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## The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years

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**Summary:** *Several African countries have recently adopted fairly democratic constitutions. An emerging trend in these constitutions is the establishment of constitutional courts or constitutional councils as key institutions for human rights protection. However, the adoption of fairly democratic constitutions sometimes is not complemented by the democratisation of politics, as autocratic governments remain in place after the adoption of a new constitution. When this happens, these countries' constitutional courts become key sites of human rights protection struggles, as many turn to public interest litigation in an effort to protect human rights. Using the Constitutional Court of Zimbabwe as a case study, the article investigates the behaviour of these courts and their reliability as human rights protection institutions, when they operate under autocratic political conditions. The article makes use of the systemic level factors theory as a conceptual framework for analysing the jurisprudence of this Court. It identifies trends in the manner in which this*

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*Court has handled high-level profile human rights cases that involve the interests of the ruling party or government. These trends are that in the majority of cases the Court has ignored the Constitution and delivered judgments that are meant to protect the government from certain political risks. In a few cases the Court appeared to be bold enough to enforce the Constitution, but a closer analysis of these cases reveals that the Court decided in that manner because the reconfigured political strategy of the ruling party and the internal factional contestations in the ruling party required or permitted the Court to make those decisions. The article concludes that the performance of the Constitutional Court of Zimbabwe thus far paints a gloomy picture as far as its reliability and utility as a guardian of human rights and democratic institutions under the current autocratic regime in Zimbabwe are concerned.*

**Key words:** *Constitutional Court of Zimbabwe; systemic level factors theory; human rights protection; democratisation of politics; politically-sensitive cases; autocratic governments; public interest litigation*

## 1 Introduction

The past two decades have seen a number of African countries adopting fairly democratic constitutions. These countries include Zimbabwe,<sup>1</sup> Niger<sup>2</sup> and Senegal.<sup>3</sup> A common feature in these constitutions is that they provide for the establishment of a constitutional court or a constitutional council with exclusive jurisdiction to adjudicate on certain key human rights matters such as presidential election petitions and disputes relating to the interpretation of the constitution, as well as the validity of legislation.<sup>4</sup> In some instances,<sup>5</sup> although lower courts can adjudicate on disputes relating to the interpretation of the constitution and the validity of

1 Adopted a new Constitution in 2013 which is regarded to be fairly democratic. See JA Mavedzenge & D Coltart *A constitutional law guide towards understanding Zimbabwe's fundamental socio-economic and cultural human rights* (2014) 5-22.

2 Adopted a new Constitution in 2010 which guarantees democratic principles, rights and tenets. For a more detailed assessment, see Freedom House 'Freedom in the World Report' (2020) <https://freedomhouse.org/country/niger/freedom-world/2020> (accessed 19 June 2020).

3 Adopted a new Constitution in 2001 which is regarded to be fairly democratic. See Freedom House 'Freedom in the World Report' (2020) <https://freedomhouse.org/country/senegal/freedom-world/2019> (accessed 19 June 2020).

4 See secs 166 and 167 of the Constitution of Zimbabwe of 2013; see art 120 of the Constitution of Niger of 2010; see art 92 of the Constitution of Senegal of 2001.

5 Eg, in Zimbabwe the High Court has the power to interpret the Constitution as well as to declare the invalidity of legislation. However, the Constitutional Court wields the power to make the final judgment on such matters. See sec 167(3) of the Constitution of Zimbabwe of 2013.

legislation, the constitutional court or the constitutional council is mandated to pass the final judgment on such matters.

Constitutions provide for the establishment of specialised constitutional courts or constitutional councils in order for such courts to serve as guardians of democratic institutions, constitutionalism and fundamental rights.<sup>6</sup> However, the adoption of these new and fairly democratic constitutions sometimes is not complemented by the democratisation of politics. In some countries<sup>7</sup> autocratic governments remain in place after the adoption of a new constitution, while in others<sup>8</sup> political parties and leaders that win elections after making democratic promises and commitments renege on those promises when they come into power. When this happens, the constitutional courts become key sites of human rights protection struggles, as many people turn to public interest litigation in an effort to protect their constitutional rights from being violated by the autocratic governments. It appears that there is an expectation that, notwithstanding the autocratic political conditions, these courts should be bold and protect the rights and the constitution. It therefore is necessary to study the behaviour of these courts when handling high-profile human rights cases and to examine their reliability as human rights protection institutions when they operate under autocratic political conditions. For reasons of space limitations this article focuses on analysing the behaviour of the Constitutional Court of Zimbabwe.

Zimbabwe is a pertinent case study as the country experienced a positive constitutional change in 2013, when its citizens adopted a fairly democratic Constitution. This Constitution was meant to activate a break from the autocratic past and facilitate a transition into a democratic future. However, the constitutional change in this country was not complemented by any significant political change in the sense that the party that had governed prior to the constitutional change remained in power and continued with its autocratic style

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6 Similar observations have been made by other scholars. Eg, see A Harding 'The fundamentals of constitutional courts' (2017) *International IDEA* 2. Similar views have been expressed in relation to comparative jurisdictions outside of Africa. See W Sadurski *Rights before courts: A study of constitutional courts in post-Communist states of Central and Eastern Europe* (2005) 6-7.

7 Eg, in Zimbabwe. The ZANU PF party won the elections after the adoption of the new Constitution in 2013 and it continued governing through autocratic means. See Freedom House 'Freedom in the World Report' (2020), <https://freedomhouse.org/country/zimbabwe/freedom-world/2020> (accessed 17 June 2020).

8 Eg, in Niger the current leader was democratically elected in 2011 and reelected in 2016, but appears to have reneged on his democratic commitments as government clamps down on civil liberties on the pretext of fighting terrorism. See Freedom House (n 2).

of governance. The Constitutional Court, which enjoys extensive judicial review powers, has become a key site of human rights protection struggles as individuals seek to rely on this Court to protect their constitutional rights from violation by the government. In this article I assess whether (based on its performance in the past six years) the Zimbabwean Constitutional Court has proved itself to be a reliable court that is prepared to enforce the Constitution and protect human rights, notwithstanding the autocratic political conditions under which it operates.

