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Non State Actors Alliance

"An Engaging Society"

A Position Paper

The State And Progress Of Constitutionalism Under The 2013 Constitution Of Zimbabwe

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A. EXECUTIVE SUMMARY

The struggle for constitutionalism in Zimbabwe is critically tied to the struggle for democracy and human development. It cannot be separated from the struggle for a constitutional and democratic state founded upon respect, protection and realization of human rights, the fight for electoral justice, the respect for multi-partyism and commitment to socio-economic justice, among other issues. It is essentially a quest for freedom, liberty, dignity, security and a standard of life that enhances the participation of the citizenry in the socio-economic, cultural and political decision making processes that decide its future, and the future of the next generation. Fundamentally, constitutionalism is vital for modern democratic governance; indeed, it can be regarded as the sole source of legitimacy for governing regimes.

This study on constitutionalism has been commissioned by the Non State Actors Alliance on the basis that there is a need for non-state organisations to study and "address underlying constraints inhibiting Non State Actors (NSAs) from effectively responding to the social, economic and political development challenges in Zimbabwe." To that extent, an appreciation of constitutionalism in Zimbabwe, that takes account of the currently ongoing legislative alignment process might be welcome as a discussion point in non-state actor platforms "designed to strengthen the collective capacities of the Civil Society Organisations in their role as stakeholders in national development".

There is no doubt that studies on constitutionalism in Africa generally, and in Zimbabwe opens up debates on the relationship between a government and the constitution, a government and civil society, and a government and its citizenry at large. This stirs issues of the impact of government's policies and actions on the citizenry, the responsiveness of such government to people's democratic, constitutional and developmental needs and to citizen's aspirations. For Zimbabwe, the struggle for constitutionalism can be traced to as far back as colonial times. However, for the purposes of this research, the focus is on the post-independence period. A lot of questions have been asked concerning the government's commitment to protection, fulfilment and respect for constitutional rights and freedoms. Democratic and constitutional governance has been undermined on numerous occasions, illustrating that the governance priorities of the government are not situated in the arena of constitutionalism.

Constitutional principles, norms, values and provisions have not been translated into practical reality. The political system has not become subservient to the constitutional system, and constitutional practice has deviated from the letter and spirit of the Constitution. Democratic space for multi-partyism has been compressed, media freedom and media rights have been circumscribed, electoral politics have not brought universally accepted and legitimate political outcomes. Constitutional institutions such as electoral bodies, human rights watch dogs and other accountability or regulatory organs have struggled to resist the ubiquity of politics and safeguard the constitution, the rights of the citizenry or their social, economic and political aspirations from a predatory state.

Most worryingly for Zimbabwe, legitimacy for political leadership of government has been justified on the basis of history in general, and participation in the liberation struggle in particular, not constitutionalism. Civil society organisations has been labelled an enemy of the ruling party, thus an enemy of the state. Consequently, civil society has struggled massively to open up space to influence social outcomes and processes.

A disturbing aspect of Zimbabwe's constitutional practice is that, in issues of political governance, the constitution has been relegated, or completely ignored. It has not compelled a behavioural change on the part of the government; a behaviour that leans towards a culture of respect for human rights, the rule of law and legality. Abuses and violations by the government have been done despite existence of the Constitution. Derogations and limitations of rights by ordinary legislation has assumed more power than the rights and freedoms in the Constitution. The courts have not been active in safeguarding the Constitution, and has sparingly used its judicial review powers to check against arbitrariness. The law has been selectively applied. As a consequence, observers have argued that there is no rule of law on the basis that the government does not abide by the provisions of the Constitution; neither does it obey and comply with court orders. Yet others have condemned the government's compliance with legislation that drastically erodes and undermines rights and freedoms in the Constitution.

This research investigates Zimbabwe's experiences with both the Lancaster House Constitution and the 2013 Constitution. This is done in order to determine government's commitment to constitutionalism and its core tenets such as separation of powers, the rule of law, judicial independence, among others aspects. The second objective of this research is to explore the

progress that has been made in the legislative alignment process. Alignment of legislation with the 2013 Constitution is a key feature that can be used to measure the government's seriousness in promoting and achieving constitutionalism. Accordingly, this part focuses on the administrative machinery that has been set up to oversee the alignment process, and the key deliverables that have been produced to date. The final part of this research focuses on the key challenges that characterise the quest for constitutionalism in Zimbabwe. These challenges are various, and in most instances un-related. Resultantly, this research selects those challenges that could be regarded as critical in the struggle for constitutionalism in Zimbabwe.

