"AFRICA: LEGAL CHALLENGES AND SOLUTIONS"

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INTRODUCTION

Individuals and groups inevitably at times get into conflict and societies require institutions that can resolve disputes. These institutions are judicial in nature. The *raison d'etre* of these judicial institutions is the protection of the Constitution, the application of the law to attain justice and the protection of fundamental rights through the adjudication of disputes.

The paramount objective of the judiciary must be to achieve qualitative justice in every instance. An excellent justice system requires a combination of a fair conduct of cases, their prompt disposal, and well-reasoned decisions so as to ensure that justice is done and seen to be done.

In exercising their functions as the harbingers of the rule of law and administrators of justice, African judiciaries have faced a plethora of challenges which have sometimes impeded their abilities to function as such. This paper focuses on the topical issues that affect judiciaries in Africa for instance human rights, elections and direct investment.

THE RIGHT TO A FAIR TRIAL

A fair trial entails a trial by a neutral and fair court, conducted in terms of principles which accord each party the due process rights required by applicable law. It ensures respect

for the defendant's constitutional rights. A fair trial is the best means of separating the guilty from the innocent and protecting against injustice. Without the right to a fair trial, the rule of law and public faith in the justice system collapse.[1]

A fair trial is the only way to prevent miscarriage of justice and is an essential part of a just and democratic society. Every person accused of a crime should have his or her guilt or innocence determined by a fair and effective legal process.[2] The right to a fair trial includes several other rights and principles that regulate the procedural and substantive processes of a trial. In this sense, the right is therefore a very broad one. For instance, it may encompass the right to equality, the right to human dignity, the right to a trial within a reasonable time, the right to counsel, the presumption of innocence, etcetera.

This right depends, in a lot of ways, on the practical availability at all times of access to competent, independent and impartial courts of law which can, and will, administer justice fairly.[3] In that regard, the right to a fair trial extends beyond the accused person to also cover the judicial

[1] See 'The Right to a Fair Trial' available at https://www.fairtrials.org/right-fair-trial

[2] *Ibid*

[3] United Nations Office of the High Commissioner for Human Rights(UNOHCHR), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, (United Nations Publications 2003) Chapter 6 The Right to a Fair Trial Part 1 - From Investigation to Trial, at p 215

officer. He or she has a duty to take the right beyond abstract concepts to make it a substantive reality.

The right to a fair trial is recognised internationally as a fundamental human right and countries are required to respect it. Different countries have developed a variety of ways of giving effect to the right but, regardless of how a particular legal system operates, the right remains core to all fair justice delivery systems.[4]

It is, however, important to note that the concept of fairness entails being "just and equitable". (*Concise Oxford Dictionary* 510 (10th ed)) It does not require perfection. This position has been confirmed time and again. The International Criminal Tribunal for the former Yugoslavia (ICTY), for instance, in the well celebrated dissenting opinion by JUDGE SHAHABUDEEN in *Prosecutor* v *Slobodan Milošević* Case No. IT-02-54-AR 73.4, held as follows:

> "…the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him."

Therefore, in considering the right to a fair trial, sight should not be lost of the fact that the right is not accorded to a legal system that is infallible but to one that is fair. (See

[4] See note 1 above

Maharaj v *Attorney-General of Trinidad and Tobago, Privy Council*, (1979) AZ 385; (1978) 2 AER 670; (1978) 2 WLR 902).

In principle, the right to a fair trial applies with similar effect to civil and criminal matters. However, it has an inherent inclination towards criminal trials by according specific guarantees to the accused person, constituting definitive elements of the right.[5]

Regionally, the African Charter on Human and Peoples' Rights ("the ACHPR") further guarantees the right to a fair trial, albeit in an African context. In this regard, Articles 7 and 26 are important and worthy of note. Article 7 states the following -

1. Every individual shall have the right to have his cause heard. This comprises -
    a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
    b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
    c. The right to defence, including the right to be defended by counsel of his choice;
    d. The right to be tried within a reasonable time by an impartial court or tribunal.

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

[5] Namakula C S *The Court Record and the Right to a Fair Trial: Botswana and Uganda*, African Human Rights Law Journal 2016, Vol.16, N.1, pp.175-203. ISSN 1996-2096. http://dx.doi.org/10.17159/1996-2096/2016/v16n1a8.

Article 26 of the ACHPR places an obligation upon State parties to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ACHPR.

In September 1999 the *Dakar Declaration on the Right to a Fair Trial in Africa* ("the Dakar Declaration") was adopted. It sought to consolidate the standards on the right to a fair trial under the ACHPR, as well as taking into account the relevant jurisprudence from the African Commission and other international human rights bodies.[6] In terms of the Dakar Declaration, the right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights.[7] The adoption of multiple international conventions safeguarding the right to a fair trial cements its status as one of the basic and fundamental human rights that accrue to a person by virtue of his or her humanity. Additionally, in 2003 the African Commission on Human and Peoples` Rights adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ("African Principles and Guidelines"). These

[6] The Right to a Fair Trial: The Dakar Declaration. (2001). *Journal of African Law, 45*(1), 140-142. Retrieved from http://www.jstor.org/stable/3558976
[7] *Ibid*

principles elaborate extensively upon Article 7(1) of the ACHPR and give content to it.

The fundamental importance of the right to a fair trial is illustrated not only by the extensive body of interpretation it has generated, but also by the several instruments which protect it.

That the right to a fair trial is part of international law cannot be meaningfully disputed. For instance, Article 10 of the Universal Declaration of Human Rights ("the UDHR") and Articles 14 and 16 of the International Covenant on Civil and Political Rights ("the ICCPR") guarantee the right to a fair trial.

Zimbabwe as a jurisdiction is part of a universal standard of norms that are given recognition worldwide. One such norm is the protection of the right to a fair trial as a fundamental human right. The importance of the right to a fair trial was emphasised in the case of *Banana* v *The Attorney General* 1998 (1) ZLR 309 (S) where the court found that when balancing the right to a fair trial and the right to freedom of expression, in the hierarchy of constitutional rights, the right to a fair trial must be given priority over freedom of expression. This shows the importance of the right to a fair trial in Zimbabwe.

Zimbabwe is a party to and has ratified the ICCPR and the ACHPR. The right to a fair trial which is contained in these instruments is given constitutional significance through its entrenchment

in the Constitution. The right to a fair hearing is part of *Chapter 4* of the Constitution, which contains the Bill of Rights. It is guaranteed in section 69 of the Constitution, which provides as follows:

> "**69 Right to a fair hearing**
>
> (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
>
> (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.
>
> (4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."

This provision contains the right of an accused person to a fair and public trial within a reasonable time. It is therefore important to note that the trial ought to be fair, it must be public and it must be held within a reasonable time. A contravention of any of these rights or principles compromises the accused person's right to a fair trial. More importantly, section 69 of the Constitution places an obligation upon the court to be independent and impartial. It is that independence which guarantees and protects the right to a fair trial. Section 69 places an institutional obligation or responsibility upon the justice system, particularly the courts, to respect and

protect the right to a fair trial. By extension, those obligations are imposed upon the individual judicial officers who preside over matters.

Section 70 of the Constitution encompasses the rights of accused persons. It guarantees an array of rights that accrue to any person who is accused of an offence. It is important to note that the rights of accused persons are the constituent rights that make up the right to a fair trial enshrined in section 69. Some are procedural and others relate to the substance of the right to a fair trial. The guaranteed rights contained in section 70 include the presumption of innocence, the right to legal representation, the right to be informed promptly of the charge and the right of appeal etcetera.

However, most importantly, the right to a fair trial is an absolute right in Zimbabwe. Section 86 (3) of the Constitution provides for the non-derogable fundamental rights and the right to a fair trial is one of the rights that cannot be limited by any means. The fact that the Constitution provides that no law can limit the right to a fair trial and that no one may violate it means that the State may not limit the right, either through legislation or other means. Consequently, even judicial officers who are tasked with ensuring the protection, fulfilment and realisation of the right to a fair trial cannot limit the right through their conduct.

Section 44 of the Constitution places a duty upon the State to respect fundamental human rights and freedoms. It provides thus:

> "The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter."

Thus, it can be seen that the constitutional framework in Zimbabwe guarantees the right to a fair trial. The right is enshrined as one of the non-derogable fundamental rights. Further to that, the Constitution itself places a positive obligation on the State and its judicial officers to ensure the respect, protection, promotion and fulfilment of the right. Consequently, the Constitution provides adequate protection of the right to a fair trial.

In Uganda, the right to a fair trial is constitutionally protected and it is provided for in terms of Article 28 of the Constitution of the Republic of Uganda (1995) which states as follows:

> "28 Right to a fair hearing.
>
> (1) In the determination of civil rights and obligations or any criminal charge,, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."

Article 44 of the Constitution of the Republic of Uganda (1995) is the non-derogation clause and one of the fundamental rights that is protected from limitation is the right to a fair hearing. In *Uganda Law Society and Anor v The Attorney General*

(Constitutional Petitions No.2 & 8 of 2002) [2009] UGCC 1 (4 February 2009), the Constitutional Court of Uganda per Twinomujuni JA held that:

> "The Constitution of Uganda does not have a concise definition of the phrase "the right to a fair hearing." It is in fact not safe to purport to give an all inclusive definition of the phrase because human rights jurists all over the world have written on the subject giving wide ranging and deep analysis of the phrase so much so that it is impossible to give a short definition of it…
>
> Article 28 is a package. Each and every one of the above constitutes what the right to a fair hearing means. It was never intended that this would be an exhaustive definition of the right to fair hearing."

In South Africa, section 35 (3) of the Constitution guarantees the right to a fair trial and it is regarded as fundamental. In *S v Jaipal* 2005 (4) SA 581 (CC) at 592 the Constitutional Court held that the right to a fair trial is a cornerstone of any civilised criminal justice system and it is the duty of every presiding officer to ensure that this right is not unjustifiably infringed upon during the course of a criminal trial.

The judiciaries in Africa often face challenges in implementing the right to a fair trial. For instance, in South African law seems not to afford the same sort of protection as international law to those who are subjected to adverse pre-trial publicity or trial by media.[8] South African media are allowed absolute freedom to speculate on the guilt or innocence of accused

[8] Flowers *SM Pre-Trial Publicity: Free Speech Versus Fair Trial* (2017)

persons. Public officials in South Africa, likewise, are allowed to speak their minds and express freely their views on the guilt of an accused.[9]

For instance, former Police Commissioner, Beki Cele, expressed his view on the certain guilt of an accused person, openly equating him to a "monkey" who believed South Africans were "stupid." Similarly, the former National Director of Public Prosecutions, Mensi Similane, was quoted in the media as saying:

> "This is purely a criminal matter of somebody who murdered his wife while he should be celebrating his honeymoon and the facts here are that the accused, who is sought to be extradited, came to the country and committed what is a very heinous crime."

These comments amounted to publicity which was potentially prejudicial to the accused person`s right to a fair trial. More importantly, they violated the accused person`s right to be presumed innocent until proven guilty. Important to note in this instance is that the accused person was eventually found not guilty and discharged because the evidence was not sufficient to sustain the charge. (See *S v Dewani* [2014] ZAWCHC 188)

It is conceded that the reporting of pending cases by the media accords with their constitutional obligation to keep the public informed of matters before courts. In this way there is exchange of ideas and conversations are stimulated, particularly around

[9]Ibid

the functioning of the criminal justice system. However, adverse pre-trial publicity exacerbates the grave consequences for those accused of crime and for those who are victims of crime. The importance of the right to a fair trial was emphasised in the case of *Banana v The Attorney General*, *supra* where the Supreme Court found, when balancing the right to a fair trial and the right to freedom of expression, that, in the hierarchy of constitutional rights, the right to a fair trial must be given priority over freedom of expression.

The bail application of Oscar Pistorius is a further example of how pre-trial publicity prompted widespread public censure and calls for him to be denied bail. The Magistrates Court responded by setting stringent bail conditions, which conditions were however relaxed by the High Court on appeal.

A challenge that has been haranguing the judiciaries in Africa regards the interpretation of the right to a fair trial. Too often, decisions of superior courts gave a narrow interpretation of this right thus undermining the accused person`s right to a fair trial.

