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**KEYNOTE PRESENTATION ON DECONSTRUCTING CONSTITUTIONALISM,
ITS CONCEPTUAL UNDERPINNINGS AND HOW IT RELATES TO ELECTORAL
JUSTICE**

**PRESENTED ON THE OCCASION OF THE AFRICA ELECTORAL JUSTICE
NETWORK**

ELEPHANT HILLS RESORT — VICTORIA FALLS

by

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*Turning the Hope of the African Charter on Democracy, Elections and Governance to
Action*

*The Role of the Judiciary in Upholding the Rule of Law and Ensuring Free, Fair and
Credible Elections in Africa*

INTRODUCTION

Electoral justice is an inherent expectation in all democratic electoral processes. The Third Annual Meeting of the Africa Electoral Justice Network (“AEJN”) brings together Judges and members of electoral administrative bodies. The participants are all involved in electoral processes. The shared participation in electoral processes by the delegates at the meeting draws attention to the common values and challenges encountered in electoral administration and adjudication.

Judges need to be able to share experiences and support each other in fulfilling their mandate in electoral adjudication. The principles of electoral adjudication are all overarched by the concept of constitutionalism. In essence, the legal reasoning that Judges must apply in the context of electoral adjudication is the same. The standards to which Judges are held are the same. It is therefore only proper that Judges focus on the concepts which have a bearing on their functions in electoral processes and identify the best practices for doing so. However, the identification of the best practices can only be discussed where the essential elements of the underlying values and principles are elucidated. Thus, the purpose of the paper is to explore the elements of

constitutionalism to demonstrate how it relates to electoral justice. Constitutionalism is to be relied on as a conceptual aid to the effective and efficient discharge of electoral justice.

In discussing the subject at hand, reference is made to provisions of the Constitution of Zimbabwe, 2013 and Zimbabwean electoral law. The reason is that the Constitution of Zimbabwe embraces the fundamental features of constitutionalism and electoral justice. It, therefore, makes a good reference point for the discussion.

CONSTITUTIONALISM AND THE UNIVERSAL PRINCIPLES OF DEMOCRACY

Constitutionalism is often accepted as a universal concept. In analysing it, and for the purpose of the discussion, the starting point is to break down the essential elements of constitutionalism as a functional concept in electoral justice. There are several definitions of constitutionalism. *Smith*, citing *Ginsburg*, stated as follows:

“Ginsburg describes constitutionalism as an effort to limit government via law – it is the pursuit of the ‘ideal of limited government under law’ – and he stresses that it involves more than efforts to limit particular subordinate agencies of government. Ginsburg defines those attempts as simply ‘legality’ – the rule of law applied by the top government officials to their subordinates. Constitutionalism aims higher. It seeks to constrain

whoever is regarded as sovereign in and over an entire government, whether the sovereign is a monarch or a democratic people.”¹

The Zimbabwean jurisdiction has accepted constitutionalism as a concept:

“... generally distinguished by respect for the principles of limited government, the rule of law, the separation of powers, democracy, and the protection of individual rights and freedoms. These foundational values and principles are necessary to preserve a just and democratic society that is based on openness where people's rights are protected and the Government is answerable to the people.”²

It is clear that there are constitutive elements of constitutionalism. To achieve the desired effect, it is necessary to discuss some of these concepts separately insofar as they relate to electoral justice.

DEMOCRACY

Democracy is an essential element of constitutionalism. In this sense, it is understood as follows:

“The word ‘democracy’ is a term that comes from Greek and it is made up with two other words *demos* = people and *kratein* = to govern, to rule. ‘Democracy’ can then be literally translated by the following terms: Government of the People or Government of the

¹ Rogers M. Smith, *Constitutionalism and the Rule of Law: Considering the Case for Antecedents*, 88 *Chi.-Kent L. Rev.* 35 (2012) at p 3. Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol88/iss1/4> (accessed 30 January 2024)

² Hon. Malaba CJ, “2024 Legal Year Opening Speech”, Harare, 2024 at p 6.

Majority. Democracy, as a State form, is to be distinguished from monarchy, aristocracy and dictatorship. You may have already heard about the most common definition of democracy: ‘the government of the people, by the people and for the people’ (Abraham Lincoln)? To put it another way we can say that a government comes from the people; it is exercised by the people, and for the purpose of the people’s own interests. This description is only a very broad one, to start with, but the pages that follow will explain to you in a more concise way the different facets of democracy”³

From the above definition, there are commonly accepted characteristics of democracy. Democracy carries the concept of rule by the people. It is a social choice. It is a determination of the type of government that a people want to be under. It is notable that not all States choose a purely democratic form of government.

There is a moment in time for all people when a choice of the preferred form of government has to be made. The choice is usually made at the time of the making of a constitution. For many African countries, the choice of democratic governance was borne out of liberation struggles.

The choice of democratic governance is typically a comprehensive decision, covering a scope of socio-legal and political aspects. One of these aspects is the mode of electoral participation. Each country

³ J. Aime and P Becker, “*What is democracy*”, (Friedrich-Ebert-Stiftung, 2008) at p 4. Available at: <https://library.fes.de/pdf-files/bueros/madagascar/05860.pdf>.

chooses a mode of participation that it considers to be ideal for its circumstances. For example, some countries have electoral models based on proportional representation while others prefer methods of direct election methods undergirded by the principle of “first-past-the-post”. The aspect of the means of election of the government is discussed in more detail below.