## 2 Systemic level factors theory as a conceptual framework for identifying trends in the Constitutional Court's attitude in high-profile cases

Various studies<sup>9</sup> reveal that even though Zimbabwe adopted a fairly democratic Constitution in 2013, the country has remained under an autocratic regime. In countries that are governed by autocratic regimes, judiciaries may have their independence guaranteed in the constitution, but in practice the courts are hardly independent to enforce the law in cases where the interests of the ruling party and government are at stake. This has led VonDoepp and Ellett to develop the systemic level factors theory as a conceptual framework for analysing the attitude of courts when handling politically-sensitive cases in autocratic jurisdictions.<sup>10</sup> The central thesis of this theory is that in a dictatorship there are factors within the political system that influence how courts ultimately decide in cases that are politically sensitive.<sup>11</sup> These factors have nothing to do with the law but have everything to do with the nature of political risks posed to the regime by the case.<sup>12</sup> The law is used only to justify a predetermined political outcome. According to VonDoepp and Ellett, where the case poses a serious risk to the regime, the court is likely to decide in favour of the ruling party in order to preserve the regime's hold on state power, even if doing so is in violation of the law. The Constitutional Court of Zimbabwe has often been accused of this.<sup>13</sup> To what extent is this

9 See eg Freedom House 'The Freedom in the World 2018 Report', <https://freedomhouse.org/report/freedom-world/2018/zimbabwe> (accessed 10 June 2019). Also see Freedom House (n 7).

10 P VonDoepp & R Ellett 'Reworking strategic models of executive-judicial relations: Insights from new African democracies' (2011) 43 *Comparative Politics* 147-165.

11 VonDoepp & Ellett (n 10) 150.

12 As above.

13 M Krönke 'Bounded autonomy: What limits Zimbabweans' trust in their courts and electoral commission?' (2018) *Afro Barometer's Policy Paper* 52.

true of the Zimbabwean Constitutional Court when one examines its decisions and reasoning in politically-sensitive cases since 2013?

## 2.1 Political risk as a factor in the Constitutional Court's adjudication

It seems that the Court has made decisions based on political considerations, particularly to protect the ruling party from certain political risks posed by the case brought before the Court. Such considerations appear to have loomed large in the Court's reasoning when the following questions or disputes were brought before it: disputes relating to election dates; the determination of the independence of the election management body; and challenges to the legality of the military action which culminated in the resignation of President Mugabe. In the cases quoted below I demonstrate this by discussing how the Court dealt with these questions.

### 2.1.1 *Jealous Mawarire v Robert Mugabe*

In this case<sup>14</sup> the Court was petitioned to declare that a general election be held no later than 30 June 2013. The background to this case was that in the previous elections held in 2008, ZANU PF had lost parliamentary majority to the opposition. The presidential election had produced an inconclusive outcome, leading to a political settlement facilitated by the Southern African Development Community (SADC) which saw the then ruling party (ZANU PF) sharing power with the opposition in a government of national unity (GNU). One of the key deliverables for the GNU was to institute electoral reforms in order to ensure that the elections to follow in 2013 would be free, fair and credible.<sup>15</sup> However, ZANU PF continued to stall these reforms, and in 2013 it demanded that elections be held immediately, without reforms, arguably because the party was not confident of winning those elections if they were to be held in a free and fair environment to be created through the intended electoral reforms.<sup>16</sup> The party controlled the presidency and sought

14 *Jealous Mawarire v Robert Mugabe* CZ1/13.

15 L Tatira & T Marevesa 'The Global Political Agreement (GPA) and the persistent political conflict arising there from: Is this another manifestation of the council of Jerusalem?' (2011) 3 *Journal of African Studies and Development* 188.

16 B Raftopoulos 'An overview of the GPA: National conflict, regional agony and international dilemma' in B Raftopoulos (ed) *The hard road to reform: The politics of Zimbabwe's Global Political Agreement* (2013) 20-21. Also see B Raftopoulos 'The 2013 elections in Zimbabwe: The end of an era' (2013) 39 *Journal of Southern African Studies* 971.

to use that office to set the dates for the elections.<sup>17</sup> However, SADC became an impediment to this strategy because the regional block had resolved that it would not support elections in Zimbabwe until all the electoral reforms had been implemented.<sup>18</sup> ZANU PF was reluctant to hold the election without SADC's endorsement. In May 2013 a citizen brought an application before the Constitutional Court, petitioning the Court to order then President Robert Mugabe to set a date for elections and that the elections be held by 29 June 2013. To some this appeared to be a ZANU PF strategy of using the Constitutional Court to set the election date.<sup>19</sup> Whether or not this is true remains debatable but what is certain is that ZANU PF would greatly benefit politically if the Court were to grant this application. In his affidavit filed in response to the application, President Mugabe concurred with the applicant that elections should be held by 29 June 2013. The opposition parties opposed the application, arguing that the country had up to 30 October 2013 to conduct elections. This would give the country enough time to implement the electoral reforms, so argued the opposition.

The crux of the political issue here was that ZANU PF wanted elections to be held immediately (by 29 June 2013) so that there would not be time to institute the intended electoral reforms, while the opposition wanted elections to be held later, on 30 October 2013, in order to allow time for reforms to be instituted.<sup>20</sup> However, the legal question before the Court was, given that the tenure of Parliament would expire on 29 June 2013, what the deadline was for the next general election.<sup>21</sup> Whether there would be enough time to implement electoral reforms depended on the Court's interpretation of the law regulating the scheduling of the next election.

The country was in transition from the former to the new Constitution. The legal answer to the above question depended

17 The then ZANU PF leader, Robert Mugabe, was the State President and he had the power to declare the date for the next general election in terms of sec 63(4) of the then Constitution of Zimbabwe of 1979.

18 See 'SADC Communiqué', <http://www.veritaszim.net/node/17> (accessed 10 June 2019). Also see Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 974.

19 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 976. Also see G Manyatera & C Hamadziripi 'Electoral law, the Constitution and democracy in Zimbabwe: A critique of Jealousy *Mbizvo Mawarire v Robert Mugabe NO & 4 Ors CCZ 1/13*' (2014) *Midlands State University Law Review* 72-83; also see D Matyszak 'New bottles – old wine: An analysis of the Constitutional Court judgement on election dates' *Research and Advocacy Unit* 18 May 2017, <http://researchandadvocacyunit.org/blog/2017/07/07/new-bottles-old-wine-analysis-constitutional-court-judgement-election-dates> (accessed 10 June 2019).

20 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 971-972.

21 *Mawarire v Mugabe NO & Others CCZ1/13* (2013) 4.

on section 58(1) of the former 1979 Constitution which stated as follows:

A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.