Persons are arrestees, detainees or suspects during the investigation phase of a criminal matter. They eventually may become accused persons if the evidence against them makes out a *prima facie* case. Prior to becoming accused persons, arrestees and detainees may invoke the protection afforded them by constitutional provisions setting out their rights for instance

sections 35 (1) and (2) of the South African Constitution or section 50 of the Zimbabwean Constitution. However, a suspect is not afforded similar protection and this suggests that the provisions of section 35 of the Constitution of South Africa are irrelevant in relation to such a person.[10] This position was confirmed in the case of *S v Van der Merwe* (1997) 4 All SA 87 (O) 91, where the court held there was nothing in the 1993 Constitution which obligated the police to warn a suspect of his constitutional rights. In *S v Mthethwa* 2004 (1) SACR 449 (E) 453 the court found the following in this regard:

> "At the time he was questioned appellant was neither an arrested nor an accused person. In these circumstances, the provisions of s 35 of the Constitution of the Republic of South Africa Act 108 of 1996, which deal with the rights of "everyone who is arrested for allegedly committing an offence (s 35(1)); "everyone who is detained" (s 35(2)); and "every accused person" (s 35(3)), are not, in my view, of relevance."

It cannot be naysaid that this restrictive and narrow interpretation of the right did not accord with the expansive nature of the right to a fair trial. The courts in South Africa have however recently given a purposive and progressive interpretation of this right. In *S v Sebejan and Others* 1997 (1) SACR 626 (W) the court held that:

> "If the suspect is deprived of the rights which have been afforded to an arrested person then a fair trial is denied the person who was operating within a quicksand of deception while making a statement. That pre trial

[10] See note 8 above at p 41

> procedure is a determinant of trial fairness is implicit in the Constitution and in our common law … The requirements of due process extends to the pre trial conduct of law enforcement authorities … The constitutional right of an accused person does not only relate to fundamental justice and fairness in the procedure and the proceedings at his trial. It also includes the right to be treated fairly, constitutionally and lawfully by policing authorities and State organs prior to the trial."

See also *S v Orrie and Another* [2004] ZAWCHC 25*; S v Melani and Others* 1996 (2) BCLR 174 (E).

The right to a fair trial ought to commence, therefore, from the inception of the criminal process, and bail applications are part of that process. In this regard, the remedy to the narrow interpretation that has been previously given to the right to a fair trial is to adopt a wide and purposive construction of the right to a fair trial, taking into cognisance respect for the arrested, detained or accused person`s fundamental human rights. After all, constitutional provisions ought to be interpreted generously and purposively to give expression to the values underlying the Constitution.

Further, in the African context, the key issues that cause the lack of protection of citizens' rights is that the bulk of the African people live in poverty, lack education and sometimes even wallow in total illiteracy. The lack of adequate awareness pertaining to the right to a fair trial is sometimes hampered by the misconception that these rights are Western ideas and due to this, these rights are not meeting the needs of African countries and their communities and hence it is extremely

difficult to protect these peoples' rights with such limitations.

Possible solutions to this challenge include the conduct of awareness campaigns which aim to educate people and help to promote these rights in an African context. The right to a fair trial may further be enhanced through the use of all of the official languages in Zimbabwe in the conduct of court proceedings. In terms of section 6 of the Constitution, Zimbabwe has sixteen official languages. However, English is the official court language and litigants who wish to use any of the other official languages ought to use the services of an interpreter. Inasmuch as all sixteen languages are recognised in the Constitution, the use of these languages in official court proceedings without the need to engage the services of an interpreter would go a long way in augmenting the right to a fair trial.

Judiciaries in Africa have also faced challenges in the generation and maintenance of reliable court records. Commenting on this subject, Namakula C S *The Court Record and the Right to a Fair Trial: Botswana and Uganda,* African Human Rights Law Journal 2016, supra stated thus:

> "Budgetary constraints and administrative challenges facing judicial services in the African countries studied here leave courts with inefficient modes of generating and maintaining full and reliable court records, hence defeating the ends of justice. Evidence is lost in the process of recording and during the preservation of court records through fires and malpractices. The court record

> is the basis for a fair trial. Any determination of a court is founded on the material in the record and such decision is placed and preserved on the face of the record. Fair trial guarantees of appeal and review are initiated by the court record. An appeal is a trial of the record. The competence of a court that cannot accurately record its proceedings and preserve the records to guarantee a fair trial is questionable. There is a need to facilitate a reliable mode of producing and maintaining the court record, towards a culture of fulfilling the right to a fair trial in Africa."

Several courts of law in Africa use outdated gadgets, while many others, especially at the lower level, rely on handwritten notes of judicial officers in circumstances where stationery may be inadequate and storage facilities are exposed to risks of fire and theft. Evidence is lost during the taking and storage of the court record. There are no video or audio recordings of proceedings, thus leaving the aforementioned notes as the only evidence of the proceedings. The court record, in such circumstances, reflects what the adjudicating officer believes to have heard. [11]

The significance of a court record in relation to the right to a fair trial cannot be overemphasised. It is the record which initiates juridical processes such as appeal or review. In fact, an appeal is determined based on the record only. (See *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01). Inefficient court records may be an infringement of the right to a fair trial,

[11] *Monyandiwa & Others v S* CLHFT-000136-06 [2009] BWHC 174

hence entitling the aggrieved party to a remedy. Such remedies include:

(i) Correction of the error;

(ii) The quashing of an order made on the basis of a defective court record;

(iii) Discharge of the accused person;

(iv) Setting aside of the verdict;

(v) Retrial; and

(vi) A permanent stay of prosecution

The long term solution to this problem is the implementation of computer based systems which improve the efficacy of record keeping. In a speech which I delivered on the official opening of the 2019 legal year, under the theme "Consolidating the Rule of Law", I indicated that the Judicial Service Commission ("the JSC") was aiming at implementing an Integrated Case Management System, initially in the Commercial Division of the High Court. This system is integral as it enhances efficiency in the manner cases are managed.

CORRUPTION

According to Transparency International, corruption can be defined as the abuse of entrusted power for private gain.[12]

[12] Transparency International *What is Corruption*? available at https://www.transparency.org/what-is-corruption

Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs. Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies. Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.[13]

The Merriam-Webster dictionary defines corruption as dishonest or illegal behaviour especially by powerful people (such as government officials or police officers).

Corruption has been very insidious in the judiciary systems of African countries, invariably culminating in the compromise of various legal and institutional mechanisms designed to curb it. The judiciary (i.e., prosecutors, court management systems, the bar, the police, traditional rulers, court brokers and court assessors) is affected by two main types of corruption:

[13] Ibid

political interference in judicial processes by either the executive or legislative branches of government, and bribery.

Judicial corruption, in essence, consists of acts or omissions that result in the use of public authority for the private benefit of judges, court personnel and other justice sector personnel, culminating in the improper and unfair delivery of judicial decisions. Such acts include bribery, extortion, intimidation, influence peddling, the abuse of court procedures for personal gain and any inappropriate influence on the impartiality of the judicial process by any actor within or outside the court system.[14]

Combating corruption remains a priority policy issue for African governments and pan-African organizations, as evidenced in the adoption of a number of important national, regional and global anti-corruption frameworks, instruments and initiatives. The most recent initiative in this regard has been the African Union's declaration of 2018 as the "African Anti-Corruption Year", a symbolic year for succeeding in combating corruption under the theme of the thirtieth session of the African Union Assembly of Heads of State and Government, "Winning the fight against corruption: a sustainable path to Africa's transformation".[15]

[14] Ikome F and Tadesse G, *United Nations Economic Commission for Africa* ECA Policy Brief No. ECA/18/005 at page 1
[15] Ibid

Corruption is the antithesis of the rule of law. As a safeguard against it, judicial independence is central to the administration of justice and for the upholding of the rule of law. In Zimbabwe, judicial independence is central to the rule of law. As a result, it is provided for in the Constitution itself in terms of section 164. Further, the Judicial Service Commission (JSC) is a constitutional body established in terms of section 189 of the Constitution. Its functions are enumerated in terms of section 190 of the Constitution and section 190 (2) states that the JSC must promote and facilitate the independence and accountability of the judiciary.

It is lack of judicial independence and integrity which is primarily responsible for corrupt activities in the judiciary. Political factors or interests also play a role in judicial corruption. In some cases judges, magistrates and prosecutors may be beholden to political interests when their careers are controlled by the executive branch.

In Cameroon, for instance, the president chairs the highest judicial body, the Superior Council of Magistracy, which, among other things, oversees judicial appointments.[16] In Egypt, it is impossible to talk about judicial corruption without tackling the issue of judicial independence. The link between the two was uncovered in 2003 by appeal judge Yahya al-Refai in his

[16] Kuwonu F, *Judiciary: Fighting Graft Needs Muscles* (2016) available at https://www.un.org/africarenewal/magazine/august-2016

resignation speech. Refai revealed the Ministry of Justice's methodical campaign to corrupt and divide judges, citing the handing out of generous bonuses to compliant judges while others survived on a meagre basic wage, and the requirement that judges provide the ministry with copies of civil and criminal suits against important officials.[17]

Appointments sanctioned by the president of a country tend to be determined by political loyalty rather than merit. When such appointees fill the judiciary, experts argue that the likelihood of a government being held accountable is diminished and the door is left open to all kinds of influence, including political pressure, threats and bribery.[18]

Even when the independence of the judiciary may be formally and legally guaranteed, the risk of interference is still present. In Angola, for example, Judge Joaquim de Abreu Cangato, a long-time official of the ruling party apparently with no judicial background, was appointed in March 2000 to the country's Supreme Court, according to the Committee to Protect Journalists 2016 report. This was despite the fact that judicial independence is enshrined in the country's law.

An effective and efficient judicial system is a prerequisite for the entrenchment of good governance and for enhancing the

[17] Transparency International *Global Corruption Report 2007* Cambridge University Press at p 201
[18] Ibid

development prospects of all countries globally. The judiciary has the primary responsibility of interpreting and applying laws and adjudicating disputes in society. It is charged with countering both private and public corruption, reducing political manipulation and increasing public confidence in the integrity of governments. It protects individual rights and ensures the security of persons and their property. The judiciary decides on what constitutes the appropriate sanction against any conduct that is at variance with the established laws, including pervasive conduct such as corruption.

Not only is the judiciary one of the main pillars of government, it is also the custodian of the rule of law and the herald of justice and people's rights. As I stated in my above referenced speech at the opening of the 2019 legal year, the courts are the last line of defence to the concept of the rule of law. They are the final arbiters and the vanguard that holds together the system of justice. The courts must therefore always take the lead in upholding the rule of law. Put simply, the Judiciary is the *sine qua non* of the concept of the rule of law. As such, the rule of law is sacrosanct and ought to be protected at all costs.

Further, judicial integrity, independence and accountability are vital to the rule of law and the fight against corruption. Judicial integrity consists of the courage of judges to make fair decisions on the basis of their understanding and

interpretation of the law without fear or favour.[19] Judicial independence focuses on the prior control of judicial action, while accountability concerns ex post control, which refers to the requirement that the judiciary explain both its administrative and functional operations and outputs, including its action.

Judiciaries in Africa are not infallible. Like all systems of government, they are susceptible to vices like corruption. According to Transparency International[20], a 2015 study carried out by Transparency International established that the judiciary, along with government officials, business executives, tax officials and the police, are among the most corrupt institutions in sub-Saharan Africa, with the judiciary occupying an unenviable fifth place. Almost one third of respondents said that judges and magistrates were affected by high levels of corruption.

As mentioned earlier, the lack of judicial independence is the primary cause of corruption in the judiciary. Other causes of corruption in the judiciary in Africa include inadequate funding and the poor remuneration of judges and other court personnel; the non-involvement of judges and magistrates in the reform of the judiciary; a lack of internal capacity both in terms of relevant skills and numbers of staff; poor court infrastructure

[19] See note 10 above
[20] *ECA Plolicy Brief No. ECA/18/005* at page 3

and inadequate facilities, including information and communications technology (ICT); inadequate training for judges and magistrates and the poor grooming of judicial staff on issues of corruption; a lack of a clear law or rules for the declaration of assets and gifts received in the course of discharging judicial functions; and a lack of strong and effective mechanisms to control delays in delivering judgments.[21]

The effects of corruption in the judiciary include the disappearances of records (because most systems are still paper based and have not embraced electronic management of records), the unjustified postponement of case hearings, high prosecution expenses and legal fees and high networking ability.

By virtue of its superior position as the vanguard of the rule of law, the judiciary has a key role to play in combating corruption. It is possible to mitigate the factors that contribute to judicial corruption, but solutions must be tailored to national, or even sub-national, realities, and are successful when they form part of an integrated reform plan. Increasing judicial salaries will not, in isolation, stop judges and court staff from taking bribes, though coupled with additional accountability mechanisms it may lead to improvements.

[21] Ibid

Also important to note is that while judges have an important role as the decision maker in a judicial process, they are but one part of a long chain of people with influence over a law suit; anti-corruption efforts need to encompass lawyers, police, prosecutors and the agencies responsible for enforcing judicial decisions.[22]

The following solutions are apposite to the combating of corruption in African judiciaries:

(a) Governments should uphold and effectively implement the principles of separation of powers, particular attention being given to enhancing the independence of the judiciary;

(b) The provision of information and Communication Technology ("ICT"), along with other relevant infrastructure, will go a long way to inform and assist in speeding up the processing and determination of judicial matters;

(c) Adequate human, material and financial resources should be made available to the judiciary to enable it to perform its duties and to reduce its vulnerability to corruption. In other words, the removal of temptation.