In addition to the foregoing characteristics, democracy is the foundation of the foundational principles of the law. An understanding that governments are formed by the people, of the people and for the people informs the emergent principles of the law necessary to protect any form of government. For this reason, some common concepts associated with democracy, such as universal suffrage, are not common in other forms of government like autocracies and dictatorships. Under these forms of government, the people have no choice. There is no government of the people. If the dictator or autocrat acts democratically, it is simply by choice.

Democracy is differentiated from other forms of government based on the unique characteristics of the founding laws in democracies. Zeroing in on electoral justice, it is for this reason that principles such as that of

a free and fair election cannot be spoken of outside an election. Democracy is the underlying concept of constitutionalism embodying these principles within the law. The law provides an answer to what has to be done in a democracy. To understand the legal implications of democracy, there is a need to explore the other concepts associated with constitutionalism.

RULE OF LAW

In the jurisdiction of Zimbabwe, the question of what exactly the phrase “rule of law” entails was addressed by CHINHENGO J in the High Court decision *Commissioner of Police v Commercial Farmer’s Union* HH 84-2000, at pp 35-36 as follows:

“I acknowledge that at the philosophical level there are different schools of thought as to what the rule of law encompasses. At the practical level, however, where a written constitution, amenable to amendment by the people is in existence, and statute law, old and new exist, and which the people’s representatives can amend or repeal, an argument such as the one advanced by the [Commissioner of Police, to the effect that certain laws relating to land should not be enforced] is ... spurious. There is, in my opinion, a middle view of the rule of law between the two extremes – that the law or the rule of law is partisan on the one hand and that it is neutral on the other hand. That middle view is that the rule of law represents a norm, a standard which ensures that any person may bring up a claim and have it determined within the framework of a body of principles which are applied

to all persons equally. Viewed from this perspective the role of the State is to maintain law and order and mitigate conflict within the community and the instrumentality for the maintenance of law and order is the police. The rule of law must be viewed as a national or societal ideal. [Accordingly] ... the rule of law ... means that 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.”

According to the United Nations:

“[The rule of law] requires measures to ensure adherence to the principles of supremacy of the 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.”⁴

The rule of law is part and parcel of constitutionalism. There is a connection between the concepts of democracy, the rule of law and good governance. A contemporary view on the subject was expressed as follows:

“In order for democracy and good governance to function and for the rule of law to be respected in order to promote sustainable development, constitutionalism then becomes a cornerstone. The rule of law upholds democracy. Economic development influences democracy through stability in governance but effective governance in contemporary society encourages and strengthens both constitutionalism and the rule of law in order to

⁴ See United Nations, “What is the Rule of Law”, *United Nations*, n.d. Available at: <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>. Accessed on 12 March 2023.

accomplish economic progress and development (Adeyemo, 2020).”⁵

One cannot think of constitutionalism without the rule of law. The rule of law occurs as a necessary feature for sustaining constitutional democracies. In the context of elections, law means the constitution and statutes. There must always be a law, either in the form of a constitution or a subsidiary statute, setting out the procedure for carrying out acts necessary to sustain constitutionalism.

TRANSPARENCY

Transparency is generally understood as the quality or state of being transparent. Although it is not in itself an essential feature of constitutionalism, it is an outcome of the outplay of most features of the concept. According to *Sithomola*:

“In contemporary constitutional democracies, constitutionalism has become synonymous with limited government, which is one of the key imperatives for sustaining good governance (Bellamy 2010:1). This denotes that, in a true constitutional democracy, the government not merely focuses on attaining its set governmental aims. In essence, the government must focus on providing a stable and legitimate framework between those entrusted with state authority and the citizens. Thus, constitutionalism revolves around

⁵ See Kesiena Urhibo, “The Prospective Nexus between Constitutionalism, the Rule of Law and Democratic Good Governance: The Nigerian Experience”, *Beijing Law Review*, Vol. 14 No. 2, June 2023 <https://www.scirp.org> (accessed 30 January 2024)

critical good governance dimensions such as accountability, the rule of law, transparency and participative processes in terms of the day-to-day activities of the state (*Tzanakopoulou* 2018:31).⁶

Transparency is associated with governments which fully subscribe to constitutionalism. It is more important in the subject of electoral justice.

The reason is that electoral processes are designed to facilitate and legitimise the assumption of governmental power by those who contest for it. The process of assuming power must be seen to be transparent.

