constitutional coup subjected the two other powers to the whims of the executive. For Adeline van Houtte from the British Broadcasting Corporation, it is probable for Talon to 'rul[e] without checks and balances … opening the way for further weakening of Benin's democratic credentials'. She also opined that:

> President Talon will have free hand now to pass through the constitutional changes that he has wanted to make over the past two years. Policymaking will be faster but on the other hand his cherished image of a modern president will be damaged.[47]

Consequently, the legislature and the judiciary became weaker, making the executive stronger while unbalancing the principles of separation of powers. Candid Azanai, Talon's former ally, stated that 'Talon's aim is to confiscate the legislative branch, impose a new constitution, a despotic, mafialike and terrorist dictatorship'.[48]

Ultimately, these two organs have been instrumentalised by the executive, thus furthering its monopoly on power. Having assumed legitimacy as the centre of power in Benin, the Talon administration is increasingly drifting away from agreed democratic norms and values. Notably, this drift is perceived through the instrumentalisation of the judiciary and the prosecution of political opponents. The instrumentalisation of the judiciary by Talon's administration was revealed to the world in the matter of *Sébastien Germain Marie Aïkoue Ajavon (The Applicant) v Republic of Benin*.[49] In this matter, Talon's administration refused to comply with the decisions of the African Court on Human and Peoples' Rights (ACtHPR), delivered on 7 December 2018 and 29 March 2019, in favour of the applicant. Ultimately, dissatisfied with the ACtHPR, on 25 March 2020, Benin deposited with the African Union Commission the instrument of withdrawal of its Declaration under art 34(6) of the African Court Protocol which allows individuals and NGOs direct access to the ACtHPR. That decision to withdraw its declaration was an indication that Benin was rolling back democratic principles.[50] Ironically, Benin became a party to the African Charter on Human

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47 'How Benin's democratic crown has slipped' *BBC News*, 6 May 2019, available at https://www.bbc.com/news/world-africa-48150006/, accessed on 25 September 2021.

48 'Crisis in Benin: the Church makes an offer of mediation for a return to peace' *Jeune Afrique*, 8 May 2019, available at http://rfi.fr/afrique/2090508-crise-benin-eglise-fait-une-offre-mediation-retour-paix/, accessed on 16 September 2021.

49 *Sébastien Germain Marie Aïkoue Ajavon (The Applicant) v Republic of Benin* (Application 065/2019) ACHPR (29 March 2021).

50 'Benin: Talon turns back the clock' *Africa Confidential,* 3 May 2019.

and Peoples' Rights on 21 October 1986, under Kerekou's dictatorship, and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 22 August 2014 under President Thomas Boni Yayi. It is obvious that there is democratic backsliding in Benin under the auspices of President Talon.[51] As President Talon pointed out, 'what is happening doesn't honour the democratic image of Benin … This situation brings discredit on our democracy and on me.'[52] Also, the fact that Benin's opposition politicians, activists, and citizens 'challenge election processes and constitutional amendment processes'[53] before African regional and sub-regional courts show how uneven the playing field is in the Republic of Benin.

5.4 VICTIMS OF DEMOCRATIC REGRESSION

5.4.1 *Civil society organisations*

With the advent of democratic renewal, civil society organisations became more visible and active in playing their role in the democratisation process and the consolidation of democratic principles and norms. Traditional and religious associations, student associations, trade unions, the media and think tanks have become involved in political debates for years in Benin. Under Talon, these organisations became less active and visible but more partisan. Dissident student associations and trade unions are either banned or excluded from political discussions.

As a result, on 15 October 2016, the government suspended all student associations in public universities. Also, some media houses[54] have been suspended and journalists[55] arrested and detained. Politically motivated censorship and media restraints became stronger. This situation is reminiscent of the pre-democratic periods Benin has known.

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[51] F Soudan 'Benin: Democracy according to Patrice Talon' *Jeune Afrique*, 2 March 2021, available at https://jeuneafrique.com/1130140/politique/edito/benin-la-democratie-selon-patrice/, accessed on 16 September 2021.

[52] *BBC News* op cit (n47).

[53] OD Akinkugbe 'International Decision Commentary: *Houngue Eric Noudehouenou v Republic of Benin*' *Schulich Law Scholars*, 19 April 2021.

[54] 'Benin: RSF condemns suspension of four media houses in 48 hours' *L'Express*, 2 December 2021, available at https://lexpansion.lexpress.fr/actualites/1/actualite-economique/benin-rsf-denonce-la-suspension-de-quatre-medias-en-48-heures_1856629.html, accessed on 22 February 2022.

[55] Casimir Kpédjo, editor of the *Nouvelle Economie* newspaper; and Ignace Sassou of Benin Web TV.

5.4.2 *The political opponents*

Regression in democratic practices is more palpable, with political repression being experienced by opposition parties and opponents under Talon's administration. From his political partner Sebastian Ajavon to the high-profile constitutionalist, Professor Joel Aivo, the list of victims is long. The former minister of justice, Reckya Madougou, Laurent Metongnon, a trade unionist, and Professor Joel Aivo are currently awaiting trial in prison on trumped-up charges of unlawful association, money-laundering and sponsoring terrorism. Koumi Koucthe and Sebastian Ajavon were forced into exile because the Criet is after them. Also, the former President Thomas Boni Yayi was put on *de facto* house arrest for 52 days after the April 2019 elections,[56] before he fled the country after his release in June. Moreover, former Prime Minister Lionel Zinsou was also accused and found guilty of overspending on a political campaign, forgery and use of false documents, and sentenced to 5 years' ineligibility for presidency.[57] Responding to his sentencing, Zinsou commented that 'arbitrariness has taken root in Benin'.[58] These machinations succeeded in barring opposition parties and candidates from competing in parliamentary and presidential elections. In consequence of these machinations, participatory democracy has become extinct in Benin under President Talon, putting Benin in a trajectory uncanny to her democratic legacies prior to April 2016.

5.4.3 *The people of Benin*

Democracy had taken root in Benin's political atmosphere in such a way that people from the same family could belong to different political parties. This liberal participation in political life had shaped political affiliation, creating a tapestry of parties representing various constituencies in parliament. Thanks to proportional representation, independent candidates and smaller parties could contest communal, legislative, and presidential elections. But with the current reforms, which its proponents defend to be an antidote to political prostitution and political price fixing, a large portion of citizens would surely be or are underrepresented in parliament. Citizens have lost confidence in the electoral systems and institutions. As a corollary, this state of things dwindles their demand for democracy. As Paul would lament, '[m]y vote will not change anything'.[59]

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[56] 'Freedom in the World 2020 – Benin' Freedom House Report 2020 Consulted on 26/09/2021.

[57] *Jeune Afrique* op cit (n43).

[58] Ibid.

[59] 'Presidential election in Benin: Weak mobilisation at the polls' *Jeune Afrique*, 12 April 2021, available at https://www.jeuneafrique.com/1153027/politique/presidentielle-au-benin-faible-mobilisation-dans-les-urnes/, accessed on 26 September 2021.

For Pamphile, '[t]his poll offers no choice'.[60] According to Isidore Gbaguidi, 'Talon's supporters stayed home, believing that, in any way, their leader will win'.[61] As a result, like that of the 2019 parliamentary elections, the outcome of the 2021 Presidential elections was a foregone conclusion. In the aftermath of the crackdowns on protests, Adeline van Houtte concluded that 'democracy has been planted in minds of citizens and has been for a long time, so this was a final blow. It has ruined Benin's image at the national and international level'.[62]

5.5 ISSUES OF DEMOCRATIC REGRESSION

Declining democratic principles and practices cover a wide range of issues under Talon's administration. Below are some of the most crucial.

5.5.1 *Exclusion of opposition parties, restriction of political participation and representation*

The exclusion of the opposition parties from political competition is the most contentious issue evidencing democratic backsliding in Benin. It is noteworthy to recall that Talon ran as an independent candidate and won thanks to a coalition of small political parties in 2016. However, his decision to reform the multiparty system without consensus is utterly unconstitutional and violated the spirit and tradition Benin's constitutionalism is built on. Also, the restrictions and requirements of the new Electoral Code are a ploy to disqualify political opponents and limit political representation and participation to parties favourable to the executive.[63] Consequently, the current parliament displays a lack of choice and is exclusive of opposition parties.[64] According to Michael Bratton, widespread involvement by various political parties probably indicates the absence of major electoral deficiencies, but a boycott seems to signal a lack of agreement on the rules of the democratic game. In the case of Benin under Talon, there were calls by major opposition parties to boycott the 2019 legislative[65] and 2021 presidential elections.[66] For the political analysist Expedit Ologou:

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60 Ibid.

61 Ibid.

62 *BBC News* op cit (n47) 2019.

63 T Roberts 'Benin continues to slide toward autocracy' *The Washington Post*, 7 May 2021, available at https://www.washingtonpost.com/politics/2021/05/07/benin-continues-slide-towards-autocracy/, accessed on 21 September 2021.

64 CiAAF op cit (n18).

65 'Benin: The opposition calls for a boycott of the legislative elections' *AfricTelegraph*, 4 November 2021, available at https://africtelegraph.com/benin-lopposition-appelle-a-boycotter-les-legislatives/, accessed on 21 September 2021.

66 'Presidential election 2021 in Benin: The radical opposition calls on its supporters to boycott the ballot' *Banouto*, 10 April 2021, available at https://www.banouto.

> Opposition parties had been excluded from the last legislative and local elections thanks to rules made by the majority. Those parties cannot, in such conditions, have presidential candidates. The laws of our Republic are antidemocratic; this is the bottom of the issue.[67]

The present configuration of parliament does not reflect the participatory democracy the Conference bequeathed the people of Benin. Talon's system alienated political participation and took political representation away from the reach of an average citizen. Is this democratic? In this vein, former Chief Justice of the Constitutional Court Robert Dossou commented on the sentencing of Lionel Zinsou by observing that '[t]he objective is clear, this goes in synch with successive state of things these last months: it is to make ineligible all potential candidates running against Talon'.[68] Moreover, Social Watch Benin observed that '[a]n election can only be democratic when it puts in competition political forces favourable to power and political forces opposed to power'.[69]

From the above, elections organised under Talon are likely to be exclusive and selective, which was the case with the parliamentary and presidential elections. If the intention is to wipe out all political opponents, is Benin heading towards a one-party state?

5.5.2 *Resurgence of a one-party state*

From the composition of the current parliament, it can be assumed that Benin is drifting towards a one-party state. As a matter of fact, the two political parties are pro-government and of the same political orientation. First, it is less probable for this government to offer a chance for credible opposition parties or candidates to contest and win elections as seen with the 2019 legislative and 2021 Presidential elections. Second, there are reasons to believe that Talon may manipulate the systems (legislative and judiciary) to run for presidency in 2026 given his record of breaking his initial promise to only run for one term. Third, the probability is higher for Talon to install a puppet president and become a vice, which the Constitution allows if he steps down in 2026.

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bj/article/politique/20210410-presidentielle-2021-au-benin-l-opposition-radicale-appelle-ses-partisans-au-boycott-du-scrutin, accessed on 21 September 2021.

67 'Patrice Talon: 5 ans après, l'heure du bilan' *Agence.Ecofin,* 26 March 2021, available at https://www.agenceecofin.com/dossier/2603-86595-patrice-talon-5-ans-apres-l-heure-du-bilan, accessed on 25 September 2021.

68 *Jeune Afrique* op cit (n43).

69 'Legislatives in Benin: a "serious attack on democracy" for the opposition' *Le Monde*, 16 April 2019, available at https://www.lemonde.fr/afrique/article/2019/04/16/legislatives-au-benin-une-grave-atteinte-a-la-democratie-pour-l-opposition_5450847_3212.html, accessed on 3 February 2022.

Finally, one-party state systems argue that a unified political climate allows for economic growth and development. Is Talon a proponent of this school of thought? Time will tell, but practice is revealing much of his ambitions to have a governmental system with a unified vision where the legislature, the executive and the judiciary connive to act as one to the detriment of popular participation and consensus. Moreover, the current rubber stamp parliament substantiates the emergence of a one-party state in Benin. In any case, Talon has his grip on Benin's political system and the vitality of its democracy will probably depend on his whim.

5.5.3 *Shrinking civic spaces*

According to CIVICUS, the International Center for Not-for-Profit Law (ICNL), Art 19, and the Civic Space Initiative (CSI), civic space is the set of conditions that allow civil society and individuals to organise, participate and communicate freely and without discrimination, and in doing so influence the political and social structures around them.[70] In the light of this definition and by merely looking at the political and social atmosphere in Benin since April 2016, one can boldly affirm that citizens and civil society organisations are playing a marginal role in influencing the political and social structures in Benin. The banning of the right to strike, the stifling of peaceful protesters in May 2019, the political manoeuvring in disenfranchising political heavyweights and the manipulation of laws and institutions are tangible evidence, precipitating democratic decline in Benin. In addition, the prosecution and jailing of journalists and bloggers under the 2016 digital law shows the extent to which Talon's administration will clamp down on civil liberties and the diverse avenues where they are expressed and enjoyed. Under the same law, press freedom is restricted and some media houses are suspended and closed.[71]

5.5.4 *Repressive practices and human rights violations*

According to the Freedom House Report of 2021, Benin shifted from a free state to a partly free state.[72] Significantly, protests surrounding the 2019 parliamentary elections met with harsh responses from the Talon administration. Police violence against demonstrators, with use of lethal weapons, resulted in loss of lives and property. On 24 March, police killed Theophile Dieudonne Adjaho during a demonstration by the National Federation of Beninese Students for demanding

[70] Westminster Foundation for Democracy 'Addressing the global emergency of shrinking civic space and how to reclaim it: A programming guide' (2020).

[71] Roberts op cit (n63).

[72] Freedom House 'Democracy under siege' (2021).

cancellation of classes due to the Covid-19 pandemic and the arrests of colleagues at previous protests.[73] Censorship and content restriction are common under Talon's administration. The government also denies permits to demonstrate on the basis of preserving public order. Unlawful or politically motivated arrests are rife.

As a result, Professor Joel Aivo, Reckya Madougou, Laurent Metongnon, Bio Dramane Tidjani, and Mamadou Tidjani are illegally and unlawfully detained in various prisons while Sebastian Ajavon, Lehadi Soglo, and Koumi Koutche are in exile. Moreover, in the name of development, many informal settlers in Cotonou and other major cities were evicted from their homes without due compensation. These practices do not only violate the fundamental rights of Beninese people but threaten their livelihoods and sources of income. Since this administration acknowledged regression of democratic principles and practices in Benin, are multiparty systems, political and civil rights an impediment to development? Especially in Benin? Given the resilience of Benin's economy despite the effect of Covid-19 on a global scale,[74] is Talon leading the country towards a developmental dictatorship?

5.6 TOWARDS A DEVELOPMENTAL DICTATORSHIP?

In Benin, even under Thomas Boni Yayi, the idea of a development model suitable for economic growth and development started evolving in the corridor of power.[75] President Talon came with a new direction called 'New beginning',[76] which through his actions means breaking up with old habits. For him:

> Development is indispensable for people and nations therefore individuals, the moral, physical, and material wellbeing is indispensable. It is the pursuit of all, that which everyone aspires for. Finding means to meet one's needs, satisfy them, even when one is misunderstood, and even when one has good faith, and moreover when one's action is bearing fruits, must this be called a developmental dictatorship? Me, I don't know.[77]

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[73] US Department of State '2020 Country report on human rights practices: Benin' (2021).

