## 2 Basic Tenets of Zimbabwe's New Constitutional Order

Admark Moyo*

### 1 Introduction

This chapter begins with detailed discussions of the basic principles of constitutional law that are relevant to a fuller understanding of the provisions of the new constitutional dispensation. These include the principles of the supremacy of the Constitution, the rule of law, democracy and accountability, the separation of powers and checks and balances. The discussion of the separation of powers and the independence of the judiciary takes place against the backdrop of the centrality of impartial courts in the enforcement of the Constitution and the enjoyment of fundamental rights and freedoms by the citizenry. Arguably, the provisions of the Declaration of Rights can only be properly understood as an integral part of the Constitution as a whole, hence the need for a detailed explanation of the basic tenets of the new constitutional order. Both the Declaration of Rights and the entire Constitution are important ingredients of the new constitutional project of transforming Zimbabwean society as well as the country's social, political and economic systems and institutions. To be logical, holistic and informed, an analysis of the provisions of the Declaration of Rights must take place within the broader constitutional context.

### 2 The Supremacy of the Constitution

Zimbabwe law in all its forms is now founded in the value of the supremacy of the Constitution. What does this mean for Zimbabwean courts and other interpreters of the Constitution? In simple terms, this means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by every form of non-constitutional law, the norm that is contained in the Constitution is to be given precedence by anyone whose duty is to enforce the provisions of the Constitution. Accordingly, legal norms or rules of decision which are embodied in parliamentary legislation, subordinate legislation, judicial decisions, the common law and customary law are subordinate to the Constitution as the supreme law of the land. In the context of statutory interpretation, domestic courts should – in the event of a clash between constitutional and non-constitutional norms – ensure that the Constitution's norm or rule of decision supersedes non-constitutional norms or rules.

Before the achievement of political independence in 1980, the doctrine of parliamentary sovereignty dominated discussions on constitutional law. In terms of this doctrine, Parliament has the authority to make any law it wishes to, and no person or institution, including the courts, may challenge the laws made by

* Senior Law Lecturer, Great Zimbabwe University. Programme Manager, Children and the Law, African Child Policy Forum.

Parliament. This created room for Parliament to be a tyrant unto itself and to legislate unpopular or repressive laws with impunity. For purposes of our discussion on fundamental rights and freedoms, it is important to note that the courts had no power to review the conduct of and the laws made by Parliament. The doctrine of the supremacy of the Constitution stands in sharp contrast to the doctrine of parliamentary sovereignty in that the former is premised on the role of the courts in reviewing the constitutionality of legislation or the conduct of the political organs of the state. If it is the Constitution that is supreme and not Parliament, then the conduct of the later – including the laws it makes – are subject to the Constitution. Accordingly, it is possible for courts to review parliamentary legislation on substantive grounds and to declare it to be 'invalid' because it violates fundamental rights and freedoms.

The Constitution is recognised as the basic legal norm that is above all others.[1] Internal evidence of such supremacy abound. For instance, the preambular provisions partly provide that "[w]e the people of Zimbabwe … hereby make this Constitution and commit ourselves to it as the fundamental law of our beloved land".[2] From the onset, the Constitution sets itself out as the fundamental law to which all other laws must be aligned. In *Mudzuru and Another v. Minister of Justice, Legal & Parliamentary Affairs & Others,*[3] the Court commented on the nexus between the supremacy clause and the court's powers to issue a declaration of constitutional invalidity.[4] It held as follows:

> The rule of invalidity of a law or conduct is derived from the fundamental principle of the supremacy of the Constitution … A court does not create constitutional invalidity. It merely declares the position in law at the time the constitutional provision came into force or at the time the impugned statute was enacted. The principle of constitutionalism requires that all laws be consistent with the fundamental law to enjoy the legitimacy necessary for force and effect. It is for this Court to give a final and binding decision on the validity of legislation.[5]

Of colossal significance is the court's observation that not even itself is above the Constitution and that constitutionalism mandates that all laws be subject to and compliant with the supreme law. More compellingly, the court portrayed itself as a 'servant' of sorts, whose duty is to merely declare the position of the law and not to 'create' constitutional invalidity. As such, a law does not become constitutionally invalid when the court so declares, but instead, it becomes invalid the moment it, or the supreme law, is enacted.[6] The Court's is a confirmatory role where all it does is confirm that a law is inconsistent with the Constitution.

Apart from the *Mudzuru* decision, the Constitutional Court of Zimbabwe has also upheld the principle of constitutional supremacy in other matters. These include *Gonese & Another v. President of Zimbabwe & Others,*[7] where the Court denied the

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[1] *See Makani & Others v. Arundel School & Others* CCZ 7/16, p. 5.
[2] *See* Preamble to the Constitution.
[3] CCZ 12/2014.
[4] *See* section 176(5)(a) of the Constitution.
[5] *See Mudzuru and Another v. Minister of Justice*, p. 48.
[6] For comparative purposes, *see Ferreira v. Levin,* para 1006I-J.
[7] CCZ 10/2018.

respondents' contention that the applicants had tacitly waived their right of audience with the court. The Court reasoned that waiver of such a right could not be easily assumed especially considering that it was a constitutional matter, and the supremacy of the Constitution entailed that the applicants must be heard in the circumstances.[8] Similarly, in *Denhere v. Denhere & Another*,[9] where the applicant was contesting the property distribution portion of a High Court order of divorce, the Court had the following to say:

> The third factor is that *constitutional provisions are binding and the Court ought to be guided accordingly. Section 2 of the Constitution makes the Constitution the supreme law of the land.* In this regard, s 3 of the Constitution provides for the values and principles which should guide all institutions and persons in Zimbabwe. Section 85(1) ought, therefore, to be understood in the context of s 3 of the Constitution. The most relevant principles to the present matter are the supremacy of the Constitution, the rule of law, and fundamental human rights and freedoms. These principles are central to the approach that courts ought to take when *adjudicating all matters.*[10]

Overall, the principle of constitutional supremacy can be generally understood to imply not only that all other laws must be subject to constitutional provisions, but also that the courts, as servants or guardians of the Constitution, are obliged to apply and interpret all laws in a manner that is consistent with it and neither creates nor deletes any rights or obligations entrenched therein.

In the Zimbabwean context, there is need to differentiate between the supremacy of the Constitution as a value and as a rule. Section 3(1)(c) of the Constitution entrenches the supremacy of the Constitution as a value, and, technically, the doctrine of constitutional supremacy may not directly be relied upon when making decisions about the constitutional validity of legislation and other sources of law. Values do not create self-standing and enforceable rights and obligations.[11] Reading section 3(1)(c) – constitutional supremacy as a value – to mean the same thing with section 2(1) – constitutional supremacy as a rule – would not only create the problem of redundancy but also suggest that values are directly enforceable in our courts.

Trumping sense constitutional supremacy, that is the supremacy of the Constitution as a rule, is mainly protected in section 2(1) of the Constitution. This section provides that "[t]his Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of its inconsistency". In the context of women's rights, section 81(3) of the Constitution also provides that "[a]ll laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement". Describing the powers of the courts and the remedies they may grant to aggrieved litigants, the Constitution stipulates that "[w]hen deciding a constitutional matter within its jurisdiction a court may declare that any law or conduct that is inconsistent with the

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[8] *Gonese v. President of Zimbabwe*, p. 13.
[9] Judgment no// CCZ 9/19.
[10] *Denhere v. Denhere & Another*,at pp. 10-11.
[11] *See Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*, 2005 (3) SA 280 (CC) para. 21.