ACCOUNTABILITY

Accountability is closely associated with judicial independence. In Zimbabwe, recognition has been made of the fact that:

“Accountability closely trails the concept of judicial independence as a medium of ensuring that the Judiciary is cognisant that its autonomy is borne out of a duty to the citizenry. This concept ensures that the Judiciary retains its liability to the will of the people in spite of its independence from external influences in the observance of its duties. Senior U.S. District Judge John L. Kane sagely notes that ‘We must all understand that judicial independence is not for the protection of Judges, but for the protection of the public.’⁷ This illuminates the two concepts as mutually compatible in their purpose rather than the rudimentary view that they exist in conflict. Due focus on

⁶ See T Sithomola, “Constitutionalism and Public Administration Critical Considerations for Public Administrators in South Africa”, *Administratio Publica*, Vol. 30 No. 3, Sept. 2022 at p. 25. Available at: https://journals.co.za/doi/pdf/10.10520/ejc-adminpub_v30_n3_a4.

⁷ Judge John L. Kane, Jr, Keynote Address at the National Association of Administrative Law Judges 1997 Annual Meeting and Conference in Denver, Colorado: Public Perceptions of Justice: Judicial Independence and Accountability (Sept. 29, 1997).

accountability also ensures that the Judiciary does not ostracise itself from society through an overbearing emphasis on judicial independence which threatens to leave it insensitive to the justified demands of society.”⁸

Accountability is a necessary ingredient for democracy. There cannot be a democratic government which truly exists for the people but fails to be accountable. It follows that in electoral justice the same standard of accountability applies.

RESPECT FOR FUNDAMENTAL RIGHTS

The respect for fundamental human rights is another feature of constitutionalism which is relevant to electoral justice. According to the United Nations, “Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more.”¹ There cannot be the government for the people without recognition of the aforementioned human rights among others. It is for this reason that the

⁸ Hon. Malaba CJ, “Discussion on The Concept of Judicial Accountability and Judicial Independence: A Comparative Experience on Regional and Jurisdictional Standards on Judicial Accountability”, Maputo 2022 at p. 4.

Constitution of Zimbabwe sets the recognition of the inherent dignity of each human being as one of its founding values.⁹

POLITICAL PARTICIPATION

Political participation is a key element of constitutional democracy. Political participation involves the ability of the people to coalesce into a group based on their shared interests and aspirations. It is only through political participation that people can express their views and contribute to the development of democracy. Constitutionalism thrives on the ability of the people to participate in the processes that it provides for.

GOVERNMENT

The government is a component of constitutionalism. The government is established by the people, of the people and for the people. The common phrase used in most constitutions to establish a nation is “we the people”. In respect of the Constitution of the United States of America, it has been commented that:

“Who is included in ‘We the People’? This is a question that has been debated throughout American history. William H. Hastie,

⁹ See section 3(1)(e) of the Constitution of Zimbabwe, 2013.

the first black federal judge in the United States ..., wrote: ‘Democracy is a process, not a static condition. It is becoming, rather than being. It can be easily lost, but is never finally won.’ Much of the history of the United States reflects this ongoing process, as individuals and groups have attempted to make the country better reflect the democratic ideals expressed in its founding documents.”¹⁰

Good systems of governance recognise the participation of the people in their own affairs. For this reason, systems of government derive from the interplay of interconnected principles of constitutionalism and democracy at play. The understanding is that when people form a government, the government is not for those who are chosen as representatives only. It is for all people. Political representatives must not act for those who voted for them only but for all the people.

Constitutions exist as guarantees that elected representatives will serve the people. They are used to entrench systems of government. It is for this reason that electoral processes are identified to establish the most ideal methods of electing people to public office.

THE ELECTION AS A TOOL OF DEMOCRATIC PARTICIPATION IN CONSTITUTIONALISM

¹⁰ “We the People in the United States”. Available at: <https://www.facinghistory.org/resource-library/we-people-united-states>. Accessed 30 January 2024.

The previous section discussed the government as a component of constitutionalism and democracy. Mention was made of the fact that electoral processes are necessary to establish a government. An election has been understood as a tool of democratic participation in constitutional democracies. According to the *Encyclopaedia Britannica*, an election is:

“... the formal process of selecting a person for public office or of accepting or rejecting a political proposition by voting. It is important to distinguish between the form and the substance of elections. In some cases, electoral forms are present but the substance of an election is missing, as when voters do not have a free and genuine choice between at least two alternatives.”¹¹

An election is the legal method for constituting a government. It follows that a government can only be said to be properly and lawfully constituted if the procedures set out in terms of the law are followed. It must also be said that elections are processes critical for democracy. It is not just the casting of a vote that occurs in an election. The people are at the centre of any election. In most cases, elections are processes undertaken by people to identify persons who can constitute a

¹¹ See Gibbins, R., Webb, Paul David and Eulau, Heinz. “election.” *Encyclopaedia Britannica*. Available at: <https://www.britannica.com/topic/election-political-science>. Accessed on 22 January 2024.

government to lead them. The utility of an election as a tool of democratic participation makes it inherently people-centric.