[74] Agence Ecofin op cit (n61).

[75] C Hessoun 'Development dictatorship: A curious recipe supposed to lead Benin to prosperity' *La Nouvelle Tribune*, 30 January 2018, available at https://lanouvelletribune.info/2018/01/dictature-de-developpement-benin/, accessed on 26 September 2021.

[76] Le Nouveau départ.

[77] 'La conférence nationale, 30 après : entretien avec Patrice Talon' *Présidence du Benin* 19 February 2020, available at https://www.youtube.com/watch?v=OKRmUuw6K5M, accessed on 26 September 2021.

5.7 CONCLUSION

This chapter has highlighted the various facets of declining democratic principles and practices in Benin since President Talon took office in 2016. From rolling back constitutionalism, restricting political competition, excluding political opponents from participating in the political life of their country, instrumentalising Benin's institutions, shrinking civic space to the repression of political opponents, the Talon administration has obviously derailed from democratic values and norms cherished by the people of Benin. Whatever the intentions of Talon's administration for the well-being of all, dialogue and consensus are values inherent to democracy. Whatever approach the current administration wishes to employ for the development of Benin, respect for and promotion of human rights, the rule of law, participatory democracy, and multiparty systems, based on consensus, are key to political stability for economic growth, peace and sustainable development. There is a need to balance the development model with democratic norms and values in Benin and Africa for the overall benefits of all. With the current upsurge of poor governance and lack of accountability, the military would be tempted to come back to power. And they are back![78]

[78] The military are in Chad, Mali, Guinea Conakry and Burkina Faso.

CHAPTER 6

When absolutism fails, the rule of law and democracy prevail: A discussion on the unrest in the Kingdom of Eswatini

SIBUSISO NHLABATSI*

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ABSTRACT

In post-colonisation many African states have made some progress in democratic and institutional reforms. While there have been some gains in parts, there has also been regression. In the Kingdom of Eswatini democracy remains illusory. Despite adopting a new Constitution in 2005 the preceding situation remains unchanged, as Eswatini remains an absolute monarchy where the King yields all governmental powers. This can be traced back to 12 April 1973, when King Sobhuza II unilaterally abrogated the Independence Constitution because it was 'unSwazi'. Through a royal decree, he assumed all legislative, executive and judicial powers, whilst at the same time strategically positioning his armed forces, ready to quell any form of resistance.

* Admitted attorney of the High Court of Eswatini, LLM Candidate (University of South Africa), LLB (University of Swaziland), Diploma in Law (University of Eswatini). Currently working as Legal Clinic Principal at the University of Eswatini.

Recently, in the face of massive internal revolt, where the people of Eswatini across the spectrum were calling for democratic reforms, King Mswati III unleashed the army on unarmed civilians, leaving over 60 people dead, thousands injured and hundreds incarcerated. The recent unrest and the possible intervention by SADC has once again put the issue of democracy in Eswatini back on the agenda. This chapter discusses how the Kingdom of Eswatini evaded accountability for many years as calls for democracy were ignored and dissidents silenced. In the main, the chapter discusses how calls for democracy continue to be resisted in Eswatini and further demonstrates how its status as the only country in Africa where political parties are banned and cannot contest elections was a catalyst for the recent public uprisings.

6.1 INTRODUCTION

Since the early 1990s, there have been significant transformations in political systems in many African countries.[1] However, many countries still struggle to strengthen and institutionalise democracy and deal effectively and fully with certain governments' impunity, particularly those which are associated with the abuse of executive power and the violation of human rights.[2] While presidents in some countries have abided by their constitution's two-term limit, others have used legislatures subservient to the president to change their constitutions to allow them to stay in power beyond those two terms, and, in some cases, indefinitely.[3] In addition, these and other recent institutional changes have created conditions that make it very difficult for the opposition to participate competitively in elections.[4] These actions of allowing incumbent presidents to unconstitutionally extend their mandate has been referred to as a constitutional coup.[5]

In sub-Saharan Africa, the tiny Kingdom of Eswatini is yet to experience democracy as it died in 1973[6] when King Sobhuza II unilaterally abrogated the

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1 JM Mbaku 'Threats to democracy in Africa: The rise of the constitutional coup' *Africa in Focus*, 30 October 2020, available at https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/, accessed on 23 February 2022.

2 Ibid.

3 Examples of presidents that have changed their countries constitutions to eliminate the two-term limit include Presidents Gnassingbé (Togo), Museveni (Uganda), Déby (Chad), Biya (Cameroon), Kagame (Rwanda), the late Nkurunziza (Burundi), and el-Sisi (Egypt).

4 Mbaku op cit (n1).

5 Ibid.

6 The effects of the proclamation were that political parties were banned and the King imposed himself as a supreme leader with all three governmental powers conferred on him.

Independence Constitution through a Proclamation to the Nation popularly known as the 1973 Decree.[7] The actions of the King were unlawful as a constitution provides the framework on which a government is based; it sets out clearly how the government is organised, and the extent of the duties performed by each arm of government. Therefore, without a constitution, any democracy can easily fall into anarchy or be transformed into something other than a democracy. By repealing the Constitution, King Sobhuza II recreated himself as an absolute monarch who, between 1973 and 1978, ruled the country with a Council of Ministers.[8]

The advent of the Constitution in 2005[9] has not changed anything even though it proclaims Eswatini as a democratic state.[10] Political parties remain banned and they are not able to contest for political power. Some political parties have been proscribed under the Suppression of Terrorism Act of 2008.[11]

The current King of Eswatini, King Mswati III, inherited the supremacy of the institution of the monarchy from his father. This concentration of power in the hands of one authority is very unhealthy and has resulted in serious tensions between the pro-democracy movement and the monarchy. After nearly five decades of absolute rule, calls for democratic reforms have been amplified in Eswatini.

The current system of government which Eswatini is governed under denies the population basic freedom and fundamental human rights which are guaranteed by the Constitution, especially the freedom of expression coupled with the right of assembly and association, which are central to ensuring that people have a say in how they are to be governed. The calls for democracy have recently intensified in Eswatini due to the fact that, amongst other things, in the midst of abject poverty and high unemployment rates, especially amongst the youth, the monarchy has continued to flash opulence in the face of the impoverished people. This chapter discusses the governance, rule of law and the causes of the recent amplified calls for democracy. The chapter further discusses why the people are unimpressed by the government and the King.

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7 Proclamation 001 of 1973.

8 JB Mzizi 'The dominance of the Swazi Monarchy and the moral dynamics of democratisation of the Swazi State' (2004) 3 *Journal of African Elections* 94.

9 Eswatini adopted a new Constitution in 2005 (The Constitution Act 001 of 2005).

10 Section 1(1) provides that Swaziland is a unitary, sovereign, democratic Kingdom.

11 Act 3 of 2008.

6.2 THE RULE OF LAW IN ESWATINI IS MERELY A PIPE DREAM

It has now been generally accepted across the African continent and the entire democratic, progressive, free and just world that the concentration of all state power in one authority is inconsistent with the rule of law and the doctrine of the separation of powers, and is therefore seriously undemocratic, and oppressive. Francis Neate[12] explains the doctrine of the rule of law in the following terms:

> What is the Rule of Law? Some people, even quite intelligent people express confusion about this. It is really not difficult. The Rule of Law is the only system so far devised by mankind to provide impartial control over the exercise of state power. Rule of Law means that it is the law which ultimately rules, not a monarch, not a president or prime minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law no one is above or beyond the law. The law is the ruler.

Neate continues to say that:

> [W]ithout the Rule of Law there could be no politics. There could be no free political discussion, no political process. Instead we would be reduced to trying to persuade those with power to exercise it, or not to exercise it (as the case may be), in our favour. That is not politics that is pleading. The political process involves free political debate and discussion. It is the Rule of Law which underpins and guarantees that process.

The separation of power between the legislative, executive and judicial arms of government ensures that power cannot be concentrated in one person or sphere, and provides inbuilt checks on the exercise of power. For the rule of law to be effective a society requires an independent judiciary, one which enforces the laws with certainty and clarity, and applies the law equally to all individuals and institutions. Without the accountability the rule of law provides, and the certainty of law that flows from it, societies lose the protection against tyranny that democracy is supposed to provide. Former Judge of the Constitutional Court of South Africa, Justice Edwin Cameron, states the following on the doctrine of the separation of powers:

> This doctrine differentiates modern states from top-down single-line ways of governing like monarchies or dictatorships. The world, and our continent, has seen many authoritarian regimes. Almost universally, they are an evil. In one of our neighbours, Eswatini, there is an autocracy in a form of a monarch.[13]

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12 F Neate *The Rule of Law: Perspectives from Around the Globe* (2009).

13 E Cameron *Justice: A Personal Account* (2014).

Section 138 of the Constitution guarantees the independence of the judiciary.[14] The judiciary is endowed with all powers to adjudicate over disputes of any nature involving the violation of fundamental human rights as enshrined in the Constitution.[15] Therefore, the courts have to safeguard the rule of law, bill of rights, democracy and the common good of the people.[16] However, having an absolute ruler erodes the rule of law and the lines of separation of powers are blurred. Practically, a monarchy is in control of the three arms of government.

Very wide powers are given to the head of state to appoint judicial officers by the Constitution. The King appoints the Chief Justice. Section 159[17] of the Constitution establishes the Judicial Service Commission (JSC), which consists of the Chief Justice, and two legal practitioners with not less than seven years' practice and of good professional standing. It also includes the chairman of the Civil Service Commission (CSC), and two other persons appointed by the King. In essence, all the members of the JSC are appointed by the King. Gumedze[18] argues that Eswatini presents a dilemma in that the King is, according to the Constitution, above the law, even though in terms of s 2(2) of the Constitution he has 'the right and duty at all times to uphold and defend this Constitution'.

An independent judiciary cannot be attained in an undemocratic society.[19] Democracy will ensure the rule of law, good governance, and respect for human rights and it starts from the constitution with a justiciable bill of rights and respect for international law – international human rights law.[20] Constitutional provisions alone are not sufficient.[21] What is required on top of good constitutional guarantees is political will on the part of the executive, in other words respect for the rule of law. It must be noted that every citizen of Eswatini is commanded by the Constitution to 'promote democracy and the rule of law'.[22] At face value, it would appear that the drafters of the Constitution had in mind the words of the

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14 'Justice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution.'

15 Section 140 of the Constitution.

16 Section 35 of the Constitution.

17 '159. Judicial Service Commission. 1. There shall be an independent Judicial Service Commission for Eswatini, hereinafter in this chapter referred to as "the Commission".'

18 S Gumedze 'Human rights and the rule of law in Eswatini' (2005) 5 *African Human Rights Law Journal* 266.

19 B Dube & A Magagula 'UPDATE: the law and legal research in Eswatini' (August 2016), available at http://www.nyulawglobal.org/globalex/Eswatini1.html#thejusticesysteminEswatini, accessed on 16 February 2022.

20 Ibid.

21 Ibid.

22 Section 58(4) of the Constitution.

preamble of the UNDHR, which states in part that 'it is essential … that human rights should be protected by the rule of law'.[23]

6.3 AN UNDEMOCRATIC CONSTITUTION

The Constitution of Eswatini refers to the Kingdom as a democratic state. Ironically, Eswatini is not democratic. Preamble 5 of the Constitution provides that:

> Whereas it is necessary to blend the good institutions of traditional Law and custom with those of an open and democratic society so as to promote transparency and the social, economic and cultural development of our Nation.

Section 1 of the Constitution declares Eswatini a unitary, sovereign, democratic Kingdom. However, the constitutional drafting process was problematic at its very inception and formulation. This is based on the fact that all the commissions appointed by the King were neither inclusive nor participatory. Neither were they accountable to the people, nor transparent in the execution of their mandate. This has been the position since the day the late King Sobhuza II appointed the First Royal Constitutional Commission after his unlawful repeal of the 1968 Constitution.[24]

Other than the conspicuous feature that all such commissions were led by senior members of the royal family, they all came to the same striking conclusion – that Eswatini must remain a no party state, with the King retaining his absolute and unlimited powers as a supreme leader in terms of the Swazi law and custom under the *Tinkhundla* system of government.[25] Under such a constitutional order the King appoints the Prime Minister and cabinet, and all members of the supposedly independent constitutional bodies, without any form of consultation except with his own hand-picked clique of advisors. The concept of democracy in Eswatini is further compounded in s 84(1) of the Constitution. That provision states that '[s]ubject to the provisions of this Constitution, the people of Eswatini have a right to be heard through and represented by their own freely chosen representatives in the Government of the country'.

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[23] Paragraph 3 of the preamble to the UDHR, 1948.

[24] Royal Constitutional Commission (RCC).

[25] Prince Guduza Economic Commission, Prince Masitsela Vusela Commission, Prince Mahlalengangeni Tinkhundla Review Commission, Prince Mangaliso Constitutional Review Commission and the Prince David Constitution Drafting Commission.

Therefore, s 1 read together with s 84(1) are enforceable by the courts and need to be understood also taking into account the political objectives[26] in the Constitution. Importantly, it is provided that Eswatini shall be a democratic country dedicated to principles which empower and encourage the active participation of all citizens at all levels in their own governance.[27] The state is obligated to cultivate among all the people of Eswatini through various measures, including civic education, respect for fundamental human rights and freedoms and the dignity of the human person.[28] Therefore political parties (as associations) and other associations that engage in public political discourse ought to be allowed the space to function. This is pursuant to the provision that '[a]ll associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisations and practice'.[29]

The provisions of s 58 seem, to all intents and purposes, taking into account ss 1 and 84, to be in line with art 21[30] of the Universal Declaration of Human Rights (UDHR), art 25[31] of the International Covenant on Civil and Political Rights (ICCPR) and art 13[32] of the African Charter on Human and Peoples' Rights. Despite this, Eswatini has failed to give effect to democratic participation as envisaged by the various human rights instruments. Although the Constitution pays regard to democracy, respect for fundamental human rights and basic freedoms, free political participation and free political activity are not permitted. The greatest impediment is s 79 of the Constitution, which makes such political participation possible, only within the confines and parameters of the *Tinkhundla* establishment. That establishment is founded on supreme traditional authority, which prohibits political pluralism and free political participation in Eswatini.

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26 Section 58 of the Constitution.

27 Section 58(1) of the Constitution.

28 Section 58(3) of the Constitution.

29 Section 58(4) of the Constitution.

30 'Article 21 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'

31 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.'

32 '1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.'

Based on the foregoing it is difficult to conclude that Eswatini is a democracy since the advent of the Constitution. There can be no democracy absent the full respect for all fundamental human rights and basic freedoms; in particular freedom of association and freedom of speech. Gumedze[33] captures it well, when he states the following:

> The *tinkhundl*a system of government does not accommodate political parties, presenting an inroad in so far as the enjoyment of the freedom of political association is concerned. Unfortunately, the constitution clandestinely endorses this three decade-long hostility towards multiparty democracy.[34]

Gumedze goes on to argue that the use of the words 'democratic, participatory .... system' in s 79 is illusory. It is illusory because the system does not include participation of political parties, one of the foundations of democracy.[35] Fombad[36] makes the point that:

> The greatest threat to the fundamental rights and freedoms enshrined in the Bill of Rights in the past has been the King and the failures to clearly state that the King is subject to the Constitution makes it quite possible for him to abrogate any of these rights as it suits his convenience under the numerous vaguely worded limitation clauses found in this part of the Constitution.[37]

In view of the absolute powers of the King and the emphasis on traditional fundamentalism as discussed above, it cannot be convincingly argued that Eswatini is a democratic society.