Constitution is invalid to the extent of the inconsistency".[12] These provisions codify trumping sense constitutional supremacy, create discrete legal rights and obligations for litigants and can be directly relied upon by persons seeking remedies for violations of their fundamental rights and freedoms. Trumping sense constitutional supremacy or the supremacy of the Constitution as a principle implies that the Constitution trumps any other source of law in the event of a direct conflict between the law in question and a constitutional provision.

If constitutional supremacy as a value meant the same thing as constitutional supremacy as a rule, the new Constitution's official supremacy clause, section 2(1), would not have been instantaneously followed by the provisions entrenching constitutional supremacy as a value, section 3(1)(c) of the Constitution. Section 2(1) and (2) of the Constitution, which is entitled "Supremacy of the Constitution", provides for an enforceable legal norm or rule of decision. In Professor Michelman's words, these provisions "lay down constitutional supremacy as a rule for the construction of a determinate hierarchical relation among legal norms emanating from various recognised sources of law … [W]e do not speak of values when rules of practice are what we have in mind. Values, rather, serve as reasons for rules, conversely, rules (if they are any good) serve to implement values."[13] Founding values give an outline, in broad terms, of the desired condition of Zimbabwean society while rules or principles give flesh to the values that are entrenched in the Constitution.

There is no doubt that the current Constitution makes a complete break with Zimbabwe's colonial history and ushers in a new constitutional dispensation. The common law and customary law have largely been reconstituted and their validity depends on their consistency with the Constitution. Thus, both the common law and customary law are accepted as valid sources of law subject to the Constitution. The Constitution has introduced a new legal culture and is therefore a foundational premise of legal reasoning because it has pervasive normative effect. It has almost affected all branches of the law. More importantly, the Constitution is founded on values previously denied people by the state and the law. As a rule, the supremacy of the Constitution suggests that all other sources of law should be consistent with the value, principles and rights stipulated in the Constitution.

Given the evident absence of jurisprudence on the scope of the supremacy of the Constitution, it is imperative to consider how courts in other jurisdictions have interpreted the same concept, particularly in light of the fact that the Constitution confers on courts the discretion to consider foreign law.[14] To this end, the bulk of lessons can be derived from the rulings of the South African Constitutional Court, especially given that the Zimbabwean Constitution is largely a transplant of the South

[12] Section 175(6)(a) of the Constitution of Zimbabwe Amendment Act No. 20 of 2013 (hereafter 'the Constitution').
[13] F. Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution', in S. Woolman and M. Bishop (eds.), *Constitutional Law of South Africa,* 2nd edition (2014) p. 11-1, at p. 11-35. Professor Michelman makes these remarks in the context of the equivalent provisions of the South African Constitution.
[14] Section 46(1)(e) of the Constitution.

African Constitution. In *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa*,[15] the Constitutional Court of South Africa held as follows:

> There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[16]

This approach speaks of a unitary legal system in which there is a hierarchy of laws that implies the submission of common law doctrines to Declaration of Rights inspection.[17] On the whole, the patriarchal aspects of customary law or the common law will gradually be displaced by the egalitarian values and rights entrenched in the Constitution. Section 2(1) provides that "this Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency". This provision indirectly sets out a hierarchy of laws, with the Constitution affirming its supremacy at the top of the hierarchy. Accordingly, the laws that were in force on the date the Constitution became operative remain valid and binding to the extent of their consistency with the Constitution.[18] The Constitution governs the validity of legislation and other legal rules embodied in other sources of law. This becomes clear when section 2(1) is read together with section 192 of the Constitution which proclaims that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified. These provisions suggest that the Constitution bears ultimate authority over the content and application of all laws.

The doctrine of the supremacy of the Constitution suggests that the Constitution reaches all corners of the legal system and influences the content of all branches of the law. This view has support from the idea that the Constitution applies both horizontally and vertically.[19] The vertical and horizontal application of the Declaration of Rights, and the fact that the Constitution imposes positive and negative obligations on state and non-state actors, suggests that no relationship or conduct is immune from constitutional control.[20] Thus, the relevant provisions have serious implications for the family, juristic persons and the state. It suggests that such family relationships as the parent-child relationship are subject to constitutional control.

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[15] 2000 (2) SA 674 (CC).
[16] Para. 44.
[17] *See* F. Michelman, 'The Bill of Rights, the Common Law and the Freedom-Friendly State', 58 *Miami Law Review* (2003–2004) p. 401, at p. 406.
[18] The problem though is what happens when the incompatible/inconsistent laws remain on the statute books and are still being used. Sometimes it is also important to read in constitutional amendments rather than invalidate laws which just need minimal correction. Arguably alignment has taken place, it is just that it is not as yet clearly articulated.
[19] *See* section 45(1)–(3) of the Constitution.
[20] Section 2(2) read with section 44 of the Constitution.

## 3 The Rule of Law

The rule of a law is provided for as one of the founding principles in the Constitution and has been construed as having both substantive and procedural connotations. Substantively, the rule of law entails that the state "[can only] subject the citizenry to publicly promulgated laws, that the state's legislative function be separate from the adjudicative function, and that no one within the polity be above the law."[21] This conception portrays the rule of law as a barricade against absolute power and arbitrariness. Under adjectival law, the rule of law provides that government functionaries may only exercise powers or perform functions beyond those conferred upon them by the law. The rule of law allows individuals to mount challenges against the laws or conduct of the state and the courts are clothed with jurisdiction to determine such claims in light of laws of general application.

In the broadest terms, the rule of law requires that the state only subject the citizenry to publicly promulgated laws that the state's legislative function be separate from the adjudicative function, and that no one within the polity be above the law. The inclusion of the rule of law as a founding value in the Zimbabwean Constitution demonstrates its importance in determining the validity of legislation or conduct of public functionaries.[22] The South African Constitution too provides that the rule of law informs the foundation of the democratic state.[23] This indicates how the rule of law has assumed a pre-eminent role in the current constitutional dispensation. This prominence is further evidenced by the manner in which courts have invoked the rule of law as a mechanism primed to limit, regulate as well as give more precise meaning to how government power is exercised. This position was emphasised by the South African Constitutional Court in the case of *Fedsure Life Insurance Ltd and Others v. Greater Johannesburg Metropolitan Council and Others,*[24] when it stated that:

> The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power or perform no function beyond that conferred upon them by law.[25]

The rule of law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve their dignity and realise their legitimate aspirations in all countries, whether

[21] *Economic Freedom Fighters v. Speaker of the National Assembly and Other; Democratic Alliance v. Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).
[22] Section 3(1)(b) of the Constitution.
[23] Section 1(c) of the Constitution of the Republic of South Africa, Act 108 of 1996.
[24] 1999 (1) SA 374 (CC).
[25] At para. 56.

dependent or independent.[26] Dicey, who articulated the principle, argued that the rule of law meant three things:

i) Absolute supremacy of the law as opposed to influence of arbitrary power. This is in contra-distinction in any system as discretionary power is inevitable but there can only be limits of that discretionary.
ii) Equality before the law implying that no person is above the law and everybody is subject to the ordinary law and jurisdiction of the courts.
iii) The ordinary courts are responsible for enforcing the ordinary laws of the land, the common law and statute in a manner that protects the basic rights of all so that these laws function as a constitution.[27]