There are a number of characteristics and legal standards that elections must meet. Elections must be free, fair, and peaceful. The dimensions of the concept of free and fair elections were discussed by two scholars thus:

“Electoral processes are more than election-day practices. Free and fair elections require the realization of several other preconditions that Robert Dahl, treating ‘institutional guarantees’ of democracy (Dahl, 1971, p. 3; 1989), enumerated: elections cannot be free and fair, competitive and recurrent if not all adult citizens have the right to vote and to run for office, if there is no freedom of speech, assembly, movement, campaign, information, and press. In other words, free and fair elections require civil and political rights; without them, no election can be called democratic. Therefore, guarantees of civil and political liberties in the pre-and post-election environment should take part in the definition. In the pre-election period, voters, parties, and candidates should have those freedoms provided for in the constitution and the electoral law. Electoral resources and media access should be almost equally distributed among competitors. In the post-election period, electoral rules on counting and complaints should be applied fairly, regularly, and impartially (Elklit & Svensson, 1997). Therefore, a complete analysis of the elections’ quality must entail every aspect that goes from the electoral law to the resolution of post-electoral disputes through, for example, the registration of voters and candidates. Following Elklit and Reynolds’ (2005)

framework, in defining the concept of ‘free and fair election’, we consider the following ten conceptual dimensions.”¹²

In addition, elections in a constitutional democracy must ensure equality of votes. The proposition that there must be equality of votes in elections corresponds with the formative processes of democracy. Under these processes, every person has a voice in the choice of government that his country adopts.

Transparency is also key. The people’s votes must be accounted for transparently. The reason for this is that people are the source of governmental authority. The Constitution of Zimbabwe spells out this fact in several portions in which it uses the phrase “derives from the people”.

To sum up this aspect, it suffices to state that electoral processes, in principle, are based on the principles of democracy. They are designed to ensure that all people entitled to participate in an election are accorded a free and fair opportunity to do so.

¹² See M Regalia and S Rombi, “Conceptualizing and measuring free and fair elections”, *Italian Journal of Electoral Studies* 86(2): 5-22, 2023 at 7. Available at: <https://oaj.fupress.net/index.php/qoe/article/view/14171/12459>.

Electoral systems, therefore, give individuals the authority to conduct an election. It has already been said that an election is rule-based. All legal rules are directed against specific subject matter. Electoral processes are defined by law.

THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

In Africa, the centrepiece of the conduct of elections and the upholding of democracy is the African Charter on Democracy, Elections and Governance (“ACDEG”). Micha Wiebusch *et al* state as follows on the ACDEG:

“The African Charter on Democracy, Elections and Governance (ACDEG) is a unique instrument, aimed at addressing these challenges so as to, in the words of its preamble, ‘deepen and consolidate the rule of law, peace, security and development’ ...The African Charter recognizes a number of rights that later found their way into the ACDEG. The right to participate in government is undoubtedly of greatest relevance to the core ideas behind the ACDEG. The ACDEG to a large extent can be described as an overall elaboration of this right by setting more detailed conditions for its fulfilment.”¹³

Chika Charles Aniekwe, Lutz Oette, Stef Vandeginste and Micha Wiebusch describe the ACDEG as follows:

“The ACDEG is different from previous instruments as it combines, in a holistic manner, the key elements of democracy,

¹³ Wiebusch M, Aniekwe CC, Oette L, Vandeginste S. The African Charter on Democracy, Elections and Governance: Past, Present and Future. *Journal of African Law*. 2019;63(S1):9-38. doi:10.1017/S002185531900007X.

human rights and governance. Its objectives are to enhance the quality of elections in Africa, promote human rights, strengthen the rule of law, improve political, economic and social governance, and address the recurrent issues relating to unconstitutional changes of government in the continent. The ACDEG has been the impetus for various policy and institutional initiatives at the level of the African Union (AU) and the Regional Economic Communities (RECs), and has become the yardstick upon which Member States' democratic governance progress is measured.”¹⁴

The authors further assert that:

“The ACDEG also fits into this logic with its broad scope to promote democracy, sustainable development, and personal security; enhance adherence to the rule of law and respect for human rights; and foster better political, economic and social governance.”¹⁵

The ACDEG represents an expression of obedience to the principles of constitutionalism, good governance and democracy by African States. It recognises the importance of human rights to democracy and good governance, which, in themselves, are part and parcel of the element of constitutionalism. Specifically provided for in the ACDEG are political

¹⁴ See Chika Charles Aniekwe, Lutz Oette, Stef Vandeginste and Micha Wiebusch on *The African Charter on Democracy, Elections and Governance: Trends, Challenges and Perspectives*.

¹⁵ See Chika Charles Aniekwe, Lutz Oette, Stef Vandeginste and Micha Wiebusch on *The African Charter on Democracy, Elections and Governance: Trends, Challenges and Perspectives*. Pg 98

rights on which the aspirations of democracy and good governance are generally founded. According to Combrinck:

“The right to vote also features in the African Charter on Democracy and Good Governance. The objectives of this Charter include the promotion of adherence to the values and principles of democracy and respect for human rights and the holding of regular free and fair elections to ‘institutionalise legitimate authority of representative governments as well as democratic change of governments’. States parties must implement the Charter in accordance with certain principles, which include the effective participation of citizens in democratic and development processes and in governance of public affairs.”¹⁶

The ACDEG has specific objectives relating to the Judiciary. In terms of Article 2(5), one of its objectives is to “promote and protect the independence of the judiciary”. Article 32 requires State parties to strive to institutionalise good political governance through “an independent judiciary”. The independence of the Judiciary is recognised by the ACDEG as a key ingredient to institutionalising good governance. The nexus between good governance and the election of