6.4 THE *TINKHUNDLA* SYSTEM OF GOVERNMENT

Given its unique features, which may not be akin to other systems, it is deemed important to provide an overview of the system of governance in Eswatini. *Tinkhundla*[38] as a system of governance in Eswatini was introduced through the establishment of the Parliament of Eswatini King's-order-in-Council of 1978[39] (the order). It was initially introduced as an experiment.[40] The King has powers to

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33 Gumedze op cit (n18).

34 Ibid.

35 Ibid.

36 C Fombad 'The Eswatini Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23 *South African Journal on Human Rights* 93.

37 Ibid.

38 The term *'Tinkhundla'* translates to plural for constituencies; *Inkhundla* for singular.

39 King's-Order-in-Council 23 of 1978.

40 SR Mthembu 'Human rights and parliamentary elections in Eswatini' in C Okpalupa *Human Rights in Eswatini: The Legal Response* (1997) 124 at 135.

establish or recognise *Tinkhundla* centres around the country. There are presently 59 *Tinkhundla* centres in the country. In terms of s 218(2) of the Constitution, the primary purpose of the *Inkhundla* is to bring the services closer to the people and let them take charge of their own development. This is, however, a formal definition of *Tinkhundla* as a system or rather what it ideally should be.

In practice, *Tinkhundla* as a concept is a system of government based on entrenching royal supremacy or hegemony to the exclusion of all others. Basically, the King owns the country under the *Tinkhundla* system as everything centres around him.[41] Therefore, it is practically impossible for the *Tinkhundla* system to serve the people as it aspires to do. The *Tinkhundla* system is riddled with open corruption and abuse of power and privilege much to the frustration of the people. The call for political reforms was a result of the system's exclusion of the people, who felt worthless and without dignity – they had to respond. The general belief is that democracy would give back to the people that voice which was taken away by the *Tinkhundla* system.

6.5 PREVIOUS ATTEMPTS AT DEMOCRATIC REFORMS

Various actors have been calling for democracy in Eswatini for a long time. These calls resulted in various commissions and committees, which led to the birth of the Constitution. Though guaranteeing and protecting human rights, albeit with heavy limitations, this Constitution still maintains the King as a supreme leader. Thus, the King is the head of state (leader of the executive),[42] occupies the office of supreme legislature[43] and has control of the judiciary.[44] Although there were attempts previously to make democratic reforms through litigation, the judiciary largely issued orders that maintained and retained the status quo.

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41 For example, the security cluster belongs to the King, His Majesty's Correctional Services, Royal Eswatini Police and Umbutfo Eswatini Defence Force. The King appoints chiefs (local traditional leaders), he appoints members of various commissions. He also appoints all members of the Judicial Service Commission, which in turn recommends to him persons to be appointed as judges. In terms of the Mines and Minerals Act 4 of 2011, the King shall have 50 per cent shares, without financial consideration, in all mining enterprises in Eswatini.

42 Section 64(1) provides that: 'The executive authority of Eswatini vests in the King as Head of State and shall be exercised in accordance with the provisions of this Constitution.'

43 Section 106(*a*), which regulates the power to make laws provides that: 'Subject to the provisions of this Constitution – the supreme legislative authority of Swaziland vests in the King-in-Parliament.'

44 All members of the Judicial Service Commission are appointed by the King in terms of s 159 of the Constitution.

6.5.1 *Challenging the legality and constitutionality of the Constitution*

Soon after the Constitution was promulgated there was an attempt by the broader civil society, through an organisation called the National Constitutional Assembly (NCA), to challenge the legitimacy, legality and credibility of the Constitution.[45] The main objection of the NCA related to the fact that the Constitution did not result from a meaningful and effective consultation process, hence it did not represent the aspirations of the people. During the constitutional review process neither groups of people nor political parties were allowed to make representations. This was restricted to individuals only. The litigation was an attack on the Constitution on the basis of s 80(2) of the Establishment of the Parliament Order, 1978. That provision states that the King together with the people of Eswatini would enact the Constitution of the country.

The view adopted was that reference to 'the people' meant all the people whether as individuals or groups and regardless of their political views. It was argued that the ban on the participation of the people through their organisations was a breach of this legislative provision. The contention was that the King's Proclamation had to be read together with and in light of this section so that Decrees 11, 12 and 13 were in conflict with s 80 in so far as constitution-making was concerned.

That approach was influenced by an understanding that a constitution, being a supreme law, is by its very nature a social contract, which needs to reflect the views of all the people within the jurisdiction of Eswatini. Civil society actors strongly believed that for the Constitution to enjoy popular support and popular legitimacy, it must enjoy ownership of all the people of Eswatini, and that such ownership could only come through effective and meaningful participation. The argument was that the people had not meaningfully and effectively participated in the drafting and adoption of the 2005 Constitution given the ban on free political activity and the narrow interpretation of s 4 of Decree 1 of 1996 and the King's Proclamation. In short, an illegitimate and discredited process could not give birth to a legitimate and credible democratic people's constitution.

To support its position, the NCA made reference to the African Commission on Human and Peoples' Rights (African Commission) which had handed down in its decision in the matter of *Lawyers for Human Rights v Swaziland*[46] that Eswatini had to engage with all stakeholders in the conception of a new constitution for Eswatini. It also found that the ban on political parties was a violation of

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[45] *Sithole NO v Prime Minister of the Kingdom of Swaziland* (2792/2006) [2007] SZHC 123 (6 November 2007).

[46] *Lawyers for Human Rights v Swaziland* African Commission on Human and Peoples' Rights, Comm 251/2002 (2005).

Eswatini's obligation made under the African Charter on Human and Peoples' Rights (African Charter).

In dismissing the NCA's application, the High Court held that in terms of the King's Proclamation read together with s 4 of Decree 1 of 1996, the applicants had no legal capacity to challenge the validity and legitimacy of the Constitution.[47] The Court continued to hold that, in any case, constitution-making was a political act not open to review by the court. This decision was upheld by the Supreme Court,[48] which observed that:

> The basis for the appellants wishing to strike down the Constitution or seeking the alternative orders is a complaint by them that in the process involved in bringing the present Constitution into being – to which I shall refer as 'the constitution making process' — they were excluded from participating in it and from making oral and written representations on behalf of their members and of the persons they represent.[49]

The Supreme Court further held that '[d]emocracy is, I would suggest, like beauty, to be found in the eyes of the beholder'.[50] The court referred to countries of the former Soviet Union that called themselves democratic, and found that there is nothing wrong with Swaziland (Eswatini) calling itself a democracy even if the body politic did not comply with the now generally acknowledged and accepted benchmarks and values of a democratic and constitutional state. This interpretation by the apex court was proof to some that the Constitution was not worth the paper it is written on.

6.5.2 *The people's rights to associate and assemble*

In the same application for the declaration of invalidity of the Constitution, there was a prayer that political parties be recognised, registered and be allowed to freely organise themselves so as to enable them to take part in the election

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47 The Court held at para 46: 'The summary of our finding, therefore, is the following. We are satisfied and find that the applicants have no locus standi to bring this application and by necessary extension they would have no standing to prosecute the main application. We are satisfied and find that there is no power inherent or statutory which this court can invoke in order to declare the Constitution of Swaziland Act 001 of 2005 null and void with no force and effect.'

48 *Sithole NO v The Prime Minister* (35/2007) [2008] SZSC 22 (23 May 2008).

49 *Sithole NO v The Prime Minister* supra (n48) para 3.

50 Paragraph 22 of the judgment.

management body and to contest elections. It was argued that ss 25[51] and 24[52] as read with s 84[53] of the Constitution protected not only the existence of political parties, but also their capacity to contest, canvass and disseminate their ideas, policies and ideology to the electorate. The arguments were also based on s 1 of the Constitution, which provides that Eswatini is a 'democratic Kingdom'. It was contended that Eswatini could not be a democracy without the lawful existence of political parties.

In essence the court found that there was nothing wrong with Eswatini calling itself a democracy even if the body politic did not comply with the now generally acknowledged and accepted bench marks and values of a democratic and constitutional state. The judgment dealt democracy in Eswatini a serious blow. If the courts could not interpret the Bill of Rights in such a way as to breathe life and give meaning to the lifeless document called the Constitution, then what is the purpose of having the Bill of Rights?

6.6 CALLS FOR DEMOCRATIC REFORM FROM WITHIN PARLIAMENT

As discussed earlier the system of governance in Eswatini allows political participation on individual merit since political parties are banned. Therefore, many political parties have over the years boycotted participation in the elections as they regarded them as a sham for excluding political parties. Parliament was

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[51] Protection of freedom of assembly and association: '25. (1) A person has the right to freedom of peaceful assembly and association. (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of peaceful assembly and association, that is to say, the right to assemble peacefully and associate freely with other persons for the promotion or protection of the interests of that person.'

[52] Protection of freedom of expression: '24. (1) A person has a right of freedom of expression and opinion. (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say – (a) freedom to hold opinions without interference; (b) freedom to receive ideas and information without interference; (c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and (d) freedom from interference with the correspondence of that person.'

[53] Right to representation: '84. (1) Subject to the provisions of this Constitution, the people of Swaziland have a right to be heard through and represented by their own freely chosen representatives in the Government of the country. (2) Without derogating from the generality of the foregoing subsection, the women of Swaziland and other marginalized groups have a right to equitable representation in Parliament and other public structures.'

viewed ineffective on the basis that it only has to rubberstamp the decisions of the executive instead of holding it to account.

The boycott of parliament worked in favour of government as there was no 'opposition' in parliament in the strict sense. However, in the current parliament three[54] members of parliament have called for democratic reforms. This has unsettled the Eswatini authorities as never before was there a call for democracy from within parliament. The calls for democratic reform are viewed in some sections of Eswatini as an affront to the power and authority of the King as in terms of s 106(a) of the Constitution the supreme legislative authority of Eswatini is vested in the King-in-Parliament.

Initially, the government and other authorities downplayed the call for democratic reforms, but it gained traction as people even at grassroots level, frustrated by the current establishment, joined the call. The people used the existing *Tinkhundla* structures to deliver petitions demanding democratic reforms and the plan of action was a simple one – petitions would be delivered to their members of parliament who would in turn, raise a motion in parliament based on the petitions. This frustrated the government further and it was not surprising that the then acting Prime Minister Themba Masuku (current Deputy Prime Minister) immediately and unilaterally imposed a ban on the delivery of petitions. He cited the Covid-19 regulations and protocols on gatherings and social distancing as a basis for banning the delivery of petitions.

The acting Prime Minister's action of banning the delivery of petitions was the cause of the pandemonium that followed thereafter. In short, he is responsible for the mass insurrection of June 2021 as he suspended the delivery of petitions. People viewed the actions of the acting Prime Minister as disingenuous, hiding under the Covid-19 pandemic to stifle the rights of political participation and having a say on how they want to be governed. What was more striking was that the people raised a valid counterargument that cultural activities sanctioned by the King attracted multitudes of people. Yet, the Covid-19 protocols were not used to limit them.

It is important to point out that before the acting Prime Minister's ban on the delivery of petitions, marches were peaceful and without any incident as people marched to their member of parliament, who graciously received their petitions. The violence that prevailed in the country after the banning of the delivery of petitions was unprecedented. Big cities like Mbabane and Manzini were forced to shut down as riots spread like wildfire. An undeclared state of emergency was in operation as the army took over the streets, killing a number of civilians and leaving many seriously injured.

[54] Mduduzi Simelane of Siphofaneni, Mduduzi Bacede Mabuza of Hosea, and Mthandeni Dube Ngwempisi.

From outside, the call for democratic reforms is not a complicated one. The institution of a constitutional monarchy is distinct in that people are able to elect their representatives. However, under an absolute monarchy, as Eswatini is, things are different. What the people are calling for is an amendment of s 67[55] of the Constitution. In the context of Eswatini, though, this call is tantamount to or can be viewed as treason. This is due to the fact that the call for democratic reform, as alluded to previously, is seen as a direct attack on the powers of the King. It is considered taboo to attack, criticise, or question the King's power and decisions. Currently the Prime Minister is appointed by the King; therefore, a call to take this authority away from him is frowned upon. It was not surprising therefore that the King ordered the arrest of the three members of parliament.[56]

Article 21 of the Universal Declaration of Human Rights as read together with art 25 of the International Covenant on Civil and Political Rights (ICCPR, 1966) provides that the will of the people shall be the basis of the authority of government. For a long time in Eswatini the monarchy has been able to use culture to perpetuate massive internal oppression. The notion that democracy comes with disrespect for authorities and the king should not be questioned for any acts or omissions is misguided as the king is supported financially by the taxpayer – the office of the king is a public institution.

According to Dube and Nhlabatsi, the idea of a dictatorial king has no place in customary law, hence the equally hallowed value in the Swazi context of *inkhosi yinkhosi ngebantfu*.[57] That literally translates to 'a king is a king through the people', and it makes the legitimacy of a king's rule conditional upon his humane treatment of the people under his rule.[58] In his coronation speech on 26 April 1986, King Mswati III reaffirmed that when he said, '[a] king is king

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55 Section 67(1) provides that the 'King shall appoint the Prime Minister from among members of the House acting on the recommendation of the King's Advisory Council'.

56 Mduduzi Bacede Mabuza of Hosea and Mthandeni Dube Ngwempisi are currently in jail as they were arrested under the Suppression of Terrorism Act 2008, as amended by Act 11 of 2017. Mduduzi Simelane is currently at large. In an audio clip former army commander Jeffrey Tshabalala was heard talking to a police officer Cebile 'Cece' Shongwe, disclosing that the King ordered for the arrest of the three members of parliament. Following the leaking of the audio the army commander resigned immediately. The two incarcerated members of parliament have been denied bail by the High Court (see *Mabuza v Rex* (218/2021) [2021] SZHC 130 (06 August 2021)) and are currently awaiting a date for the hearing in the Supreme Court since they have appealed the High Court order.

57 A Dube & S Nhlabatsi 'The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO & Others* on constitutionalism' (2016) 16 *African Human Rights Law Journal* 265.

58 Ibid.

by his people'.[59] It is a form of checks and balances on royal political power, and it means that the legitimacy of a king's rule flows from the people.

The myth that democracy is a foreign or a Western concept should be dismissed. Africa had principles and values that regulated governance, way before colonialism. The *Inkhosi yinkhosi ngebantfu* is one of those expressions that validate the African democratic value that the king cannot be absolute and that the peoples' views and opinions matter. This is echoed by Nelson Mandela in his autobiography, *Long Walk to Freedom*,[60] where he discusses tribal meetings he listened to. Mandela viewed such meetings as his earliest lessons in democracy. He noted that:

> Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard, chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and labourer … The foundation of self-government was that all men were free to voice their opinions and equal in their value as citizens.

In simple terms democracy seeks to ensure that government is based upon the consent of the governed and is accountable to the people. That is the call of the people of Eswatini—to have their own government instead of a government of the king which currently is not accountable to them. Article 2(2) of the ICCPR affirms the importance of political participation by stating that:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The King's unhindered and unlimited power is problematic for any state that aspires to be democratic. As it has been said, 'absolute power corrupts absolutely'. Various international and regional organisations have advised that Eswatini needs to open up the political space and allow political parties to contest for political power. In its 2013 Report the Commonwealth recommended that:

> It is vital, and in Swaziland's long-term national interest, that these contradictions are resolved and that enabling legislation be put in place to allow for political parties. This would give full effect to the letter and spirit of Section 25 of the Constitution, and in accordance with Swaziland's commitment to its regional and international commitments. The aim is to ensure that Swaziland's commitment to political pluralism is unequivocal.[61]

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[59] JSM Matsebula *A History of Swaziland* (1988) 325.