Despite the prominence of the principle, no constitution explains how it will be achieved, thereby leaving the concept of the rule of law vague and elastic.[28] Fundamentally, it means that human rights and obligations must be determined by laws rather than by individuals or groups of individuals exercising arbitrary discretion. In the modern sense, the concept of the rule of law:

> refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[29]

This idea of the rule of law was also recognised by Plato when he stated that "where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state".[30] From Plato's point of view, the principle of the rule of law encompasses, at the very least, the idea that not a single person or institution is above the law and that everyone is equally answerable to the same laws without any exception regardless of status or social standing. The question of what exactly the phrase 'rule of law' entails has also been addressed by Chinhengo J in *Commissioner of Police v. Commercial Farmer's Union*.[31] The learned judge acknowledged that:

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[26] M. Hamalengwa, C. Flinterman and E. Dankwa (eds.), *The International Law of Human Rights in Africa: Basic Documents and Annotated Mibliography* (1988) p. 37.
[27] A. V. Dicey (1959) referred to in P. De Vos *et al.* (eds.), *South African Constitutional Law in Context* (2014) p. 78.
[28] T. Carothers, 'Rule of Law Temptations', in J. J. Heckman, R. L. Nelson and L. Cabatingan (eds.), *Global Perspectives on the Rule of Law* (2013).
[29] United Nations Security Council, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, August 2004, para. 6.
[30] Constitutional Rights Foundation, 'Plato and Aristotle on Tyranny and the Rule of Law', 26:1 *Bill of Rights in Action* (2010), available at <http://www.crf-usa.org/bill-of-rights-in-action/bria-26-1-plato-and-aristotle-on-tyranny-and-the-rule-of-law.html>.
[31] 2000 (1) ZLR 503 (H).

> 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.[32]

The rule of law expresses the idea that laws, even those made by a sovereign, are subject to a fundamental law, typically a higher law or constitution, and therefore can be held invalid by an independent court if that fundamental law is breached. The Zimbabwean executive is subject to the Constitution as highlighted by provisions in section 88(2)[33] and 90(2)(c).[34] The South African case of *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others*[35] underscored the fact that "the Constitution, the rule of law and accountability are the sharp and mighty sword ready to chop off the ugly head of impunity".[36] Resilience of these core principles are at the heart of democracy. In Zimbabwe, the president is granted immunity in section 98 of the Constitution whereas in South Africa there is no presidential immunity.[37] This shows that presidential immunity undermines the rule of law.

The question whether or not the rule of law as a principle has or is being respected is a controversial one. It will suffice to point out that a conception of the rule of law that is divorced from justice and just laws becomes a hollow concept. The same goes for implementation of unreasonable and iniquitous laws through the application of brutal state power, which in and of itself, does not promote the rule of law. On the contrary, it becomes rule by law if those in power use the laws to achieve their own ends and to perpetuate inequalities between the haves and the have nots. Pierre De Vos *et al.* explore this by bringing an example of the apartheid era in South Africa.[38] They posit that even during that time the people in power claimed that they were guided by the rule of law, but the laws were so draconian and oppressive that they

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[32] At p. 525.

[33] This is to the effect that the executive authority of Zimbabwe vests in the president who exercises it, subject to the Constitution, through the Cabinet.

[34] The Constitution here imposes the duty on the president to, *inter alia*, ensure protection of fundamental human rights and freedoms and the rule of law.

[35] 2016 (3) SA 580 (CC).

[36] At para 1. *See also* para. 75 where Mogoeng CJ pointed to the fact that the rule of law requires that no power is to be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view people hold. This then translates to the fact that no one is above the law even the president as was the case *in casu*.

[37] Section 98 of the Constitution governs presidential immunity.

[38] De Vos *et al*., *supra* note 27, p. 78.

were divorced from the principle of the rule of law. This reflects the fact that respecting the principle of the rule of law on its own is not sufficient to protect the most basic human rights of people in the society. The apartheid government maintained that it respected the laws because it governed in terms of the laws duly enacted by Parliament, yet the apartheid era witnessed countless instances of human rights violations in the history of South Africa, including extrajudicial killings and torture.

In Zimbabwe, the rule of law has been used in a rather formalistic manner.[39] The formalistic approach to the principle of rule of law includes the understanding of law as an instrument of governance rather than a substantive understanding that also concerns itself with the contents of the law. This also implies that as long as there are legislative provisions authorising governmental conduct, regardless of them being unjust and oppressive, the enforcement of such laws would be considered to be lawfully warranted. This would be tantamount to rule by law because such laws neither reflects the rule of law in a substantive sense nor would they be sufficient enough in protecting basic human rights that the rule of law is meant to protect. This scenario would be identical to the South African apartheid government in that the inherent injustice and inequality of the system at the time did not prevent some from still speaking of the system as being premised on the principle of the rule of law.[40]

On a negative note, some constitutional provisions undermine the principle of the rule of law and the enjoyment of property rights. Section 72(3)(b) of the Constitution[41] provides that where agricultural land or any right or interest in such land has been compulsorily acquired, no person may apply to the court for determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and (c) provides that such acquisition may not be challenged on the ground that it was discriminatory in contravention of Section 56.[42] This general ouster of the court's jurisdiction in land issues emasculates the concept of rule of law and allows the state to violate property rights by grabbing land without paying compensation or allowing the owners of such land to turn to courts for redress. This in no way reflects the principle of the rule of law which implies that all citizens should have the right to approach courts to seek redress in the event that any right has been infringed. Such provisions imply that the state power is not subject to the checks and balances that exist through the judiciary. Even in the event that the state uses its powers arbitrarily, the courts' hands are tied and the state thus would get away with such abuse of its citizens which the rule of law and all the concepts that fall under it seek to protect.

From the above, it follows that the fact that the laws are in place and that the rule of enacted laws is being respected is not enough. A society cannot claim to function in accordance with the rule of law merely because the executive acts strictly in

[39] In the past, certainly before 1980 and until the 2013 version of the Constitution.
[40] Dugard referred to in De Vos *et al., supra* note 27, p. 79.
[41] *See also* Section 295 (3) of the Constitution.
[42] Which is generally to the effect that all persons are equal before the law and that they have the right not to be treated in an unfairly discriminatory manner on such grounds as, *inter alia*, gender, race and economic or social status.

accordance with enacted laws. Those laws should reflect the values and principles which underlie an open and democratic society that allows its citizens to enjoy fundamental rights and freedoms. The same laws should also apply uniformly to every person regardless of their race, gender or social standing. This means that everyone, including the president, should be accountable under the law. Failure to make those who hold public power accountable to the law would imply the trivialisation of the substantive content of the law, thereby leaving the citizenry vulnerable to exploitation, oppression and human rights violations.