(d) Training in ethics and on the imperative of upholding codes of conduct should be mandatory for all levels and

[22] Transparency International *Global Corruption Report 2007* Cambridge University Press at p 7

categories of judicial officials. There should be continuing legal education for judges, magistrates and lawyers. However, it is important to note that judicial corruption is a systemic problem and addressing ethics alone is not sufficient to tackle the problem.[23]

In Zimbabwe, a select group of magistrates was handpicked and were adequately prepared for the task of adjudicating over the corruption cases. The magistrates underwent a series of training courses, which I believe have fully equipped them with the skills that they will use to efficiently deal with corruption cases.

(e) There is a need to enhance institutional links and cooperation among law enforcement agencies, prosecutors' offices, prison systems, probation officers, social workers, doctors and other experts in the field of criminology and penology to work harmoniously with the judicial system to solve interrelated problems. An example is the cooperation between the Zimbabwe Anti Corruption Commission and the Zimbabwe Republic Police.

(f) There is a need to develop and deploy proper interactive mechanisms between the judiciary and the citizenry for the purposes of raising the awareness of citizens on the services, procedures and operations of

[23] Transparency International *Global Corruption Report 2007* Cambridge University Press at p 3

the judiciary system, with a view to curbing corrupt exploitation of the citizenry.

(g) The establishment of anti-corruption courts is also a long term solution to the scourge of corruption. In the course of the year 2018, I presided over the opening of specialised anti-corruption courts at Harare and Bulawayo. The courts were operationalised as a pilot project. They are also a symbol of the Judiciary's commitment to fight corruption together with other stakeholders.

(h) Fair judicial salaries and pensions make court personnel less vulnerable to bribery. These should reflect experience, performance and an honest track record. In the face of powerful interests, several measures can also protect judges from pressure. These include investigations of credible allegations against them, and limited liability for decisions. Court officials must be aware that if corruption is proved, they'll be removed in a fair, open way.[24]

(i) In order to tackle corruption, the criticism of judicial officers by the public ought to be accepted. In my earlier mentioned speech I indicated that Judges are not immune to criticism. Their decisions must be scrutinised, commented on and even criticised. Our

[24] https//www.transparencyinternational.org

system encourages that the scrutiny, comments or criticism must remain professional, impersonal and constructive. If that is observed, it develops the jurisprudence of the country because the criticism ceases to be mere criticism and becomes a contestation of ideas between and amongst intellectuals. The Chief Justice of Ghana Mr Justice Kingsley Acquah acknowledged the problem of judicial corruption and since his appointment in June 2003 has concentrated on reforming the judicial system.[25] Speaking at the Fourth Chief Justices' Forum in Accra in November 2005, he accepted that corruption is a national problem and urged that criticism of judges should be seen as a means of correcting their mistakes and keeping corruption in check.[26]

ELECTIONS

Zimbabwe is a constitutional democracy and has deep respect for the people from whom the authority to govern them is derived. Courts play a fundamental role in upholding and facilitating the protection of fundamental human rights. Section 67 of the

[25] Transparency International *Global Corruption Report 2007* Cambridge University Press at p 208
[26] Chief Justice Kingsley Acquah, *4th Chief Justices' Forum (CJF) in Accra*, 22 November 2005, quoted in Ghana Review (Ghana), 23 November 2005. Available at ghanareview.com/review/index.php?classall&date2005-11-23&id12472

Constitution of Zimbabwe is the bedrock of electoral rights in Zimbabwe. Those electoral rights are then given effect to by the Electoral Act [*Chapter 2:13*] ("the Electoral Act"). It has been held that the laws of election are self-contained codes and the rights arising out of elections are the offspring of those laws. The courts play an instrumental role in the resolution of disputes which arise in the process of exercising electoral rights.

The authors Currie I and de Waal J in their text "*The Bill of Rights Handbook"* outline the importance of electoral rights by stating that democracy is strengthened and invigorated by each vote cast and … when citizens mark their ballots they 'remind those elected that their position is based on the will of the people and will remain subject to their will. The moment of voting reminds us that both electors and those elected bear civic responsibilities arising out of a democratic Constitution and its values. Therefore, the right to vote has 'bright, symbolic value' accompanied by 'deep, democratic value that lies in a citizenry conscious of its responsibilities and willing to take the trouble that exercising the right to vote entails.[27]

The role of the judiciary comes in the context of these election rights and legal rights in general. The separation of powers doctrine postulates that the role of the judiciary as one of the

[27] Currie I & de Waal J *The Bill of Rights Handbook* (6th ed, Juta & Co Ltd, Cape Town, 2013) pages 421-422

arms of government is to interpret the law. In other words, it is an adjudicative function that the courts perform. To give effect to justice between man and man, the courts have to be independent so that they can protect the rights of citizens in a country without fear or favour. In Zimbabwe, the independence of the courts is a closely guarded value.

Since the 1900s African states have committed themselves to the institutionalisation of democratic governance individually and collectively through regional and continental inter-governmental bodies. One of the constitutional cores of democracy which is generally accepted as basic to all forms of democracy is periodic elections often regulated by law.[28]

The problem however is that these elections have been reported to be tainted with flaws and irregularities which undermine the credibility of the outcome. Allegations of cheating include, but are not limited to bloated voter registers, over-voting and tampering with election figures. There have been cases where disgruntled parties to an election have rejected the election outcome. Non acceptance of electoral results is registered in several ways ranging from protests, outrage and demonstrations to the perpetration of violence which sometimes leads to civil conflict.[29] On the other hand, others resort to existing

[28] Nkansah, L. (2016). Dispute Resolution and Electoral Justice in Africa: The Way Forward. *Africa Development / Afrique Et Développement, 41*(2), 97-131. Retrieved from http://www.jstor.org/stable/90013871
[29] Ibid

electoral justice mechanisms such as the courts and alternative dispute resolution mechanisms.

The effective resolution of disputes emanating from the electoral process is critical to electoral integrity. Commenting on the importance of electoral dispute resolution, the Chief Justice of Ghana Mrs Justice Wood, quoted with approval by Nkansah L[30] said the following:

> "In our contemporary world, in a representative democracy, the timelines with which a judiciary decisively determines electoral disputes without fear or favour, affection or ill will, is part of the package of mirrors through which civilised societies view a people. We, the judiciary in Ghana, recognise that we have a major contribution to make to ensure that our country is seen in the best possible light and given the highest regard globally."

Judicial adjudication is considered critical in ensuring electoral justice. By judicial adjudication reference is being made to the legal process of resolving a dispute. The formal giving or pronouncement of a judgement or decree in a court proceeding, which also includes the judgement or decision given. It implies a hearing by a court, after notice, of legal evidence of the factual issues involved. The African Union's ("AU") Principles Governing Democratic Elections in Africa, 2002, provides that a critical component of democratic elections is the presence of an independent judiciary to adjudicate issues emanating from the process. In Ghana, Kenya, Côte d'Ivoire,

[30] See note 28 above

Zimbabwe, Nigeria, and Uganda and many others, electoral disputes were handled by the courts with varying outcomes.

The overarching object of electoral dispute resolution is to achieve justice. The International Institute for Democracy and Electoral Assistance (IDEA) conceived electoral justice as the means, measures and mechanisms which have been inserted into an electoral system to prevent the occurrence of irregularities and for that matter electoral dispute or to mitigate them or to resolve them and punish perpetrators when they do occur.

The constitutions of African countries provide for the right to vote and to be voted for as well as the right of redress for electoral complaints which statutes and case law uphold. Examples include Articles 106 and 117 of the Constitution of Benin; Article 219 of the 1999 Constitution of Cape Verde; Section 285 (1) of the 1999 Constitution of Nigeria and the Electoral Act of Nigeria, 2006; Articles L43, L44, R28 and R35 of the Electoral Code of Senegal; Section 45(2)(a-b) and Section 78 of the Constitution of Sierra Leone 1991 and the Electoral Laws Act, 2002 of Sierra Leone (as amended); Article 21(1) of the Constitution of Tanzania.

The Protocol on Democracy and Good Governance adopted by the Economic Community of West African States (ECOWAS Protocol) in 2002 mandates among other things that 'the principles to be declared as constitutional principles shared by all Member States' is that 'Every accession to power must be made through

free, fair and transparent elections' (Article 1 (b)). Article 4 of the AU Declaration on Principles Governing Democratic Elections in Africa adopted in Durban South Africa in July 2002 gives the benchmark for democratic elections namely, that they should be conducted fairly, under democratic constitutions and in compliance with supportive legal instruments, under a system of separation of powers that ensures in particular the independence of the judiciary at regular intervals in accordance with national constitutions, by impartial, all-inclusive competent and accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.[31]

The African Charter on Democracy, Elections and Governance ('the Charter') (2007) requires State Parties to 'establish and strengthen national mechanisms that redress election- related disputes in a timely manner'. Article 17(4) of the Charter requires State parties to put a binding code of ethics in place which shall 'include a commitment by political stakeholders to accept the results of the election or challenge them... through exclusively legal channels'.

In the contexts of Africa, where electoral disputes are concerned, the judiciary is well suited to serve as neutral arbiter other than the other two arms of government. This is because the judicial officers are not elected but are appointed

[31] See note 24 above

with security of tenure unlike the officials of the other arms of government who are reconstituted periodically.

Various challenges beset the resolution of electoral disputes in Africa and these include, but are not limited to:

(a) Inadequacy, uncertainty and clumsiness of electoral laws

As a way of resolving electoral disputes, the laws on electoral adjudication are in some cases inadequate. Okello[32] reported that the laws on elections in Uganda are inadequate. He complained that there were no laws on absentee balloting, early voting of polling officials or security officials who are deployed on election day.

The Supreme Court of Ghana per Wood CJ in *Ramadan and Another v Electoral Commission and Others* [2014] GHASC 161 expressed the need for electoral reform in the following words:

> "The need for a credible and reliable multipurpose national identification system comprising the relevant data and communication infrastructure that would answer to most of our national needs, whether for electoral, planning or developmental, or other purposes, is greater than ever before. We think the time has come for the appropriate authorities to respond to this need."

A further challenge that bedevils the African judiciaries in electoral dispute resolution is the centralisation of

[32] See note 28 above

jurisdiction in relation to these disputes. It has been reported that some of the electoral laws are clumsy, and the interpretation by the courts conflicting.[33] In Benin, for example, the Constitutional Court declares the provisional results of elections and after it has heard and resolved electoral dispute issues declares the final results. This creates a situation that may require that it adjudicates over its own decision.[34] The management of electoral dispute in the Republic of Benin is one of the difficulties faced in the chain of electoral management. This is because the sharing of responsibilities amongst the electoral dispute adjudicators is not very clear.[35]

In Uganda there is uncertainty about electoral laws. It seems that for each election period new rules are enacted to guide the elections and the electoral process begins with the amendment and enactment of electoral laws and regulations which will govern those elections.[36] This situation poses a problem because 'late enactment and/or amendment of enabling laws leaves the Commission with inadequate time to organise, to conduct, and supervise elections including activities that have legal time requirements'. This has a resultant effect where 'organising and

[33] Kiggundu, B.M., 2006, *Electoral Petitions, Regulation in Uganda: Challenges and best practices.* Paper presented at the 8th Judges Conference held from 6-9 February 2006 at the Sheraton Hotel, Kampala, Uganda
[34] Fall, I.M., Hounkpe, M., Jinadu, A.L. & Kambale, P., 2011, *Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy*, Dakar, Senegal: Open Society Foundations.
[35] Ibid
[36] See note 24 above at p 108

conducting election within a short timeframe does not give the various stakeholders adequate time to internalise the requirements for participation in elections'[37]. Badru M. Kiggundu, the Chairman of the Uganda Electoral Commission decried this situation when he observed:

> "Uganda faces a chronic problem of late enactment of electoral laws....This leaves room to several mistakes. Some of the requirements of the electoral laws are impracticable. For instance, the current regime of electoral laws requires that all public servants wishing to contest for membership of the 8th Parliament must have resigned at least three months prior to their nomination. However at the time this law became effective, this three months were no longer available under the Constitution."[38]

In Kenya, there is uncertainty with regard to the timeframe for the commencement of an election petition other than presidential elections. Article 87(1) of the Kenyan Constitution provided that election petition should be lodged within 28 days from the declaration of the results by the Independent Electoral and Boundaries Commission (IEBC). The Election Act, however, provided in section 76 (1) (a) that election petition to challenge the validity of election should be filed within 28 days of the publication of the results in the gazette. Section 77(1) of the Election Act further provides that an election petition other than for a presidential election is to be filed within 28 days of the declaration of the results by the

[37] Ibid
[38] Ibid

Commission. The position therefore seems to be that a complaint ought to be filed within 28 days. The problem relates to the computation of the 28 day period. Is the period calculated from the date of the declaration of the results or from the publication of the results in the gazette. The courts in Kenya have given conflicting interpretations. On one side, the High Court has held that an election petition should be filed within 28 days of the publication of the results in the gazette (See *Josiah Taraiya Kipelian Ole Kores v. David Ole Nkedienye and Others [2013] eKLR (Petition 6 of 2013))*. In other matters, the courts held the section unconstitutional and that a complaint should be made within 28 days of the declaration of the results and not the publication of the results.[39]

As shown above, the procedure for bringing complaints should be clear and transparent, but this is not always the case. The formal and procedural requirements of rule of law demand that law must avoid contradictions and law should be written with reasonable clarity to avoid unfair enforcement.