B. Summary of Key Recommendations

The key recommendations of this Research are as follows:

1. The government must seriously commit itself to ensuring that the prerogatives, values, institutions, systems and norms in the 2013 Constitution are translated into action-oriented constitutional practice. The principles, institutions, norms, values and objectives in the 2013 Constitution must all be reduced into practical reality. State practice must ensure that the new constitutional framework establishes a new constitutional system that replaces the old system. This on its own can ensure that there is a real and fundamental change in constitutional practice. Constitutionalism entails the translation of progressive constitutional ideals and principles into tangible reality. Accordingly, separation of powers must be reduced to reality; the same applies to judicial independence, the rule of law, protection, respect and fulfilment of human rights, independence and professionalism of constitutional institutions among others. A lack of governmental commitment to do this leads to a failure in constitutionalism, and this in turn militate against social transformation that is expected from a new Constitution.

2. The government must operationalise and seriously commit itself to supporting constitutional commissions and bodies that are critical in the promotion of democracy, protection of human rights and the implementation of rule of law. These bodies include the Zimbabwe Electoral Commission, the Media Commission, the National Prosecuting Authority, Gender Commission, the Human Rights Commission and the Anti-Corruption Commission. On their part, these institutions must discharge their mandates in a

professional, objective and apolitical manner. They should not act as if they are subservient to political interests or as if they are a conduit of the Executive.

3. The government must recognize and accept the role and contribution of civil society in democratic governance, political accountability, achievement and promotion of the rule of law and in policy formulation. Civil society is not anti-government; neither is it an enemy of the state. In contrast, it has a progressive, complementary role to play for purposes of enhancing public participation in various socio-economic and political consultative processes critical for the government to function. Further the government must create platforms for this to happen, especially if it is serious in promoting and implementing the constitutional values of transparency, responsiveness, accountability and justice in section 3 of the Constitution. On its part, civil society has to constantly seek to engage the government in a non-confrontational and constructive manner. Only through persuasive avenues of opening space for dialogue and participation in such spaces can positive outcomes be achieved, especially in view of the heavy-handed and intransigent approach the government has shown against civil society in the past.

4. Civil society must be permitted to contribute in activities that enhance judicial independence and the professionalism of the judicial sector. This is because the judiciary has a critical role to play in the realization of constitutionalism goals. Zimbabwe's politics have suggested that the ruling party does not wish to let go its tight grip over the judiciary, and creative avenues have to be sought in order to make sure that this does not happen.

5. On its part, the judiciary must always be reminded of their role in a constitutional state that respects constitutionalism, the rule of law, democracy, human rights and justice. Most importantly, the judiciary must always be reminded that they have a role in making sure that the criminal justice system is not abused or misused in the interests of political gain. The past three decades has numerous examples of the criminal justice system, presided by supposedly independent judicial officers, being abused to settle political

scores, undermine political opponents, undercut multi-partyism and entrench political power.

6. Security sector reforms are necessary in order to ensure that key civil service institutions such as the military and the police are not involved in the politics of the day, as they are currently.[1] Again, the government can only drive these important reforms. The Constitution is clear that the security services sector serve the national interest, not political party interests. They respond to national security threats, or to threats to legality, civil order and peace. Since independence, the security services sector has acted in a very partisan manner as conduits of the ruling party. They have not demonstrated a commitment to the protection of human rights and fundamental freedoms, respect for rule of law, or constitutionalism. Avenues should be explored in order to ensure that these sectors are apolitical, non-partisan and professional.

7. Constitutional supremacy and separation of powers must be respected in both constitutional theory and practice. The Constitution is the supreme law of the land, and this presupposes that the three powerful arms of government (legislature, judiciary and the executive) are equal and subject to the Constitution. The myth and reality of executive supremacy and judicial-legislative subservience to the executive has no place in our constitutional system. The Legislature and the Judiciary must therefore not pander to the whims and caprices of the Executive.

[1] See Sunday Mail 'General Chiwenga fires waring shots' available at http://www.sundaymail.co.zw/general-chiwenga-fires-warning-shots/ accessed on 07/08/2016. The Herald 'Army warns destabilisers' available at http://www.herald.co.zw/army-warns-destabilisers/ accessed on 07/08/16. See further *The Daily Nation* 'Zimbabwe military chiefs still won't salute premier' available at http://www.nation.co.ke/news/africa/1066-630358-6s7130z/index.html accessed on 07/08/16. Newsday 'Parliament to discuss Brigadier-General Nyikayaramba's statements' available at https://www.newsday.co.zw/2011/07/13/2011-07-13-parliament-to-discuss-brigadiergeneral-douglas-nyikayarambas-statements/ accessed on 07/08/2016.