## 4 Democracy, Transparency and Accountability

From the outset, it is important to emphasise that democracy, transparency and accountability form part of the principles of good governance protected in section 3(2) of the Constitution. This suggests the centrality of these values and principles in the new constitutional dispensation. The core idea behind the term 'democracy' is that decisions affecting the members of a political community should be taken by the members themselves, or at least by their elected representatives whose power to make those decisions ultimately derives from the members.[43] This definition speaks to various conceptions of democracy both from the perspective of the persons affected by political decisions and "from a perspective that recognises that modern democracy is exercised mainly through institutionalised politics that entails citizens electing individuals or organisations to represent their interests".[44] Almost all definitions of democracy revolve around the idea that the will of the people is sovereign and that the people should be involved in processes by which they are governed. To be 'democratic' a political system should enable members of a community to engage each other in matters that affect them and to make collective decisions to address such matters. Central to the notion of democracy is that no one has the divine right to govern and that governments are only legitimate if they rest squarely on the consent of the governed.

There are varied conceptions of democracy, and the Constitution does not prescribe any particular form thereof. These include, among others, direct democracy, representative democracy, participatory democracy and constitutional democracy. The different forms of democracy enshrined in the Constitution mirror both the varied conceptions of democracy and the centrality of democracy in shaping the type of post-colonial society 'We the People' wish to become. Direct democracy is "a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives".[45] Direct democracy comes closest to attaining the rule of the people. This is because it practically demands a vote on every piece of legislation by every eligible member of society.

Unfortunately, the complex structure and internal workings of the modern nation state have left little room for direct democracy to prevail. Contemporary societies

[43] T. Roux, 'Democracy', in Woolman and Bishop, *supra* note 13, p. 10-1, at p. 10-1.
[44] De Vos *et al.*, *supra* note 27, p. 86.
[45] Roux, *supra* note 43, at p. 10-4.

pose a challenge to direct democracy in several senses: first, the numbers of people involved are often so high that it would not be possible to give every other person the opportunity to participate before decisions are made; second, some decisions are so complicated that it is difficult for other members of the political community to effectively contribute towards their making; third, even if it were possible for everyone to participate effectively, the decision-making process would become very long (other decisions would be overtaken by events) and unaffordably expensive (even where the decision to be made is relatively small); and, fourth, persons have the freedom to waive their right to participate and may decide to be 'non-aligned' when it comes to the making of certain decisions.

In modern nation states there are also multiple hurdles relating to lack of information sufficient enough to make an informed decision; geographical spread and the costs this generates for the state to reach out to everyone; unequal access to resources and its influence on the power of agenda setting; citizen apathy as a result of other members of the community perceiving the political, social and economic systems as stubbornly exclusionary; and lack of 'equal access' to decision-making forums and variations in individual or collective capacity to influence decisions. To respond to the challenges outlined above, many countries have turned to representative democracy while retaining key aspects of direct democracy such as public participation in law and policy-making, elections and referenda.

Representative democracy denotes an understanding of democratic governance in which the members of a political community participate in rule and decision-making processes indirectly through freely chosen representatives. At the core of representative democracy is the idea that the people should elect their representatives who should govern for a limited period of time until the next election (to create a framework for public accountability of parliament and government). Political parties are essential in a representative democracy because electoral processes largely require the electorate to vote for political parties and not individuals. Since the emergence of the nation-state as a political entity that occupies a particular geographical space and houses a sizeable population, representative democracy has become widely accepted as the only workable system of democracy.[46] The centrality of political parties in promoting representative democracy is mirrored in the founding values, the principles of good governance[47] and the provisions guaranteeing the freedom to belong to a political party and to participate in its activities.[48] Both political tolerance and multi-partyism are integral components of representative in modern democracies.

Representative democracy becomes effective if it is exercised alongside other types of democracy. For this reason, the Constitution and many other laws create platforms for public participation in governance-related matters. Participatory democracy seeks to ensure that citizens are afforded real opportunities to participate meaningfully in the making of decisions that affect them – a move beyond tokenism.

[46] *Ibid.*, at p. 10-13.
[47] Section 3(2) of the Constitution.
[48] Section 67(2) of the Constitution.

It is intended to ensure that while citizens confer a mandate on elected representatives, they are not totally excluded from political decision making processes during the period between elections. The Constitution anticipates the existence of a perpetually involved citizenry alerted to and involved in all legislative, policy and other programmes at every level of government.

The principle of public participation, which is a constitutive element of participatory democracy, is not only limited to citizens taking part in legislative processes, it also extends to the involvement of the public in defining and implementing government policies. The central idea is that citizens are entitled to more than the right to vote in periodic elections.[49] Participatory democracy "reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who themselves should participate in government".[50] The same notion is expressed in the preamble of the Constitution, which starts by saying "We the people of Zimbabwe" to emphasise that the authority to govern is derived from the general public. The idea of ongoing public participation is also found in section 3(2)(f) which states that the principles of good governance include "respect for the people of Zimbabwe from whom the authority to govern is derived". It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes.[51] Through these provisions the people reserved for themselves part of the sovereign legislative authority that they otherwise mainly delegated to the representative bodies they created.

The periodic rights to vote, which is inherently linked to representative democracy, and the right to participate actively on an on-going basis, a characteristic of participatory democracy, have a complimentary relationship. Active and on-going public involvement in legislative and government processes is in line with principles of accountability, responsiveness and openness, principles which, by their very own nature, are ingrained in representative democracy. To this end the South African Constitutional Court, in *Doctors for Life International*, held as follows:

> In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[52]

[49] P. Sachs in *Doctors for Life International*, paras. 231–232.
[50] P. Ngcobo in Doctors for Life International, para. 110.
[51] *See*, for instance, section 141 of the Constitution.
[52] *Doctors for Life International*, para. 115

Apart from the above forms of democracy, modern nation states also protect constitutional democracy. The term 'constitutional democracy' does not have any technical meaning and is said not to have an underlying theory attached to it. As a descriptive term, it describes a political system in which a particular political community's decisions are made in terms of a constitution. In a constitutional democracy, all the decisions that affect the citizens must be made in terms of the constitution which usually stipulates all the rights that are necessary for other forms of democracy to exist.

Constitutional democracy must be understood as something of a composite understanding of democracy entrenching the other multiple forms thereof. Constitutional democracy seeks to emphasise (a) the role that democracy plays in a constitutional system, and (b) the role that a constitution plays in a democratic system. The preamble to our Constitution provides that: "We the people of Zimbabwe … resolve by the tenets of this Constitution." The doctrine of the supremacy of the Constitution both as a founding value and a principle (trumping sense constitutional supremacy) emphasises the centrality of the Constitution in promoting democracy, good governance and human rights. The Constitution does not aspire to have any particular type of democracy as representing a societal ideal but narrates the type of democratic society that it seeks to build.

The different types of democracy referred to above create space for citizens, the courts and other mechanisms to require the state to account about the way public functionaries deliver on their constitutional mandate. Given that the primary duty of the state is to ensure effective service delivery to the ordinary people from whom the power to govern is derived, the transparency and openness that characterises democratic states empower citizens to demand accountability not only about service delivery but also about the extent to which laws and policies made by the political organs of the state respond to the broad needs of the general public. There is a strong overlap between democracy and the idea of responsive and open governments or societies. Governors must respond to the will and needs of the people. Constitutional provisions that facilitate ongoing dialogue between the citizen and the state ensure that government policies are informed by and respond to the legitimate demands of their people.