(a) Limited jurisdiction of the courts

The jurisdiction of the courts in electoral matters is limited in some countries. In Ghana, the High Court has the jurisdiction to hear cases concerning the validity of election of a Member

[39] Ibid

of Parliament by virtue of Article 99 (1) of the 1992 Constitution of Ghana. Article 99(2) of the Constitution further provided that "A person aggrieved by the determination of the High Court... may appeal to the Court of Appeal". The Supreme Court of Ghana has held in the case of *In Re Parliamentary Election for Wulensi Constituency: Zakaria v Nyimakan* (2003-2004) *SCGLR 1* that the import of the said Article 99(2) is that an appeal against the decision of the High Court on the validity of the election of Members of Parliament ends at the Appeal Court and cannot go beyond to the Supreme Court. Within the contexts of parliamentary election petition, the right of appeal ends at the Court of Appeal. Consequently, Article 13 1(1) of the 1992 Constitution which provides for the right of appeal from the judgement of the Appeal Court to the Supreme Court in respect of criminal and civil matters does not apply to the Appeal Court's decisions on parliamentary election. This is a denial of the constitutional right of the aggrieved to have their grievances pursued up to the highest court in the land.[40]

In Zimbabwe, the decision of the Electoral Court on a question of fact is final and cannot be appealed against. An appeal from a decision of the Electoral Court may only be on a question of law in terms of section 172 of the Electoral Act.

[40] See note 24 above at p 106

In Tanzania, the results of presidential elections cannot be challenged by law, but that of a parliamentary election can be challenged (EISA 2010). The Constitution of the United Republic of Tanzania (The Union Constitution), the constitution for Tanzania Mainland and Tanzania Zanzibar in Article 74(12) ousts the jurisdiction of the court from entertaining "anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of this constitution". This notwithstanding, the Court of Appeal of Tanzania held in *Attorney-General and Others v Aman Walid Kabourou* [1996] TLR 156 (CA) that:

> "The High Court of this country has a supervisory jurisdiction to inquire into the legality of anything done or made by a public authority, and this jurisdiction includes the power to inquire into the legality of an official proclamation by the Electoral Commission."

Also, Article 41(7) of the Union Constitution ousted the jurisdiction of the High Court from entertaining any matter on presidential elections once the results are declared by the National Electoral Commission. In *Augustine Lyantonga Mrema and Others v Attorney-General* [1996] T.L.R. 273 (HC) (Maina J, Kyando J, Mackanja J) the petitioners prayed the Court to nullify the presidential election due to a nationwide misconduct that characterised the election. The Court upheld the constitutional provision that once the results of a presidential election were

declared, the jurisdiction of the court was ousted.[41] In the Kaborou case (1996), the former Chief Justice of Tanzania decried the situation and hoped for constitutional amendment. The matter was laid to rest in *Attorney-General v Christopher Mtikila (unreported).*

It should be noted that election petitions, being neither civil nor criminal matters, are a special form of petition regarded in law as *sui generis*, that is special proceedings of their own kind and the courts have treated them as such. This is primarily because of the importance of elections for the wellbeing of democracy. An example is the case of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR (Presidential Petition No. 1 of 2017). On the 8 August 2017, the Republic of Kenya held its second general election under the 2010 Constitution. On the 11 August 2017, the Independent Electoral and Boundaries Commission (IEBC) declared the incumbent, Uhuru Kenyatta, as the outright winner. Dissatisfied with the results, Odinga and his running mate, Stephen Kalonzo Musyoka, filed a petition challenging the election of Kenyatta in the Supreme Court of Kenya. The legitimacy of the whole election was called into question.

[41] Makaramba, R.V., *Trial and Management of Election Petitions by Courts: A Case of Tanzania*, paper presented at the Ninth EAMJA Annual Conference and General Meeting on 'The Role of the East African Judiciaries in the Electoral Processes', held from 11-15 October 2011 at the Imperial Resort Beach Hotel,
Entebbe, Uganda.

By a majority of four to two judges, the Court held that:

(a) The presidential election held on 8 August 2017 was not conducted in accordance with the Constitution and applicable law, rendering the declared result invalid, null and void;
(b) The irregularities and illegalities in the presidential election were substantial and significant, and affected the integrity of the election;
(c) Uhuru Kenyatta was not validly declared as president elect and that the declaration was invalid, null and void; and
(d) The IEBC should organize and conduct fresh presidential elections in strict conformity with the Constitution and applicable electoral laws within 60 days

The Kenyan Supreme Court's judgment is significant for various reasons. First, it reflects the first time that an African court has nullified a presidential election. The second important point about the judgment, and perhaps its greatest contribution to electoral jurisprudence in Africa, is its correct application of the "substantial effect" rule. Often election results are affected by honest mistakes, incompetence of election officials, corruption, fraud, violence, intimidation, and other irregularities. Some of these irregularities may be minor and inconsequential. However, many others are significant and bear on the fairness and legitimacy of an election.[42]

In August 2018, pursuant to the July 2018 Zimbabwean harmonised elections, the losing candidate, Nelson Chamisa, launched a

[42] Kaaba, O'Brien (2018) *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others Presidential Petition No. 1 of 2017*,SAIPAR Case Review: Vol. 1 : Iss. 2 , Article 6.Available at:https://scholarship.law.cornell.edu/scr/vol1/iss2/6

presidential election petition challenging the election results and the subsequent election of Emmerson Dambudzo Mnangagwa into office. The Constitutional Court in *Chamisa v Mnangagwa & Ors* CCZ 42/18 recognised the substantial effect doctrine in the following terms:

> "The general position of the law is that no election is declared to be invalid by reason of any act or omission by a returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate electoral rules if it appears to the Court that the election was conducted substantially in accordance with the law governing elections and that the act or omission did not affect the result.
>
> As an exception to this general position, the Court will declare an election void when it is satisfied from the evidence provided by an applicant that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws. Additionally, the Court must be satisfied that this breach has affected the results of the election. In other words, an applicant must prove that the entire election process is so fundamentally flawed and so poorly conducted that it cannot be said to have been conducted in substantial compliance with the law. Additionally, an election result which has been obtained through fraud would necessarily be invalidated."

It can be noticed that there has been a proliferation of election petitions pursuant to general or harmonised elections in African jurisdictions. These petitions were as a result various reasons ranging from genuine concerns regarding the conduct of elections to mere disgruntlement with the election results. What cannot be denied however is that the large numbers of petitions put a lot of strain on the judiciary which is already beset with manpower and logistical challenges. If the trend is not curbed

so that genuine cases go through adjudication, the whole idea of election adjudication would become so notorious that it would clog up and slow down the court processes and lose its purpose.

Another problem is the challenge it poses to the political system by creating uncertainty in the governance of a country. Thus parliamentary candidates who are declared winners are invalidated at the court of first instance and removed from their seat for their opponents. On appeal they may win and get the seat back. This violates the voters' right to representation in government as it is not clear who their member of parliament is in the course of electoral *judicialization* or may not end up with their choice of representation.[43]

Various solutions to the problems besetting the adjudication of electoral disputes in Africa include the regularisation of timelines relating to election petitions. The legal maxim 'justice delayed is justice denied' implies that for one to say there has been a fair hearing the proceedings in connection with the hearing must be conducted in an expeditious manner. In the contexts of electoral adjudication, it is critical because of the electoral cycle which is time-bound. In this regard, section 155 (2) (e) of the Constitution of Zimbabwe calls upon the State to ensure the timely resolution of electoral disputes. In

[43] See note 24 above at p 122

jurisdictions where no such clauses exist, the amendment of existing legislation to include such requirements will go a long way in curbing the court roll with election disputes.

The creation of stand-alone specialised electoral courts that are solely meant for the resolution of election disputes may also be a solution. The creation of such a court will remove the possibility of conflict that is caused by situations like in Benin where there is a prospect that the Constitutional Court may review its own decision. In Zimbabwe, the Electoral Court is created in terms of the Judicial Laws Amendment (Ease of Settling Commercial and Other Disputes) Act, 2017. The creation of this specialised court keeps in line with the constitutional obligation on the State to ensure the expeditious resolution of electoral disputes.

A further solution to the smooth running of elections and the consequent decline in genuine election petitions is the involvement of the international community in elections. It ought to be noted that various sensitivities arise through the assistance of international players. Concerns about the protection of sovereignty frequently lie just beneath the surface when international actors support electoral processes in Africa, fuelled largely by the legacy of colonial domination on the continent. It is clear that international assistance plays a vital role in supporting successful electoral processes. This assistance can come from many different actors (e.g.,

international, regional, and sub-regional organizations, and NGOs) and it can be both political and technical in nature. The external support provided to the Southern Sudan referendum on independence, held in January 2011, demonstrates the impact that focused external engagement can have. In spite of enormous technical and political challenges, the referendum went smoothly, surpassing the expectations of many analysts.[44]

In recent years, the UN has consistently played an important role in elections in Africa. Many peacekeeping and political missions today have election support embedded in their mandates. The UN provides technical assistance in the form of training of electoral workers, voter and civic education, security, and by procuring electoral materials.

At a regional level, the African Union and sub-regional organisations such as the Southern African Development Community ("SADC") and the Economic Community of West African States ("ECOWAS") increasingly support electoral processes, providing electoral observers and monitors and assistance to election management bodies, as well as devising normative frameworks.

INSOLVENCY ACROSS BORDERS

Insolvency is the condition or state of a person when his financial position reaches the unfortunate stage that he is

[44] *Elections in Africa: Challenges and Opportunities*, International Peace Institute (2011) at p 3

unable to pay his debts, or what is almost the same thing, his liabilities exceed his assets.[45] The legal test for insolvency was laid down in the South African case of *Ex Parte Harmse* 2005 (1) SA 323 (N) where the court stated that it was "only when it is established that it is improbable that his assets will realise sufficient to settle the amounts of his debts in full that it can truly be said that the Court ought to be satisfied that the estate of the debtor is insolvent".

A person who has insufficient assets to discharge his liabilities, although satisfying the test of insolvency, is not treated as insolvent for legal purposes unless his estate has been sequestrated by an order of the court. A sequestration order is a formal declaration that a debtor is insolvent.[46] The order is granted either at the instance of the debtor himself (voluntary surrender) or at the instance of one or more of the creditors (compulsory sequestration).

The legal recognition of an insolvent estate is not only for the protection of the creditors but also for protection of the public at large. The effect of a sequestration order is that the debtor becomes statutorily insolvent and that all his property is placed under the control of an impartial person, called the trustee, who realises it and distributes the proceeds among the

[45] Millin P and Wille G *Mercantile Law of South Africa* (7th edn , Hortors Limited, Johannesburg , 1975) at p 604
[46] Sharrock R, Van Der Linde K and Smith A *Hockly`s Insolvency Law* (9th edn, Juta & Co (Pty) Ltd, Cape Town, 2016) at p 3

various creditors according to definite rules and in a defined order. The insolvent debtor meanwhile becomes the subject of various legal disabilities, as compared to an ordinary person, and these continue until his estate has been finally distributed and he has been rehabilitated.

The law of insolvency in Zimbabwe is regulated by the Insolvency Act [*Chapter 6:07*] ("the Insolvency Act"). The Master of the High Court supervises the whole process. The High Court exercise general jurisdiction in terms of section 189 of the Insolvency Act including the jurisdiction to review the decisions of the Master of the High Court in terms of section 191 of the Insolvency Act.