1. INTRODUCTION

As a national binding document, the constitution has grown in stature and prominence to become one of the most important prerequisite to political governance, and also to the exercise of political power in the modern state. Indeed, a constitution has become a primary, defining feature of modern democratic and non-democratic states. This position remain uncontested despite the lack of consensus on what a constitution should consist of, i.e its contents or substantive rules, principles, norms, values and institutions. Clearly, the debate on the substantive normative and institutional framework that should be prioritized in a constitution owes much to the different political systems across the world, and most importantly, to the uniqueness of each geo-political entity. Each state has unique cultural, social and political history that determines the norms it wishes to respects, elevate, relegate or ignore. Again, each nation state is driven by a set of peculiar aspirations and national objectives that define its own vision of society. In addition, each state has a sovereign right to pick, choose and ignore norms from the international human rights normative system in the process of considering whether such norms are important for its own socio-economic and political objectives. All these factors, among others, have made it impossible to draw up a model constitution that all states should look towards in drafting their constitutions.

That constitutions differ temporally and spatially due to a multiplicity of factors can neither be contested nor questioned, and testimony to this are the comparable and contrasting provisions of the various constitutions of states comprising the community of nations. The major source of contestation regarding constitutions however derives from the degree to which constitutions abide or depart from the standard of constitutionalism.

There has been quite a handful of definitions for constitutionalism. Thus, there is no universally accepted definition. However, some definitions emphasize common aspects, principles and notions such that there seems to be a general understanding of what constitutionalism entails. One common feature associated with constitutionalism is that it can serve as a 'means of evaluating the form, substance, and legitimacy' of a constitution.[2] In this way, constitutionalism is associated with constitutions; not all constitutions meet the test proposed by constitutionalism.

[2] LC Backer 'From constitution to constitutionalism: A global framework for legitimate public power systems' (2009) 113:3 *Penn State Law Review* 671.

Further, constitutionalism goes beyond the mere exercise of governmental power in obedience to a Constitution. This is mere legality, or constitutionality. Constitutionalism has an interest in ensuring limited government, but goes far beyond mere strategy to prevent arbitrary rule or dictatorship. Indeed, as a concept, constitutionalism inevitably regulates politics; the submission of politics to law is an important aspect of constitutionalism as understood today.

One of the most accepted approaches to understanding constitutionalism is by examining the core or essential features that should exist in a constitution that promotes constitutionalism. Of course, the implementation of the constitution that promotes constitutionalism is key in the realisation of constitutionalism. Various scholars agree that the core features that should exist in a constitution that promotes constitutionalism include, among others, principles of rule of law, protection of and respect for human rights and fundamental freedoms, universal suffrage, limits to the assertion of governmental power,[3] independence of the judiciary and judicial review, separation of powers as a basis of the relationship between the three arms of government and adherence to the principle of supremacy of the constitution. One scholar[4], puts this succinctly, asserting that;

> "Constitutionalism is thus a written constitution *per se* surrounded by a cloak of unwritten principles, values, ideals, procedures, and practices. … Making up the core of constitutionalism are the ideas of "popular sovereignty" and a social contract as the source of the government; the principles of republicanism, federalism, separation of powers, and government limited by law; respect for the rights and liberties of citizens and the protection of private property; the rule of law and the supremacy of the Constitution; and independence of the judiciary and judicial review."

Certainly, integral to these principles is the recognition of two fundamental positions, firstly, that the substance or content of rules in constitutions is important in determining constitutionalism, and secondly, that the existence of these ideals presuppose the existence of constitutional or legal institutions to give effect to these constitutional ideals or operationalize the constitutional state. In brief therefore, constitutionalism can be scrutinized from an examination of the quality of

[3] See M. Rosenfeld 'Modern Constitutionalism as Interplay Between Identity and Diversity' in M Rosenfield (ed) *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 1994, 3.
[4] VA Vlasihin Political rights and Freedoms in the context of American Constitutionalism: A view of a concerned Soviet Scholar' (1989) 84 *NW University Law Review* 258.

substantive rules as much as it can be studied by scrutinizing the legal institutions put in place by the constitution for the operationalization of the substantive rules. For instance, in relation to substantive norms, the Universal Human Rights Guiding Principles (UN World Summit, 2005) provides a list of expectations in the human rights arena that could promote constitutionalism if such values are embedded in a Constitution. These values include equality and non-discrimination, access to effective remedies, representation, protection of rights of vulnerable population groups such as women, youth and children, people with disabilities and the rights of indigenous peoples, among others.[5]

One thing is clear at this stage, that is, constitutionalism means more than the presence or existence of a constitution or that constitution having progressive provisions. It goes far, inquiring into the nature, scope, content, meaning of constitutional provisions, principles, ideals, values and norms, and most importantly, implementation of these venerated ideals. It answers the question of whether constitutional provisions embodied in a constitution can practically ensure limited government or arbitrariness, promote the rule of law and safeguard due process, protect and secure the rights of citizens and promote their enjoyment, ring-fencing such rights against opportunities for exploitation, oppression and tyranny at the hands of a powerful state. Progressive provisions have to be implemented so that constitutional aspirations are translated into real outcomes that change society and enhance democracy, freedom, peace and dignity, among other aspects of life.