Democracy may also be explained as government by explanation or persuasion rather than government by coercion. In Mureinik's view, "a culture in which every exercise of power is expected to be justified, in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command".[53] Under the new constitutional dispensation, this democratic approach to governance firmly rests on the right to lawful, fair, just, reasonable, proportionate, impartial and prompt administrative justice as protected in section 68(1)–(3) of the Constitution. In particular, the government's duty to account for everything it does is firmly required by every person's right to be promptly and in writing given reasons for administrative action

[53] E. Mureinik, 'A Bridge to Where? Introducing the Interim Billof Rights', 10:1 *South African Journal on Human Rights* (1994) p. 31, at p. 32.

that adversely affects their rights, interests or legitimate expectations. This fosters the idea of government by explanation and a culture of justification.

Finally, the relevance of democracy to the enjoyment of fundamental rights and freedoms lies in the fact that the language of rights is unpopular in autocratic states. The civil and political rights to freedom of assembly, demonstration and petition; freedom of speech, expression and the media; and the right to campaign against the government can only be meaningfully exercised in democratic societies. The same applies to the rights to vote for a candidate or political party of one's choice; to make political choices freely; and to stand for, and if elected to hold, any political office. Given the elements of transparency and openness that characterise democratic societies, it is possible for citizens to request or demand access to information relating to specific issues such as budgeting for specific programmes or projects. In fact, the Constitution entrenches every person's right of access to information held by the state "in so far as the information is required in the interests of public accountability".[54] This right plays an important role in two senses: first, it implies that government must explain its laws and actions if required to do so;[55] second, it ensures that citizens have access to the information required for purposes of making informed choices in many contexts (including voting); and, third, it concretises the government's duty to be open and transparent in many contexts.

## 5 The Separation of Powers Doctrine and the Idea of Checks and Balances

The separation of powers is the idea that the state must be divided into three arms, namely the executive, the judiciary and the legislature.[56] Under the separation of powers doctrine, the legislature is responsible for making the law, the judiciary is responsible for interpreting and applying the law, and the executive is responsible for interpreting the law. It is not necessary, in this chapter, to engage in great detail with the constitutional provisions entrenching the separation of powers doctrine. The reason is that this is not a constitutional law textbook but a book on human rights under the Zimbabwean Constitution. For purposes of this chapter, it is imperative to underscore that the separation of powers creates a system of checks and balances amongst the three branches of government, which protects democracy by making sure that public power is not concentrated in one institution or one person but is distributed across the government.[57]

The checks and balances lead to greater accountability between the three arms of government, and such accountability helps check against abuse of power.[58] There are provisions which give power to a body to check on the decisions made by another body and these are judicial review, legislative oversight over the executive and the

[54] Section 62(1) of the Constitution.
[55] *See generally University of the Western Cape v. Member of Executive Committee for Health and Social Services*, 1998 (3) SA 124 (C) at 137B-C.
[56] R. Malherbe, *Constitutional Law* (2009) p. 78.
[57] A. Mavedzenge and D. Coltart, *A Constitutional Law Guide Towards Understanding Zimbabwe Fundamental Socio-Economic & Cultural Human Rights* (2014) p. 14.
[58] I. Currie and J. De Waal, *The New Constitutional and Administrative Law* (2001) p. 91.

creation of institutions such as auditor general and constitutional commissions to execute control over legislative and executive power.[59] Checks and balances are limits that are imposed upon all the branches of the government by vesting in each branch the right to amend or void those acts of another that falls within its purview.[60] The principle of checks and balances anticipates the necessary or unavoidable intrusion of one branch on the terrain of another, thereby ensuring accountability, responsiveness and openness between three branches of government.[61] While the purpose of separating functions and personnel is to limit the power of a single individual or institution, the purpose of checks and balances is to make the branches accountable to each other.[62]

The Constitution gives the judiciary the mandate to review the constitutionality of laws and government decisions.[63] The judiciary therefore performs the function of checks and balances on the two arms of government by ensuring that their activities conform to the law. Government have a tendency to manipulate democratic principles, and judicial review has become a necessary mechanism of ensuring governance is in accordance with the constitutionally entrenched normative values and principles of democracy.[64] Since the courts play an important role in the enforcement of constitutional rights, the discussion of the separation of powers doctrine in this section is strongly linked to the independence of the judiciary and the vindication of constitutional rights.

### 5.1 *Origins, Evolution and Purpose*

The articulation of an explicit doctrine of separation of powers as a distinct explicatory theory of governance is generally thought to have its origin in the political philosophy of the Enlightenment in 17th century Europe, when political thinkers started to challenge the unlimited mighty and arbitrariness of an absolute monarchy.[65] However, its basic aim is much older, that is to find a structure of government that prevents the accumulation of too much power in one institution.[66] The power which vests in a state may be divided into three, namely legislative, judicial and administrative.[67] All three powers originally vested in the king, but development towards separation took place, and the king finally remained as a figure-head with certain reserve powers which are only relevant under very extreme

[59] Sections 232–236 of the Constitution.
[60] I. M. Rautenbach and E F. J. Malherbe, *Constitutional Law,* 6th edition (2013) p. 165.
[61] *Frankfurter in Certification of the Constitution of the Republic of South Africa*, 1996, 108–109.
[62] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996 (4) SA (CC) para. 112.
[63] Section 167(2)(d) and 167(3) of the Constitution of Zimbabwe. *See also* A. R. Gubbay, 'The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience', 2 *Human Rights Quarterly* (1997) at p. 232.
[64] B. Nwabueze, *Judicialism and Good Governance in Africa* (2009) p. 91.
[65] Woolman and Bishop, *supra* note 13, at p. 12-3.
[66] *Ibid.*
[67] W. J. Hosten *et al*., *Introduction to South African Law and Legal Theory* (1975) p. 604.

circumstances.[68] The separation of powers doctrine was first enunciated by French philosopher Montesquieu.[69]

However, the separation of powers doctrine grew out of centuries of political and philosophical development. Accordingly its origins can be traced to fourth century B.C., when Aristotle, in his treatise entitled *Politics*, described the three agencies of the government, *viz* the general assembly, the public officials and the judiciary.[70] In republican Rome there was a somewhat similar system consisting of public assemblies, the Senate and the public officials, all operating on a principle of checks and balances.[71] Following the fall of the Roman Empire, Europe became fragmented into nation states, and from the end of the Middle Ages until the 18th century the dominant governmental structure consisted of a concentrated power residing in hereditary rulers, the sole exception being the development of the English Parliament in the 17th century.[72] With the birth of the parliament, the theory of the three branches of government reappeared, this time in John Locke's *Two Treatise of Government* (1689), where these powers were defined as legislative, executive and federative.[73] Locke's concern was that absolute monarchical should not just be replaced by absolute parliamentary power. In his view, the concentration of influence in any one institution entailed an inherent danger:

> It may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage.[74]

Locke, however, did not consider the three branches to be co-equal; nor did he consider them as designed to operate independently.[75] Locke considered the legislative branch to be supreme, while the executive and federative functions – internal and external affairs respectively – were left within the control of the monarch, a scheme which obviously corresponded with the dual form of government prevailing in England at the time, the Parliament and the King.[76] The separation of powers doctrine was refined and expanded by Baron de Montesquieu, whose *Spirit of the Laws* appeared in 1748 and was well known to many members of the Constitutional Convention. That is why he is known as the modern exponent of this theory.[77] Montesquieu's singular contribution was to conceive the judicial power as an independent state function, thereby treating it as a form of power equivalent to the legislative and executive powers, and laying the theoretical basis for the