In terms of the law, the insolvent status of a person ceases to apply at international borders. In this regard, Christie[47] comments thus:

> "Insolvency is a status imposing a legal disability, and the immediate effect of an order of sequestration is to impose this status on the insolvent, but it should be note that this status stops at international borders, and a person who is insolvent or bankrupt under the law of any foreign country will not be regarded as insolvent in Zimbabwe: *R v Etberg* 1932 AD 142."

Cross border insolvency deals with a sequestration or winding up involving property or debts in a jurisdiction other than the one in which the relevant court order is granted. In cross border insolvency, therefore, the law of insolvency and winding up

[47] Christie RH *Business Law in Zimbabwe* (1st edn, Juta & Co Ltd, Cape Twon, 1998) at p 469

intersects with the conflict of laws (private international law).[48]

Previously, the Insolvency Act in Zimbabwe did not expressly cater for cross border insolvency. However the Act was amended and gazetted on 25 June 2018 to cater for cross border insolvency and it is regulated by Part XXV of the Act. The purpose of this part is captured in the following terms:

> "The purpose of this Part is to provide effective mechanisms for dealing with cases of cross border insolvency so as to promote—
>
> (*a*) co-operation between the Courts and other competent authorities of Zimbabwe and those of foreign States involved in cases of cross border insolvency;
> (*b*) greater legal certainty for trade and investment;
> (*c*) fair and efficient administration of cross border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
> (*d*) protection and maximisation of the value of the debtor's assets;
> (*e*) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

Whether a foreign representative such as a trustee or liquidator may deal with Zimbabwean assets is a question determined by a division of types of property and the classification of persons. Movable property is governed by the law of the natural person`s domicile (*lex domicilii*). The debtor declared insolvent by the court of his domicile is thus, by a fiction, automatically divested of his movables throughout the world and in Zimbabwe.

[48] See note 40 above at p 297

Immovable property is governed by the law of the place where the immovable property is situated (*lex situs*), whether the debtor is an individual or a juristic person.

Before dealing with local assets, a foreign representative is obliged to seek recognition from the Zimbabwean courts. This is in terms of section 165 of the Insolvency Act which mandates the foreign representative to make an application in the High Court. Section 165 reads as follows:

> **"165 Application for recognition of foreign proceedings**
>
> (1) A foreign representative may apply to the Court for recognition of the foreign proceedings in which the foreign representative has been appointed.
>
> (2) An application for recognition must be accompanied by—
>
> (*a*) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or
>
> (*b*) a certificate from the foreign Court affirming the existence of the foreign proceedings and of the appointment of the foreign representative; or
>
> (*c*) in the absence of evidence referred to in paragraphs (*a*) and (*b*), any other evidence acceptable to the Court of the existence of the foreign proceedings and of the appointment of the foreign representative.
>
> (3) An application for recognition must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
>
> (4) The Court may require a translation of documents supplied in support of the application for recognition into an official language of Zimbabwe."

In *Ward and Another v Suit and Others In Re: Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) the court held the following in this regard:

> "The appointment of a liquidator to an external company in the country of its incorporation and the authority conferred by foreign legislation on the liquidator to deal with the assets of that company have no extra-territorial application. Such a liquidator, until he or she is recognised by a South African court, will accordingly have no power to deal with assets of the company situated in this country, regardless of whether those assets are movable or immovable; nor will creditors be precluded from attaching such assets and proceeding to execution.
>
> When an external company is being wound up in the country of its incorporation a competent South African court will, however, on application and in the exercise of its discretion, grant an order recognising the foreign appointed liquidator and ordinarily by so doing declare the liquidator to be entitled to deal with local assets (subject, of course, to local law) as if those assets were situated in the country in question. Such an order will be founded not only upon considerations of comity, but also convenience and equity."

See also *Lagoon Beach Hotel v Lehane* (235/2015) [2015] ZA SCA 2010

The application of the Insolvency Act relates to any state designated by the Minister of Justice by notice in the *Government Gazette*.(section 152 (3)). The Minister may also withdraw such notice in terms of subsection (4). Important to note is that the Insolvency Act, in terms of section 153, yields to other obligations incurred by Zimbabwe arising out of any treaty entered into. In cases of conflict, the provisions of the treaty or agreement shall prevail.

The Insolvency Act also envisages a foreign representative making an application for the recognition of main or non-main foreign proceedings. Pending the determination of the application for recognition of foreign proceedings, the High Court may, at the foreign representative`s request, grant urgent provisional relief like a stay of execution in terms of section 169.

The recognition of foreign main proceedings stays the commencement or the continuation of individual proceedings in connection with the debtor`s affairs, as well as execution against assets. It also suspends the debtor`s right to dispose of assets (see section 171). Other forms of relief that can be granted by the court include allowing the examination of witnesses and the collection of evidence, entrusting the administration or realisation of assets to the foreign representative or a designee, extending urgent provisional relief or granting any other appropriate relief.

The Insolvency Act also obliges the court to cooperate to the maximum extent possible with foreign Courts or foreign representatives, either directly or through a trustee, liquidator, corporate rescue practitioner, curator, or receiver. In this regard, the court may communicate directly with, or request information or assistance directly from, foreign courts or foreign representatives.

As regards concurrent proceedings, section 178 is to the effect that once foreign main proceedings have been recognised by the High Court, it is possible to launch insolvency proceedings in Zimbabwe only if the debtor has assets in Zimbabwe. The effects of the Zimbabwean proceedings are then limited to the assets of the debtor that are located in Zimbabwe and, to the extent necessary to implement cooperation and coordination under sections 165, 166 and 167, to other assets of the debtor that, under the law of Zimbabwe, should be administered in those proceedings.

In South Africa, the Cross Border Insolvency Act No. 42 of 2000 is the principal statute that regulates cross border insolvency. If a South African trustee or liquidator seeks to pursue investigation and recovery processes outside South Africa, he may have to apply to the South African High Court for "letters of request" recognising his appointment as a preparatory step for approaching the relevant foreign authorities.[49] In seeking these "letters of request", the representative need only hold the genuine belief that foreign proceedings should be initiated. In order to convince the court to grant him the "letters of request", he is not required to establish a *prima facie* case or prove a reasonable prospect of success in recovering assets through foreign examination.

[49] See note 40 above at p 300

The main problems presented by cross border insolvency are varied. The globalisation of international business means that people and assets can now move around more quickly than ever before. As such, due to technological advancements like the use of cryptocurrencies like Bitcoin, liquidators and trustees may find it difficult to keep up with currency movements by clever debtors who make use of such technology.

Another drawback on cross border insolvency is as a result of limitations on state power. As has been discussed above, each state can only dispose of the debtor`s assets in its own territory. Thus, efforts aimed at making the best use of a multinational debtor`s assets in business rescue attempts may be impeded by state boundaries.[50]

A further challenge of cross border insolvency is the lack of a proper legal framework that governs this area of law. There are no international instruments in place. Few treaties and conventions exist and unfortunately they are not wide enough to cover all the countries.

Conflict between universalist and territorialist approaches to cross border insolvency law may also present a challenge. The universalist approach would see all the debtor`s assets and affairs being dealt with in one proceeding, to which the courts and lawyers of other countries would give assistance. The

[50] Ibid at p 297

territorialist approach, in contrast, confines the effects of the debtor`s insolvency to the jurisdictional limits of each country in which there are assets and debts. Most legal systems blend the two approaches.[51]

As already alluded to above, there is no international convention that is designed to deal with cross border insolvency and the abovementioned problems it poses. In this regard, Ailola[52] commented thus:

> "For many years the law on inter-state cooperation in insolvency has been, at best, vague. There has been no definitive international legal rule on whether a non-liquidating or non-sequestrating state is legally bound to grant recognition to a foreign trustee in insolvency and as such to enforce an insiolvency order issued by a court in a foreign sequestrating state. Nor has there been any universal rule on the question of procedures to be followed. There is, for instance, no principle of international law governing multiple bankruptcy applications directed at the same debtor in different jurisdictions. Equally the question of secured interests and priorities remains largely a municipal law affair despite the dramatic rise in interaction between states and nationals of different states. This fluid state of affairs means that there has been no uniformity of approach among states in relation to these questions."

In response to this legal gap, the United Nations Commission on International Trade Law ("UNCITRAL") enacted a proposed Model Law on Cross Border Insolvency ("the Model Law") which was issued by the UNCITRAL secretariat on 30 May 1997 to assist states in relation to the regulation of corporate insolvency and financial

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[51] Ibid at pp 297-298

[52] Ailola D (1999) *Recognition of foreign proceedings, orders and officials in insolvency in Southern Africa: A call for a regional convention,* The Comparative and International Law Journal of Southern Africa, *32*(1), 54-71. Retrieved from http://www.jstor.org/stable/23251067

distress involving companies which have assets or creditors in more than one state. It ought to be noted that the Model Law is not a treaty but a template which individual states may adopt and adapt to their individual needs. The 2018 amendment of the Insolvency Act in Zimbabwe is an attempt by Zimbabwe to adopt and adapt the provisions of the Model Law.

In Kenya, the Insolvency Act 2015 was published in the Kenya Gazette on 18 September 2015. The Insolvency Act amends and consolidates Kenyan legislation relating to insolvency of natural persons and incorporated and unincorporated bodies, and in section 720 it grants the force of law to the UNCITRAL Model Law as set out in the Fifth Schedule to the Act.

Uganda has been a pacesetter in the East African region to incorporate the Model Law in its substantive legal regime. Part IX of the Insolvency Act 2011 elaborately provides for cross border insolvency in line with the Model Law.

A coordinated cross border insolvency practice is only possible where there is an underlying enabling reciprocal cross border insolvency legal regime in each of the member states. Considering that a country's biggest trade partner is usually a neighbouring state, it is imperative that the rest of the East African states that have not yet incorporated the Model law in their insolvency legal regimes should accelerate efforts to do so. This will improve the ease of doing business in the region and in turn fast track efforts towards regional integration and

economic development. Investors will also have legal certainty on cross border trade and insolvency proceedings in the region.[53]

The principle of comity refers to an association of nations for their mutual benefit. In other words, this is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

The principle of comity has been tested in Uganda in *Christopher Sales and Carol Sales v Attorney General [2013] UGHCCD 15* where the question raised was whether a judgment creditor 'stranded' with a judgment from a country with no reciprocal arrangements with Uganda could enforce that judgment.

It was held that a judgment creditor armed with such a judgment should be allowed to realise the fruits of his judgment and should be afforded recognition by Ugandan courts even in the absence of a reciprocal arrangement. One must however appreciate that for the principle of comity to firmly take root in the region, it would take unprecedented levels of judicial activism as was done in the abovementioned case.

[53] *Cross Border Insolvency: Is East Africa ready*? (2017) available at http://www.mmaks.co.ug/articles/2017/07/24

Cross border insolvency legislation in Africa will provide a gateway for foreign representatives to gain access to municipal proceedings and for African representatives to gain access to foreign proceedings. However, as far as the adoption and adaptation of the UNCITRAL Model Law is concerned, a number of African States have not yet adopted this model law into their national law and this hampers the implementation of cross border insolvency laws and the creation of a truly global village. There is need therefore for African states to expedite efforts to incorporate the Model Law into their legislation.

THE RULE OF LAW

The rule of law is a veritable aspect of every democratic system of government in the world. Despite the concept having been a fertile ground for much debate among jurists, philosophers, and historians - it has been branded as an elusive and broad concept which is not readily definable. It has, over the years, developed and metamorphosed to reflect so many faces that point to it being a bulwark against capricious and arbitrary governance. Most African States have been highly exemplary in upholding and following international conceptions of the rule of law. There, however, remain challenges which are highlighted hereunder.

In order to ascertain the development and challenges in the manifestation of the rule of law in African countries, it is

imperative for one to have a clear scope of the concept. As has already been alluded to above, the notion of the rule of law is one that has attracted divergent views. To understand the evolution of the rule of law, it is apposite to consider one of the earliest formulations of the concept by A.V Dicey who is considered as the earliest proponent of the rule of law concept.

According to Davis D, Chaskalson M & De Waal J in their article titled '*Democracy and Constitutionalism: The Role of Constitutional Interpretation*',[54] Dicey's conception of the rule of law comprised the following fundamental tenents:

1. The regular law is supreme and, therefore, individuals should not be subject to arbitrary power.
2. State officials are subject to the jurisdiction of the ordinary laws of the land in the same manner as individual citizens.
3. The Constitution is the product of the ordinary law of the law of the land, and the courts should therefore determine the position of the executive and the bureaucracy in terms of the principles of private law.

Carpenter G in the article '*Public Law*'[55] remarked as follows about the rule of law:

> "In its ordinary sense, as defined by AV Dicey, it means three things; first that no one is punishable except for a distinct breach of law, to which everyone is subject;

[54] Van Wyk *et al* (eds) *The South African Legal Order* (1994) at p1.
[55] Hosten WJ *et al* (eds) *Introduction to South African Law and Legal Theory* (1997) at p959.