A very important element of constitutionalism is the rule of law, and its absence alone is a sufficient basis to conclude that there is no commitment to constitutionalism. There are various definitions of the concept of the rule of law, and from these definitions, central features are common. The most common aspect of the rule of law is that there should be a law in existence against whom all governmental actions are measured – there should be no arbitrariness. In terms of this, the power exercised by officials should be conferred by law. Effective remedies for violations must exist, and the judiciary must be independent in order to provide adequate relief. In addition, there is equality before the law. The Supreme Court of Zimbabwe had an opportunity to define this concept, and stated as follows:

[5] See paragraphs 121 – 131 of the Universal Human Rights Guiding Principles (UN World Summit, 2005), available at www.un.org/womenwatch/ods/A-RES-60-1-E.pdf accessed on 05 August 2016.

> "it is necessary to set out the general principles of the concept of "Rule of Law". There are many facets in the meaning of the expression but its essence is that the law is supreme over decisions and actions of government and private persons. There is, in short, one law for all. The concept postulates that the exercise of all public power must find its ultimate source in a legal rule. In other words, the rights enjoyed and powers exercised must derive from duly enacted or established law. Put another way, the relationship between the State and the subject must be regulated by law. So must the relationship between subjects in order to prevent resort to self-help. The rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary."

A closer scrutiny of this description of the rule of law suggests that there should be a law in existence to justify actions, of both officials and individual citizens. As long as there is a law, and that law is complied with, the rule of law exists.

However, another approach (the broad approach) of defining the concept places emphasis on the substantive content of the laws that have to be obeyed, not merely their existence and obedience. De Smith and Brazier argues for this approach that calls for the law to meet and conform to certain minimum standards of substantive and procedural justice.[6] This approach therefore has two legs; first, existence of laws to justify actions, and secondly, the laws to meet and conform to certain minimum standards of substantive and procedural justice. Thus an unjust law cannot be law because it undermines justice; a discriminatory law has the same fate. Not every law that is passed by the Legislature qualify as law under this approach for the sole reason that it has been formally passed. It has to be that stated this approach can be traced to the jurisprudential responses to Nazism and Fascism. Under Hitler, the *Bundestagstag* passed laws that were essentially unjust, unfair and some of them gave Hitler power to exterminate Jews across Europe. These laws were formally passed by the German legislature, thus meeting the procedural requirement. However, they fell short of the substantive aspect as they did not conform to minimum standards of justice, fairness, morality and human rights.

Lon Fuller, a scholar in jurisprudence, is a staunch proponent of the philosophical justification for this approach. Fuller's jurisprudence directly derived from criticism of the Nazi legal system.

[6] SA De Smith and R Brazier *Constitutional and administrative law* (1998).

His main argument is that law should have an 'inner morality' before it can be accepted as law. According to Fuller, laws should meet certain minimum standards.[7]

The broad approach to understanding the rule of law appears to be friendlier to the fundamental tenets of constitutionalism; law that is formally and passed enacted must not be regarded as promoting constitutionalism where such laws suppress or make deep arbitrary inroads into constitutional rights and freedoms. Such laws should fail the test of rule of law if they arbitrarily entrench power, limit legal remedies and concentrate power in one arm of the government, such as the Executive. The same fate should visit laws that undermine judicial independence or the impartiality of courts.

Finally, the constitution should acknowledge the linkage between human rights, democracy and rule of law and such connection is critical in promoting constitutionalism. As the Universal Human Rights Guiding Principles (UN World Summit, 2005) states, these values "are interlinked and mutually reinforcing and … belong to the universal and indivisible core values and principles of the United Nations".

1.2 Constitutionalism in the Zimbabwean Context

The understanding of the form and content of a constitution in Zimbabwe cannot be separated from an appreciation of Zimbabwe's social, economic and political history. At independence, Zimbabwe adopted a constitution that was a by-product of the Lancaster House conference; for this reason, some have argued that the document was essentially a power transfer pact between Britain and Zimbabwe. The Lancaster House Constitution was, for all purposes, bequeathed by the former colonial power to Zimbabwe. Indeed, it contained various plausible constitutional principles, norms and institutions that are found in modern constitutions, and that have been identified as integral in the realization of constitutionalism. Thus, it made provision for separation of powers, constitutional supremacy, protection of fundamental rights and freedoms in a justiciable bill of rights, judicial review, independent courts and judiciary, the office of the Ombudsman, auditor general among others. Crawford Young identifies this reasonably