¹⁶ See Heléne Combrinck, *Everybody counts: The right to vote with Psychosocial Disabilities in South Africa*, 2014. Available at: https://www.google.com/search?q=the+african+charter+on+elections+safflii&sca_esv=251b1afa33144db8&sxsrf=ACQVn09DgidHVqLmMBn7jYXToQFDwNVrOw%3A1706602017668&ei=Ia64Zbe0KKaRhbIPh5K_8AQ&ved=0ahUKEwj3yKT404SEAxWmSEEAHQfJD04Q4dUDCBA&uact=5&oq=the+african+charter+on+elections+safflii&gs_lp=Egxnd3Mtd2l6LXNlcnAiKHRoZSBhZnJpY2FuIGNoYXJ0ZXIgb24gZWxlY3Rpb25zIHNhZmZsaWkyBxAjGLACGCdI4w5QdVhlcAF4AJABAjgBiAKgAYgCqgEDMi0xuAEDyAEA-AEBwgIKECMYsAIYsAMYJ-IDBBgBIEGIBgQOBgE&scIent=gws-wiz-serp

persons to form government is important. Judiciaries play a role of ensuring that appropriate persons are elected to public office.

ELECTORAL JUSTICE

The discussion identifies the place of constitutionalism in electoral justice. Electoral justice refers to:

“... 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. An electoral justice system involves the means and mechanisms for ensuring that

- 1) ‘each action, procedure and decision related to the electoral process is in line with the law (the constitution, statute law, international instruments, and all other provisions)’,
- 2) ‘and also for protecting or restoring the enjoyment of electoral rights’ and
- 3) ‘giving people who believe their electoral rights have been violated the ability to make a complaint, get a hearing and receive adjudication’.”¹⁷

A discussion of electoral justice in the context of constitutionalism has a specific aim. The discussion aims at equipping Judges with the

¹⁷ See the International Institute for Democracy and Electoral Assistance, cited by, L. A. Nkansah, “Dispute Resolution and Electoral Justice in Africa: The Way Forward” *Africa Development*, Vol. XLI, No. 2, 2016, pp 97–131 at p 100. Available at: <https://www.ajol.info/index.php/ad/article/view/163585>. Accessed on 13 February 2024.

necessary knowledge for electoral adjudication. The reason is that Judges who are conscious of the law and who appreciate the reason for adherence to the law are capable of achieving electoral justice.

The involvement of Judges in electoral adjudication is derived from an established legal order. Wherever there is a law, there will be an institution of law responsible for ensuring that those who must act in accordance with the law perform the acts defined by law. In the context of electoral justice, it means that those who must act perform acts defined by the Constitution and the electoral law.

The election is a product of law. Laws are put in place to make electoral processes work. Rule-based electoral processes give effect to the rule of law, which, in itself, is a component of constitutionalism. The objective of the law in electoral processes is tied to the purpose of an election of achieving a government by the people, both present and future. The activities by which it is conducted will always involve the courts. Given that the election is embedded in law, the courts will have to be involved in electoral adjudication, The mere presence of courts is part and parcel of the infrastructure and institutions which conduct elections.

There must be a person or institution that is able to declare whether there was compliance with the standard for conducting elections. Typically, these are the courts. The courts are established to ensure that the fundamental principles of electoral law are complied with. It is notable that in many civil law and common law jurisdictions, there are also bodies established to superintend the administration of elections. By implication, such bodies are subject to review by the courts.

Bodies established to conduct elections are typically bestowed with independence, such as independent commissions. Independent commissions exist to ensure that they enforce the law impartially. The leadership of the electoral commissions results in minimum involvement by electoral players. Their conduct is thus exclusively subject to review by the courts. The courts are constantly supervising electoral processes at every turn even before the moment the actual dispute is placed before the court. It is significant that courts are involved at every stage of adjudication.

The foundation and basis of elections is in the constitution and electoral law. The constitution and subsidiary electoral laws have different levels of specificity of acts required to ensure electoral processes are done in

accordance with the set legal standards. The constitution always speaks – it is a living document setting out standards for the conduct of elections. Legal standards are specified in the law through the choice of acts that must be done to achieve a specific electoral result. A true electoral process is a restatement of compliance with legal demands.

There is, therefore, an obligation on the courts to hear and determine electoral petitions. In Zimbabwe, a court must hear and determine an electoral petition once it has been filed. To safeguard the integrity of the courts, court orders need to be obeyed. It is through the authority of court orders that courts become mechanisms for eliminating controversies in electoral processes.

A related aspect is that of the finality of a court's decision. Court decisions are final. The rule of law demands that once the institution of courts pronounces on an electoral matter, that is the end. If people defy the courts they no longer act lawfully.

It has been stated that under constitutionalism there will be institutions for interpreting the law. The institutions for interpreting the law perform several functions, including ensuring that the electoral

management body acts properly, for example by counting the votes properly and tabulating the results in accordance with the law. The institutions decide whether there is a vote and whether there is fairness in the vote. The underlying objective of these judicial processes is an environment where there is electoral integrity and where everyone is confident to participate in the electoral process.