The grammatical meaning of section 58(1) of the Constitution simply is that elections should be held within four months 'after' the dissolution of Parliament. Parliament dissolves either by proclamation of the President or by operation of law.<sup>22</sup> Whichever way Parliament dissolves, elections should be held within four months 'after' such dissolution. In the majority judgment the Court admitted that this was the grammatical meaning of section 58(1) of the Constitution.<sup>23</sup> However, it rejected this as the appropriate interpretation. The Court held that the constitutional provision had to be given a purposive interpretation.<sup>24</sup> According to the Court, a grammatical meaning would allow a situation where Zimbabwe would be governed without the legislature and that would be an absurd interpretation which the framers of the Constitution could never have intended.<sup>25</sup> The Court fashioned what it termed a purposive meaning, which is that elections should be held no later than the first day after Parliament had dissolved.<sup>26</sup> As a result of this, the Court granted the application and ordered that elections be held by 31 July 2013. President Mugabe proceeded to set 31 July 2013 as the date for the elections, which was his party's preferred timeframe for the election.<sup>27</sup> When requested by the SADC to postpone elections in order to allow time for reforms to be implemented, President Mugabe argued that his hands were tied by the Court's ruling and that, therefore, elections had to be held by 31 July 2013.<sup>28</sup>

The problem with this decision is not necessarily that the Court ruled in favour of the dominant party (ZANU PF) but that the decision was contrary to what the Constitution dictated. Whilst courts are permitted to disregard the grammatical meaning of the constitutional provision in order to generate a purposive interpretation, they cannot do so if the constitutional provision in question is written in simple,

22 Sec 58(1) of the Constitution of Zimbabwe 1979.

23 *Mawarire* (n 21) 10-11.

24 *Mawarire* 16-18.

25 *Mawarire* 15-16.

26 *Mawarire* 23-24.

27 As he and his party had indicated in their pleadings in court. See *Mawarire* (n 21).

28 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 976-977.

straightforward grammar which admits to only one unambiguous meaning.<sup>29</sup> Disregarding the unambiguous meaning of a legal provision is akin to usurping the legislative powers and therefore is a violation of the separation of powers. Section 58(1) of the Constitution is so grammatically clear that the framers of the Constitution could not have intended something else other than what they clearly and in simple language said. By expressly stating that elections should be held within four months after the dissolution of Parliament, the framers knew and, therefore, contemplated the possibility that the country could be governed for a certain transitional period without the legislature. Thus, section 58(1) of the Constitution was incapable of the 'purposive interpretation' which the Court attached to it. This led to Malaba DCJ (as he then was) to write a dissenting judgment in which he heavily criticised the majority judgment for essentially being a political judgment.<sup>30</sup> It therefore seems that the approach adopted by the majority judges (when interpreting the law) in this case was contrary to the Constitution, but it appears to be congruent with the political interests of the dominant party in government. If the Court had given the law its deserved grammatical meaning, it would have arrived at a decision which would have meant that Zimbabwe did not need to rush into an election. This would have compelled the country to cooperate with the SADC to implement the intended electoral reforms until 30 October 2013. This could have created political conditions which would possibly have made it difficult for ZANU PF to win the elections and retain state power.<sup>31</sup> Therefore, it seems that the Court allowed the Constitution to be violated by stampeding the country into an election in order to avert a perceived political risk that was facing the ruling party (ZANU PF) at that time.

### 2.1.2 *Mavedzenge v Minister of Justice*

Four years later the Court took a strikingly similar approach in the case of *Justice Mavedzenge v Minister of Justice*.<sup>32</sup> The background to this case was that Zimbabwe in 2013 had adopted a new Constitution. Through section 232(a) the Constitution establishes the Zimbabwe Electoral Commission (ZEC) as one of the 'independent commissions' and gives it an exclusive mandate to administer all elections into public office. The Constitution guarantees ZEC's independence by stating the following in section 235:

29 I Currie & J de Waal *The Bill of Rights handbook* (2013) 135.

30 See the dissenting judgment of Malaba DCJ in the case of *Mawarire* (n 21) 28-29.

31 Raftopoulos 'The 2013 elections in Zimbabwe' (n 16) 971-976-977.

32 CCZ 05/18.



The independent commissions are (a) independent and are not subject to the direction or control of anyone ... (c) must exercise their functions without fear, favour or prejudice although they are accountable to Parliament for the efficient performance of their functions.

The Electoral Act,<sup>33</sup> which is the main legislation governing the conduct of elections, gives ZEC the power to make administrative regulations to facilitate the management of elections. To that effect, section 192(6) of this Act provides as follows:

Regulations made in terms of subsection (1) and statutory instruments made in terms of subsection (4) *shall not have effect until they have been approved by the Minister and published in the Gazette.*

Essentially this means that the ZEC can only develop draft regulations but these must be approved by the Minister before the ZEC can proclaim them as regulations governing elections. In *Mavedzenge* the applicant petitioned the Court to declare section 192(6) of the Act unconstitutional. The matter was heard on 5 July 2017, but the judgment was delivered a year later on 31 May 2018 – barely two months before the next general election. By this time the country had undergone a ‘*coup*’ which saw the then President Robert Mugabe being replaced by President Emmerson Mnangagwa. Following this ‘*coup*’ ZANU PF had split and one of the factions joined forces with the opposition. Thus, at the time the Court’s judgment was delivered, President Mnangagwa and the ruling party ZANU PF were facing their biggest opposition in an election since 1980<sup>34</sup> and they needed to do all they can to win the election.

Meanwhile, in *Mavedzenge*, the crux of the applicant’s case was that by requiring the Minister’s approval first before the election management body (ZEC) can proclaim regulations, section 192(6) of the Electoral Act prevented the ZEC from exercising its function to promulgate electoral regulations independent of direction, control or interference from the Minister. The Minister, acting on behalf of government, opposed the application and advanced two main arguments. The first was that the Minister’s powers (to approve regulations drafted by the ZEC before they can be proclaimed) were constitutionally valid because the Minister is the executive member responsible for the administration of the Electoral Act and, therefore, the Minister is the one answerable to Parliament

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33 Ch 2:13.

34 N Beardsworth et al ‘Zimbabwe: The coup that never was and the election that could have been’ (2019) 118 *African Affairs* 584. Also see D Moore ‘The bar for success is low, but the stakes in Zimbabwe’s elections are high’ *News* 23 July 2019, <https://www.iol.co.za/news/opinion/the-bar-for-success-is-low-but-the-stakes-in-zimbabwes-elections-are-high-16192724> (accessed 10 June 2019).

concerning the regulations developed by the ZEC.<sup>35</sup> The Minister further argued that because the ZEC cannot account directly to Parliament, the Minister has to account to the legislature on behalf of the ZEC. When accounting to Parliament, the Minister must be able to take responsibility for the regulations. He cannot do so if he does not approve of the regulations, so argued the Minister.<sup>36</sup> Lastly, the Minister argued that the powers given to his office in terms of section 192 (6) of the Electoral Act were necessary to ensure that the process of making and promulgating regulations does not ignore 'government policy'.<sup>37</sup>

The central legal question to be determined by the Court was whether the power given to the Minister 'to approve regulations' was constitutionally valid in light of the constitutional guarantee of the independence of the election management body – the ZEC.<sup>38</sup> The literal meaning of section 192(6) of the Act is that the Minister can approve or disapprove the regulations drafted by the election management body. If this grammatical interpretation was to be accepted by the Court, then section 192(6) of the Act would be deemed unconstitutional as it gives the Minister the power to interfere with the administrative functions of an independent election management body. However, the Court rejected this grammatical meaning and held that the impugned provision must be given a purposive interpretation. According to the Court, a purposive interpretation of the impugned provision implies that the Minister does not necessarily enjoy the power to veto the regulations proposed by the election management body, but he simply checks the draft regulations to ensure that they comply with the law.<sup>39</sup> On that basis the Court ruled in favour of the Minister, thereby allowing him to continue to enjoy such powers over the election management body. Further, the Court held that applicant had not provided evidence to show that the Minister had used his powers to influence the election management body to proclaim regulations that are biased in favour of the Minister's party.<sup>40</sup>

The approach taken by the Court and its decision seem to be contrary to the Constitution. Section 192(6) of the Electoral Act is so unambiguous that it admits only one logical meaning. When a Minister

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35 See para 2.4(a) of the first respondent's opposing affidavit, <https://constitutionallythinking.wordpress.com/constitutional-litigation-cases/> (accessed 10 June 2019).