[7]Lon Fuller lists 8 standards that law has to meet in order to be law, and these are; General rules much be established/laid down; Rules must be public/made known; Legislation may not be retroactive; Rules must be understandable; Rules may not be contradictory; Rules must be such that they are possible to follow; Rules may not be changed too often so that it is impossible to orientate oneself in accordance with them; There should be a close relation between the rules and their implementation/administration.

progressive approach as a 'dignified retreat from empire'[8] by the former colonial power, whilst another prominent constitutionalist, Prempeh, notes the manner in which the bequeathed constitutional systems came complete "with protections for opposition parties, individual rights, independent courts, and some measure of regional or local autonomy" with the objective of laying "the foundation for postcolonial constitutionalism."[9]

For most African states, the aspiration for a post-colonial government system based on constitutionalism ended with the transfer of power into African hands. In not time, it became clear that African leaders had no faith in the practical relevance of principles of human rights, separation of powers, independent judiciary and other venerated constitutional maxims as a source for their legitimacy, or the legitimacy of their regimes. Zimbabwe fell into the class of states that clearly ignored the path towards real constitutionalism as government actions hugely detracted from the constitutional principles and values entrenched in its 1980 Constitution. However, in 1980 in one of his opening speeches as the First Prime Minister of independent Zimbabwe, Mr. Mugabe had promised to abide by the tenets of rule of law. He declared;

> "Whatever government I succeed in creating will certainly adhere to the letter and spirit of our Constitution, since that government will itself have been the product of such Constitution.
>
> Only a government that subjects itself to the rule of law has any moral right to demand of its citizens, obedience to the rule of law".

This verbal commitment was not to put to practice. Immediately after 1980, there is no record of a serious government policy at legislative reform to ensure the colonial laws were made consistent or 'aligned' with the 1980 Constitution. Indeed, there are no records of a special legislative taskforce established after 1980 to conduct the process of legislative reform. At best, the reforms that were carried out were piecemeal, and were not done on the basis of urgency or the need to embrace constitutionalism in theory and in practice.

Pre-independence laws that were patently oppressive and adversely impacted on human rights and freedoms, judicial independence and separation of powers were barely revisited, and most

[8] C Young Africa 'An Interim Balance Sheet' *in Democratisation in Africa* 64.
[9] HK Prempeh 'Africa's constitutionalism revival: false start or new dawn?' available at http://icon.oxfordjournals.org/ accessed on 02 August 2016.

were left untouched, ready to be used by the government in the post-independence era against the citizens. Stand-out examples of these include the Sedition Act, 1936; the Subversive Activities Act, 1950; the Public Order Act, 1955; the Unlawful Organisations Act [Chapter 91]; the Emergency Powers Act [Chapter 83] and the Law and Order Maintenance Act [Chapter 65]. These laws were to be later used by government to crush opposition dissent and political party mobilization. Again, Prempeh describes this phenomena succinctly;

> "Importantly, the new African state also received, as part of its colonial bequest, a command-based legal order — the full panoply of coercive legislation, orders, ordinances, bylaws, and judicial precedents — upon which colonial authority had been based. The inherited legal apparatus thus "offered African elites real power and the bureaucratic machinery with which to exercise it effectively." By choosing the authoritarian model, then, Africa's new managers would not have to reinvent the wheel; the structures, laws, and usages of the colonial state were readily at hand."[10]

Most importantly, the new post-independence government retained the State of Emergency initiated by the Smith regime in 1965. The State of Emergency existed until 1990, and its general effect was to grant the government extensive powers to limit fundamental rights and freedoms in the Bill of Rights such as the right to liberty, freedom of expression, freedom of movement, freedom from arbitrary search and freedom of association, among others. In essence, the most problematic aspect of the State of Emergency is that it suspended the operation of the constitution in relation to certain rights in favour of legislation that would have been passed in response to the exigencies of the State of Emergency. This is just but one of the most glaring examples of the discard of the essence of constitutionalism; the government appropriated to itself huge powers to do as it desired, and made sure that the 1980 Constitution could not provide useful checks, restraints or protections of fundamental freedoms and human rights.

Yet another, albeit more recent episode that can best describe the extent of constitutionalism in Zimbabwe under the Lancaster House Constitution of 1980 is the land reform programme. In brief, this controversial policy was implemented in a patently racist manner, targeting white commercial farmers. The Constitution was amended on a number of occasions to erode the protections of fundamental rights and freedoms such as the right to property, equal protection of

[10] Prempeh, 478 – 479.

the law, right to equality and also to restrict the constitutional or legal remedies available in face of constitutional violations. The independence of the judiciary was hugely compromised, as government actions led to the resignation of senior judges from the superior courts who were seen as defending the rights of the victims of land reform. In one case, amidst the constitutional "crisis" engendered by land reform, the court urged the Executive "to recognise that the permanent interest of Zimbabwe and the rule of law are served by ensuring that the land invasions are brought to an immediate end."[11] Legislation such as the Land Acquisition Act and the Rural Occupiers (Protection from Eviction) Act gave wide powers to government to interfere with constitutional rights, substantive and procedural fairness, and entrenched property rights.