The legal standards to which the courts and judicial officers must answer render them a suitable institution in electoral administration.

The *Bangalore Principles* capture these universally accepted principles. They are a set of guidelines that help judicial officers, such as Judges, maintain their professional and ethical conduct.¹⁸ These principles aim to uphold the integrity of the Judiciary.

The *Bangalore Principles* are intended to establish standards for the ethical conduct of Judges. They are designed to provide guidance to Judges and to offer the Judiciary a framework for regulating judicial conduct. Six core values are recognised - independence, impartiality, integrity, propriety, equality and finally competence and diligence.¹⁹

¹⁸ <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf>.

¹⁹ The Judicial Integrity Group <https://www.judicialintegritygroup.org/jig-principles#:~:text=The%20Bangalore%20Principles%20of%20Judicial%20Conduct&text=T>

The six core values are essentially designed to provide guidance to Judges in the performance of their judicial duties and to afford the Judiciary a framework for regulating judicial conduct. They are also intended to assist members of the Executive and the Legislature, and lawyers and the public in general, to better understand the judicial role, and to offer the community a standard by which to measure the performance of Judges.

One of the six core values bearing upon judicial conduct is integrity. Integrity is connected to impartiality. By behaving transparently, Judges demonstrate their trustworthiness to dispense electoral justice. One common method of ensuring transparency in electoral adjudication is the livestreaming of proceedings. Through livestreaming, a decision can be seen as credible. In the case of *Chamisa v Mnangagwa and Others* CCZ-21-19 at p 10, the Constitutional Court of Zimbabwe held that:

“The decision to broadcast live on national television the proceedings in this case was made by the Court on the basis of consideration of the interests of justice. The Court took into account the fact that the matters in the Presidential election dispute at the

[hey%20are%20designed%20to%20provide,and%20finally%20competence%20and%20diligence](#). [accessed 30 January 2024]

centre of the proceedings were of constitutional and national importance, impacting on the interests of the public at large. The Court also considered the fact that it has under the Constitution inherent power to protect and regulate its own process, taking into account the interests of justice.”

The standards to which the courts and Judges answer to facilitate the attainment of conditions necessary for the conduct of elections. One of these conditions is timelines. Electoral cases must be disposed of timeously. One of the reasons is to ensure that the political tension is not prolonged.

Time is important in the legal process for conducting elections. It is put in place to build an inherent mechanism that ensures that the electoral process has an end. In addition to rules on timelines in the conduct of elections, there are other rules, such as that a person cannot approach a court unless he or she meets a certain threshold of standing.

EXPECTATIONS PLACED ON JUDGES IN ELECTORAL JUSTICE

The foregoing discussion has revealed the challenges that Judges may face in electoral adjudication. Judges are, therefore, required to understand the dynamics of electoral processes. The requirement stems from the fact that elections do not take place in a vacuum. Elections are

grounded in legal philosophy. They are a result of the interplay of interconnected concepts which are all underpinned by constitutionalism. The interplay of the concepts of constitutionalism creates particular social, political and legal dynamics that Judges must be aware of to discharge electoral justice. One such dynamic is the rule of law.

Judges must understand broader principles of the law against which elections are conducted. The principles of electoral law are a result of the rule of law. The discussion above established that the rule of law is a necessary concept for sustaining constitutionalism and democracy.

Professor Nkansah states that:

“The idea of instituting an election petition in court as opposed to the aggrieved persons resorting to mayhem is a positive sign in the democratisation process. The aggrieved choose the law as their arbiter and put their hope in the law. Adjudication brings a closure to electoral disputes, all things being equal. This practice will facilitate the institutionalisation of democratic succession and entrench the rule of law and constitutionalism.”²⁰

It follows from the above quotation that when Judges play their part in electoral adjudication, they are upholding democracy.

²⁰ See L. A. Nkansah, “Dispute Resolution and Electoral Justice,” *op. cit.* at p. 126.

The purpose and outcomes of the dispensation of electoral justice are significant. They place a specific demand on Judges. Judges must be aware of the space they occupy and the intended outcomes of their judicial industry in elections. Although the specific outcomes of electoral justice may not always be apparent on a case-to-case basis, they tend to be the result of the cumulative and consistent adherence to legal standards by Judges.

It has been discussed that there are laws in place to regulate the conduct of elections. The laws are the framework within which elections must be conducted. Any act that is done outside the legal framework does not conform to the purpose for which elections are held. It is necessary to connect this to the fact that Judges are presumed to be the custodians of the law under which elections are held. They must understand the law for them to give effect to the purpose for which elections were adopted as a mode of selecting a government.

Beyond an understanding of the law, Judges must understand the political environment within which electoral justice must be dispensed. The political environment in which elections take place is accepted as

potentially inhibiting an impartial trial of electoral matters. The tensions between political parties or actors are usually high.

Notwithstanding potentially inhibitive political and electoral practices, Judges are still expected to uphold the law. To ensure this, the law has devised principles that Judges must resort to. One such principle is embodied in the presumption of validity and the presumption of constitutionality. The presumptions rest on the fact that a challenge to elections is a challenge to a process which has taken place. The presumptions – which exist in different forms in a number of jurisdictions – are intended to ensure that Judges do not lose sight of the objective of electoral adjudication. It enables Judges to commence the process of adjudication undeterred by political forces at play and to be able to look at the matters before them objectively. The reason is that the presumption inherently calls upon litigants and political actors alleging electoral malpractices to prove the same.