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[68] *Ibid.*
[69] *The Spirit of Laws* (1748), Book XI Chapter VI, cited in *ibid.*, p. 604.
[70] Aristotle, *Politics*, Book IV, Chapter 14, in S. J. Ervin Jr., 'Separation of Powers: Judicial Independence', 35 *Law and Contemporary Problems* (1970) pp. 108-127. *See also* E. V. D. Robinson 'The Division of Governmental Power in Ancient Greece', 18 *Political Science Quarterly* (1903) p. 614.
[71] J. Bryce, *Modern Democracies* (1903) p. 391.
[72] Ervin Jr., *supra* note 70, p. 108.
[73] *See* G. B. Gwyn, *The Meaning of Separation of Powers* (1965) p. 47.
[74] J. Locke, *Two Treaties of Government II* (1688) Chapter XIII, para. 107.
[75] *See* Gwyn, *supra* note 73, p. 58.
[76] J. A. Fairlie, 'The Separation of Powers', 21 *Michigan Law Review* (1922) p. 396.
[77] T. B. Singh, *Principles of Separation of Powers and Concentration of Authority* (1996) p. 1.

independence of the judiciary.[78] For Montesquieu, the separation of powers doctrine was foundational to any constitution that sought to prevent the abuse of power and advance personal freedom:

> [There is no] liberty if the power of judging is not separate from legislative power and from executive powers ... All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[79]

Montesquieu also observed that in the British system the judiciary ranked 'next to nothing' when compared with the other branches of government.[80] Some 17 years later, Blackstone noted the importance of a more powerful and independent judiciary in his *Commentaries,* which were a primary reference for the American colonists:

> Were it [the judicial power] joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative.[81]

Two years before the Constitutional Convention, William Paley, an English philosopher and theologian, observed as follows in his *Moral and Political Philosophy*:

> [T]he judges of the land become not infrequently the arbitrators between the king and the people, on which account they ought to be independent of either; or, what is the same thing, equally dependent upon both; that is, if they be appointed by one, they should be removable only by the other.[82]

Montesquieu looked to the English Constitution which in his belief was the only one having liberty as its chief object. Though English constitutional law classified political power primarily in terms of 'legislative' and 'executive' functions and further subdivided the latter to take into account Locke's distinction between executive and federative functions, he decided to call the conduct of foreign affairs as executive power and the execution of domestic law as judicial power.[83] Based on this broad classification, he divided the governmental power into legislative, executive and judicial functions. This is however evident from the fact that in the United Kingdom the principle of separation of powers has neither been accorded a constitutional status nor has it been theoretically enshrined.

### 5.2 *The Separation of Powers and the Independence of the Judiciary*

Judicial independence is an incidence of the separation of powers doctrine.[84] This doctrine seeks to avoid the concentration of power in a single organ of the state as

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[78] M. J. C. Vile, *Constitutionalism and the Separation of Powers* (1967) p. 96.
[79] Montesquieu, *The Spirit of Laws* (1823) p. 157.
[80] *Ibid.*, p. 156.
[81] W. Blackstone, *Commentaries on the Law of England* (1765) pp. 259–260.
[82] Ervin Jr., *supra* note 70, p. 109.
[83] Montesquieu, *supra* note 79, p. 156.
[84] Woolman and Bishop, *supra* note 13, at p. 12-6.

this is viewed as detrimental to the freedom of citizens.[85] An independent judiciary and legal profession are critical elements of the rule of law and the protection of human rights.[86] The bedrock of a constitutional democracy is an independent judiciary. A judiciary that is not independent from the executive and legislature renders the checks and balances inherent in the concept of separation of powers ineffective. Montesquieu asserts that the judiciary should be separated from the legislature and the executive to guarantee freedom. Thus, the doctrine demands that the law making task be vested in the legislature, the application and interpretation of the law in the judiciary and the overall administration of government in the executive.[87]

Judicial independence is the yardstick of a functional judiciary and has been explained not only to mean independence from the legislature or the executive but also from political organs, the public or from themselves.[88] It also further means security of tenure and reliance, for payment of remuneration, on independent or non-political sources of funding. In most cases this requires the state to ensure that judges' salaries are paid from a fund other than the consolidated revenue fund.

Judicial independence is a principle which requires that the judicial branch of government be independent, and officers of the courts should be protected from political influence or other pressures and that the courts must practice fidelity to the law in their adjudication.[89] Courts do not operate in a political vacuum.[90] The tendency is to isolate the judiciary and its work though part of the government from political decision-making and to prevent courts from morphing into theatres for the deployment of political judgment and rhetoric.[91] Judicial impartiality is the principle that the judiciary must apply the law without fear, favour or prejudice.[92] This, it seems, is the major goal of positing adjudication as an objective and rationality-bound process, in stark contrast to the non-rational and often arbitrary/self-interested character of political decision-making.[93] For this reason, in most countries, judges are not elected unlike those who occupy executive and legislative positions.[94] In a new constitutional democracy such as the one envisaged by the new Constitution of Zimbabwe, an independent and impartial judiciary is essential for the task of applying

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[85] R. Brazier, *Constitutional Reform* (2008) pp. 179–180.
[86] A. R. Gubbay, 'The Progressive Erosion of the Rule of Law in independent Zimbabwe**',** *Third International Rule of Law Lecture* (2009) p. 2.
[87] E. Dumbutshena, 'The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwe Experience', 5 *South African Journal of Human Rights* (1989) p. 311, at p. 321.
[88] *Ibid.*, p. 313.
[89] J. B. Diescho, 'The Paradigm of an Independence Judiciary: Its History, Implications and Limitations in Africa', in N. Horn and A. Bosl (eds.), *The Independence of the Judiciary in Namibia* (2008) p. 18.
[90] M. Adams and G. Van Der Schyff, 'Political Theory Put to the Test: Comparative Law and the Origins of Judicial Constitutional Review', 10 *Global Jurist* (2010) p. 206.
[91] H. Botha 'Freedom and Constraint in Constitutional Adjudication', 20 *South African Journal for Human Rights* (2004) p. 249, at p. 250.
[92] Diescho, *supra* note 89, p. 18.
[93] A. C. Hutchinson and P. J. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought', 36 *Stanford Law Review* (1984) p. 199, at p. 202.
[94] *See generally* J. Toobin, The Nine: Inside the Secret World of the Supreme Court (2007-2008) and S. D. Law, *How to Rig the Courts* (2011) p. 99.

and upholding the constitution.[95] It is certainly a welcome development that the new Constitution contains various provisions which separate state power among the different state institutions, ensuring that power is not pooled in one institution.[96]

In a country founded on constitutional democracy, the independence of the courts is pivotal to the protection of human rights.[97] Constant interferences with judicial independence[98] in Zimbabwe have consequently contributed to the infringement of human rights as the citizenry cannot rely on the courts for their protection.[99] Indeed, there has been periods in which it seemed that state institutions worked together in a manner that allowed arbitrary exercises of power to go unchecked with the result that citizens were deprived of exercising their rights and deriving the full benefits that such rights bestowed on them.[100] Cognisant of the significant role of the judiciary in the protection of human rights, the drafters of the Constitution ensured that the final document provides an adequate legal framework for bolstering the independence and review powers of the judiciary through a number of important provisions.[101]

Judicial independence is expressly provided for under the current Constitution. Section 164(1) thereof provides that "[t]he courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice". This emphasises the idea that the courts are the sanctuary of democracy, the rule of law and the enjoyment of fundamental rights and freedoms. An independent judiciary that is at liberty to interpret and apply the law impartially is an essential ingredient for the efficient enforcement of human rights. By stipulating that the courts must apply the law "impartially, expeditiously and without fear, favour or prejudice", the Constitution underlines the functional importance of deciding cases free from the influence of politicians, powerful business interests and civil society or pressure groups.