[60] N Mandela *Long Walk to Freedom*: *The Autobiography of Nelson Mandela* (1995).

[61] 'Swaziland National Elections, 20 September 2013: Report of the Commonwealth Observer Mission', available at http://thecommonwealth.org/sites/default/files/

Similar recommendations were made by the African Union (AU) and the Southern African Development Community (SADC). The AU stated categorically that:

> In line with the African Union instruments on Election and Human Rights and other international instruments on Human Rights, the AUEOM recommends that the Kingdom of Swaziland review Article 79 of the Constitution to be in conformity with Articles 14(1)(b) and 25 which enshrine the fundamental freedoms of conscience, expression, peaceful assembly, association and movement as well as international principles for free and fair elections and participation in electoral process and specifically the OAU/AU Durban Declaration on the Principles Governing Democratic Elections in Africa.[62]

The Southern African Development Community Lawyers' Association (SADCLA) recommended as much when it called for the '[i]mplementation of the growing views of sections of society, as guaranteed in section 25 of the Constitution, which called for the introduction of a multi-party system'.[63] SADCLA continued to state that the 'will of the people be respected in this regard'.[64]

6.7 CONCLUSION

From the preceding discussion it is very clear that the Kingdom of Eswatini has had longstanding issues on the rule of law, democracy and constitutionalism. While this has gone on for a while, presently the Kingdom of Eswatini is no longer at ease, the people are no longer silent. The tensions are glaring and the King has become very unpopular in his own Kingdom. For a simple call for democracy, the right to say how they want to be governed and for accountability, a number of people have been killed by the security forces.

It is clear that *Tinkhundla* in its current form, or even reformed, will not withstand the winds of change. The writing is on the wall, the King needs to be persuaded that a democratic Eswatini, with respect for the rule of law and human rights, is better not only for him, but for all the people. If the King would take

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project/documents/Commonwealth_Observer_Mission_to_Swaziland_National_Elections_2013_Final_Report.pdf, accessed on 23 February 2022.

62 African Union 'Election Observation Mission Report: Report of African Union Election Observation Mission to the 20 September 2013 National Elections in the kingdom of Swaziland', available at https://aceproject.org/ero-en/regions/africa/SZ/swaziland-preliminary-statement-by-african-union, accessed on 23 February 2022.

63 Southern African Development Community Lawyers' Association (SADCLA) 'Report of the Election Observation Mission to the Kingdom of Swaziland' (22 September 2015) 10.

64 Ibid.

the lead to institute and initiate a constitutional process of dialogue, he would emerge a hero.

The current Constitution is not that different from the 1973 King's Proclamation to the nation – the King still yields absolute power. Yet real power, in a true democracy, lies with the people. If indeed the monarchy enjoys popular support as it usually claims, it would not be afraid of a free, fair, credible and genuinely democratic ballot box which is truly competitive. This is because the only way to prove legitimacy is nothing less than winning the hearts of the masses of the people through such a fair and just electoral process. The monarchy should move away from the mainstream body politic in order to accommodate dissenting voices – the kingship needs to be redefined and reconceptualised so that Eswatini becomes an electoral democracy without an absolute monarch and with separation of powers.

Eswatini needs to usher in a new chapter and this can be achieved through meaningful negotiations by all segments of the Eswatini society, under an environment conducive to a meaningful, participatory, open and transparent process. This requires that all impediments, such as oppressive laws (including the Sedition and Subversive Activities Act 1938, Suppression of Terrorism Act of 2008, Public Order Act of 2017 as well as the 1973 Proclamation) and traditional practices must be removed.

Finally, political parties should be unbanned and allowed to contest for political power. The ban on political parties and free political activity is a breach which undermines fundamental rights and freedoms which are at the very heart of a democratic society: the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association. Without these rights, there can be no democracy even if a constitution proclaims that a country is democratic. The 2005 Constitution makes that claim, but it is an undemocratic Constitution without constitutionalism, and not worth the paper it is written on.

CHAPTER 7

Democracy without democratisation: An African incongruity

KIBET BRIAN*

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ABSTRACT

The result of an increase in the frequency of the holding of elections should ordinarily give rise to a more democratic society where the mandate to govern a given polity is not just felt but seen to be derived from the people. Put simply, it means that the governed will feel at the centre of the electioneering process and the governments that come to power will not trouble themselves seeking legitimacy. However, echoes from some quarters of the African continent seem to reflect otherwise. This chapter is predominantly triggered by the events that have surrounded the Ugandan elections of 2021 and the Côte d'Ivoire elections of 2020. In both cases, an environment was created that made it almost impossible for opposition candidates to campaign amidst arbitrary arrests of their key leaders and raids on their offices. In some cases, there was state-sponsored violence and mayhem in opposition strongholds. On the other hand, in both elections, the incumbents were seeking new terms, enjoyed very peaceful campaigns and were able to reach their voters with their messages seamlessly. This presents a Hobson's choice to voters, who have either an option to re-elect the incumbent or not vote at all. The result is a government that indeed emerged victorious in the elections but cannot really be christened a government of the people, by the people and for the people.

* LLB Candidate, Faculty of Law, University of Nairobi.

7.1 INTRODUCTION

The shift from autocracy and authoritarianism to democracy is perhaps the most basic change that any nation seeking to have the government's policies gain universal consent must make.[1] However, democracy goes beyond holding regular elections and demands that these elections are free and fair.[2] The holding of elections regularly in free and fair processes leads to societies which are open, participatory and less authoritarian.[3] The process that leads to that egalitarian society is called democratisation.[4]

Robert Dahl has described 'democracy' as growing broader in reach but growing shallower in depth.[5] This shallowness in depth has been connoted by a reduction in 'democratic qualities' in processes leading to the election of democratic governments.[6] Therefore an increase in the frequency of elections and the survival of regimes that come to power through democratic means is by no means the evidence of democratic credentials in a particular country.[7] The qualities of democratic deepening have been marked by equality, participation and representation in the process of election of governments.[8] Deepened democracy is a critical way of avoiding the instability and chaos that mark most electoral cycles in Africa.[9]

This chapter interrogates democratisation in electoral processes in Africa. This is of importance since elections form an integral part of democracy.

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1 J Wallace, H Kundnani & E Donnelly 'The importance of democracy' *Chatham House*, 14 April 2021, available at https://www.chathamhouse.org/2021/04/importance-democracy, accessed on 4 October 2021.

2 Ibid.

3 B Boutros-Ghali 'An agenda for democratisation' (1996), available at https://www.un.org/fr/events/democracyday/assets/pdf/An_agenda_for_democratization.pdf, accessed on 4 October 2021.

4 Ibid.

5 RA Dahl *On Democracy* (2000) 180.

6 M Bratton 'Wide but shallow: Popular support for democracy in Africa' *Afrobarometer*, Paper 19, available at https://afrobarometer.org/sites/default/files/publications/Working%20paper/AfropaperNo19.pdf accessed on 23 September 2021. Democratic qualities in elections have been theorised to include participation, competition and legitimacy. See Generally, SI Lindberg (2004) 'The democratic qualities of competitive elections: Participation, competition and legitimacy in Africa' (2004) 42 *Commonwealth & Comparative Politics* 61.

7 A Przeworski et al 'What makes democracies endure' (1996) 7 *Journal of Democracy* 39.

8 M Alagappa 'Deepening democracy' *Edge Malaysia*, 18 February 2018, available at https://carnegieendowment.org/2013/02/18/deepening-democracy-pub-51294 accessed on 4 October 2021.

9 Ibid.

If democracy is to live up to its promises, then it must be seen that electoral processes live by the ideals of democracy. Put simply, it is only democratic elections that birth governments that can live to deliver the democratic governance that aligns with the values of constitutionalism and the rule of law.

The relationship between democracy and democratisation and how the same has been theorised will be explored. The effects of smokescreen democracy on the social, economic and political lives of people will be illustrated, followed by how democracy may exist without democratisation through an analysis of the presidential election in the Côte d'Ivoire in 2020 and the Ugandan presidential election of 2021. Subsequently, lessons that can be drawn from those elections in an attempt to offer possible guides to entrenching democratisation in Africa will be suggested. The conclusion then follows.

7.2 DEMOCRACY AND DEMOCRATISATION

The definition of what democracy is has been characterised as 'muddled' since it has changed what it connotes more than once in more than one direction.[10] To some, democracy is simply popular sovereignty.[11] This means that democracy is a government of the people, by the people and for the people.[12] David Beetham theorised that democracy should be seen as an end of a spectrum, in which the other end is a system where people have no influence over the decision-making process.[13]

To others, democracy is the power of men to determine who rules them.[14] During the Warsaw Conference of 2000, Kofi Annan, the United Nations Secretary General, pointed out that one of the greatest challenges to humankind in the new century will be the struggle to make the practice of democracy equally universal.[15] This is because democracy has been recognised as the only form of governance that 'guarantees the right to free expression of political preference and promotes progress through peaceful competition between different interests and ideas'.[16]

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10 CB Macpherson *The Real World of Democracy* (1966).

11 Wallace, Kundnani & Donnelly op cit (n1).

12 As theorised by Abraham Lincoln, the 16th President of the United States of America in the Gettysburg Address given on 19 November 1863.

13 D Beetham 'Liberal democracy and the limits of democratisation' (1992) 40 *Political Studies* 40.

14 JA Schumpeter *Capitalism, socialism, and democracy* (1942).

15 UN Secretary General Kofi Annan's closing remarks, as cited by R Mikaelsson *Promoting Democracy: Sweden and the Democratisation Process in Macedonia* (2008), available at http://liu.diva-portal.org/smash/get/diva2:1748/FULLTEXT01.pdf, accessed on 5 October 2021.

16 Wallace, Kundnani & Donnelly op cit (n1).

At the centre of democracy are elections. It is through elections that the will of voters is expressed, resulting in democratically elected governments. However, concerns have been raised that in the recent past the number of elections taking place has increased, but, the democratic quality of these elections has decreased. This suggests that although democracy seems to be taking root, the values that are corollaries of democracy are yet to adequately reflect in these elections.[17] What makes democracy is a process called democratisation.

Democratisation has been conceptualised as a process 'in which a country transforms and thereby moves along a spectrum towards a more inclusive and substantial democratic institutional arrangement'.[18] Boutros Boutros-Ghali defined democratisation as a process which leads to a more open, more participatory, less authoritarian society.[19] Democratisation may result in predictable patterns of election periods.[20] This has the potential to promote good governance and peaceful transitions of power.[21]

Democracy therefore results in the formation of governments where the people determine who rules over them. This demands openness and participation in the process which leads to the making of those decisions by voters. These values can only exist where democratisation has occurred. Furthermore, democratisation enables the actualisation of democracy. In that regard an inextricable link exists between the two.

The absence of democratisation in a country that attempts to practise democracy results in the holding of 'farcical elections' which lead to the loss of lives and political instability.[22] It has been pointed out that those countries that are in the process of democratisation and hold elections regularly are prone to civil conflicts.[23] These 'farcical elections' are also to blame for corruption and

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17 N Cheeseman & B Klass *How to Rig an Election* (2018) 320.

18 Mikaelsson op cit (n15).

19 Boutros-Ghali op cit (n3).

20 Ibid.

21 GM Carbone 'Do all good things go together? Exploring the political, economic and social consequences of democratisation' Paper presented at the 66th Annual National Conference of the Midwest Political Science Association (MPSA), Chicago, 3–6 April 2008, available at https://core.ac.uk/download/pdf/187799192.pdf, accessed on 6 October 2021. In it the benefits of democratisation are further theorised as political, economic and social. The political benefits are nation-building, state-building, efficient government and international peace. The economic benefits are economic development, macroeconomic stability and economic reform. The social benefits are given as income distribution, welfare policies, gender equality and happiness.

22 P Collier *Wars, Guns, and Votes: Democracy in Dangerous Places* (2009).

23 H Hegre 'Toward a democratic civil peace?' (2001) 95 *American Political Science Review* 16.

economic underperformance.[24] In this sense, the democratic promise of safer countries is lost in the absence of democratisation.

7.3 CASE STUDIES OF THE CÔTE D'IVOIRE ELECTIONS 2020 AND UGANDAN ELECTIONS 2021

Both Uganda and the Côte d'Ivoire are located in sub-Saharan Africa with the Côte d'Ivoire located in West Africa and Uganda located in East Africa.[25] In the 2021 elections, 72 per cent of Ugandan voters were aged between 18 and 40 years.[26] In the 2020 Côte d'Ivoire elections, the majority of the voters were youths.[27] In both countries, this majority voter base had not been adequately sensitised and exposed to democratic principles and values and was even denied the opportunity to vote in the elections.[28] A correlation between politically motivated violence and a youthful population has been drawn.[29] The disenfranchisement of this key voter base in the electoral process, which is common to the two countries, cultivates perfect fields for electoral violence, which compromises the quality of elections and democracy generally.[30] It is on this premise that Uganda and the Côte d'Ivoire have been selected as case studies.

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24 Ibid.

25 See generally the political map of Africa by One World, available at https://www.nationsonline.org/maps/africa-political-map.jpg, accessed on 2 February 2022.

26 U Kashaka 'Who will win the 2021 youth vote?' New Vision, available at https://www.newvision.co.ug/news/1532682/win-2021-youth-vote, accessed on 10 February 2021.

27 See generally 'Ivory Coast election: High stakes for the youth' *AfricaNews*, 22 October 2020, available at https://www.africanews.com/2020/10/22/ivory-coast-election-high-stakes-for-the-youth//, accessed on 15 February 2021.

28 See: for Uganda, 'Uganda blocks a million first-time voters' *Deutsche Welle*, available at https://www.dw.com/en/uganda-blocks-a-million-first-time-voters/a-52575191, accessed on 15 February 2022; for Côte d'Ivoire, 'National endowment for democracy, youth participation critical to democratic progress in Côte d'Ivoire' *National Endowment for Democracy*, 12 November 2020, available at https://www.ned.org/youth-participation-critical-democratic-progress-cote-divoire-ivory-coast/, accessed on 15 February 2021.

29 See generally O Ismail & F Olonisaki 'Why do youth participate in violence in Africa? A review of evidence' (2021) 21 *Conflict, Security & Development* 371; and L McLean Hilker 'Violence, peace and stability: The "youth factor"' *UNICEF*, 17 September 2014, available at https://www.unicef-irc.org/article/1061-violence-peace-and-stability-the-youth-factor.html, accessed on 11 February 2022.

30 Generally, Ismail & Olonisaki op cit (n29).

7.3.1 *Côte d'Ivoire elections 2020*

The 31 October 2020 Ivorian elections where the incumbent Alassane Ouattara was seeking re-election for a third term in office has been described as being held in an environment that did not 'allow for a genuinely competitive election'.[31] As indicated above, competitiveness in an electoral process arises under the aegis of participation of all the relevant persons in the process. An election that guarantees participation by all the stakeholders, that is, all willing voters, a free press, participation of all qualified candidates and an environment of tolerance to all political views expressed before, during and after elections can be deemed to meet the minimum standards of credibility.