It must always be accepted that electoral law has many stakeholders and expectations. Electoral law cannot be divorced from an election and the politics of it. Judges are to be aware of the pressure on them. All political actors will expect decisions in their favour. The point was

brought out by the High Court in the case of *Chimhini v Chairperson, Zimbabwe Electoral Commission and Others* HMA-59-18 at pp 7-8

thus:

“[25] Given the political tension between the major political parties in this country and the attendant polarity in our society, justice is only justice if one wins, never mind the graceless presentation of the cases in court. One gets the sense that some legal practitioners like Mr *Nyakureba* bank on that and play to the gallery. In this particular case for example, Mr *Nyakureba*'s heads of argument begin with a curious quotation, completely out of context, said to be from a speech by one Caroline Kennedy, a US attorney and head of the John F. Kennedy Library, at some award presentation in 2012 in Boston, that:

‘The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, Judges who can make decisions independent of the political winds that are blowing.’

[26] No one can argue with that. Our Constitution says much the same thing in s 164. It is the duty of the courts to uphold and give effect to the rights and freedoms enshrined in the Constitution. There can be no question about that. But the question that may arise is whether the litigants themselves have played the game according to the book of rules, because the law says it is only when they do so that the court can become umpire.”

The subjective attitudes of litigants to electoral decisions must not deter the courts. The business of the courts in such matters is to give effect to the principles of democracy.

It becomes apparent that electoral adjudication places competing interests at loggerheads. On the one hand, Judges must interpret the law to ensure that it is complied with correctly. On the other hand, Judges are confronted by the political heat generated by the tensions between political actors. The burden on the Judge is to navigate his or her own way out of the tension and conclude a matter in a way that is consistent with the demands of the law. Regrettably, Judges without sufficient understanding of the purpose of electoral adjudication may choose the easy route of giving in to the pressure at the expense of democracy and constitutionalism.

There is also the risk that Judges may be drawn into underlying conflicts of interest to political players. The practice tends to take the Judges' minds away from the goal of electoral adjudication. In some schools of thought, this has been defined as the politicisation of the Judiciary. Helpful conceptions of the politicisation of the courts have been discussed thus:

“In this paper, politicisation of the courts or political courts is analysed from the following three perspectives. First, it indicates that the design of the courts reflects power allocation. Second, it means that the jurisdiction of the courts is expanded to include ‘matters of outright and outmost political significance’. Third, it

dictates that judges, instead of being neutral and independent, tend to base on political interests or ideologies in making decisions.”²¹

Related to the politicisation of the courts, is the specific practice by political leaders of playing out their politics within the courtroom. It often occurs that under the pressure of the political minefield, politicians apply pressure on the courts. They institute litigation whilst at the same time making bald and unsubstantiated public statements about the merits of their cases. The public is made to believe that the only acceptable decision is one in keeping with the political statements made by the leaders. By the time the court sits to hear and pass a decision on the matter, the court of public opinion would have already been swayed against any contrary decision that may come from the court. Again, in these situations, Judges must remain alive to the purpose for which they have to adjudicate.

In fact, it is not uncommon for the public to expect only decisions that favour them. The political practice tends to place pressure on some Judges. It is not uncommon in electoral adjudication. Judges confronted

²¹ See Jiunn-rong Yeh, Politicization of Constitutional Courts in Asia: Institutional Features, Contexts and Legitimacy at <https://web.archive.org> (accessed 30 January 2024) at pp 215 – 216.

by this evil must always recall the constitutional concept on which their mandate is founded. They must also recall the conditions attaching to their service as judicial officers which are intended to insulate them from political pressure.

The advancement in technology has resulted in developments such as social media. Although social media has both positive and negative impacts, the negative impacts are typically experienced by Judges dealing with high-profile cases of national interest and electoral matters. Spurious allegations against Judges may be made on social media. In addition, some people may share Judges' personal information on social media, leaving them and their families in danger. Social media creates a challenge for courts because a simple "tweet" or "comment" can be posted, copied, and republished around the world within seconds. If the tweet, post, or comment relates to an ongoing case or trial, the availability of such information can cause serious complications for the courts.²²

²² See Davey *et al.*, *supra* note 7, at 24-26 (discussing the effect social media has on court proceedings).

Social media platforms have given a voice to the masses, allowing individuals to express their opinions freely and instantaneously. This freedom of expression has the potential to sway public opinion and influence legal proceedings. High-profile cases are often accompanied by intense online discussions, debates, and sometimes even campaigns that can exert pressure on the justice system. While public awareness and involvement can be beneficial in ensuring justice, the challenge lies in separating fact from fiction, as misinformation can spread rapidly.²³

It is also common to see persons denigrating Judges on social media. Allegations may be made that a judicial officer is captured prior to the hearing of a matter of public importance.

It is important for the challenges that Judges may face in electoral adjudication to be measured against their constitutional independence.