The doctrine of separation of powers and checks and balances can operate optimally only if an independent and impartial judiciary is given adequate space to interpret and apply the provisions of the Constitution without fear, favour or prejudice. Under a democratic system of governance, the courts operate as a watchman and their fundamental role is to patrol the constitutional borders to check whether or not the political organs of the state – the legislature and the executive – are acting within the bounds of the authority conferred on them by the constitution or any other law.

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[95] M. Wesson and M. Du Plessis, 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary', 24 *South African Journal for Human Rights* (2008) p. 188.

[96] M. Ryan, *Unlocking Constitutional and Administrative Law*, 2nd edition (2007) p.60.

[97] *See* section 3(2) of the Constitution.

[98] L. Chiduza, *Towards the Protection of Human Rights: Do the New Constitutional Provisions on Judicial Independence Suffice?* (2014) p. 368.

[99] One of the examples of the Zimbabwean government's interference with the judiciary was when Gubbay CJ (as he then was) was forced to retire prematurely after he delivered a judgment in the case of *Commercial Farmers Union v. Minister of Lands, Agriculture and Resettlement*, 2000 (2) ZLR 469 (SC). The former Chief Justice had granted an interdict barring further land acquisitions by the government, as such acquisition were unconstitutional and had been carried out in a violent manner.

[100] *See Mike Campbell (Pvt) Limited and Another v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another*, SC 49/07.

[101] Chiduza, *supra* note 98, p. 368.

The Constitution is explicit enough to state the sort of 'things' that impede judicial independence and what exactly needs to be done for courts to have the freedom to decide legal disputes impartially. Section 164(2)(a) of the Constitution provides that "neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts". First, the duty not to interfere in the function of the courts applies vertically thereby imposing an obligation on the political organs and other functionaries of the state to respect and promote the independence of the judiciary and the separation of powers doctrine.

In addition, the state's duty to take positive steps to promote the institutional and functional independence of the courts is reiterated in section 164(2)(b) of the Constitution. This provision states that "the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165". The range of measures to be taken by the state is not constitutionally prescribed, thereby leaving room for the political organs of the state to be inventive enough to play their role in promoting judicial independence, the rule of law and democratic governance. Second, the duty not to interfere with the functioning of the courts also applies horizontally. Accordingly, every person has the duty to refrain from actions that impede or are likely to be perceived as impeding the impartial and independent interpretation and application of the Constitution or any other law. This is an important invention, especially given the rise of rich and powerful individuals as well as large business corporations that have the means and capacity to influence the outcome of legal disputes.

The judiciary is an important arm of the state. Judges are required to be independent in the discharge of their duties. This independence of the judiciary from other two arms of the state is the cornerstone of the theory of separation of powers. If the legislature or the executive are not happy with a certain interpretation of the law by the courts, the only way out is to seek a change to the law rather than disregard the interpretation and argue that it is wrong. The prerogative to interpret the law lies only with the judiciary. An act of Parliament or any other law which contravenes the Constitution can be declared unlawful by the courts. The constitutional imperative of judicial independence operates to safeguard rights to a fair trial but may very well go beyond the tenets of the Declaration of Rights. It could be conceptualised as a cornerstone for judicial review of legislation and executive conduct. Thus, the scope of judicial independence has a wider reach than just the limitations that it places on executive control of individuals and institutions.

From the foregoing discussion, two facets of judicial independence could be discerned. The first is the institutional facet. This relates to the structural safeguards, which ensure that judicial organs are not unduly interfered with. These would include controls, proper and transparent methods of appointing judicial officers (judges), reasonable financial autonomy and even exclusive jurisdictional competence over all issues of a judicial nature. The second facet to judicial independence is referred to as the neutralising distance between individual judges and the legal dispute. This facet canvasses issues such as adequate remuneration, security of tenure (so that a judge cannot be arbitrarily removed from office), political insularity, freedom from

fear of reprisals following decisions they make while performing their functions and of course impartiality. The importance of these aspects and the way in which they empower courts to make independent decisions about violations of rights as well as the remedies they attract will be explored below.

### 5.3 *Constitutional Litigation, Remedies for Proven Violations of Rights and the Role of the Courts in Safeguarding Human Rights*

There is an indisputable correlation between the existence of an independent and impartial judiciary and the enjoyment of fundamental rights and civil liberties. On the one hand, oppressive political regimes often rely on partial courts to push their agenda and to enforce draconian laws that entrench despotic power. On the other, democratic political systems heavily rely on independent and impartial courts to foster democracy, the rule of law, good governance and fundamental rights and freedoms. To this end, our Constitution underscores the fact that "the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance". While, at this stage, the Constitution does not expressly recognise the importance of judicial independence for the enjoyment of human rights, it is patent that such rights may only be vindicated in democratic systems of governance that are premised on the idea of the rule of law. Besides, the relationship between judicial independence and the enjoyment of fundamental rights or freedoms is reiterated under the 'principles guiding the judiciary'. These include, among others, the principle that "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law".[102] Therefore, courts are constitutionally required to be mindful of their role in bridging the gap between the promise of the Declaration of Rights and the reality of poverty and degradation that confronts millions of people in this country.

Apart from the principles guiding the judiciary, there are other provisions that are designed to ensure that the courts play a leading role in the enforcement of fundamental human rights and freedoms. First, the Constitution protects the principle of the supremacy of the Constitution as a founding value and a principle, thereby ensuring that we depart from the concept of parliamentary sovereignty and entrench the powers of the courts to review legislation and administrative conduct that infringes upon fundamental rights and freedoms. To this end, the Constitution provides that "[t]his Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency".[103] The power to declare law or conduct, including the conduct of Parliament or the president, to be inconsistent with the Constitution is reinforced by other provisions of the Constitution.[104] For instance, section 175(6) of the Constitution provides that "[w]hen deciding a constitutional matter within its jurisdiction a court may declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency". The power to make

[102] Section 165(1)(c) of the Constitution.
[103] Section 2(1) of the Constitution.
[104] *See* section 175(1) and (6) of the Constitution.

declaratory and other orders to prevent infringements of rights is an important element of judicial independence and ensures that courts fashion appropriate remedies for peculiar infringements of rights.