36 First respondent's opposing affidavit (n 35) para 17.

37 First respondent's opposing affidavit (n 35) para 21.

38 *Mavedzenge v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 05/18 (2018) 8.

39 *Mavedzenge* (n 38) 8-9.

40 *Mavedzenge* (n 38) 8.

enjoys the power to approve something before it can happen, it simply means that he or she also has the power to disapprove it and, if he disapproves it, then that thing will not happen. The election management body will not promulgate regulations if the Minister does not approve the draft submitted to him. There seems to be no logical legal reason why the Court rejected this clear interpretation. Arguably, there was a political reason to do so. If the Court had accepted this interpretation, it would have left it with no choice but to strike down this provision and the political consequence would be such that the governing party (ZANU PF) would lose control over the electoral commission's regulation-making process. Potentially this would bring about catastrophic consequences to the ruling party, especially at this time when it was facing its biggest opposition.<sup>41</sup> To avoid this, it seems that the Court had to invent a purposive meaning of an otherwise clear and unambiguous legal provision. Thus, it seems that the Court failed to enforce the Constitution and protect the independence of the election management body. Instead, it appears that the Court allowed the Constitution to be violated in order to allow the ruling party to maintain its control over the election management body.

### 2.1.3 *Liberal Democrats v President of the Republic of Zimbabwe*

This case<sup>42</sup> was decided at the backdrop of a military action against the then President Robert Mugabe's government. Before the military action, the ruling party (ZANU PF) had been embroiled in a serious internal factional battle as two groups fought to succeed the then ageing President Mugabe. One faction appeared to be led by the then Vice-President Emmerson Mnangagwa, while the other faction seemingly was led by President Mugabe's wife, Grace Mugabe. President Mugabe appeared to have taken sides with the 'Grace Mugabe faction' when he expelled Vice-President Emmerson Mnangagwa from government.<sup>43</sup> President Mugabe sought to change the leadership of the military in order to neutralise the army's support for the 'Emmerson Mnangagwa faction'.<sup>44</sup> However, before he could do that, a *coup* was mounted against him. Between 14 and 15 November 2017 military tankers and heavily-armed soldiers were deployed in the streets of Harare and around national key points. Members of the police and central intelligence (believed to be in support of President Mugabe) were disarmed and ordered

41 Moore (n 34).

42 CCZ 7/18.

43 D Rodgers *Two weeks in November: The astonishing untold story of the operation that toppled Mugabe* (2019) 92.

44 Rodgers (n 43) 152. Also see Beardsworth et al (n 34).

to vacate the streets they were patrolling.<sup>45</sup> A senior military official appeared on the state radio and television station, announcing that the military had moved in to secure a deteriorating situation where the President had abdicated his constitutional duties to unelected 'criminals', referring to politicians in the 'Grace Mugabe faction'.<sup>46</sup> He also announced that what was happening was not a *coup* but that the military intended to arrest the 'criminals' around the President, and he promised that the situation would return to normalcy once these 'criminals' had been arrested. The military action was followed by massive public protests in Harare, calling for President Mugabe to resign. A number of senior politicians from the 'Grace Mugabe faction' were forced into exile while others were arrested and detained by the military.<sup>47</sup> A few days later Parliament convened to impeach President Mugabe but before this could happen, President Mugabe tendered his resignation. Mr Emmerson Mnangagwa was subsequently appointed by ZANU PF as the successor to President Mugabe and he assumed the office of State President.

A few months later a citizen joined hands with an opposition political party to challenge the constitutionality of Mr Mnangagwa's appointment as State President. The crux of the applicants' petition was that Mr Mnangagwa's appointment was necessitated by former President Mugabe's resignation which was necessitated by the unconstitutional military deployment and action against his government.<sup>48</sup> Applicants added that the military deployment was unconstitutional because it had not been sanctioned by the President.<sup>49</sup> The applicants further contended that President Mugabe was forced to resign as a result of the illegal military deployment and that, therefore, Mr Mnangagwa's appointment to replace President Mugabe was a constitutional nullity. Applicants sought, among other things, the Constitutional Court to order the establishment of a transitional government which would organise free and fair elections to pave the way for Zimbabwe's return to constitutional rule.<sup>50</sup>

The question of whether or not the military deployment was constitutionally valid depended on one's interpretation of section 213 of the Constitution, which provides as follows:

45 Rodgers (n 43) 169-170.

46 The full speech is available at <https://www.youtube.com/watch?v=eQyV2IVqKsl> (accessed 10 June 2019).

47 Rodgers (n 43) 218-219.

48 *Liberal Democrats & Others v President of the Republic of Zimbabwe & Others* CCZ 7/18 (2018) 3.

49 *Liberal Democrats* (n 48) 6.

50 *Liberal Democrats* (n 48) 3.

- (1) Subject to this Constitution, only the President, as Commander-in-Chief of the defence forces, has power –
  - (a) to authorise the deployment of the Defence Forces; or
  - (b) has power to determine the operational use of the Defence Forces.
- (2) With the authority of the President, the Defence Forces may be deployed in Zimbabwe.

Thus, only the President can authorise the deployment of the military, and in this case he had neither deployed the soldiers nor authorised their actions. However, it has been argued that the military commanders deployed the army out of necessity, in order to restore the constitutional order that had been deposed by the unelected members of the 'Grace Mugabe faction', who allegedly had usurped executive authority.<sup>51</sup> The doctrine of necessity is an extreme form of defence which requires those who plead it to adduce clear and credible evidence that the constitutional order had been deposed or was about to be overthrown and that, therefore, the military intervention was not only desirable but necessary.<sup>52</sup> While it was clear that the 'Grace Mugabe faction' was close to the then President and enjoyed his support, those who have pleaded the doctrine of necessity have not produced any tangible evidence of unelected individuals who had usurped presidential powers. In the absence of such evidence, the doctrine of necessity cannot stand as a justification for the illegal military intervention in what was an internal party succession battle.