This paper finds that the 2020 Ivorian election did not meet these tests and therefore voters were treated to what was a Hobson's choice where they did not have the alternatives and hence did not express their view at the ballot. It is important to point out at this juncture that the constitutionality of President Ouattara's decision to run for a third term had been unsuccessfully challenged in the Constitutional Council.[32]

The withdrawal of Henri Konan Bédié and Pascal Affi N'Guessan, the two principal opposition leaders, on the eve of the election presented serious legitimacy questions of the subsequent winner.[33] The withdrawal of candidates very close to an election significantly drops voter turnouts in the subsequent elections.[34] The voter turnout in the Ivorian election is debatable.[35] Whereas the

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[31] International Election Observation Mission (IEOM) 'Non-inclusive Ivorian election is boycotted, leaving country fractured' *Carter Center*, 2 November 2020, available at https://www.cartercenter.org/news/pr/2020/cote-divoire-110220.html, accessed on 4 October 2021.

[32] Côte D'Ivore promulgated a new Constitution on 8 November 2016. It retained the two-terms limit for presidential candidates, but says nothing on terms served prior to its adoption. See Generally AK Abebe 'Côte d'Ivoire: Ouattara's bid for 3rd term opens up a can of worms' *The Africa Report*, 23 July 2020, available at https://www.theafricareport.com/34674/cote-divoire-ouattaras-bid-for-3rd-term-opens-up-a-can-of-worms/, accessed on 4 October 2021; 'Ivory Coast: Ouattara formally picked to run for third term' *Aljazeera,* 22 August 2020, available at https://www.aljazeera.com/news/2020/8/22/ivory-coast-ouattara-formally-picked-to-run-for-third-term, accessed on 4 October 2021.

[33] MA Bakare 'Elections and electoral violence in Côte d'Ivoire: ECOWAS's efforts towards stability' *Accord*, 21 April 2021, available at https://www.accord.org.za/conflict-trends/elections-and-electoral-violence-in-cote-divoire-ecowass-efforts-towards-stability/, accessed on 4 October 2021.

[34] The Carter Center 'Kenya 2017 general and presidential elections: Final report' (2018), available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf, accessed on 4 October 2021.

[35] Schumpeter op cit (n14).

Independent Electoral Commission pegged the voter turnout at 53.90 per cent, only 41 per cent of voters' cards were collected in advance of the polls.[36] This creates an impression that the voter turnout could possibly have been inflated to give the notion that voters had indeed turned up to vote and thus the results that were subsequently released reflected the will of the people.[37] This indicates the level to which a democratic process can be manipulated to offer an impression of democratisation in the electoral process.

Civil disobedience is also one of the factors that drew the 2020 elections further from an ideal democratic election.[38] The call by leading opposition leaders to their supporters to not only refrain from voting but also to take steps to prevent the holding of elections negated the democratic credentials of the impugned elections.[39] In the town of Daoukro, protesters ransacked polling stations and erected roadblocks leading to them.[40] The distribution of voter cards was also disrupted and some of the election materials burned.[41]

After the polls, the opposition announced the formation of a National Transitional Council after terming the election a 'sham election'.[42] This cuts back on democracy since the outcome of 'democratic elections' can only be challenged in courts in democratised settings.[43] Though the outcome was eventually challenged and the case dismissed, the act of opting to create and operate an independent government during the transition period casts a lot of doubt on their democratic credentials.

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36 'International Election Observation Mission (IEOM), Côte d'Ivoire 2020' *The Carter Center* 2 November 2020, available at https://www.cartercenter.org/news/pr/2020/cote-divoire-110220.html, accessed on 4 October 2021.

37 Ibid.

38 See generally, 'Ivory Coast's key opposition leaders called on voters to boycott Oct. 31 elections, heightening tensions in the world's top cocoa producer' *Bloomberg*, 15 October 2020, available at https://www.bloomberg.com/news/articles/2020-10-15/ivory-coast-main-opposition-candidates-call-for-vote-boycott, accessed on 4 October 2021.

39 'Ivory Coast heads into crisis as opposition calls for election boycott' *Deutsche Welle,* available at https://www.dw.com/en/ivory-coast-heads-into-crisis-as-opposition-calls-for-election-boycott/a-55298666, accessed on 4 October 2021.

40 Schumpeter op cit (n14).

41 Ibid.

42 F Richard 'Côte d'Ivoire: Alassane Ouattara re-elected for a 3rd term with 94.27%', *The Africa Report,* 3 November 2020, available at https://www.theafricareport.com/48878/cote-divoire-alassane-ouattara-re-elected-for-a-3rd-term-with-94-27/, accessed on 4 October 2021.

43 Ibid.

7.3.2 *Ugandan elections 2021*

After unsuccessful attempts to postpone the elections that were due for early 2021, the Ugandan elections were held on 14 January 2021.[44] The elections have been described as 'not 100% free, credible'.[45] Robert Kyagulanyi (alias Bobi Wine), the leading opposition candidate, rejected the results 'with the contempt they deserve' and claimed he was worried about his life and that of his wife.[46] The reasons for his views seem to stem from the circumstances before and during the elections. This part discusses the violence, internet shutdown and the uneven campaigning atmosphere that marked the day before elections and how they impacted on the polls.

Uganda has had a history of pre-election violence that has been blamed on the misuse of security forces.[47] The 2021 election was replete with widespread violence which targeted the opposition presidential candidates.[48] General Elly Tumwine asserted that security forces have a right to shoot and kill in situations where offenders display a certain level of violence.[49] On 6 January 2021, perhaps acting on the General's words, a police officer shot at Patrick Oboi's convoy and shattered a window in Kitawenda in Western Uganda.[50]

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[44] President Museveni had hinted that: 'To have elections when the virus is still there … It will be madness'. See generally 'Uganda's Museveni hints at postponing 2021 election because of COVID-19' *CGTN Africa*, 12 May 2020, available at https://africa.cgtn.com/2020/05/12/ugandas-museveni-hints-at-postponing-2021-election-because-of-covid-19/, accessed on 4 October 2021.

[45] 'Uganda vote "not 100% free, credible," election observer says' *Deutsche Welle*, available at https://www.dw.com/en/uganda-vote-not-100-free-credible-election-observer-says/a-56250607, accessed on 5 October 2021.

[46] 'Uganda election: Bobi Wine "fearful for life" after Museveni win' *BBC News*, 17 January 2021, available at https://www.bbc.com/news/world-africa-55694667, accessed on 4 October 2021.

[47] In 2016, at least 20 people were killed and even more threatened or beaten in the lead-up to the elections. See A Costagliola 'Internet suppression and violence in Uganda: Implications for the 2021 elections' *OXPOL*, 30 June 2020, available at https://blog.politics.ox.ac.uk/internet-suppression-and-violence-in-uganda-implications-for-the-2021-elections/, accessed on 4 October 2021.

[48] S Namwase 'Uganda: The unsurprising pre-election violence by security forces' *The Africa Report,* 14 January 2021, available at https://www.theafricareport.com/59129/uganda-the-unsurprising-pre-election-violence-by-security-forces/, accessed on 05 October 2021.

[49] Ibid.

[50] 'Uganda: Elections marred by violence' *Human Rights Watch*, 21 January 2021, available at https://www.hrw.org/news/2021/01/21/uganda-elections-marred-violence, accessed on 4 October 2021.

On 8 January 2021, Martin Okoth, the Inspector General of the Ugandan Police, informed journalists that they would be 'beaten for their own sake' so that they could know they are not supposed to visit the offices of the National Unity Party, Bobi Wines' party.[51] This was after the November 5th incident where a reporter was shot in the face with a rubber bullet as he filmed Bobi Wine arriving at the offices of their party in Kampala.[52] These acts of violence meted out on the candidates created a hostile environment for them to share their messages with the electorate.

Two days before the elections, the Uganda Communications Commission blocked access to the internet in Uganda.[53] Social media sites such as Twitter could not be accessed and therefore affected the coordination of opposition parties in their plans to monitor the elections and mobilise their mainly youthful supporters to come out and vote for them.[54] These internet shutdowns also obstructed the documentation of irregularities and weakened the trust in the democratic process.[55] The provision of free and open political communication is an essential element of ensuring fair and democratic electoral processes.[56]

In November 2020 the arrest of Bobi Wine for flouting the Covid-19 restriction guidelines triggered protests in the capital, Kampala.[57] The security forces responded with force resulting in at least 54 deaths.[58] It is noteworthy that the campaigns of the ruling party the National Resistance Movement, in Kotido and Gulu, held around the same dates did not comply with the restrictions to control Covid-19 but were never interrupted.[59] On 18 November 2020, Patrick Oboi Amuriat, the candidate of the Forum for Democratic Change, was arrested in Gulu for organising an unauthorised procession.[60]

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51 Ibid.

52 Ibid.

53 Ibid.

54 'Ugandan opposition's Bobi Wine denounces internet shutdown tweet' *Nation*, 14 January 2021, available at https://www.youtube.com/watch?v=f5aguWpJeJ8, accessed on 4 October 2021.

55 Access Now *Internet shutdowns and elections handbook: A guide for election observers, embassies, activists, and journalist,* available at https://www.accessnow.org/internet-shutdowns-and-elections-handbook/, accessed on 4 October 2021.

56 K David 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2017), available at https://digitallibrary.un.org/record/1304394?ln=en, accessed on 4 October 2021.

57 Human Rights Watch op cit (n50).

58 Ibid.

59 'Uganda: Authorities weaponize Covid-19 for repression' *Human Rights Watch*, 20 November 2020, available at https://www.hrw.org/news/2020/11/20/uganda-authorities-weaponize-covid-19-repression, accessed on 4 May 2021.

60 Ibid.

This indicates that Covid-19 restrictions were weaponised to prevent the opposition from presenting their manifesto to the voters and some voters did not have an opportunity to get a glimpse of what the opposition intended to do if they formed the next government. The ruling party on the contrary had the upper hand and easily got their message across to the voters. Thus voters were never accorded an opportunity to objectively determine who would earn their vote. Given that the centrepiece of democratic elections is a voter's choice, it is argued here that when making that choice, democratisation demands that the voter be accorded an opportunity to hear the messages from all the candidates prior to making the decision of who to vote for.

From the case studies, it can be concluded that the factors that drive the incongruity of democracy without democratisation are not unique to each country. In both countries, mistrust of the judicial process to solve any controversies arising from elections, partisanship by security agencies and the rise of politics of fear, where voters are warned of the consequences that follow the election of certain candidates, all cut back any gains from the elections that were held.

7.4 LESSONS FROM THE CASE STUDIES AND THE WAY FORWARD

From the case studies above, it can be inferred that elections can be held, results announced and a 'democratically elected' government whose election has been validated by the courts has been inaugurated into office despite the existence of an electoral environment inimical to an ideal democratic process. Such elections only offer legitimacy to an otherwise authoritarian regime – arguably, they should not qualify as elections. Elections have been reduced to periodical activities and not endgames to allow the masses to determine how they are governed. In other words, elections have been reduced to ruses for validating predetermined outcomes contrary to what democratisation connotes.

Pre-election violence and internet shutdowns greatly impact on the electoral process. They instil fear and affect voter turnout in the subsequent elections. Elections in which voter turnouts are low or voting does not happen completely in some regions result in the announcement of results which do not represent the wishes of the majority of the population.

The Covid-19 control regulations have also been utilised by authoritarian regimes to clamp down on dissent and expression. Opposition candidates can barely get the opportunity to address their supporters, unlike the incumbents. This leads to a situation whereby voters head to the polls without sufficient knowledge of what other candidates in the race are offering. The decision of the voter is therefore an uninformed one and negates the representative factor of the decision.

The opposition parties can also be blamed for the regression of democracy in Africa. In the Côte d'Ivore, the opposition parties urged their voters to not only to reject the elections but also to take part in activities that would hamper the preparations of the elections such as the distribution of voter cards. The announcement of a 'Transitional Governing Council' upon the declaration of the results instead of challenging the same in the Constitutional Council also weakens the democratisation.

However, it is critical that the dispute resolution bodies for elections are seen to be transparent if they are to be approached by any aggrieved parties in the first place. This can be done through the setting up of these bodies within a reasonable time prior to elections and the timely disposition of the matters referred to them. In the recent past, the Supreme Courts of Kenya and Malawi have nullified the results of presidential elections in their countries indicating that the courts may be reliable adjudicators of electoral controversies in Africa.[61]

In Uganda, after lodging a case seeking to overturn the elections at the Supreme Court of Uganda, Bobi Wine later opted to withdraw the case and 'take it to the court of the people'.[62] This not only affected the esteem of the courts but also resulted in a lost opportunity to develop the law on presidential election petitions in Uganda. This is because the opinions of judges in such cases can help other presidential election petitions that may arise in the future not only in Uganda but across the commonwealth.

Whilst, as evidenced in Malawi and Kenya, where the judiciary has been at the forefront of consolidating democracy, the judiciary risks being overburdened with an overload of expectations and political interests.[63] A lot of lifting has to be done by civil society, legislative organs of government and international partners in enhancing the independence of bodies mandated to facilitate the electoral process. Voters themselves too have a critical role to play in advancing democratic

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[61] See generally, 'Kenya presidential election cancelled by Supreme Court' *BBC News*, 1 September 2017, available at https://www.bbc.com/news/world-africa-41123329, accessed on 15 February 2022; and G Motonga 'Malawi's Supreme Court affirms nullification of presidential election' *Mail & Guardian*, 8 May 2020, available at https://mg.co.za/africa/2020-05-08-malawis-supreme-court-affirms-nullification-of-presidential-election/, accessed on 15 February 2022.

[62] R Muhumuza 'Uganda's Wine withdraws court challenge to election results' *AP News*, 22 February 2021, available at https://apnews.com/article/yoweri-museveni-elections-bobi-wine-africa-uganda-88085eefd624de960d32fc7f36f2472d, accessed on 4 October2021.

[63] D Banik & H Kayuni 'A great judgment, but court victories won't deliver democracy in Malawi' *The Conversation*, 10 February 2020, available at https://theconversation.com/a-great-judgment-but-court-victories-wont-deliver-democracy-in-malawi-131483, accessed on 15 February 2022.

ideals by turning up to vote and shunning calls to engage in electoral-instigated violence. This means that democracy, being a political exercise, needs the active input of all the sectors and not the judiciary alone.

Going forward, the path to democracy and democratisation demands the impartiality of the security agencies in the enforcement and provision of security around election time. It is worth noting that the culture of violence associated with elections is actually fuelled by the elite and not ordinary citizens.[64] Therefore, reining in politicians from practising politics of fear addresses the instances where security agencies have to respond to cases of violence which erupt during and around election time. This will go a long way in reducing the cases of human rights abuses by security forces since there will be fewer instances where their interventions will be necessary in the lead-up to polls.

There is also a need by incumbents to tolerate dissent since that is the beauty of democracy in itself. The international community must also be keen to call out human-rights abuses and sanction governments whose security forces threaten the freedom of the press particularly around election time.

Opposition parties also need to be prevailed upon to at all times seek constitutional means to challenge democratic processes. Even though there may be concerns on the impartiality of courts mandated to hear and determine election petitions, this avenue must be sought and exhausted. It is necessary since in an ever-evolving legal landscape in Africa, where judges are sometimes known to give dissenting opinions, the judicial pronouncements from these courts may be impactful in other jurisdictions leading to the nullification of elections which do not meet the democratic test.