The second point, which is related to the first, is that domestic courts now have, under the current Constitution, wide discretionary powers to decide the range of remedies that are appropriate for numerous human rights violations. These include the power to issue remedies other than those historically permitted by the common law or customary law. Apart from the power to issue declaratory orders, courts have, when deciding a constitutional matter within its jurisdiction, wide powers to "make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity or suspending the declaration of invalidity for any period to allow the competent authority to correct the defect".[105] The power to make '*any* order that is just and equitable' is left deliberately open ended to ensure that courts have enough space to function optimally without any influence from internal or external persons and other state functionaries. In *Fose v. Minister of Safety and Security*,[106] the Constitutional Court had the occasion to observe as follows:

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a Declaration of Rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. *If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights*.[107]

In the field of human rights litigation, it is necessary for courts to fashion new remedies and direct state functionaries to take concrete steps to ensure the enjoyment of human rights. However, such orders may not be too prescriptive to deny the political organs of the state their functional autonomy, particularly with regards to priority setting and resource allocation. Yet, the political organs of the state and every person – whether natural or juristic – must respect the decisions of the courts even where they do not agree with them. This is because the Constitution stipulates that "[a]n order of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them".[108] These provisions equally apply to court orders pertaining to the protection and enforcement of human rights.

Third, the Constitutional Court, the High Court and the Supreme Court have the "inherent power to protect and regulate their own processes and to develop the common law or customary law". The power to regulate their own processes is meant to underline the significance of judicial independence in the adjudication of cases. Further, the power to develop the common law or customary law is very necessary in a patriarchal society such as Zimbabwe, where women and other marginalised groups face discrimination and exclusion as a result of oppressive principles of

[105] Section 175(6)(b) of the Constitution.
[106] 1997 (3) SA 786 (CC).
[107] Para. 19, emphasis added.
[108] *See* section 164(3) of the Constitution.

customary law or the common law. Accordingly, when interpreting legislation or developing the common law or customary law, courts should determine whether there is any other way through which these sources of law may be brought into line with the Declaration of Rights without necessarily declaring them to be inconsistent with the Constitution. This requires courts to have regard to the objectives, underlying principles and founding values of the constitutional state.[109]

Fourth, there has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi* in Zimbabwe. The liberalisation of standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the very reason behind conferring entitlements upon the poor and the marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources, the knowledge and the legal space to drag powerful states, transnational corporations or rich individuals to court in the event that a violation of their rights occurs. To address this problem, section 85(1) of the Constitution allows not only persons acting in their own interests but also any person acting on behalf of another person who cannot act for themselves, any person acting as a member, or in the interests, of a group or class of persons, any person acting in the public interest and any association acting in the interests of its members to launch court proceedings against alleged violators of the rights in the Declaration of Rights.[110]

With regards to the liberalisation of standing, the provisions allowing public interest litigation stand out as an important innovation under the new constitutional order. This is particularly important because the bulk of human rights violations negatively affect not only individuals but also families and the communities in which people live. While it may be difficult, in some cases, to identify particular individuals affected by the infringement of rights, it is patent in the majority of contested cases that the disputed legislation or conduct violates certain rights. Public interest litigation enables lawyers and non-governmental organisations to expose and challenge human rights violations in instances where there is no identifiable person or determinate groups of persons directly negatively affected by the disputed legislation

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[109] *See* section 46(2) of the Constitution.

[110] Section 85(1) states that:

Any of the following persons, namely—

(a) any person acting in their own interests;
(b) any person acting on behalf of another person who cannot act for themselves;
(c) any person acting as a member, or in the interests, of a group or class of persons;
(d) any person acting in the public interest;
(e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a Declaration of Rights and an award of compensation.

or conduct. This line of reasoning is applied in *Mudzuru and Another v. Minister of Justice*, where Malaba DCJ makes the following remarks:

> section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.[111]

Public interest litigation allows courts to entertain matters they would not entertain if they were to follow the technical rules and procedural formalities historically governing *locus standi*. According to Olowu, "it is important for the effective protection of human rights … to achieve liberal and wider access to court for social action and public interest litigation".[112] Elsewhere, the ECOWAS Court has relied on the *action popularis* to hold that "in public interest litigation, the plaintiff needs not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable."[113] The Constitution emphasises the idea that in matters affecting the public interest, requiring the plaintiff to demonstrate a personal interest 'over and above' those of the general public unnecessarily limits the jurisdiction of domestic courts, undermines the purpose behind liberalising standing and relegates poor persons' rights to the margins of the legal process.

## 6 Conclusion

This chapter explained in some detail the basic tenets of the new constitutional order. These include the doctrine of the supremacy of the Constitution, the rule of law, democracy, transparency and accountability, the separation of powers doctrine and checks and balances. On the supremacy of the Constitution, it has been observed that it means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by every form of non-constitutional law, the norm that is contained in the Constitution is to be given precedence over norms entrenched in ordinary law. Accordingly, legal norms or rules of decision which are embodied in parliamentary legislation, subordinate legislation, judicial decisions, the common law and customary law are subordinate to the Constitution as the supreme law of the land. With regards to the rule of law, it was reiterated that it is a principle of governance in terms of which "all persons, institutions and entities, whether private or public, are accountable to laws that are publicly promulgated, equally enforced and

[111] At p. 12.
[112] D. Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (2009) p. 172.
[113] *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria & Universal Basic Education Commission*, Suit ECJ/CCJ/APP/08/08, 16.

independently adjudicated, and which are consistent with international human rights norms and standards".[114]

In Zimbabwe, the rule of law has been used in a rather formalistic manner. The formalistic approach to the principle of rule of law includes the understanding of law as an instrument of governance rather than a substantive understanding that also concerns itself with the contents of the law. This also implies that as long as there are legislative provisions authorising governmental conduct, regardless of them being unjust and oppressive, the enforcement of such laws would be considered to be lawfully warranted. This would be tantamount to rule by law because such laws neither reflects the rule of law in a substantive sense nor would they be sufficient enough in protecting basic human rights that the rule of law is meant to protect.

Democracy, transparency and accountability are some of the important tenets of the new constitutional order. There are varied conceptions of democracy, and the Constitution does not prescribe any particular form thereof. These include, among others, direct democracy, representative democracy, participatory democracy and constitutional democracy. The different forms of democracy enshrined in the Constitution mirror both the varied conceptions of democracy and the centrality of democracy in shaping the type of post-colonial society Zimbabwe wishes to become. The different types of democracy referred to above create space for citizens, the courts and other mechanisms to require the state to account about the way public functionaries deliver on their constitutional mandate. Given that the primary duty of the state is to ensure effective service delivery to the ordinary people from whom the power to govern is derived, the transparency and openness that characterises democratic states empower citizens to demand accountability not only about service delivery but also about the extent to which laws and policies made by the political organs of the state respond to the broad needs of the general public.

The separation of powers doctrine creates a system of checks and balances amongst the three branches of government. This protects democracy and human rights by making sure that public power is not concentrated in one institution or person but is distributed across the government. The checks and balances lead to greater accountability between the three arms of government, and such accountability helps check against abuse of power. For purposes of this chapter, it was emphasised that the importance of the separation of powers doctrine lies in its close link with the independence of the judiciary. There is an indisputable correlation between the existence of an independent and impartial judiciary and the enjoyment of fundamental rights and civil liberties. Democratic political systems heavily rely on independent and impartial courts to foster democracy, the rule of law, good governance and fundamental rights and freedoms. In our context, the relationship between judicial independence and the enjoyment of fundamental rights or freedoms is reiterated under the 'principles guiding the judiciary'. These include, among others, the principle that "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law".[115] Therefore, courts are constitutionally required

[114] *See* section 3.3 of this chapter.
[115] Section 165(1)(c) of the Constitution.

to be mindful of their role in bridging the gap between the promise of the Declaration of Rights and the reality of poverty and degradation that confronts millions of people in this country.