In one of the most significant cases pitting government and the commercial white farmers association,[12] the Supreme Court made bold declarations pertaining to the state of rule of law in Zimbabwe as a result of the land reform programme. The Chief Justice summarized the chaos that characterized the land reform, observing that;

> "It is overwhelmingly obvious that the farm invasions are, have been, and continue to be, unlawful. Each Provincial Governor, each Minister in charge of a relevant Ministry, even the Commissioner of Police, has admitted it. They could do nothing else. Wicked things have been done, and continue to be done. They must be stopped. Common-law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government. The activities of the past nine months must be condemned."[13]

In granting relief, the Supreme Court declared that;

(i) the rule of law has been persistently violated in the commercial farming areas of Zimbabwe since February 2000 and it is imperative that that situation be rectified forthwith.

(ii) persons in the commercial farming areas have been denied the protection of the law, in contravention of section 8 of the Constitution; have suffered discrimination on the grounds of political opinions and place of origin in contravention of section 23 of the Constitution; and have had their rights of

[11] See *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (H), 527.
[12] *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement and Others* 2001 (3) BCLR 197 (ZS).
[13] Ibid, 213.

assembly and association infringed in contravention of section 21of the Constitution.[14]

An important aspect of this case is that, under huge pressure, the Supreme Court granted an interdict against government proceeding with the land reform, but postponed the operation of the interdict "*to enable the first, second and third respondents to produce a workable programme of land reform, and to enable the fourth (Commissioner of Police) and fifth respondents (President of Zimbabwe) to satisfy this Court that the rule of law has been restored in the commercial farming areas of Zimbabwe*." After the judgment, the government went back to the drawing board and produced a written land reform policy document. In addition, the government passed the notorious Rural Land Occupiers (Protection from Eviction) Act, in an endeavor to legalise previously unlawful occupation of land by land invaders.

In a subsequent case[15]arising from this case, a newly constituted Supreme Court, headed by a new Chief Justice, held that;

> "This court gave the applicants (Government) two options to regularise the unlawful farm occupations. The occupiers' presence on the land had to be legalised; or they were to be removed from the land, in order to put an end to their illegal occupation and restore the rule of law in the commercial farming areas of Zimbabwe.
>
> The applicants, through the government, chose the former. In pursuance of the chosen option, the government enacted the Land (*sic*) Occupiers (Protection from Eviction) Act with the object of legalising the previously unlawful presence of the occupiers on commercial farms belonging to members of the respondent. The Act also suspended the operation of the orders of both the High Court and this court for the eviction of settlers. ***To that extent, the Act restored the rule of law in the commercial farming areas of Zimbabwe***."[16] (emphasis).

[14] Ibid, 214.

[15] *Minister of Lands and Ors v Commercial Farmers Union* 2001 (2) ZLR 457 (S).

[16] Ibid, 476. See however the dissenting opinion of Ebrahim JA. Later in the same judgment, (p.481)n the CJ held that "The enactment of the Rural Land Occupiers Act *was an enforcement of the rule of law*. Government could not have created a vacuum by suspending court orders and declaring them of no force or effect before enacting the Act."

It is clear from an analysis of this judgment that the Supreme Court's view was that the rule of law could be restored by a simple passing of legislation that had retrospective effect, and whose consequence was to suspend the orders of the courts. Thus, by this reasoning, the rule of law meant government complying with its own law, even if such law grossly eroded entrenched constitutional rights, or denied citizens constitutional redress, or exposed them to discriminatory policies whose implementation did not comply with due process. It could be argued that the Supreme Court followed the narrow view of the rule of law that accepts laws to the extent that they are passed procedurally by Parliament. As noted earlier on, this view ignores the substantive content of the law. Indeed, by the Supreme Court's reasoning, the rule of law still held fort even where the President used his unilateral law making powers under the Presidential Powers (Temporary Measures) Act to pass Regulations[17] whose effect was to amend the provisions of an Act passed by the Legislature. The nature of these laws was never explored by the courts; neither was their constitutionality. This conflicts with the understanding that the rule of law relates to a) the fact that power exercised by politicians and officials have a legitimate foundation – they must be based on authority conferred by the law; and that (b) the law itself should conform to certain minimum standards of both substantive and procedural justice.[18]