In this past, it has been said that:

“Judicial independence in its simplest form relates to the absence of dependence, which is to say complete autonomy and immunity to external guidance, influence, or control. It is a concept that enjoys universal recognition in the modern era where democracy

²³ Delaney Fenton: The Impact of Social Media on Legal Proceedings: Balancing the Benefits and Challenges <https://tlc-texas.com/impact-of-social-media-on-legal-proceedings/> [accessed 30 January 2024]

is widely celebrated as the minimum standard for sovereign states.

Judicial independence is important because it is an essential precondition to the Judiciary playing its appropriate and meaningful role as an impartial and fair arbiter of disputes, and protector of rights. In the absence of independence, the Judiciary is relegated to a secondary role where it serves a perfunctory role as the rubber stamp of partisan interests which ultimately does not provide justice.”²⁴

The courts are to be able to maintain their independence. It is through independence that they can withstand attempts to detract them from their adjudicative function which gives effect to constitutionalism and democracy.

Politics can play into the legitimate judicial processes. In *Tsvangirai v Mugabe* 2017 (2) ZLR 1 (CC) at 11H-12B, the Constitutional Court of Zimbabwe held that:

“It is a requirement under s 93(3) of the Constitution that the petition or application be brought to an end by a judgment of the Court as opposed to being brought to an end by means of a unilateral decision and actions of a petitioner or applicant to withdraw the petition or application. It is not a decision that would be based on the reason given by the petitioner or applicant for withdrawing the petition or application. It would be a decision based on the results of the evaluation or assessment by the Court

²⁴ See Hon. Malaba CJ, “Discussion on The Concept of Judicial Accountability and Judicial Independence: A Comparative Experience on Regional and Jurisdictional Standards on Judicial Accountability”, Maputo 2022.

itself of the evidence and arguments presented by the parties and findings of the facts in issue.

A final decision can only mean that all the issues raised by the petition or application have been determined or litigated on the merits. Determination of the petition or application can only be by the Court. Withdrawal of the petition or application would determine nothing. It cannot be a judgment of the Court, which is the only means by which a petition or application lodged under s 93(1) of the Constitution is required to be brought to an end. In prescribing what the Court has to do to ensure the achievement of the objective pursued, the people would not have included acts the performance of which would in effect have prevented the achievement of the objective. In any case, one cannot withdraw what one has no control over.”

In the *Tsvangirai* case *supra*, the Court was alive to the fact that there would have been allegations of electoral malpractice which would remain unclear in the absence of a definitive determination by the Constitutional Court. Courts must always be alive to the reality that an election process is not a mere political process. The universal standard of an election is that it must be a free, fair and peaceful process.

Having said this, it is important to discuss the specific roles that Judges play in electoral adjudication in a constitutional democracy. Under constitutionalism, courts play a number of roles in ensuring electoral justice. In this regard, one of the foremost roles is to develop

jurisprudence. There is no question about the importance of jurisprudence to any society. It has been noted:

“No society can properly be understood or explained without a coherent conception of its law and legal doctrine. The social, moral, and cultural foundations of the law, and the theories which both inform and account for them, are no less important than the law’s ‘black letter’:

Legal and political theories are not descriptions of brute facts. Nor are they merely postulated ideals or aspirations. Theories reflect and are reflected in our social relationships. And the historical development of our social life is itself a part of the intellectual evolution of our ideas And, if understanding a moral or political concept is a matter of understanding the ‘form of life’ to which it belongs, an articulation of this or that conception may well require attention to its history. Moral and political values thus cannot and should not be discussed in isolation from the institutions and social histories that shaped them.”²⁵

In this regard, the development of jurisprudence on electoral matters is important because it creates a source of experiential wisdom by which elections may be better conducted in future.

Regard being had to the fact that elections are grounded in human rights philosophy, it is apparent that there are fundamental human rights at stake in electoral processes. Fundamental rights are essentially claims against those in power. Fundamental rights are derived from the system

²⁵ See Raymond Wacks, “Understanding Jurisprudence: An Introduction to Legal Theory”, 3rd ed. Oxford University Press at p 4.

of democracy. They place a demand on those who are in power to overcome self-interest and act in the best interests of all people. Fundamental rights create parameters within which governance can legitimately and lawfully take place. The democratic foundations of a State necessitate that those who are elected into public offices respect the fundamental rights of the electorate. Therefore, courts have the role of elucidating the importance of the electoral process in safeguarding human rights in a constitutional democracy. Electoral justice imposes on the courts the obligation to act only on the evidence, the facts found proved, and the applicable law to arrive at a decision in every case subject to electoral adjudication.

CONCLUSION

In conclusion, it can be seen that electoral processes are designed to give effect to interconnected features of constitutionalism. Given that the electoral process is one that is steeped in the law, it is inevitable for breaches of that law to occur. The courts come into the picture to resolve disputes relating to the application of electoral law. It is the resolution of such disputes by the courts which gives effect to electoral justice. In itself, electoral justice is a victory for constitutionalism. It

vindicates democracy and good governance which are all features of constitutionalism. Therefore, Judges must always appreciate the effect of their adjudication on electoral justice.