Thus, it seems that the impugned military deployment could not pass constitutional scrutiny when analysed through either the application of section 213 of the Constitution or the doctrine of necessity. However, the Court refrained from engaging in any interpretation of section 213 of the Constitution or the doctrine of necessity. Rather, it held that

[t]he question of the lawfulness of the military action of 14 and 15 November 2017 was determined by the High Court. In the case of *Sibanda & Anor v President of the Republic of Zimbabwe NO & Ors* HC 1082/17 [where the Court ordered that] The actions of the Defence Forces of Zimbabwe ... are constitutionally permissible and lawful in terms of section 212 of the Constitution of Zimbabwe in that (a) they arrest the first respondent's [President] abdication of constitutional function, and (b) they ensure that non-elected individuals do not

51 See the order of the High Court in *Sibanda & Another v President of the Republic of Zimbabwe NO & Others* HC 1082/17 (2017) which is also reproduced in *Liberal Democrats* (n 48) 6.

52 R Dahal 'Doctrine of necessity and its application in Nepalese constitutional law: An overview' 9 April 2012, <https://ssrn.com/abstract=2037059> (accessed 10 June 2019).

exercise executive functions which can only be exercised by elected constitutional functionaries.<sup>53</sup>

Therefore, it was strange that a Constitutional Court, which is supposed to be the chief protector of the Constitution, adopted a vague order made by a subordinate court. Some may argue, as the Court did,<sup>54</sup> that the applicants should have appealed against the existing order that had been made by the subordinate court (the High Court). An appeal was impossible in this instance because the High Court did not deliver a full judgment with reasons, but only issued an order exonerating the military action of any constitutional invalidity. To date, there is no publicly-accessible written judgment to explain this order. Considering the constitutional importance of the question that had been placed before the judges by the applicant, the Constitutional Court ought to, at the very least, have engaged critically with both the Constitution and the High Court order and demonstrate why the military action should be deemed constitutionally valid.

Furthermore, the decision by the Court to refuse to engage with this question on account that the applicant should have appealed against the High Court order is inconsistent with the Court's own practice in previous cases, where it accepted to determine constitutional questions brought directly before it, without appealing against decisions by lower courts where similar questions would have been dealt with.<sup>55</sup>

It seems that the decision to ignore any engagement with section 213 of the Constitution or the doctrine of necessity was made in order to justify the Court's decision to validate Mr Mnangagwa's appointment as State President. Section 213 of the Constitution is written in language that is clear and unambiguous to the extent that it renders unconstitutional any military deployment that is done outside of the President's authority. The doctrine of necessity could not be pleaded without hard evidence. Section 212 of the Constitution, on which the military sought to rely for its actions, did not give the army the power to deploy itself. It simply states that '[t]he function of the Defence Forces is to protect Zimbabwe, its people,

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53 *Liberal Democrats* (n 48) 6.

54 *As above*.

55 *Eg, in In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* CCZ 13/2017 (2015) para 4 the Court stated that it accepted to determine the question whether the Prosecutor-General's independence was absolute or not even although a similar question had arisen in a case heard and determined by the High Court in two different cases. The Court acknowledged this but nevertheless proceeded to determine the question brought before it as it was in the interests of justice to do so.

its national security and interests and its territorial integrity and to uphold this Constitution'. In this case, the military failed to uphold the Constitution because it deployed itself without the authority of its commander-in-chief. All this pointed towards the illegality of the military intervention.

The constitutional validity of Mr Mnangagwa's appointment as President would logically be difficult to legally justify if the Court had found the military action preceding his appointment to be illegal. Thus, the Court seems to have made a strategic decision to avoid engaging with the Constitution in dealing with this question and in the result made a ruling in favour of the ruling party. In doing so, the Court seems to have engaged in procedural avoidance (avoiding to deal with a legal question brought before it) in order to avert a political risk to both President Mnangagwa and the entire regime's continued stay in power.

#### 2.1.4 *S v Mwonzora*

The background to this case<sup>56</sup> is that a senior opposition politician, Mr Douglas Mwonzora, had been charged for insulting and undermining the authority of the President, in contravention of section 33(2)(a) of the Criminal Law Code (the insult law), which provides as follows:

Any person who publicly, unlawfully and intentionally –

- (a) makes any statement about or concerning the President or any acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may –
  - (i) engender feelings of hostility towards, or
  - (ii) cause hatred, contempt or ridicule of; the President or any acting President, whether in person or in respect of the President's Office

shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.

Mr Mwonzora had uttered the following statement at a political rally:<sup>57</sup>

President Robert Mugabe *chikwambo uye achamhanya ... Ndawona Mugabe achigeza, tauro muchiuno, sipo muhapwa uye ndebvu hwaapepe ... Pamberi ne MDC. Pasi nechihurumende chembavha chinosunga vanhu vasina mhosva chichitora zvinhu zvavo ...*

<sup>56</sup> CCZ 17/2016.

<sup>57</sup> *S v Mwonzora* CCZ 17/2016 (2016) 2.

[literally translated to: President Robert Mugabe is a goblin and will run ... I saw Mugabe bathing, towel on waist, soap under his armpits and big beard ... Forward with MDC, down with bad government of thieves which arrest innocent people and taking away their property].

It was the state's case that by referring to the President as a goblin, Mr Mwonzora had uttered a false statement, with the knowledge that there was a real risk that the statement was false and that it could engender feelings of hostility towards the President in person or in respect of his office.<sup>58</sup> Mr Mwonzora was now being tried in the magistrate's court. During the trial Mr Mwonzora challenged the constitutionality of the offence of insulting the President. The presiding magistrate referred the challenge to the Constitutional Court, specifically requesting the Court to determine the constitutionality of the crime of insulting the President, in light of the fact that the Constitution guarantees the freedom of expression for every individual.<sup>59</sup>

The Constitutional Court refused to directly adjudicate on that question. Instead, it decided that the appropriate approach is to first assess whether in this particular case Mr Mwonzora had actually committed the crime which he was alleged to have committed and, if so, then the Court could determine the constitutional question tendered before it.<sup>60</sup> The Court found that, based on the charge sheet, Mr Mwonzora had not committed the said offence. It reasoned as follows:<sup>61</sup>

The statement that the President was a goblin was obviously a false statement. The offence is however not committed because a person has uttered at a public place a false statement about or concerning the President. The statement must be accompanied at the time of its utterance by the knowledge of its falsity and an intention to use it to engender feelings of hostility in the audience against the President. That is not even enough for the offence to be committed. The State must prove beyond reasonable doubt that the false statement about or concerning the President was capable of deceiving the hearer into believing [that] it is true and that it was likely to arouse in the audience feelings of hostility towards the President or his office. A patently false statement to the effect that the President is a goblin was unlikely to deceive any right thinking person into believing that it is true. It was unlikely to engender in the hearer feelings of hostility towards the President ... Such a statement cannot hold up the President to ridicule.