7.5 CONCLUSION

Although elections were held on 31 October 2020 in the Côte d'Ivoire and on 14 January 2021 in Uganda, their quality was defective such that they could not be deemed to reflect the will of the people. Such elections give the impression of entrenchment of democracy but in reality the democratic process itself has been stifled. This chapter has discussed democratisation as the corollary of democracy and that the former can only be realised if the latter is actualised. It has noted that an incongruity exists in Africa where democracy seems to be taking root but democratisation remains a mirage.

[64] The Electoral Knowledge Network 'Preventing election related violence', available at https://aceproject.org/ace-en/topics/ev/factors-that-may-trigger-electoral-violence/internal-factors/electoral-campaigning/provocative-and-violent-actions-by-political, accessed on 15 February 2022.

CHAPTER 8

Conceptualising democratic regression and its key manifestations: The case of Zimbabwe

JACQUELINE CHIKAKANO*

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ABSTRACT

As with many other countries, the concept of democracy in Zimbabwe has evolved over time as the country transited different political phases. Despite some positive strides noted over the years, which include the adoption of a progressive Constitution in 2013, Zimbabwe is arguably in democratic regression. This chapter identifies the major manifestations of Zimbabwe's democratic regression, key of which include: the 2017 'military assisted' political transition; a weakened parliament; and deliberately restrictive and unprocedural government actions taken under the guise of regulating the Covid-19 pandemic. Manifestations also include the governance of the country via statutory instruments with little to no parliamentary oversight and the decimation of the country's Constitution through amendments instituted at a time when the legislative-constitutional alignment programme was ongoing. Threats against civil society operations, proposed laws to tighten their regulation and the stated intention to introduce other laws which are likely to stifle fundamental freedoms such as expression and association amongst others, are some of the other manifestations. The chapter concludes that Zimbabwe's

* A constitutional and legal researcher as well as a democracy, human rights, and governance practitioner.

democratic regression is well on course and makes a comparative analysis with a few African countries to highlight the likely trajectory of the country's democratic regression as informed by common manifestations.

8.1 INTRODUCTION

The state of democracy in Zimbabwe has been evolving since its independence in 1980, which came against the backdrop of various phases of political transition witnessed from the time of colonial rule to the liberation war. Noteworthy during that highly volatile period of political transition is the 1965 unilateral declaration of independence (UDI) by the then Prime Minister Ian Smith, which amongst other things served to establish and firmly consolidate a pro-white minority system of governance. The UDI, which was not recognised by the international community, resulted in a number of processes and actions being introduced by the Smith government which all painted a picture of authoritarianism and desperation of the regime to remain in power on their own terms. Amongst other things, there was an introduction of even more racist legislation by the colonial government as a means to control the Africans. As can be seen in some modern-day authoritarian states, the colonial government in pre-independence Zimbabwe invested a lot in strengthening its coercive apparatus, that is the army, the police and the central intelligence, '[which] were expanded and heavily resourced by the Smith regime'[1] and were used to thwart any dissent as well as enforce the colonial racist and oppressive system of government. The country was at that time in a regressive democratic state manifesting in various ways, which worsened over the years as a collective of black nationalists waged a war of liberation in resistance. The latter was in turn met by a heavy-handed response from the colonial government until independence was attained in 1980.

The independence of Zimbabwe in 1980, formed on the basis of the Lancaster House Agreement, was cemented by the Lancaster House Constitution, which laid out the constitutional framework for the new government. This Constitution remained in force until it was replaced by the current 2013 Constitution.[2] In a country that has recently been dogged by controversial and disputed amendments to the Constitution, it is worth pointing out that this tendency dates back to a newly independent Zimbabwe which hastily subjected the 1980 Constitution to amendments. By the time it was repealed in 2013, the Lancaster House Constitution had gone through 19 constitutional amendments on various

[1] See Political Context: ZIMBABWE Introduction: A historical overview 1 (uio.no) at page 1.

[2] Constitution of Zimbabwe Amendment Act 20 of 2013.

aspects which ranged from promotion of affirmative action in parliament and within the Judicial Service Commission;[3] the establishment of the Supreme Court and the High Court;[4] the abolishment of dual citizenship;[5] strengthening the hand of the Prime Minister vis-à-vis the non-executive President;[6] further limitation of 'unjustifiable' compensation to improvements on land;[7] to ousting of the jurisdiction of the courts over cases of acquisition of land by the state,[8] amongst many others. It appears therefore that Zimbabwe's knack for tweaking the Constitution ever so often is nothing new but dates as far back as the birth of the newly independent state. Against this background, the question then arises whether there is anything peculiar about the modern-day constitutional amendments. Is the same treatment of the current Constitution justified or is it a different case altogether? With the jury still out on this issue, a bigger question to consider is whether the amendment of a modern-day Constitution voted into force by a majority of the country's citizens, can be equated to the amendment of a compromise, negotiated and transitional instrument, which is what the Lancaster House Constitution was. A number of factors are not in contention and these include the fact that the state of democracy in pre- and post-independent Zimbabwe has not been constant but has been evolving; that this evolution has been met by various responses from the government, across the political divide and the citizenry at large; and that the actions and reactions of government and their impact on the citizenry in particular remain a benchmark on whether there is democratic consolidation or regression.

Despite this conclusion, it is worth noting that many positive democratic steps have been taken over the years. In some instances, measures taken were not wholly positive or as desired by many in the country, but they still laid a key foundation to some of the positive steps being celebrated and leveraged on to date. For example, post-2000 Zimbabwe registered positive democracy indicators such as a reduction in incidents of state impunity and blatant human-rights violations and increased citizen engagement with the government. Also, the 2008 Global Political Agreement and the 2009 Government of National Unity (GNU), while contentious, still serve as crucial mechanisms shaping and informing Zimbabwe as it is today.

The Constitution of Zimbabwe Act 20 of 2013 (the Constitution) is another GNU creation whose coming into force laid a much-needed framework for democratic governance. The framework includes an expansive Bill of Rights,

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3 Amendment 1 (1981).
4 Amendment 2 (1981).
5 Amendment 3 (1983).
6 Amendment 4 (1984).
7 Amendment 16 (2000).
8 Amendment 17 (2007).

the much advocated for mechanisms for devolution of governmental powers, by necessity, the establishment of the Inter-Ministerial Taskforce on alignment of laws with the Constitution (IMT),[9] as well as the establishment of independent and other constitutional commissions supporting democracy. However equally evident amidst these positives, are indications that the country is now undergoing regression in its democratic trajectory. In fact, what Zimbabwe has at hand is a situation of subtle but systematic regression of the democratic fabric with the nature and proponents behind it having evolved with time, and the change in administration giving a false positive semblance. A number of recent developments can be singled out which give credence to the asserted democratic regression which include but are not limited to: the militarisation of the country's politics and governance systems; a weakened parliament; weaponisation of national emergencies such as the Covid-19 pandemic to violate human rights and flout the rule of law; the decimation of the Constitution; and government threats to civil society organisations (CSOs), all of which are expounded in detail below.

8.2 DECIMATION AND UNDERMINING OF THE CONSTITUTION

The Preamble to the Constitution highlights the importance of the entrenchment of democracy for the people of Zimbabwe and indeed, the Charter is laden with numerous provisions and mechanisms which, if fully implemented, would facilitate the existence of a vibrant and fledgling democracy in Zimbabwe. Thus, it defies logic that with many of its provisions yet to be implemented and which were voted into force by more than 93 per cent of the population, the current administration instituted extensive amendments to the same Constitution. Unbeknown to many, the introduction of the first constitutional amendment (gazetted 17 September 2017), seeking to empower the country's President to appoint the country's apex court judges, was seemingly a testing of the waters, which also signified the beginning of a well-orchestrated quest to consolidate power around the President and which evidently flies in the face of democracy. The introduction of even more extensive amendments through Constitutional Amendment Bill 2 (CAB-2) with far reaching implications on various key tenets of democracy, such as the separation of powers and judicial

[9] The IMT is a government institution established in 2015 to spearhead the alignment of laws to the Constitution. To date some progress has been registered in the constitutional alignment programme such as the repeal of repressive laws including the Public Order and Security Act, Chap 11:17 (POSA) and the Access to Information and Protection of Privacy Act, 2002 (AIPPA) and with the proposed Zimbabwe Independent Complaints Commission Bill (HB 5 of 2020), which is meant to provide for an independent complaints mechanism for members of the public against members of the security services pursuant to s 210 of the Constitution.

independence, further consolidating power in the President. That is a major manifestation of democratic regression in Zimbabwe and its continuance on that trajectory is probable with the administration emboldened by the 'success' of the two initial amendments. This is more so considering that the move was very much disputed and that spirited calls against any further tampering with the Constitution were ignored.[10]

Collective civil society voices on the passing into law of CAB-2 in particular paint a clear picture of its ominous implications on the country's future prospects and how this marks a turning point and a pathway for further democratic regression. The amendments have been described as 'a moment of monumental regression',[11] a project seeking to 'consolidate and solidify the President's position ahead of the 2023 elections and beyond',[12] and overall

> a backward step in the pursuit of democracy, accountability, the divisions of governmental power, representativeness, the rule of law and human rights in Zimbabwe (and more importantly as) precedence to future and further amendments to the Constitution which will additionally undermine the democratic and civic space in Zimbabwe.[13]

The current government enjoys a two-thirds parliamentary majority, which is bolstered by a depleted opposition following the recall of opposition members of parliament. Given this context, the government appears to have unfettered powers to further undo the constitutional framework which was voted into force by over 93 per cent of the population.

As it is, the ruling ZANU-PF party has on many occasions expressed its intention to introduce further amendments. On 22 October 2021, for example, ZANU-PF's Acting Deputy Secretary for Youth Affairs, Tendai Chirau, announced that the party's youth had unanimously agreed that Mnangagwa was their presidential candidate for the 2023 elections and beyond and that 'if need be, it is very important the current Constitution of the country is amended

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[10] See for example 'WALPE statement on Constitution of Zimbabwe Amendment No 2 Bill Public Hearings' *Kubatana*, 11 June 2020, available at https://kubatana.net/2020/06/11/walpe-statement-on-constitution-of-zimbabwe-amendment-no-2-bill-public-hearings/, accessed on 24 February 2022.

[11] 'Zimbabwe decimating constitutional democracy' *The Zimbabwean*, 21 May 2021, available at https://www.thezimbabwean.co/2021/04/zimbabwe-decimating-constitutional-democracy/, accessed on 24 February 2022.

[12] Ibid.

[13] 'Joint Civil Society Statement on the Constitution of Zimbabwe Amendment (No 2) Bill' *Kubatana*, 29 April 2021, available at https://kubatana.net/2021/04/29/joint-civil-society-statement-on-the-constitution-of-zimbabwe-amendment-no-2-bill/, accessed on 24 February 2022.

so that it can allow a leader to have more than two terms'.[14] Thankfully the provisions of s 328(7) of the Constitution are an internal safeguard against wanton constitutional amendments aimed at extending the incumbent's tenure of office as it prohibits this envisaged constitutional amendment from applying in relation to any incumbent. While this term limit envisaged amendment would not be easily achieved as with other sections of the Constitution due to the requirement of a referendum (s 328(8)), there is enough precedence across the continent to keep the concern alive as well as spur on Zimbabwe's ruling party to pursue this route. This is particularly so in light of recent studies which show that there is 'a growing pattern of evading term limits in Africa [which] carries far-reaching consequences for the continent's governance, security, and development'.[15]

Since 2005, about 13 incumbent leaders have either evaded or otherwise facilitated the further weakening of term limit restrictions and a number have been successful, which is a worrying trend.[16] Of concern is also the fact that the stated intentions around removal of term limits are indicative of a blatant disregard of the fact that presidential term limits in themselves are a key mechanism of preserving democracy. This raises the question of the role of political parties and the extent to which they are empowered or impeded from supporting the principle of democracy in Zimbabwe including with respect to the sanctity of the Constitution. From the utterances of the ZANU-PF party regarding their intention to introduce further constitutional amendments to change, amongst other things, the presidential term limit, a number of issues arise which relate to the role of political parties in supporting related principles of democracy. What can be observed in Zimbabwe's politics is that the principle of democracy and its various tenets are generally well understood across the political divide including in ZANU-PF. The latter as the ruling party, and with its parliamentary majority, inadvertently sets the agenda for the whole government but the extent to which it uses both its knowledge of key democracy tenets and its positioning in parliament and government as a whole is ultimately determined by the broader party policies

[14] M Mpofu 'ED Mnangagwa set to rule beyond 2028 as Zanu PF proposes removal of 2-term limit for president' *My Zimbabwe News,* 23 October 2021, available at https://www.myzimbabwe.co.zw/news/87233-ed-mnangagwa-set-to-rule-beyond-2028-as-zanu-pf-proposes-removal-of-2-term-limit-for-president.html, accessed on 24 February 2022.

[15] J Siegle & C Cook 'Circumvention of term limits weakens governance in Africa' (14 September 2020) (updated on 17 May 2021), available at https://africacenter.org/spotlight/circumvention-of-term-limits-weakens-governance-in-africa/, accessed on 24 February 2022.

[16] Ibid.

and strategy which may or may not be in line with a given democratic principle and the same applies to the subject on the decimation of the Constitution.

The opposition formations on the other hand are largely empowered to defend democratic principles particularly in as far as knowledge and appreciation of such are concerned. This is evidenced by their readiness to use litigation to defend democratic tenets as has been the case with the recent court challenges mounted with respect to the recalls of members of parliament within the MDC formations. Be that as it may, the opposition formations have also been their own worst enemy and by extension that of the citizens to the extent that they have undermined their ability to collectively or even individually and consistently advance and promote the principles of democracy due to their perennial infighting. This is most unfortunate considering that collectively, the opposition formations have a large constituency of young, vibrant and educated individuals whose diverse capabilities could be better harnessed to advance the rule of law and democracy for the benefit of all Zimbabweans. Further, despite their smaller number in parliament, at times the opposition also fails the democracy cause by either being reactive to undemocratic and other contrary situations as they arise or by not initiating bold, sustained initiatives and varying strategies to consistently challenge positions which threaten democracy in the country. On the other hand, the ruling party's parliamentary super-majority is admittedly a major hurdle to the opposition parties particularly with respect to any planned championing of democracy-related issues in parliament where these are not in sync with the strategic direction and position of the ruling party. These will no doubt be quickly quashed.

8.3 MILITARISED POLITICAL TRANSITION

Political transition is one of the most critical aspects of any democracy and how this is effected at any given time points directly to the existence (or not) of the rule of law in a country. Any departure from the constitutional framework on the manner in which a change of government is to be effected points to the absence of the rule of law. For many African countries, the military has remained a strong and determining force in the process of political transition despite the fact that Constitutions of countries like Zimbabwe prohibit military involvement in the politics of the country and in related institutions. The militarisation of political transitions has thus remained a major pointer to an undermined democratic framework and a lack of the rule of law in a country. Over the years, the role of the military in a country's political system as well as its transitional processes has in some instances grown more subtle for various reasons but mainly because 'states and regional institutions have taken "stern" measures against military takeovers of government, making it less desirable than working behind civilian

political elites as guarantors of political power'.[17] Thus while countries such as Zimbabwe may have shied away from an open coup d'état, an increasingly overt militarisation of the country's politics and governance is underway, which recently manifested in the role played by the military in the 2017 removal of Mugabe from power. Such militarised transitions and coups are attributed to 75 per cent of global democratic failures and often mark transitions to direct or indirect military rule.[18] Studies have also revealed that:

> [M]ilitary practices and actions in the distribution of power, intervention or meddling in internal domestic politics, governance and representation under authoritarian regimes have cross-cutting effects on the broader concept of democratic governance.[19]

Zimbabwe is in danger of the same.