Apart from property rights, the manner in which the government has conducted itself in relation to other rights under the 1980 Constitution seriously undermined its commitment to rule of law and constitutionalism. These areas included media freedom and media rights,[19] rights of opposition political parties,[20] electoral laws,[21] rights of communities in mining areas,[22] democratic space for civil society, freedom of expression, association and assembly and trade union rights. The heavy-handedness of government in treating its opponents, real or imagined, and in responding to critics of its policies led to abuse of power, erosion of constitutional rights and arbitrariness. It should be reiterated that the government was able to act in this manner despite the existence of a constitution entrenching a justiciable Bill of Rights that supposedly

[17] The Presidential Powers (Temporary Measures) (Land Acquisition) (No. 2) Regulations 2001 SI. 338 of 2001.
[18] See De Smith and Brazier *Constitutional and Administrative Law* (1998).
[19] *Chavunduka & Another v Commissioner of Police & Anor* 2000 (1) ZLR 418 (SC).
[20] See the various cases pitting opposition parties and the government.
[21] See G Feltoe *A Critical Analysis of Zimbabwe's Electoral Laws in relation to the SADC Principles and Guidelines* (2006). See also the various amendments to the Electoral Act Chapter 2:13.
[22] See generally R Saunders and T Nyamunda *Facets of Power: Politics, Profits and People in the Making of Blood Diamonds in Zimbabwe* (2016) Weaver Press. See also Nathaniel Manheru '*Operation Hakudzokwi: Reasserting authority in the wild*' available at www.newzimbabwe.com.

protected fundamental rights and freedoms, and recognized venerated constitutional principles and values such as separation of powers, judicial independence, constitutional supremacy, universal suffrage, democracy, among others. This detracted massively from constitutionalism. As one scholar asserts;

> "Constitutions, in contrast, are premised on the acceptance of state power as legitimate. If significant strife exists on the ground or the government is not accepted by the people, then the constitution may become a "façade constitution." A façade constitution can declare aspirational principles and adopt power structures for government, but such provisions and principles are ineffective and potentially delegitimized because they are not followed in practice."[23]

A summary is apposite pertaining to the commitment of the Zimbabwean government to constitutionalism under the 1980 Constitution. Firstly, it is clear that despite progressive principles and values in the Constitution that sought to lay the platform for constitutionalism after 1980, there was no serious governmental commitment to achieve a society based on constitutionalism. Human rights and freedoms were eroded and violated at will, the government cracked down on media freedom and political rights, and made electoral democracy impossible to achieve. Its trigger-happy approach to resorting to violence and other unlawful strategies where its policies or actions were attacked deeply entrenched political power. There was no submission of politics to law; the suppression of civil society and the readiness to resort to security forces for even the least kind of threats that could be addressed by non-violent measures extinguished the democratic dream, and the nation awoke to the reality of a *securocracy* – rule by the securocats.

Various amendments were made to the Constitution for the purpose of entrenching power, undermining democracy and the rule of law and eroding liberty, free speech and political participation. The judiciary was exposed to the intolerable political pressure by the Executive, leading to acquiescence and timidity, especially in those stand out cases pitting government and its erstwhile detractors, real or imagined. The little space for civil society participation was continually compressed as government refused to consult, open up and consider avenues for multi-sectoral participation in its policy formulation, implementation and scrutiny.

[23] Note, 'Counterinsurgency and constitutional design' (2008) 121 *Harvard Law Review* 1622, at 1632.

1.3 Constitutionalism and the 2013 Constitution

This Constitution was a product of political developments in Zimbabwe traceable as far back as 2008. To an extent, the 2013 Constitution was welcome to a nation that had no use for a heavily patched ceasefire document bequeathed by the former colonial power as the first Constitution of Zimbabwe. Although the 2013 Constitution underwent all the expected processes during the constitution making phase, political events on the ground dictated the nature of such consultative processes, the level of input and discussions as well as the ultimate provisions, especially those that were sources of contest under the 1980 Constitution.

Again, as with its Lancaster House predecessor, the 2013 Constitution recognizes important constitutional principles such as separation of powers, constitutional supremacy, judicial independence, rule of law, parliamentary oversight function over the Executive, in addition to entrenching a progressive and comprehensive Bill of Rights. Further, the Constitution calls for the establishment of democratic institutions necessary in a democratic state for various purposes such as accountability and oversight. These include the National Prosecuting Authority, the Zimbabwe Human Rights Commission, the Zimbabwe Electoral Commission, the Gender Commission, the Media Commission, and the Anti-Corruption Commission. A Constitutional Court now exists and is the apex court for all constitutional matters and there is reasonable access to this Court by complainants.