58 *Mwonzora* (n 57) 1.

59 *As above*.

60 *Mwonzora* (n 57) 5-9.

61 *Mwonzora* 10.



Ultimately the Court stated that Mr Mwonzora had not committed the alleged crime and there was no need to determine whether or not the crime of insulting and undermining the President was constitutional.<sup>62</sup>

This case was decided under conditions that made it politically sensitive. To start with, the case involved the prosecution of Mr Mwonzora – a high-ranking figure in the then biggest opposition movement. Furthermore, the case concerned the application of a law as a weapon to suppress dissenting voices that were critical of the President. During this time, the President had come under massive public scrutiny as he was very advanced in age, physically looked frail, was often forgetful and was clearly failing to cope with the demands of his office as he frequently fell asleep in public meetings.<sup>63</sup> He became a subject of public ridicule and this was embarrassing to the ruling party, ZANU PF. In response, the state made numerous arrests and prosecutions on the grounds of contravening the law against insulting the President, hoping to dissuade people from criticising the President. Between 2013 and 2017 at least 80 cases were filed in court on charges of insulting the President.<sup>64</sup> Given this context, it would appear that the Court made a bold decision to discharge a senior opposition leader from a frivolous criminal trial. However, a closer analysis of the judgment raises a few concerns.

The first concern relates to the approach adopted by the Court. It decided to first assess whether or not the crime had been committed before it could determine the constitutionality of the existing law creating that crime. This approach is contrary to the role of the Court and its rules of procedure. The Constitutional Court's role is to determine constitutional questions brought before it.<sup>65</sup> It does so if the question is constitutional in nature, if the matter is not moot, if the case has been properly placed before the Court, and if it is in the interests of justice that the question be determined at that time.<sup>66</sup> In this case, the question clearly was constitutional in nature and had been properly placed before the Court by way of referral by the magistrate. The constitutional question arose from an ongoing criminal trial and, therefore, it was not moot as it was a subject of a live controversy. It was in the interests of justice to

62 Mwonzora 11.

63 See S Chikwinya 'Mugabe bringing Zimbabwe into disrepute' *The Zimbabwean* 1 April 2016, <http://www.thezimbabwean.co/2016/04/mugabe-bringing-zimbabwe-into-disrepute/> (accessed 10 June 2019).

64 See Staff Writer 'Presidential insult laws must be abolished' *Daily News* 8 December 2017, <https://www.dailynews.co.zw/articles/2017/12/08/presidential-insult-laws-must-be-abolished> (accessed 12 June 2019).

65 Sec 167(1)(b) Constitution of Zimbabwe 2013.

66 See secs 167(5) & 175(4) of the Constitution of Zimbabwe 2013.

determine this question as it arose from an existing legislation. Therefore, the Court ought to have decided the question presented before it. The fact that Mr Mwonzora was charged with the crime of which the constitutionality was now being impugned provided adequate jurisdiction for the Court to directly deal with the presented constitutional question. The Court's decision did not have to depend on whether or not Mr Mwonzora was guilty, but on whether the impugned legislation could be deemed constitutionally valid in light of freedom of expression. Why did the Court choose not to determine the constitutionality of the 'insult law' regardless of whether or not Mr Mwonzora had indeed committed the crime?

The answer to this question seems to be that the Court adopted this approach in order to avoid having to determine the constitutionality of the impugned criminal law. If the Court had adopted a different approach, it would have been forced to review the constitutionality of the law against ridiculing the President, and potentially would be forced to strike it down as the impugned law is incompatible with the constitutionally-guaranteed freedom of expression. This would deprive the state of one of its most vicious weapons of muzzling dissenting voices. It therefore may be argued that, through this Court's decision, the state gave up the on-going prosecution of a senior opposition leader but retained the impugned criminal law for future use. After this judgment the state has continued to arrest, detain and charge people for violating this law.<sup>67</sup> Thus, in this case the Court appears to have abdicated its role of enforcing the Constitution against the interests of the ruling party to shield the President from public criticism through the continued application of an apparently unconstitutional criminal law.

### 3 A court ready to enforce the Constitution?

Although in the cases discussed above the Court appears to have abdicated from its role, there are instances where it seemed to demonstrate some eagerness to enforce the Constitution even against the interests of the ruling party and government. These include instances when the Court ordered the Prosecutor-General to issue a *nolle prosequi*, resulting in the private prosecution of a powerful politician in the ruling party for sexually abusing a minor.<sup>68</sup>

67 See National Public Radio 'After Mugabe, Zimbabwe still enforces a law against insulting the President' 20 December 2018, <https://www.npr.org/2018/12/20/676055453/after-mugabe-zimbabwe-still-enforces-a-law-against-insulting-the-president> (accessed 11 June 2019).

68 *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* CCZ 13/2017 (2015).

This prosecution resulted in a conviction and a lengthy custodial sentence being imposed on the politician. Furthermore, in 2018 this Court struck down a statute that gave the police disproportionate powers to impose a blanket ban on the exercise of the constitutional right to demonstrate and freedom of assembly.<sup>69</sup> In light of these decisions, would it still be fair to characterise this Court as partial towards the ruling party and government?

On the face of it these decisions suggest that the Court is impartial and can be relied upon to enforce the Constitution even against the interests of the ruling party and government. However, a closer analysis of the political conditions existing at the time when these cases were decided reveals that the Court made those decisions not necessarily because it intended to impartially enforce the Constitution even against the interests of the ruling party and government. On the contrary and, as I show below, the Court made those decisions because certain powerful factions within the ruling party were supportive of those decisions or that the change of political strategy by the ruling party required or allowed the Court to make those decisions. I explain these arguments in the paragraphs below.

### 3.1 Internal party power dynamics as a factor in the Constitutional Court's adjudication

Autocratic regimes are hardly monolithic as they comprise, within themselves, powerful rival factions that are constantly competing for power. While the leader and the ideological inclination of the regime may not change, the internal balance of power regularly changes, resulting in different factions exercising control over the levers of state power at different episodes. This appears true of ZANU PF. Since the party took control of the state in 1980, it did not change its leader until 2017. However, the party is comprised of factions that are constantly wrestling for power and to succeed the party leader. During the period under review, the ruling party was comprised of two dominant factions that were constantly wrestling against each other for power. As mentioned above, there was a faction led by the President's wife – the 'Grace Mugabe faction' – and the other was led by the then Vice-President, known as the 'Emmerson Mnangagwa faction'.<sup>70</sup>

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69 *Democratic Assembly for Restoration and Empowerment & Others v Saunyama NO & Others* CCZ 9/18 (2018).