While a lot of effort has been expended to distinguish the November 2017 military action from a coup, including its legitimisation by the High Court of Zimbabwe,[20] the semantics however do not take away from the fact that whatever form the security sector's involvement in state politics may take, it only paves the way for progressive democratic regression including unattainable democratic control of the security sector. In Zimbabwe, this is evidenced by the military's growing influence in the politics and governance of the country, in a manner that ignores constitutional prescriptions[21] requiring the military (defence forces) to be professional and subordinate to civilian authority. The successfully legitimised military action has arguably firmly positioned the military at the centre of politics and governance of the country in a manner that will take years if ever to undo. This is more so as the prevailing set-up appears to be a mutually beneficial relationship with the ZANU-PF government where the military serves to strengthen ZANU-PF's power retention as a means to protect its strategic interests. This, however, risks national and human security interests as well as the country's value systems, progress and sustainable development.

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17 O Hodzi 'Political transition to democracy: The role of the security sector and regional economic communities in Zimbabwe and Côte d'Ivoire's democratic puzzle' (2014) 23 *African Security Review* 1 at 6.

18 D Tichaona 'Zimbabwe's military-assisted political transition: Impacts and implications on democratic governance' LLM (University of Helsinki) (2020), available at https://ethesis.helsinki.fi/repository/handle/123456789/31214, accessed on 24 February 2022.

19 Ibid.

20 In its ruling in the case of *Joseph Evurath Sibanda and Leonard Chikomba v President of the Republic of Zimbabwe, Robert Gabriel Mugabe NO and Minister of Defence and Commander of the Zimbabwe Defence Forces and Attorney-General of Zimbabwe* (HC 10820/2017).

21 Section 211(3) of the Constitution of Zimbabwe.

A few likely scenarios can be mapped out regarding the future of democracy in Zimbabwe based on what has taken place in other countries regarding militarised politics and governance systems. The success of the 'military assisted transition' still leaves a risk of a possible repeat in the future akin to what has happened in countries that have experienced a coup d'état and have often paid,

> a steep and long term price for their militaries' misplaced and sometimes cyclical interference in political discourse. Once the precedent of a coup has been established, the probability of subsequent coups rises dramatically.[22]

Studies reveal that 42 per cent of 65 per cent of sub-Saharan countries who had experienced a coup by 2012 went on to experience further coups which were directed against an existing military regime that had come into power through a coup. Once a precedence of the military's intervention in a country's political transition is set, it becomes a burden hard to overcome and this may be Zimbabwe's fate. A case for how continued military presence in the political and governance framework is a recipe for its further embeddedness to the detriment of a country's democracy, is strengthened by evidence from other countries where the military still looms behind a façade of civilian rule in countries such as Uganda. After its history involving a military coup there has been continued military presence in Uganda's governance most evident in parliament where the military is one of the special interest groups represented by ten serving members of the army as provided for in art 78(1)(*c*) of the Constitution. This is a likely scenario for Zimbabwe for as long as the military continues to have a hold on the country's politics and governance. This is more so because the current administration and the ruling party have been emboldened by the amendment of the Constitution as a means to put in place systems that work in their interests.

The October 2021 utterances by the ruling party's youth wing[23] on its resolve to support a constitutional amendment to remove presidential term limits is a key indicator that they will stop at nothing towards their quest to consolidate power around current President Mnangagwa or any of their future chosen representatives and this puts the country on a slippery slope. Against this background, a constitutional amendment to further the involvement of the army in the country's governance system including parliament is thus a possibility considering that there are already a number of retired army personnel in various positions of government. A scenario such as this would only further undermine democracy in the country.

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[22] E Ouédraogo 'Advancing military professionalism in Africa' A research paper from the Africa Centre For Strategic Studies (July 2014), available at https://africacenter.org/publication/principles-military-professionalism/, accessed on 24 February 2022.

[23] Op cit (n14).

Angola also provides useful insights into possible scenarios created by the intrusiveness of the military in non-military affairs from the presidency of José Eduardo dos Santos, where this was well entrenched and systematically supported by members of the administration. Amongst other things, its military participates in 'administrative aspects such as contract negotiations with foreign companies and sits on corporate boards and holds majority shareholding in key institutions such as telecommunications'.[24] Similarly, in Egypt for many years,

> the military was effectively the power behind the power in Egypt, intimately involved in policymaking and maintaining the status of the incumbent … [taking] over state-owned enterprises, controlling many economic ventures – from running daycare centers and beach resorts to managing gas stations.[25]

Over decades the Egyptian military became increasingly emboldened and politically entitled to the point of unilaterally proposing constitutional changes viewed by many as aimed at entrenching its stronghold on political power. It thus provides a classic example of how militarised political transitions are a sure way of distorting a country's democratic fabric. Despite the election of President Morsi into office, the military' s role in politics was not curtailed and it went on to play a central role in his ousting. That case in particular, points to a very possible future trajectory for Zimbabwe.

8.4 WEAKENED PARLIAMENT

The operations of the current Parliament of Zimbabwe, particularly between 2020 and 2021, worryingly point to a parliament increasingly weakened and undermined to the detriment of the country's democracy. Specifically, parliament's representative and law-making functions have been severely weakened due to a combination of factors, mainly the recall of opposition members of parliament and the temporary suspension of parliament business in 2020 due to Covid-19 related restrictions. The 2020 Supreme Court ruling[26] that Nelson Chamisa's succession of Morgan Tsvangirai was unlawful paved the way for the recall of over 48 MPs and over 80 councillors by Thokozani Khupe and Douglas Mwonzora on the reasoning that the relevant individuals had ceased to

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[24] R Marques de Morais 'The Angolan Presidency: The epicentre of corruption' *Pambazuka News,* 5 August 2010, available at https://allafrica.com/stories/201008060882.html, accessed on 24 February 2022.

[25] Ibid.

[26] In the case of *MDC v Elias Mashavira* SC 56/20. This was an appeal following the 8 May 2019 ruling by Justice Edith Mushore that the appointment of Advocate Chamisa and Engineer Elias Mudzuri to the positions of vice president was contrary to the MDC Constitution.

be members of the MDC party. While the opposition MDC party may have felt justified in recalling the targeted members from parliament and local councils based on the provisions of s 129(1)(*k*) of the Constitution, this disputed action, which some of the affected MPs challenged in court, is in effect subverting the will of voters.[27] It seems to some to be a conspiracy between the ruling ZANU-PF and the opposition MDC factions to destroy the MDC Alliance party, which had the biggest opposition following for different individual party interests.[28] The weakening of parliament's representative and law-making functions had various consequences which affected the country's democratic tenets as well as the direct interests of the broader citizenry. Amongst these were a delay in the finalisation of bills before parliament due to the prolonged period of time that it was on a Covid-19 induced recess. This also meant that any matters requiring parliamentary attention were deferred until its resumption and the citizens could not utilise this critical body for its other non-legislative functions such as petitioning. Further, the massive recalls of members of parliament and councillors from office deprived citizens of representatives and the much-needed links between them, the local authorities and the national government. On a more practical level, the impact of the recalls which have necessitated the much-awaited by-elections could have a negative impact on the country's finances as elections in themselves require a huge financial investment which the country at the moment arguably cannot afford, more so going into another general election in 2023. Further, citizens' access to and enjoyment of their socio-economic and political rights were curtailed in various ways including with respect to service delivery in the absence of local as well as house of assembly representatives to advance their causes. Further the parliamentary recalls in particular, arguably further weakened debate and the likelihood of opposing voices and opinions being raised in parliament due to the severely depleted opposition contingent. That was further compounded by the two-thirds majority that the ruling party already enjoys.

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[27] See L Ndebele 'Recall of MDC alliance MPs in Zim is a ploy to "subvert the will of voters" – US' *Times Live,* 23 March 2021, available at https://www.timeslive.co.za/news/africa/2021-03-23-recall-of-mdc-alliance-mps-in-zim-is-a-ploy-to-subvert-the-will-of-voters-us/, accessed on 24 February 2022.

[28] MDC Alliance President Chamisa argues that ZANU-PF had an interest in the recall of opposition MPs as it sought to secure a two-thirds majority which it needed amongst other things to amend the Constitution or to possibly turn the country into a one-party state, see 'Chamisa: MDC – A recall calculated to give ZANU PF two-thirds majority' *AfricaPress,* 27 April 2021, available at https://www.africa-press.net/zimbabwe/all-news/chamisa-mdc-a-recalls-calculated-to-give-zanu-pf-two-thirds-majority, accessed on 24 February 2022.

While the public was still contending with the gap left by the recalled MPs and councillors and eagerly waiting for the by-elections which had remained pending for months on account of Covid-19, in October 2020, the Minister of Health and Child Welfare through Statutory Instrument 225 of 2020, went on to suspend the much-awaited by-elections for the duration of the period of Covid-19, which it declared a formidable epidemic disease. By September 2021, this directive was still in force despite the lowering of Covid-19 restrictions and the increased opening up of many sectors in the country. The mounting vacancies in the legislature and local authorities were undoubtedly a threat to democracy as this was tantamount to the deprivation of the public's right to be represented and to participate in national issues through their chosen representatives. This situation has also been problematic considering that:

> Without some of its members, Parliament's functions are curtailed [and] excesses of other arms of government will, needless to say, go unchecked [which] does not bode well for a democratic society based on openness, accountability, transparency and equality.[29]

What also indicates that democracy is a fast receding ideal in Zimbabwe is the fact that while by-elections remained suspended throughout 2020 and 2021 on account of the Covid-19 pandemic, the ruling party was still able to hold its own internal electoral processes and only then paved the way for holding the by-elections in January 2022, setting 26 March 2022[30] as the date for the by-elections.

Further, the fact that the members of parliament could be expelled from parliament as orchestrated by the MDC party without mechanisms to facilitate the filling of these vacancies points to the weaponisation of Covid-19 by the Zimbabwean government[31] with the complicity of the opposition. This is more so considering that while inactive on matters of accountability, broader oversight and law-making, Zimbabwe's parliament still regrouped[32] to action

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[29] Comments by Trust Maanda ERC Chairperson as reported in 'Mwonzora, Mnangagwa onslaught against MDC Alliance leaves democracy in peril' *Nehanda Radio,* 28 March 2021, available at https://nehandaradio.com/2021/03/28/mwonzora-mnangagwa-onslaught-against-mdc-alliance-leaves-democracy-in-peril/, accessed on 24 February 2022.

[30] See N Ndoro 'Mnangagwa sets date for long-awaited by-elections in Zimbabwe' *Nehanda Radio,* 6 January 2022, available at https://nehandaradio.com/2022/01/06/mnangagwa-sets-date-for-long-awaited-by-elections-in-zimbabwe/, accessed on 24 February 2022.

[31] G Moyo & KI Phulu 'The weaponisation of the coronavirus crisis in Zimbabwe: legal and extra-legal instruments' (2021) 13 *iBusiness* 48 at 59.

[32] Parliament met on 5 May and 23 June 2020, where the speaker of parliament announced the expulsion of opposition members of parliament.

the recalling of opposition members of parliament, making it a willing pawn in its own crippling by the executive. These conclusions in turn are supported by the fact that amidst the same Covid-19 pandemic, and in some instances more severe than what Zimbabwe has experienced, a number of countries went ahead and put in place measures to ensure the safe conduct of elections. Examples are the USA, which held presidential elections in November 2020, Malawi in June 2020 and Zambia in August 2021. Thus, the Covid-19 pandemic excuse was and remains exactly that, which for too long ate away at citizens' right to participate in national issues individually and/or through representatives of their choice. The fact that parliament was fully operational for a while after its Covid-19 induced adjournment and yet not able to exert adequate and timely pressure on the executive for it to speedily facilitate the holding of these by-elections, lends credibility to the assertion that the current parliament is severely weakened to the point that it threatens democracy. It is further argued that with the ruling party's parliamentary majority coupled with its centralised party structure, Zimbabwe could follow Ethiopia's path around 2010 where the ruling party's centralised party structure served to increase the executive's dominance and all decisions were adopted at the party level with parliament only rubber-stamping decisions proposed by the executive.[33]

8.5 THREATS TO CSO WORK AND VIABILITY

Another key indicator that democracy is under threat in Zimbabwe is the purging of and increasing government threats to the operations of Civil Society Organisations (CSOs) in Zimbabwe. Their existence, vibrant and effective operations are critical in any society, more so in Zimbabwe considering its chequered past characterised by human rights violations which CSOs have been at pains to highlight. Arguably, some of the progressive strides recorded under the Mnangagwa administration such as the repeal of POSA and AIPPA are all attributable to sustained CSO lobbying and advocacy dating back to their promulgation. Clearly, while their successful fifth estate role has served the citizens well, those in power consider CSOs a threat which needs to be contained and the wheels have been in motion for a while in this quest. This includes arrests of CSO leaders,[34] denial of police clearances for public meetings and arbitrary disruptions

[33] See EB Faris *The impact of party dominance on the role of parliamentary oversight for the protection of human rights in Ethiopia* LLM thesis (University of Pretoria, 2012) 28.

[34] See for example the May 2019 arrest of Citizens Manifesto Coordinator Tatenda Mombeyarara, Centre for Community Development in Zimbabwe, Advocacy Officer George Makoni, Nyasha Frank Mpahlo of Transparency International Zimbabwe, and Executive Director of COTRAD Gamuchirai Mukura at the Robert Mugabe International Airport for allegedly having attended a regime change training in

of CSO activities. The current government's distrust and desire to control CSO operations has escalated of late, and probably heightened as the country inches closer to the 2023 elections. This is evidenced by the proposed introduction of laws aimed at restricting CSO operations as well as the amendment of existing ones such as the Private Voluntary Organisations Act, Chapter 17:05 (PVO Act). Further to the PVO Act, in August 2020, the government announced its intention to introduce a Patriotic Bill intended amongst other things, to prohibit hate speech by the media, politicians and the broader citizenry. A March 2021 parliamentary motion highlighted that the Bill would target

> unpatriotic actions and communications … [and] wilfully communicating messages intended to harm the image and reputation of the country on international platforms or engaging with foreign countries with the intention of communicating messages intended to harm the country's positive image and/or to under its integrity and reputation.[35]

In September 2020, Cabinet also reportedly approved the proposed amendments to the Criminal Law Codification and Reform Act, Chapter 9:23 to criminalise 'the unauthorized communication or negotiation by private citizens with foreign governments'.[36] If the proposed Patriot Bill and or Amendments to the Criminal Code were to be passed into law in line with the initially stated scope, this would negatively affect CSOs especially those who engage in regional and international advocacy which entails communicating with 'foreigners' on human rights and the socio-economic and political situation in Zimbabwe.[37]

Other than legislative threats, government threats to CSOs are a common and increasing occurrence. In August 2019, for example, then Home Affairs

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Prague see 'Police arrest 4 CSOs leaders' *The Zimbabwean,* 22 May 2019, available at https://www.thezimbabwean.co/2019/05/police-arrest-4-csos-leaders/, accessed on 24 February 2022.

35 See 'BILL WATCH 15/2021 - Debate on the need for a "Patriotic Bill"' *Veritas,* 9 March 2021, available at http://www.veritaszim.net/node/4827, accessed on 24 February 2022.