> secondly, that all are equal before the law; and third, that the rights of the individual are not formally protected in a constitution, but by the ordinary courts of the land"

It should be noted that in modern Africa and the rest of the world, the conception of what is considered to form part of the rule of law has evolved from the basic elements reflected in the Diceyean formulation above. What is now widely accepted as a modern conceptualisation of the rule of law was formulated by the UN Secretary General in 2004. He defined the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[56]

[56] See Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-conflict" societies," https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616 (last accessed in April 2019).

In *Commissioner of Police v Commercial Farmers' Union*[57] the question of what the rule of law is dealt with. The Court held as follows with regard to the rule of law:

> "The rule of law must in my opinion be viewed as a national or societal ideal. The rule of law to me means everyone must be subject to a shared set of rules that are applied universally and which deal even-handedly with people and which treat like cases alike. It means that those who are affected by official inaction should be able to bring actions, on the basis of the official rules i.e. the law, to protect their interests."

In spite of the dissimilarity of opinion as to the exact scope of the rule of law, there is reasonable consensus that the following form the core elements of the rule of law:

- Legal certainty
- Independence of the judiciary
- Control over the exercise of discretionary powers and over subordinate legislatures
- Limitation of government powers through checks and balances
- Minimum procedural standards to ensure that no one may be found guilty unless she or he has been duly proved to be so
- Equality before the law, which implies more than equality before the courts

[57] 2000 (9) BCLR 957 (Z).

- Effective judicial remedies for the enforcement of fundamental rights[58]

What is apparent is that the essence of the rule of law is to curb the arbitrary exercise of public authority by the State, with an emphasis on governance through the law. Its function is aimed at safeguarding against a despotic government by restraining and civilising power. As was once stated by the Honourable Gubbay Chief Justice (Rtd) the rule of law is the antithesis of the existence of wide, arbitrary and discretionary powers in the hands of the executive. It is a celebration of individual rights and liberties, and all the values of a constitutional democracy, characterized by the absence of unregulated executive or legislative power.

Most African States have embraced the concept of the rule of law. In Zimbabwe, the 2013 Constitution which set out the constitutional framework for a democratic government provides as follows:

"2 Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
(2) …
(3) Founding values and principles
(1) Zimbabwe is founded on respect for the following values and principles—
(b) the rule of law;"

[58] See AMB Mangu *et al Advanced Constitutional Law: Fundamental Rights* (University of South Africa Press, 2011) at p21-22.

The supremacy of the Constitution as expounded by A. V. Dicey is also enshrined in Section 1(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), which provides thus: 'This constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria'. The South African Constitution similarly recognises the rule of law as a founding value (section 1(c) of the 1996 Constitution of South Africa).

Supremacy of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative or even wide discretionary powers on the part of government.[59] The implication of the above provisions relating to the supremacy of the law is that powers ought to be exercised in a manner that is consistent with the law.

The conception of the rule of law governing the exercise of public authority has received judicial affirmation in a plethora of African States. In the case of *Military Governor of Lagos State vs Ojukwu*[60] the Supreme Court of Nigeria stated that the essence of the rule of law is that the Court should never operate

[59] Ameh, I., (2012) Rule of Law as a Basis for Good Governance: The Nigerian Experience, in Madaki, A. M. ed., Challenges of Constitutional Governance in Nigeria, Legal Essays in Honour of Dr. Samson Sani Ameh SAN, MFR, by the Department of Private Law, A. B. U. Zaria, Meadal Micro Computers, Kaduna, Nigeria, p. 458.
[60] (2001) FWLR Pt. 50 P. 1779.

under the rule of force or fear. The Court further stated that the rule of law presupposes that: the state is subject to the law and that the judiciary is a necessary agency of the rule of law with the government having a correlate obligation to respect the respect the right of an individual citizen under the law.[61]

The rule of law continues to be an important foundational concept in African constitutional sphere. Its prominence is evidenced by the manner in which the courts have invoked the rule of law as a mechanism primed to limit, regulate as well as give more precise meaning to how governmental power is exercised. As such, the rule of law has emerged as a powerful practical principle that can be invoked before our courts to ensure that the exercise of state power conforms to basic minimum criteria.

The rule of law, as a constitutional principle, has been invoked in many cases where it has been raised as the basis of a constitutional challenge against Acts of Parliament or executive conduct. This has occurred in cases where the actions of the legislature or the executive were challenged on the basis that these actions somehow infringed on any of the rights contained in the Bill of Rights.

For instance in Zimbabwe, the Constitutional Court in *In re: Prosecutor-General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control*[62] held

[61] Ibid at p 1783.
[62] CCZ 13/17.

that the Prosecutor-General was compelled by law to issue a *nolle prosequi* certificate despite his claims as to constitutional independence in his decisions. The Court held as follows with regard to the rule of law at page 7-9 of the cyclostyled judgment:

> "The primary question before this Court is whether there is a law that compels the Prosecutor-General to issue certificates *nolle prosequi*. In answering that question, it is important to acknowledge the well-known canons that the Constitution is the supreme law and that the rule of law is a founding principle of our nation. … There are unambiguously crafted statutory provisions that compel him to do so and he must comply with them. The rule of law demands that a law that is in existence must be complied with. The law is an instrument for the regulation of all conduct, both public and private. The performance of his prescribed duties by the applicant is no exception. It is subject to regulation by law, *i.e.* the governing statutory provisions as interpreted by the courts."

In *National Director of Public Prosecutions and Others* v *Freedom Under Law*)[63] the South African Supreme Court of Appeal cited the *dictum* of Ngcobo J in *Affordable Medicines Trust & Others* v *Minister of Health & Others* 2006 (3) SA 247 (CC) para 49:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

[63] 2014 (4) SA 298 (SCA).

Despite recognition of the rule of law by many African States, the continent has been plagued by wanton violations of the principles of the rule of law. These challenges have characterised what can be referred to as the African paradox in which Constitutions entrench the rule of law formally without the substantive recognition of the principles thereto. The rule of law is the bedrock on which democracy and democratic practices are supposed to be anchored.

Among the notable challenges to the implementation of the rule of law is the military influence in African States. The Nigerian experience during the military rule period (1966 to 1999 with only intermittent civil governance) is reflective of the impediment of the rule of law where the military is involved in the politics of the State.

What is interesting to note is the fact that upon attaining power through the barrel of the gun as against the ballot box, the military junta in Nigeria proclaimed the rule of law as the cornerstone of their administration.[64]

It has been noted, however, that the military regime only paid lip service to the rule of law as their government were characterised by the 'Alpha and Omega' Syndrome which is a situation whereby the military in power believes that they are

[64] Agbaje, F. (1995), "*The Rule of Law and the Third Republic*", In Fundamental Legal Issues in Nigeria. N.L.R.ED. P Series No. 1), 45. See also https://www.iiste.org/Journals/index.php/JLPG/article/viewFile/1880/1835 (last accessed on 21/4/19).

the law and even above the law. Another way of describing the 'Alpha and Omega' syndrome may sometimes be the whims and caprices of the leadership of the military government and if this is the case, A.V. Dicey's concept of the rule of law has no place in a military regime where executive lawlessness reigns supreme. [65]

It is necessary to recall some of the incidents when the military engaged in the abuse of cardinal principles of the rule of law or acted in excess of the minimum norms of government acceptable in a civilised society. The most grotesque abuse of the rule of law under the military was through the reckless abandon with which and sometimes-mindless way they had to use force and the instrument of state power on the innocent and helpless civilian populace.[66]

For instance in 1985 the former warlord, Chief Odumegun Ojukwu was forcefully ejected from his residence in Lagos by a multitude of armed men. The apex court of Nigeria in the case of *Military Governor of Lagos State v Ojukwu*[67] while describing the ejectment as an act of executive lawlessness held that:

> "…essence of the rule of law is that it should never operate under the rule of force or fear."

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[65] See Akanbi MM 'Rule of Law in Nigeria' 'https://www.iiste.org/Journals/index.php/JLPG/article/viewFile/1880/1835 (last accessed on 21/4/19).

[66] Jegede, J.K. (1999), "*The Rule of law in a Military Government: An appraisal*". Nigerian Law and Practice Journal, 19.

[67] *Military Governor of Lagos State v Ojukwu* I Nigerian Weekly Law Report, 1986 at 626.

Other challenges encountered in the implementation of the rule of law on the continent can be attributed to the 'capture of the judiciary' or rather executive influence on workings of the judiciary. The judiciary as an organ of state plays an instrumental role in the enforcement of the rule of law on the continent. Section 165(1)(c) of the Zimbabwean Constitution on principles guiding the judiciary provides that the role of the courts is paramount in safeguarding human rights and the rule of law.

As aforementioned, one of the fundamental objectives of the rule of law entails the limitation of government powers through checks and balances. It is therefore of utmost importance that the independence of the judiciary be guaranteed.

Mahomed CJ in an address on the '*Role of the Judiciary in a Constitutional State*' published in 1998 (115) SALJ at 112, had this to say about the independence of the judiciary:

> "The exact boundaries of judicial powers have varied from time to time and from country to country, but the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundation of the civilization which it protects. What judicial independence means in principle is simply the right and the duty of the judges to perform the function of the judicial adjudication, on an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution."

The procedures for the appointment of judges can be another cause for concern. Most African states have a system whereby the President makes these appointments acting in accordance with the advice of independent judicial service institutions. Autocratic leaders are often in the habit of appointing to the bench only those who are notoriously known to be loyal to their cause.

The Swaziland case is apposite in this regard. The Constitution of Swaziland provides that the judges are appointed by the King after consultation with the Judicial Service Commission.[68] Even though Swaziland's 2005 Constitution enshrines the guarantee of the independence of the judiciary, the executive has not respected this principle in practice. A 2015 International Commission of Jurists report found that King Mswati III, the absolute monarch in Swaziland, stands in the way of the kingdom having independent judges.[69]

Solutions to counter the deadly blow dealt to the rule of law by captured judiciaries can be derived from the recommendations found in the report of the International Commission of Jurists on the proceedings of the '*African Conference on the Rule of Law*', Lagos, Nigeria, 1961. The following was stated in this regard:

> "2. It is recognized that in different countries there are different ways of appointing, promoting and removing judges by means of action taken by the executive and legislative

[68] Constitution of Swaziland, 2005, section 153.
[69] 'Justice Locked Out: Swaziland's Rule of Law Crisis' International Commission of Jurists (2016), 34 to 36.

powers. It is not recommended that these powers should be abrogated where they have been universally accepted over a long period as working well - provided that they conform to the principles expressed in Clauses II, III, IV and V of the Report of the Fourth Committee at New Delhi.

(3) In respect of any country in which the methods of appointing, promoting and removing judges are not yet fully settled, or do not ensure the independence of the Judiciary, it is recommended:

(a) that these powers should not be put into the hands of the Executive or the Legislative, but should be entrusted exclusively to an independent organ such as the Judicial Service Commission of Nigeria or the Conseil superieurde la magistrature in the African French-speaking countries;

(b) that in any country in which the independence of the Judiciary is not already fully secured in accordance with these principles, they should be implemented immediately in respect of all judges, especially those having criminal jurisdiction." (emphasis added)

Constitutionalism is also a sharp instrument for ensuring the maintenance of respect for the rule of law. It is submitted that constitutionalism is only attainable to a marked degree in states where there exists an independent and impartial judiciary, that is, a judiciary that is independent from the pressures of the executive, legislature and private persons and institutions; a judiciary that is fearless to apply the law in all cases, even where the government is an opposing party.

Complementary to an independent judiciary is the requirement of a well-organised and independent private legal profession, ready and willing to represent individuals in pursuit of their rights

– even where the other party is the government.[70] There has to be an independent and proactive legal profession, which, without fear of reprisal from any office or authority, is allowed to serve justice as officers of court; to represent their clients' interests to the fullest extent permitted by law; to vindicate the rights of minorities and the disadvantaged; to initiate social programmes to inform members of the public about their rights and duties; and to make the law more accessible to them.[71]

Mahomed CJ in an address at a conference on "The Rule of Law and its Constitutional Organs" held in Windhoek on 2 October 1994, remarked as follows:

> "[t]o survive meaningfully, the values of the constitution and the rule of law must be emotionally internalised within the psyche of citizens. The active participation of the organs of civil society outside of the constitution in the articulation and dissemination of these values is a logistical necessity for the survival and perpetuation of the rule of law. Without it, the law and the ruler become alienated from the ruled. In a dangerously sterile sense the law itself becomes a series of mechanical commands to the citizen, resting its ultimate authority on the physical might of the state and its capacity to impose its will on the citizenry. There can be no security in such a legal system either for the governor or the governed. A maturing society premised on the rule of law therefore urgently requires the support of national ethos of human rights conscientiously and methodically propagated, legitimised and activised [sic] by all organs of civil society"

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[70] Shivute P '*The Rule of Law in Sub-Saharan Africa- an overview*' at page 215. https://www.kas.de/c/document_library/get_file?uuid=2528ba94-446b-ce48-a32d-fa34b630faf1&groupId=252038 (last accessed 21/4/19)

[71] Ibid at 215.