70 Rodgers (n 43).

Given that the party is conflated with the state,<sup>71</sup> the internal factional battles between these two groups had a direct impact on state administration including the operations of the judiciary. In the paragraphs below I show how these internal factional power dynamics (and not necessarily the impartiality of the Court) may have influenced the Court to enforce the Constitution against the interests of the government.

### 3.1.1 *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control*

In this case<sup>72</sup> the Prosecutor-General filed an *ex parte* application in which he sought the Constitutional Court to determine whether the Prosecutor-General could be compelled through a court order to issue an order of *nolle prosequi*. The Prosecutor-General's argument was that his office enjoyed absolute independence as guaranteed by the Constitution and that, therefore, he could not be directed by the courts to issue a *nolle prosequi*. The Prosecutor-General relied on section 260 of the 2013 Constitution, which states that

[s]ubject to this Constitution, the Prosecutor-General (a) is independent and is not subject to the direction or control of anyone; and (b) must exercise his or her functions impartially and without fear, favour, prejudice or bias.

The Court took the view that the independence of the Prosecutor-General was not absolute.<sup>73</sup> Rather, it is qualified in the sense that the Prosecutor-General must independently make prosecutorial decisions.<sup>74</sup> However, those decisions are subject to judicial review.

This case was shrouded by political sensitivities at different levels. The office of the Prosecutor-General is a strategic institution for the ruling party to the extent that the party has always made sure that the person who occupies that office is someone whom they can control, for two key reasons. The first is that this allows them to rely on the Prosecutor-General to persecute political dissenters by prosecuting them on frivolous criminal charges.<sup>75</sup> The second

71 J Shumba *Zimbabwe's predatory state: Party, military and business* (2018).

72 CCZ 13/2017.

73 *Prosecutor General of Zimbabwe* (n 68) 8.

74 Such as deciding to prosecute or refusing to do so and rejecting requests for *nolle prosequi*.

75 Eg, many opposition political leaders and civil society activists are often charged with serious crimes for purposes of arresting them. They rarely are found guilty of those crimes. See International Commission of Jurists 'Stop abuse of charges of subverting a constitutional government' 6 June 2019, <https://www.icj.org/stop-abuse-of-charges-of-subverting-a-constitutional-government-against-zimbabwe-7/> (accessed 12 June 2019).

reason is that they rely on the Prosecutor-General to protect them against being held criminally accountable for abuse of power. The Prosecutor-General does this by declining to conduct prosecutions when criminal charges are laid against those politicians. For instance, prior to this case the Prosecutor-General declined to prosecute a senior ruling party politician – Mr Munyaradzi Kereke – who had been accused of sexually abusing a minor.<sup>76</sup> The Prosecutor-General also denied the victim's request for a *nolle prosequi*, which meant that Mr Kereke could neither be prosecuted by the state nor privately. The victim took on review at the High Court the Prosecutor-General's decision to reject her request for a *nolle prosequi*. The High Court ordered the Prosecutor-General to grant the *nolle prosequi*, but he refused to comply with the High Court order and instead filed this *ex parte* application before the Constitutional Court.

Against this background the decision of the Constitutional Court to reject the Prosecutor-General's argument of absolute independence seems profound. This decision had personal ramifications for a senior ruling party politician (Mr Kereke) as it left him vulnerable to private prosecution. He was eventually prosecuted privately in the magistrate's court and was convicted to serve a lengthy custodial sentence.<sup>77</sup> Furthermore, this decision has ramifications for all the politicians from the ruling party as it left them vulnerable to future private prosecution because once the Prosecutor-General declines to prosecute, individuals now have the option to conduct private prosecutions. They can do this by applying for a *nolle prosequi* from the Prosecutor-General and if denied, they can take his decision on review. Alternatively, they can challenge his decision to decline public prosecution. Thus, the Prosecutor-General no longer is the final authority on prosecutorial decisions and, therefore, may not be able to protect the politicians in the ruling party as he had done in the past. Could this case therefore be evidence that this Court at times is prepared to enforce the Constitution even though that would jeopardise the interests or liberty of powerful politicians from the ruling party?

At the time that this case was decided ZANU PF was embroiled in a massive internal factional battle, as described above. The rival factions were using the law as a political weapon against each other. The Emmerson Mnangagwa faction appeared to have gained control over the Prosecutor-General, and was accused of using this

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<sup>76</sup> *Prosecutor General of Zimbabwe* (n 68) 2.

<sup>77</sup> The details of his trial and conviction are set out in *Kereke v Maramwidze* ZWHHC 792 (2016) 1.

to prosecute political rivals from the Grace Mugabe faction.<sup>78</sup> In response, the Grace Mugabe faction, with the support of President Robert Mugabe, wanted the Prosecutor General replaced. Thus, at the time that this case was decided the Prosecutor-General appeared to have lost the support of the President and some powerful politicians in the ruling party. It was convenient for the President and his preferred Grace Mugabe faction for the Court to rule against the Prosecutor-General and set into motion the process of his removal. The Court's decision in this case was followed by the impeachment of the Prosecutor-General, as well as the prosecution and conviction of Mr Kereke, who was perceived to be associated with the Mnangagwa faction. Therefore, it seems that while the decision of the Court underscored certain important constitutional principles, this may only have been necessitated more by the political conditions rather than the independence of the Court or its preparedness to protect the Constitution against violations emanating from the ruling party. This is precisely because the same bench (judges) that wrote this judgment failed to uphold the Constitution in the other cases as was discussed above, even though the law was clear that the government's position was unlawful.

### 3.2 Change of political strategy as a factor in the Constitutional Court's adjudication

In autocratic regimes the state has a tendency of using the judiciary to rubber-stamp its decisions and policies.<sup>79</sup> Thus, these regimes tend to use the courts to lend legal legitimacy to policies and decisions that otherwise are illegal and unpopular. In the case of Zimbabwe it has been suggested that the courts sometimes are used, particularly by the executive, to rubber-stamp legislation and decisions that are patently unconstitutional but which assist the ruling party to maintain its political power. However, as a result of political pressure the regime sometimes is forced to change its strategy. As part of realigning its strategy, the regime may have to give up some of the laws or policies, but retain some or introduce new ones. These changes in the ruling party's political programme and strategy may either require or allow the courts to make certain decisions which *prima facie* appear progressive. Yet a closer analysis of the political conditions may show that the Court did not necessarily make those decisions because of its preparedness or independence to enforce

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<sup>78</sup> M Tafireyika 'Sacked Tomana was in wrong ZANU PF basket' *The Daily News* 11 June 2017, <https://www.dailynews.co.zw/articles/2017/06/11/sacked-tomana-was-in-wrong-zanu-pf-basket> (accessed 12 June 2019).

<sup>79</sup> C Larkins 'The judiciary and delegative democracy in Argentina' (1998) 30 *Comparative Politics* 423.

the Constitution regardless of the interests of the ruling party. In the paragraphs below I demonstrate this argument.