36 F Mutsaka 'Zimbabwe cabinet approves bill to criminalise protests' *AP News,* 28 October 2020, available at https://apnews.com/article/virus-outbreak-cabinets-legislation-zimbabwe-emmerson-mnangagwa-8cb546223a479eae414d287a1ee1c9f0, accessed on 24 February 2022.

37 Cabinet on 16 November 2021, went on to approve the principles aimed at amending the Criminal Law (Codification and Reform) Act to amongst other things criminalise citizens' unauthorised negotiations with foreign governments. See 'Cabinet approves principles on criminalising citizens "unlawful" engagement with foreign governments' *MISA Zimbabwe*, 17 November 2021, available at https://zimbabwe.misa.org/2021/11/17/cabinet-approves-principles-on-criminalising-citizens-unlawful-engagement-with-foreign-governments/, accessed on 24 February 2022.

Minister Cain Mathema ordered all NGOs in the country to co-operate with the government or risk deregistration stating that:

> [A]ll NGOs must work with the government or they should close their offices and each has to tell … who funds them and how they use their funds. If they do not work with the government, they [would be deemed] spy organisations.[38]

In June 2021, Harare Provincial Development Coordinator Tafadzwa Muguti ordered Non-Governmental Organisations (NGOs) operating in the capital city of Harare to share their work plans for 2021 for his scrutiny, a directive not supported by law. When many NGOs disregarded his directive, on 29 July 2021 he issued a directive to the police to arrest all non-compliant NGOs. This directive precipitated urgent court action by 82 NGOs for an injunction against the proposed action which was granted by the High Court of Zimbabwe. These continued threats, use of extra-legal means coupled with processes under way to amend and introduce laws towards muzzling and controlling NGOS/CSOs in the country, are some of the clear manifestations of democratic regression in Zimbabwe.

Zimbabwe is however not alone in this vice as a number of African governments have also been looking to hamstring NGO activity as a means to narrow the democratic space by crippling NGOs' abilities to effectively challenge any perceived undemocratic practices. Between 2004 and 2019, 11 African governments adopted measures constraining legitimate NGO activities in various ways such as limiting the flow of foreign funding, the hiring of foreigners, tightening registration processes and legitimising governmental meddling in NGO operations.[39] Other than specific NGO laws, African states are also increasingly introducing other laws to facilitate control and restriction of NGOs under justifications such as countering terrorism, money laundering, or cybersecurity. Recent examples include Egypt and Sierra Leone that adopted NGO-curbing legislation in 2017 and 2018, respectively, while Ethiopia replaced its notorious 2009 Charities and Societies Proclamation (CSP) law with the 2019 Civil Society Proclamation Act. Egypt's 2019 NGO law, for example, is criticised for limiting NGO work to an undefined 'social development', its overbroad and vague provisions which can be interpreted to cover any organisation at any given time, unjustified criminalisation of NGO activities, exorbitant fines and

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[38] See article 'Government threatens NGOs again' *Newsday,* 19 August 2019, available at https://www.newsday.co.zw/2019/08/government-threatens-ngos-again/, accessed on 24 February 2022.

[39] Freedom House 'Special Report 2019: The spread of anti-NGO measures in Africa: Freedoms under threat' (2019), available at https://freedomhouse.org/report/special-report/2019/spread-anti-ngo-measures-africa-freedoms-under-threat, accessed on 24 February 2022.

restrictions that deny CSOs access to important funding sources. For example, article 24 of this law mandates receipt of funds within Egypt by notification and disallows diplomatic missions from supporting associations' activities through simple notification.[40] The June–July 2021 increased scrutiny and demands on NGO operations in Zimbabwe by the current administration indicates a probability of Zimbabwe's proposed amendments to the PVO Act[41] and other laws, having a similar effect to the Egyptian law.

8.6 SYMBOLIC AND COSMETIC LEGAL REFORM AND DISENFRANCHISEMENT OF CITIZEN INPUT IN LAW-MAKING

The law-making process in Zimbabwe is also increasingly pointing to democratic regression in the country in many respects. The processes undertaken leading to the final adoption of laws, including the CAB-2, point to a disregard of the citizens' franchise in the law-making process. For example, a largely cursory and cosmetic public inquiry on the CAB-2 was conducted at the height of the Covid-19 pandemic and a national lockdown that limited public gatherings to not more than 50 people. Despite the fact that the Constitution was voted for by over 93 per cent of the over 13 million people of Zimbabwe, parliament only held 17 meetings in selected areas across the country as well as three online meetings over a period of five days, giving weight to the assertion that the meetings were merely cosmetic and not intended to harvest any meaningful public input. Further, the Bill was also fast tracked through parliament in a manner arguably unlawful considering the extensive amendments made to it days before being put to vote and to which the public were not notified or provided with an opportunity to provide their input.[42]

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[40] 'Egypt: Legal Commentary on Regulations of NGO Law n. 149 for 2019 on Civic Associations' *CIHRS,* 25 February 2021, available at https://cihrs.org/egypt-legal-commentary-on-regulations-of-ngo-law-n-149-for-2019-on-civic associations/?lang=en, accessed on 24 February 2022.

[41] As it is, broader CSOs have raised concerns over the gazetted PVO Amendment Bill on a number of grounds including broad and vague provisions that are open to wide and retrogressive interpretations, excessive involvement of the executive in PVO administration, and a tedious registration framework. See 'Statement on Zimbabwe's Recently Gazetted Private Voluntary Organisations (PVO) Amendment Bill' *Kubatana*, 17 February 2022, available at https://kubatana.net/2022/02/17/statement-on-zimbabwes-recently-gazetted-private-voluntary-organisations-pvo-amendment-bill/, accessed on 25 February 2022. The Private Voluntary Organizations Amendment Bill, was gazetted on 5 November 2021.

[42] Many stakeholders argued that while CAB-2 was gazetted and provided a 90-day notice within which the public had an opportunity to make input, the Bill was then

The same concerns have been raised over the course of the constitutional alignment programme, for example, with respect to the Cybersecurity and Data Protection Bill which, despite awaiting presidential signature and assent, had CSOs petitioning the President not to sign it for similar reasons.[43] Wittingly or unwittingly, it appears to be a conspiracy between the executive and the legislature to disenfranchise the public of meaningful input into the country's legislative framework. This is seemingly achieved through minimal and at times tokenistic consideration of public input on bills as well as their subjection to extensive and fundamental amendments while they are before parliament without further opportunities for the public to provide input on the scope of those changes.

Further, symbolic and cosmetic legal reforms in general are also posing a threat to the envisaged democratic legislative framework. For example, the much-awaited Freedom of Information Act (FOI), a key to the repeal of the AIPPA, while greatly welcomed, was equally met with misgivings over key stakeholder input not covered in the Act. For example, the Act amongst other concerns, unconstitutionally limits the scope of the right to information by not providing for access to information held by private bodies despite this gap being amply raised by many stakeholders. Concerns have also been raised regarding the new Zimbabwe Media Commission Act, key of which is the Act's silence on the co-regulation of the media after many years of CSO engagement with parliament and the executive on the issue. Other than the above media-related laws, concerns have been raised regarding other laws such as the Maintenance of Public Order Act, which replaced POSA. While many were relieved to see the later repealed, its substance and impact saw it labelled a 'regurgitation of the outgoing oppressive Public Order and Security Act (POSA)'.[44] This again points to the fact that the government's much anticipated law reform is merely cosmetic to the extent that it in some instances the final products are still restrictive and take on the shape that the current administration wants. Further, the apparent symbolic nature of the law reform process is evidenced by the fact that more than eight years after the coming into force of the Constitution, the alignment of laws with the Constitution is yet to be completed with about 40 out of

extensively amended before parliament and ultimately fast tracked to its passage with no further opportunity for public scrutiny or input. See *The Zimbabwean* op cit (n11).

[43] 'MISA appeals to Mnangagwa to decline signing Cyber Bill into law' *MISA,* 7 September 2021, available at https://zimbabwe.misa.org/2021/09/07/misa-appeals-to-president-mnangagwa-to-decline-signing-cyber-bill-into-law/, accessed on 25 March 2022. Note that the Bill was eventually signed into law as the Data Protection Act on 7 December 2021

[44] 'POSA bounces back as MOPA' *NewsDay,* 26 April 2019, available at https://www.newsday.co.zw/2019/04/posa-bounces-back-as-mopa/, accessed on 25 February 2022.

the 60 laws identified for alignment yet to be aligned as of July 2021.[45] The populace thus continues to be governed by laws that are unconstitutional and this will likely continue for the next few years considering that it has taken six years from the establishment of the IMT to align 20 laws. This in itself is untenable and is also evidence of the fact that the country is moving at a retrogressive pace.

The state's undermining of separation of powers, citizen participation and independence of institutions is another factor pointing to a regressing democratic state. Its overruling of the Zimbabwe Electoral Commission's (ZEC) published 5 December 2020 by-elections for the recalled MPs and councillors is one example which points to the state blatantly undermining ZEC's independence despite this being entrenched in s 164 of the Constitution. At this point, it is already settled that the Covid-19 pandemic can no longer be used as an excuse for withholding elections. The African Court on Human and Peoples' Rights, for example, issued an Advisory Opinion providing guidelines on public participation during public health emergencies such as the Covid-19 pandemic.[46] Amongst other things, the opinion emphasises the importance of consultations when a country decides to postpone elections because of the pandemic and which consultations should include political actors, health authorities and representatives of civil society to ensure an inclusive approach to the process. This appears not to have been the case with the suspension of the by-elections and communities affected by the recalls, and indeed the country at large, continued to be held ransom by this arbitrary move.

As indicated earlier, parliament is another institution whose autonomy from the executive has been undermined by the same executive branch especially with regard to its law-making and representative functions. In terms of s 134 of the Constitution, law-making is one of parliament's primary functions and while it can delegate the power to make statutory instruments, these still have to be laid before parliament for its scrutiny before they become law.[47] This however has not always been the case especially with respect to most statutory instruments relating to Covid-19 which were passed by the executive without parliamentary oversight or involvement during the time that parliament

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[45] See 'IMT Bill Tracker' *Centre for Applied Legal Research*, July 2021, available at http://www.ca-lr.org/publications-resources/imt-resources/imt-bill-tracker/, accessed on 25 February 2022, which shows that 20 out of 60 laws have been completed and ten of the outstanding 40 are before parliament, meaning the other 30 are still far from completion.

[46] JN Stefanelli 'African Court issues Advisory Opinion on Elections during a pandemic' *American Society of International Law,* 21 July 2021, available at https://asil.org/ILIB/african-court-issues-advisory-opinion-elections-during-pandemic, accessed on 25 February 2022.

[47] Section 134(*f*) of the Constitution.

was on a prolonged Covid-19 induced adjournment. This observation is supported by Phulu and Moyo,[48] who assert that none of the Covid-19 related statutory instruments passed in 2020 were presented to parliament despite the fact that they gave very wide powers to the executive arm of the state. This action of the executive is arguably tantamount to the usurpation of parliament's primary law-making function, which is prohibited by s 134 of the Constitution, and points to a systematic undermining of the doctrine of separation of powers.

The doctrine of separation of powers in Zimbabwe is one of the key principles of good governance binding on the state and on all its institutions and agencies,[49] the executive included. It is an essential element of the principle of the rule of law and is ultimately a key tenet of democracy. The framework for the 'observance of the principle of separation of powers' stipulated in s 3(2)(*e*) of the Constitution is fully outlined in Chapters 5 and 6, where the three branches of government are amply and individually provided for and in a manner that clearly indicates the parameters, roles and functions of each branch. Ideally and logically, in terms of strict separation of powers, the concept should extend to the appointment of the members of each branch, where for example, the legislature should not appoint members of the executive and similarly the executive should not have a role in electing members of the legislature or the judiciary in order to preserve the independence of each branch.

However, this neat separation is not fully supported by the country's constitutional framework as there are some exceptions. For example, following the first amendment to the current Constitution,[50] the president and head of the executive has the sole responsibility to appoint senior judges such as the Chief Justice, Deputy Chief Justice, and the Judge President of the High Court. The President now also has a vital role to play in determining an extension of tenure for judges post their retirement age in terms of s 186 of the Constitution as amended by the second amendment.[51] In terms of s 116 of the Constitution, the President is also one of the two broad structures that make up parliament.

Exceptions to the strict concept of separation of powers can equally be seen in many jurisdictions in various forms, cognisant of the reality that for it to yield the intended value, separation of powers requires independence as much as it requires interdependence in some instances.[52] It has also been noted that a system of totally separated powers may lead to:

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48 Moyo & Phulu op cit (n31) 49.

49 Section 3(2)(*e*) of the Constitution.

50 Section 180(2) as amended by the Constitution of Zimbabwe Amendment (No 1) Act 10 of 2017.

51 Constitution of Zimbabwe Amendment (No 2) Act, 2 of 2021.

52 S Seedorf & S Sibanda Chapter 12 (constitutionallawofsouthafrica.co.za) at 12

> [A] diffused and uncoordinated exercise of power [and that] the doctrine needs 'to avoid diffusing power so completely that the government is unable to take timely measures in the public interest [as] ultimately, the aim is to make government more efficient."[53]

In Zimbabwe's case, a purposeful interdependence and seeming overlapping in the government's branches can be seen with respect to the President's power to make the executive decision to declare war and peace in terms of s 111(1) of the Constitution. An executive decision made in this regard is then subjected to parliamentary control through s 111(2), and which parliament can by a two-thirds majority joint resolution, revoke. Upon such a resolution, the President has no choice but to comply with it.

Be that as it may, while the value of a 'compromise' separation of powers mechanism is well noted and the fact that Zimbabwe's constitutional framework facilitates this distortion in certain instances, it is still pertinent that outside of the listed permissible departures, the strict parameters of separation of powers be observed and that there be no unjustified and unsanctioned blatant overriding of other branches. Thus, incidences such as the usurpation of parliament's law-making function and relatedly the overriding of its oversight function by the executive in the passing of the numerous Covid-19 and other critical statutory instruments point to retrogression in the country's democratic tenets.

8.7 CONCLUSION

Based on the above, it is concluded that Zimbabwe is indeed in democratic regression, which will likely worsen as the country inches closer to the 2023 elections. With the precedent set in the successful institution of fundamental amendments to the Constitution and based on indications and utterances by the ruling party, it would not be far-fetched to expect further tampering with the Constitution before the 2023 polls and even beyond regardless of who is in power. With the passing of the two constitutional amendments in 2021, the ruling party's super-majority amidst a very weakened opposition and based on the current administrations' successful undermining of parliament and other key constitutional mechanisms, again, Zimbabwe is possibly yet to see the worst of this democratic regression. This is exacerbated by the threat posed by the ongoing militarised politics to democratic governance and all related ideals espoused in the country's Constitution. Going forward, if Zimbabwe is to recover from this downward democratic trajectory, its government and other

[53] L Mhandara, S Hamauswa & E Nyemba 'A review of the doctrine of separation of powers in Zimbabwe (1979-2013)' (2013) 2 *Southern Peace Review Journal* (Special Issue with OSSREA Zimbabwe Chapter) 68 at 78.

relevant institutions, the army included, will need to at the very least, respect the sanctity of the Constitution and the people from whom the authority to govern is derived and generally uphold the rule of law. It will also need to invest in ambitious institutional, political, legal as well as security sector reforms in order to mitigate and eventually undo the present and likely future impact of the militarisation of the country's political and governance systems. All efforts will however need to be based on a model that upholds the democratic tenets and supporting frameworks amply provided in the Constitution.

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