Therefore it can be seen that the role of civic organs and an independent legal profession in propagating, without fear or bias, for the rule of law in African States cannot be taken lightly. Through public engagement and structured awareness programmes, these associations can be influential in the advancement of public interest and the ultimate survival of the fundamental tenets of the rule of law.

HUMAN RIGHTS

Human rights, also known as fundamental rights are those rights without which there can be no human dignity. These are rights that accrue to every person by virtue of them being human. The learned author Nsirimovu in the book '*Human Rights Educations Techniques in Schools*'[72] defined human rights as follows:

> "The term 'human rights' means the conditions of life which men have right to expect by virtue of being a human being. The concept involves not a statement of fact but rather a yard-stick against which conditions in practice may be measured. Nor does the supposed existence of rights necessarily imply the existence or even possibility of laws to enforce or protect rights, though in practice this may sometimes be the case. Rights are the ideals and distinguishing marks of a civilised society. The fundamental concepts embraced in the over-arching concept of rights may be identified as justice, equality, freedom and self-determination."

[72] Nsirimovu R. *Human Rights Educations Techniques in Schools* (Lagos: Macmillan, 1994) 24.

Whereas, Cranston in his book titled '*What Are Human Rights*?'[73] defined human rights as moral rights which all men everywhere at all times ought to have and something which no one may be deprived of without grave affront to justice; something which is owing to every human being simply because he is human. Human rights are moral and individual rights, but they can also be collective rights.

Human rights are usually categorised into three generations: the first generation comprising of civil and political rights, the second consisting of socio economic and cultural rights and the third group rights such as the right to development, self-determination, peace and a clean environment. The latter rights are sometimes referred to as community rights.[74]

Human rights are a key concept in international law and relations. By ratifying the United Nations Charter, African nations have committed and pledged themselves to promote 'the universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion.'[75] Currently, all African countries adhere to the view that respect for human rights in their societies is compulsory.

[73] Cranston M. *What Are Human Rights*? (New York: Taplinger, 1973) 3-4.
[74] See AMB Mangu *et al Advanced Constitutional Law: Fundamental Rights* (University of South Africa Press, 2011) at p9.
[75] Article 55 read with Article 56 of the United Nations Charter.

The respect for human rights on the continent is not only reflected at the universal level but also at the regional level through regional instruments aimed at protecting fundamental rights on the continent. All African States are now part and parcel of the African system of human rights which is built on the African Charter on Human and Peoples' Rights (ACHPR).[76]

The adoption of the ACHPR was a significant milestone in the march toward the protection of human rights in Africa. A perusal of the Charter depicts that it followed the pattern of international instruments on human rights but it also gives a new significance to aspects which have been lacking in the traditional notion of human rights.

According to the learned author Kunig in an article titled '*The protection of Human Rights by International Law in Africa*' published in the German Yearbook of International Law:[77]

> "The African Charter on Human and Peoples' Rights is a significant piece of law made by young states. It preserves the heritage of the Universal Declaration of Human Rights, and also follows the UN Covenants on Human Rights, but does not assert rights which are either not yet realisable or have few or no roots in African traditions. ... It emphasises rights of groups, fundamental duties and the individual obligations to the community, and restricts the jurisdiction of the Commission to advisory and conciliatory functions, thus avoiding a court-like structure which would equally not have been in accordance with African traditions. All in all the Charter thus demonstrates an independent approach by comparison with the other regional

[76] See Kabange C '*The Challenges for the Advancement of Human Rights and Democracy in Africa in the 21st Century*' (2012) Sachs Journal of Human Rights (Vol 2 Number 1) at p15.
[77] Kunig P. '*The protection of Human Rights by International Law in Africa*' (1982) 25 German Yearbook of International Law 138, 167.

> conventions on human rights, which is also reflected its provisions on the sources of law: customary law practised by States and general principles of law contained in their national legal system are emphasised, without rejecting universal international law in principle."

In comparing the African Charter with the Tanzanian Bill of Rights, the learned author Peter M.C in his book titled '*Human rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights*'[78] remarked as follows:

> "The adoption of the African Charter on Human and Peoples' Rights was an epoch-making event, not only to over millions Africans but to peace-loving and democratic-minded people the world over. It was the crescendo of sporadic and sometimes uncoordinated attempts by different interest groups in Africa to create a legal mechanism that would guarantee fundamental rights and freedoms to the common people. For many Africans, the Charter had created high expectations, especially regarding the restoration of human dignity, which had been totally violated by some African leaders."

In addition to the Charter, the Constitutions of most African States have an entrenched bill of rights (See chapter 2 of the Constitution of Lesotho, 1993; Chapter 3 of the Constitution of the Kingdom of Swaziland Act 2005; Chapter 4 of the Constitution of Zimbabwe, 2013 etcetera) which is supported by numerous pieces of human rights legislation. These legal instruments

[78] Peter M.C. *Human rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights* (New York: Greenwood, 1990) 7.

contain provisions that recognise and protect a wide array of fundamental rights on the continent.

It has become clear, however, that beyond the recognition and inclusion of fundamental rights in a legal system, these rights will remain meaningless for African citizens if they are not translated to a living and tangible reality. The challenge faced by the continent is that the promotion of fundamental rights at the universal, regional and municipal levels has been taken up with ease but their enforcement on the continent remains the hardest part of the puzzle to fix in place.[79]

The prevailing state of affairs clearly shows that human rights have not still been given maximum consideration by many African States. From the early 1960s, Africa has been going through tumultuous times characterised by series of egregious violations of human rights. In its 2010 report, Amnesty International noted that: "members of armed opposition groups and government security forces in Central African Republic, Chad, DRC, Somalia and Sudan continued to commit human rights abuses with impunity in those parts of the countries affected by armed conflict or insecurity."[80]

[79] See Kabange C '*The Challenges for the Advancement of Human Rights and Democracy in Africa in the 21st Century*' (2012) Sachs Journal of Human Rights (Vol 2 Number 1) at p16.
[80] Amnesty International Report: The State of the World's Human Rights (Amnesty 2010)at p4.

In its 2012 report, the non-governmental organisation Human Rights Watch observed that politically motivated human rights violations escalated as elections approached in the DRC. The United Nations investigators reported 188 cases of such violations before the official campaign was launched.[81]

Recently in Kenya, some Kenyan and international human rights organisations documented a range of rights abuses by the security forces in military and law enforcement operations between 2016 and 2017 across the country. In Laikipia county of the Rift Valley, where herders looking for pasture for their livestock are in conflict with private ranch owners, Human Rights Watch found, in June 2017, that police and the military were implicated in beating and killing herders and their livestock from the Pokot community.[82]

Solutions and a glimmer of hope with regard to the grave human rights violations on the African continent can be derived from the establishment of institutions supporting constitutional democracy. Both the Zimbabwean and South African Constitutions have established such institutions, for instance they provide

[81] Human Rights Watch World Report 2012 at p 104. https://www.hrw.org/sites/default/files/world_report_download/wr2012.pdf (Last accessed 22/4/19)
[82] Human Rights Watch World Report 2018 at p317-19. https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf (last accessed 22/4/19)

for the establishment of a Human Rights Commission among others.[83]

These institutions supporting constitutional democracy have been described in legal literature as 'soft protection mechanisms' that broadens the net of inclusion for the protection of human rights on the continent.[84] Reference to these institutions as 'soft protection mechanisms' recognises that it is not exclusively through the courts that fundamental rights may be realised and achieved.

According to Holness D and Vrancken P in '*Non-judicial enforcement of human rights*'[85] stated that the broad aim in establishing these institutions is to ensure:

> "Protection and promotion of human rights through monitoring and effective investigation of complaints against violations of these rights and to make recommendations on the steps to be taken to address the alleged violations."

The idea behind the establishment of these institutions encapsulates a commitment to transparency and social justice which involves the synthesis of the law and justice. The importance of creating these institutions supporting

[83] Section 242 of the Constitution of Zimbabwe, 2013; section 181b of the Constitution of South Africa, 1996.
[84] De Vos P '*Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution*' (1997) 13 SAJHR 67.
[85] Holness D and Vrancken P ' Non-judicial enforcement of human rights' in Govindjee A & Vrancken P (eds) *Introduction to human rights* (2009) Butterworths Durban at p240.

constitutional democracy in African states plagued with wanton human rights violations cannot be gainsaid. The learned authors Holness and Vrancken in '*Non-judicial enforcement of human rights*' supra at page 239 emphasise the importance of these institutions with reference to the difficulties associated with the enforcement of human rights through the courts. They contend that:

1. the enforcement of human rights through the courts is highly confrontational;
2. the justice system is simply not equipped to deal with every single human rights dispute that may arise;
3. court procedures that such that the courts take a long time to deal with cases that they are prepared to adjudicate;
4. litigation is usually an expensive exercise, which may discourage the more vulnerable people from appealing to the courts due to their lack of financial means, with the result that they do not have a proper and equal access to the courts.

The difficulties associated with the promotion and protection of human rights as noted above give due recognition to the importance of utilising soft protection of human rights through monitoring and investigation of instances of alleged human rights violations. The learned authors go further to hold at page 240 that the role of these institutions is particularly important when one considers that the courts are not in a better position to enforce their own orders as a result of constraints on the human and financial resources necessary to monitor the implication of the orders.

It is from this background that it is recommended that African States establish these institutions, particularly a Human Rights Commission with the following functions:

(*a*) to promote awareness of and respect for human rights and freedoms at all levels of society;

(*b*) to promote the protection, development and attainment of human rights and freedoms;

(*c*) to monitor, assess and ensure observance of human rights and freedoms;

(*d*) to receive and consider complaints from the public and to take such action in regard to the com-plaints as it considers appropriate;

(*e*) to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;

(*f*) to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person;

(*g*) to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated;

(*h*) to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of any such investigation; (See section 243 of the Constitution of Zimbabwe, 2013)

The independence of the judiciary also plays a vital role not only in the realisation of the rule of law but in the enforcement of fundamental rights. The Learned authors Vrancken and

Killander on '*Human rights ligitation'*[86] at page 251 argue that the protection of human rights would be of no value if there were no judicial bodies to turn to, if the bodies were not independent and impartial, if access to these bodies could be denied and if other bodies could refuse to comply with the decisions of the judicial bodies.

It is from this premise that the provision of the right to equal access of courts is recommended in all African States. It is within the framework of the right to equal access of the courts that the judiciary plays an important role in the adjudication of disputes relating to human rights violations. The right to equal access of the courts was given content by the South African Constitutional Court in *Lesapo v North West Agricultural Bank and Another*[87]

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."

[86] Vrancken P and Killander M 'Human rights ligitation' in Govindjee A & Vrancken P (eds) *Introduction to human rights* (2009) Butterworths Durban at p240.
[87] 1999 (12) BCLR 1420.

In Zimbabwe, section 85(1) of the Constitution liberalises the concept of *locus standi* and access to courts in relation to purported infringements to fundamental rights enshrined in the Constitution. It allows a wide range of persons to approach the courts for personal relief or to vindicate the public interest. Section 85(1) of the Constitution allows not only persons acting in their own interests, but also any person acting on behalf of another person who cannot act for themselves, any person acting as a member, or in the interests of a group or class of persons, any person acting in the public interest and any association acting in the interests of its members, to launch court proceedings against alleged violators of the rights in the Declaration of Rights.[88]

Section 85(1) of the Zimbabwean Constitution has been instrumental in the adjudication of human rights violations in Zimbabwe. For instance, in the landmark case of *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & Ors* CCZ 12/15 the applicants approach the Constitutional Court directly in terms of the above section alleging the infringement of fundamental rights of the girl children subject to early marriages. This effectively led to the Court finding that section 22(1) of the Marriage Act [*Chapter 5:11*] and any law,

[88] A Moyo 'Standing, access to justice and the rule of law in Zimbabwe' (2018) 18 *African Human Rights Law Journal* 266-292 at 267.

custom and practice authorising child marriages was unconstitutional.

ADHERENCE TO INTERNATIONAL LAW

Dugard J in the book *International Law: A South African Perspective* defines international law as a body of rules and principles which are binding upon the States in their relations with one another.[89] These rules may broadly be divided into general and particular rules. The learned author proceeds to give an example of the rule that the high seas are open to the shipping of all nations is a general rule of international law binding on all States, whereas a particular rule of international law is created by a treaty establishing a relationship between two or more States.