### 3.2.1 *Democratic Assembly for Restoration and Empowerment v Newbert Saunyama NO*

The background to this case<sup>80</sup> is that the respondent, a senior police officer in charge of Harare central district, during 2017 had imposed a ban on all public demonstrations and processions for a period of two weeks.<sup>81</sup> He was acting in terms of section 27(1) of the then Public Order and Security Act (POSA) which stated:

If a regulating authority for any area believes on reasonable grounds that the powers conferred by section 26 [of POSA] will not be sufficient to prevent public disorder being occasioned by the holding of processions or public demonstrations or any class thereof in the area or any part thereof, he may issue an order prohibiting, for a specified period not exceeding one month, the holding of all public demonstrations or any class of public demonstrations in the area or part thereof concerned.

The constitutional validity of these powers was challenged at the High Court, and in its final order the High Court upheld the constitutionality of the impugned legislation. This necessitated an appeal to the Supreme Court. The Supreme Court<sup>82</sup> then referred a constitutional question for determination by the Constitutional Court. The constitutional question was whether or not section 27 of POSA is constitutional to the extent that it empowers the police to impose a ban on public demonstrations in a particular district for a period not exceeding one month.

The Constitutional Court held that the impugned legislation was unconstitutional and summarised its reasoning as follows:<sup>83</sup>

The ban imposed is blanket in nature and has a dragnet effect. During the currency of the ban, the rights to demonstrate and to petition peacefully are completely nullified. This includes demonstrations already planned at the time the ban is imposed and those that are yet to be planned. This also includes mass demonstrations and small demonstrations. It includes demonstrations of all sizes and for whatever purpose without discrimination. Like a blanket or a dragnet, it covers or catches them all. To the extent that the ban does not discriminate between known and yet to be planned demonstrations, the limitation in s 27 has the effect of denying the rights in advance

80 CCZ 9/18.

81 *Democratic Assembly for Restoration and Empowerment* (n 69) 1.

82 Acting in terms of sec 175(4) of the Constitution of Zimbabwe 2013.

83 *Democratic Assembly for Restoration and Empowerment* (n 69) 14-15.

and condemning all demonstrations and petitions before their purpose or nature is known. It does not leave scope for limiting each demonstration according to its circumstances and only prohibiting those that deserve to be prohibited while allowing those that do not offend against some objective criteria set by the regulating authority to proceed. The limitation in s 27 of POSA stereotypes all demonstrations during the period of the ban and condemns them as being unworthy of protection. Stereotyping is a manifestation of bias without any reasonable basis for that bias. To the extent that the limitation in s 27 stereotypes all demonstrations during the period of the ban, it loses impartiality and becomes not only unfair but irrational.

In addition to holding that the powers given to the police by the impugned legislation are irrational, the Court also held that those powers had a disproportionate negative impact on the right to freedom to demonstrate peacefully.<sup>84</sup> This is an important judgment as it vindicated the right to demonstrate peacefully, which is a critical right in a democracy, as explained below by the Court itself:<sup>85</sup>

Clearly, the right to demonstrate creates space for individuals to coalesce around an issue and speak with a voice that is louder than the individual voices of the demonstrators. As is intended, demonstrations bring visibility to issues of public concern more vividly than individually communicated complaints or compliments to public authorities. Demonstrations have thus become an acceptable platform of public engagement and a medium of communication on issues of a public nature in open societies based on justice and freedom.

The state had always relied on the impugned law to suppress public demonstrations. Public demonstrations, especially those of massive proportions, tend to be embarrassing to dictatorial regimes as they expose a lack of legitimacy and a lack of public support for the government or its policies. They also have a chilling effect on unpopular dictatorial regimes because they can mutate into mass action which may lead to the removal of government.<sup>86</sup> It appears profound that the Court made this decision against the government but in favour of the Constitution, at a time when the government was under pressure from public demonstrations organised mainly by the opposition and social movements, and the state was hell-bent on suppressing these demonstrations.<sup>87</sup>

However, it must be noted that this judgment was handed down at a time when the new government of President Mnangagwa was

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84 *Democratic Assembly for Restoration and Empowerment* 14.

85 *Democratic Assembly for Restoration and Empowerment* 8.

86 As occurred during the 2011 Arab Spring revolutions in Egypt and Tunisia.

87 B Manavire et al 'Pressure mounting as more protests line-up' *The Zimbabwe Independent* 18 January 2019, <https://www.theindependent.co.zw/2019/01/18/pressure-mounting-as-more-protests-line-up/> (accessed 12 June 2019).



vigorously pursuing a policy of re-engaging with Europe and the United States of America (USA) in its bid to attract foreign direct investment. The USA and the European Union (EU) had made it clear that they would support this policy only if the Zimbabwean government demonstrated a commitment towards strengthening democracy and respect for human rights.<sup>88</sup> In response the Zimbabwean government embarked on pseudo-democratic reforms while in practice it continued to be autocratic. For instance, the government decided to amend a raft of draconian legislation, including the Public Order and Security Act. It therefore may be argued that the Court's decision was consistent with this strategy where the state was prepared to give away the impugned law and develop other ways of suppressing the demonstrations. It appears that, rather than using laws to outlaw protests, the government now prefers to intimidate people from participating in protests. It does so partly by using the state security agents to harass would-be protesters and those organising the protests. This usually is done by criminally charging and placing on remand those who are leading mass mobilisation ahead of the planned demonstration.<sup>89</sup> Sometimes chilling threats of military intervention are issued to suppress protests.<sup>90</sup>

#### 4 Conclusion

A review of the Constitutional Court's decisions in the past six years reveals that in the majority of cases it appears that the Court made decisions in order to avert political risks facing the ruling party and government rather than enforcing the Constitution. Potentially this is why public trust in the Zimbabwean judiciary is very high (77 per cent) among the ruling party supporters but very low (48 per cent) among the opposition supporters.<sup>91</sup> There are a few cases where the Court made decisions to enforce the Constitution. However, it appears that this was only possible because the internal factional contestations in the ruling party and government required or permitted the Court to make those decisions. The performance of the Zimbabwean Constitutional Court thus far paints a gloomy picture of the reliability and utility of constitutional courts as sites of human rights struggles in countries that have a fairly democratic constitution but that are governed by autocratic regimes.

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88 M Dzirutwe & C Evans 'EU says ready to support Zimbabwe engage foreign lenders' *Reuters* 23 January 2019, <https://af.reuters.com/article/topNews/idAFKBN1FC1IX-OZATP> (accessed 12 June 2019).

89 See International Commission of Jurists (n 75).

90 See Staff Reporter 'Zimbabwe Army to step in' *Bulawayo24* 19 June 2019, <https://bulawayo24.com/index-id-news-sc-national-byo-164436.html> (accessed 10 July 2019).

91 Krönke (n 13).