In order to examine the adherence to international in African States, it is imperative to have a clear understanding of what constitutes international law. Assistance can be derived from the sources of international law. The sources of international law are described in article 38(1) of the State of the International Court of Justice as:

- international conventions (treaties), whether general or particular;
- international custom, as evidence of a general practice accepted as law;

[89] Dugard J *International Law: A South African Perspective* 4ed (Juta & Co, Ltd 2011) at page 1.

- ❖ the general principles of law recognised by civilised nations; and
- ❖ judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.[90]

Therefore, international law is essentially made up of treaties, reflecting the express agreement of States, and custom, which comprises those rules of international conduct to which the states have given tacit consent. The applicability of international law in disputes in any particular country ultimately depends upon its constitutional provisions.

The application of international law in Zimbabwe is governed by sections 326 and 327 of the Constitution. Section 326 recognises that customary international law is part of the law of Zimbabwe to the extent of its consistency with the laws of the country. This provision is an affirmation of the long-standing judicial precedent by GEORGES JA in *Barker McComarc (Pvt) Ltd* v *Government of Kenya*[91] where he stated that customary international law is part of the law of Zimbabwe.[92]

Section 327 of the Constitution directly addresses the application of international law in Zimbabwe. It states that any international treaty which has been concluded or executed by the President, or under the President's authority, does not bind

[90] Ibid at p24.
[91] 1983 (4) SA 817 (ZS).
[92] Saki O and Chiware T *The Law in Zimbabwe* (2017) available at http://www.nyulawglobal.org/globalex/Zimbabwe1.html

Zimbabwe unless it has been approved by Parliament. The section further provides that the treaty does not form part of the law unless it has been incorporated into the law through an Act of Parliament.

Section 34 of the Constitution places an obligation upon the State to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law. Zimbabwe as a jurisdiction is part of a universal standard of norms that are given recognition worldwide. These norms are contained in various conventions ratified by the country, for instance the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR) among others.

Adherence or compliance is defined as the degree to which the State behaviour conforms to what an agreement prescribes or proscribes.[93] Adherence to the rules of international law which binds Zimbabwe can be denoted from the judicial decisions handed down by the courts of the land.

In the 2019 case of *S v Chokuramba*[94] the Constitutional Court of Zimbabwe in rendering judicial corporal punishment of sentenced juveniles as being a cruel, inhumane and degrading punishment

[93] Young, O. (1979). *Compliance and public authority*. Baltimore: Johns Hopkins University Press at page 104.
[94] CCZ 10/19.

considered may provisions of international law and reached a decision that was consistent with the various treaties that were signed by the country. Handing down the unanimous decision, the held as follows at page 47 of the cyclostyled judgment:

> "The appropriateness of the choice by a court of a sentencing option or disposition method for a juvenile offender will depend on the extent to which the decision complies with the fundamental principles of international law, conventions and treaties to which Zimbabwe is a party that govern the administration of juvenile justice. The criminal justice system and the juvenile justice system in Zimbabwe have embraced the fundamental principles of relevant international legal instruments and given effect to them. In that way, they bind judicial officers to comply with the provisions of the international legal instruments in the choice and application of the sentencing options and disposition orders when dealing with juvenile offenders. The relevant provisions of international law, conventions and treaties brought a revolution to the administration of the juvenile justice system, both in terms of the shift of emphasis in respect of the objectives to be pursued in the punishment of juvenile offenders and the principles to be applied in the assessment of the appropriate sentence. The most important instrument in this regard is the *CRC*. The primary objectives the court is required by the *CRC* to bear in mind when choosing and assessing an appropriate sentence for a juvenile offender are the reintegration and rehabilitation of the juvenile offender with his or her family or community, where he or she becomes a productive member. (emphasis added)

In the case of *Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O & Ors* supra, the Court held that when interpreting the fundamental rights enshrined in chapter 4 of the Constitution one has to take into account international law. The Court held as follows at page 25-26 of the cyclostyled judgment:

> "Section 46(1)(c) of the Constitution imposes an obligation on a court when interpreting any provision of the Constitution

> contained in Chapter 4, to take into account international law and all treaties and conventions to which Zimbabwe is a party. Both s 22(1) of the Marriage Act and s 78(1) of the Constitution were born out of provisions of international human rights law prevailing at the time of their respective enactment. The meaning of s 78(1) of the Constitution is not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions on matters of marriage and family relations at the time it was enacted on 22 May 2013. In deciding whether s 22(1) of the Marriage Act or any other law which authorises child marriage infringes the fundamental rights of girl children enshrined, guaranteed and protected under s 81(1) as read with s 78(1) of the Constitution, regard must be had to the contemporary norms and aspirations of the people of Zimbabwe as expressed in the Constitution. Regard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a party, on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood." (emphasis added)

Therefore, it can be seen that the judiciary in Zimbabwe has been active in attempts to ensure that the law and conduct of executive authorities in the country complies with the provisions of international law that binds the country. The same can be said for other Southern African countries like the neighbouring South Africa.

South African courts have shown, since as early as 1894, respect for international law. In *CC Maynard et al v The Field Cornet of Pretoria*,[95] Kotze CJ declared that municipal law:

> "must be interpreted in such a way as not to conflict with the principles of international law … it follows from [this], as put by Sir Henry Maine, 'that the state which disclaims the authority of international law places herself outside the circle of civilised nations.' It is only by strict adherence

[95] (1894) 1 SAR 214 at 223.

> to these recognized principles that our young state can hope to acquire and maintain the respect of all civilized communities, and so preserve its own national independence."

It should be noted that international law arguments did not, however, receive such sympathetic consideration before the South African courts of the apartheid period. It is submitted that judgments of this time showed a hostility resembling that of the executive to international law.[96]

At present, the adherence to customary international law in South Africa is regulated by section 232 of the 1996 Constitution. This section provides that: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' Section 233 of the Constitution also provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. It should be noted that the courts in South Africa are furthermore enjoined to consider international law in interpreting the Bill of Rights. Thus it can be seen that in an attempt to adhere with international law provisions, the South African Constitution stipulates that

[96] J Duggard 'The South African judiciary and international law in the apartheid era' (1998) 14 SAJHR 110.

international law can be used as a tool to interpret fundamental rights.

In *S v Makwanyane*[97] the South African Constitutional Court stated that both binding and non-binding public international law may be used as tools of interpretation:

> "International agreements and customary international law accordingly provide a framework within which Chapter 3 [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealings with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights … may provide guidance as to the correct interpretation of particular provisions."

Despite the above attempts to secure adherence to international law, it has been established that there have been various violations to international law on the continent particularly in areas that deal with International Humanitarian Law. Solutions for the challenges in complying with international law on the continent can be derived from the recommendations by International Committee of the Red Cross on enhancing ratification rates of International Humanitarian Law rates on the continent.

It is stated that '*peer-to-peer meetings of States*' can be utilized as a unique platform for profiling International Humanitarian Law on the continent.[98] Such events provide

[97] 1995 (3) SA 391 (CC) at [36]-[37].
[98] https://blogs.icrc.org/law-and-policy/2016/10/04/africa-ihl-ratification-compliance/ (last accessed on 23/4/19)

government representatives with the opportunity to discuss with their counterparts the challenges that they face in the promotion and enforcement of International Humanitarian Law' and also to share in the best practices for overcoming such challenges. It is also submitted that such meetings can aid in giving like-minded government officials from the same region an opportunity to discuss advantages and disadvantages of various treaties.[99]

Provision can be made for training in international law in a manner that is beneficial to African audiences. There is no doubt that increased awareness of international humanitarian law results in the better performance and adherence to the relevant international instruments. These trainings can be conducted by the State itself, a local think-tank or by an international organization.[100]

DIRECT INVESTMENT

Foreign direct invest is welcomed and, indeed, actively sought after by virtually all African countries. The contribution that direct investment can make into African economic development and integration into the world economy is widely recognized. For this reason, African countries have made considerable efforts over the past decade to improve their investment climate. They have liberalized their investment regulations and have offered

[99] Ibid.
[100] Ibid.

incentives to foreign investors. More importantly, the economic performance of the region had substantially improved from the mid-1990s.[101]

After gaining political independence in the 1960s, African countries, like most developing nations, were very sceptical about the virtues of free trade and investment. Consequently, in the 1970s and 1980s several countries in the region imposed trade restrictions and capital controls as part of a policy of import-substitution industrialization aimed at protecting domestic industries and conserving scarce foreign exchange reserves.[102] There is now substantial evidence that this inward-looking development strategy discouraged trade as well as foreign direct investment 'FDI' and had deleterious effects on economic growth and living conditions in the region.[103]

Although most of the concerns of African countries regarding foreign investment are legitimate- for example, there is some evidence that the activities of foreign oil firms in Nigeria have had perverse effects on the local environment.[104] Studies show that if a host country creates an environment conducive to

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[101] See the Executive Summary on Foreign Direct Investment in Africa: Performance and Potential (UNCTAD, 1999)

[102] Dupasquier C and Osakwe P.N 'Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities' (Africa Trade Policy Centre, 2005)1.

[103] Rodrik, D. (1998). Trade policy and economic performance in Sub-Saharan Africa. National Bureau of
Economic Research Working Paper 6562.

[104] EIA (2003). Nigeria: environmental issues. Country Analysis Briefs, Energy Information Administration,
US Department of Energy, July.

investment, direct investment can play a huge role in its development efforts.

As has already been alluded to above some of the policies adopted by a vast number of countries inhibited the inflow of foreign direct investment in many African States. Other challenges faced by African States in attracting directing investment are as a result of the following factors:

- Macroeconomic instability: Instability in macroeconomic variables as evidenced by the high incidence of currency crashes, double digit inflation, and excessive budget deficits, has also limited the regions ability to attract foreign investment. Recent evidence based on African data suggests that countries with high inflation tend to attract less direct investment.
- Poor infrastructure: The absence of adequate supporting infrastructure: telecommunication; transport; power supply; skilled labour, discourage foreign investment because it increases transaction costs. Furthermore poor infrastructure reduces the productivity of investments thereby discouraging inflows. It has been submitted that good infrastructure has a positive impact on direct investment flows to the continent.[105]

[105] Asiedu, E. (2002b). Aggressive trade reform and infrastructure development: a solution to Africa's foreign direct investment woes. Mimeo, Department of Economics, University of Kansas; Morrisset, P. (2000). Foreign direct investment to Africa: policies also matter. Transnational Corporation 9, 107-25.

- High protectionism: The low integration of Africa into the global economy as well as the high degree of barriers to trade and foreign investment has also been identified as a constraint to boosting direct investment to the region.[106]
- High dependence on commodities: Several African countries rely on the export of a few primary commodities for foreign exchange earnings. Because the prices of these commodities are highly volatile, they are highly vulnerable to terms of trade shocks, which results in high country risk thereby discouraging foreign investment;[107] and
- Political instability: some parts of the continent are politically unstable because of the high incidence of wars, frequent military interventions in politics, and religious and ethnic conflicts. Sachs and Sievers in 'FDI in Africa: Africa Competitiveness Report' for the Geneva: World Economic Forum also argued that political stability is one of the most important determinants of FDI in Africa.[108]

The solutions to the African challenges pertaining to attracting foreign investment are rooted in each country adopting domestic regulatory reforms, image building and investment marketing. In other words, there is need for African States to ensure political and macroeconomic stability in their respective countries. Also

[106] Dupasquier C and Osakwe P.N 'Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities' (Africa Trade Policy Centre, 2005) 15.
[107] Ibid at 16.
[108] Sachs, J. & Sievers, S. (1998). FDI in Africa. Africa Competitiveness Report 1998. Geneva: World Economic Forum.

the protection of property rights and implementation of the principles of the rule of law will foster an environment that is conducive for direct investment inflows.

Supporting existing investors may also be a solution. The improvement of the investment climate for existing domestic and foreign investors through infrastructure development; provision of services and changes in the regulatory framework, relaxing laws on profit repatriation etc will encourage them to increase their investments and also attract new investors. In the case of domestic investors, an improvement in the investment climate will also encourage them to keep their wealth in the region and reduce capital flight.

The diversification of African economies can also aid in attracting direct investment. Several African countries rely on the export of a few primary commodities for foreign exchange earnings. This exposes them to significant terms of trade shocks. Diversification of the economy will enable them to cushion the effects of these shocks and reduce country risk. The reduction in country risk will increase the attractiveness of the economy to FDI in the secondary and tertiary sectors.[109]

[109] Dupasquier C and Osakwe P.N 'Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities' (Africa Trade Policy Centre, 2005) 18.