A further development in the 2013 Constitution is the value system. Essentially, there is a constitutional democratic value system that entrenches values normally associated with constitutional democracies. These values include respect for the supremacy of the Constitution, the rule of law, respect for fundamental human rights and freedoms; the nation's diverse cultural, religious and traditional values; recognition of the inherent dignity and worth of each human being; recognition of the equality of all human beings; gender equality; good governance; and recognition of and respect for the liberation struggle.

It can be argued that on paper, the Constitution is progressive and comprehensive. There are some problematic aspects that could impact on the rule of law and constitutionalism, but on a fair evaluation, the good provisions outnumber the bad ones. One of the problematic aspects remains the land rights clauses. This clause precludes payment of compensation by the state in the event of acquisition of agricultural land, and ousts the jurisdiction of courts in cases concerning such

compensation. Further, the provisions suspends the application of the Equality and anti-discrimination clause, in that acquisition of land may not be challenged on the ground that it was discriminatory. Presidential appointments to constitutional bodies and other institutions of the state and government still dominate, although some safeguards have been put in place to insulate against the President hand picking persons in some institutions.

This said, it should be reiterated that constitutionalism relates to both constitutional theory and constitutional practice. Implementation of important constitutional provisions is key in ensuring that the substantive constitutional principles, constitutional institutions and constitutional procedures are given effect. To this extent, it is apposite to determine whether the new Constitution has ushered in a new era in constitutionalism in Zimbabwe in practice. One such denominator is to determine government's approach to the legislative 'alignment' process which is a process meant to make legislation that predated the 2013 Constitution consistent with the Constitution.

2. Government's Commitment to the Legislative Alignment Process

2.1 The Early Stages

Following the adoption of the 2013 Constitution, the government set out to commence the alignment of legislation for constitutional consistency. However, in the early stages, the verbal commitments were not translated to reality, as there seemed to be no clear, comprehensive strategy on how this was going to be done, whereas this really needed a carefully crafted and systematic plan. The teething problems were exacerbated by the fact that the Minister of Justice, Legal and Parliamentary Affairs also doubles up as one of the two national Vice President, Mr. Emmerson Mnangagwa. At some point, the delays and lack of commitment in the legislative process pitted the Ministry of Justice and Parliament. The delays were succinctly captured by the Speaker of Parliament, Advocate Jacob Mudenda in June 2015, two years after the 2013 Constitution was enacted:

> "The pace has been extremely slow. The pace of a snail. The Seventh Parliament can pride itself in having moved mountains to come up with a new Constitution. That is their benchmark. Ours therefore, in the Eighth Parliament should be total re-alignment of the laws to the Constitution. According to our strategic priority we had hoped that by now we

should have realigned 200 pieces of legislation. Historically, six Bills were passed in 2013 and 11 in the whole of 2014. And with those eleven from last year, I think only three were for realignment (out of 400). At that pace it can take us 90 years to re-align. Terrible indictment!"[24]

2.2 The Work Begins[25]

Following the early days, the government began to demonstrate a serious commitment in the alignment process. Importantly, government's approach was to accept that the alignment process was a complex and sophisticated one, requiring various procedures careful coordination and supervision and strategic planning. The government adopted a working definition of the legislative process and this meant

> "interpreting and assigning meaning to specific constitutional provisions requiring implementation; enactment of new legislation; alignment of the existing laws to the constitution; streamlining existing institutions to uphold and respect the spirit and letter of the constitution; creation of commissions, institutions, bodies, and structures; restructuring the system of Government to a devolved system and crafting new policies and reviewing existing policies."[26]

The formal alignment process took off in October 2014 when government appointed the Inter-Ministerial Taskforce on Legislative Alignment (IMT), and the task of coordinating the alignment process was given to the Ministry of Justice, with the Attorney General's Office playing a crucial role.[27] An important aspect of the alignment process encapsulated the IMT coordinating the review of legislation by all Government Ministries and providing technical support where required. The IMT comprised of Legal Advisors and Senior State Counsels from various Ministries. The Attorney General provided the linkage between three government departments in the Ministry of Justice, namely the Constitutional and Parliamentary Affairs department (CPA), the Law Development Commission (LDC) and the Legislative Drafting

[24] See The Herald, June 20, 2015 '*Speaker fumes*' available at http://www.herald.co.zw/speaker-fumes/ accessed on 02 August 2016. See also The Herald, June 5, 2014 '*New laws: the long road ahead*' available at http://www.herald.co.zw/new-laws-the-long-road-ahead/ accessed on 02 August 2016.
[25] The information in these paragraphs is based on information and data from interviews with various government officials and stakeholders in the alignment process.
[26] Interview with a senior government official in the Ministry of Justice.
[27] Interview with a senior government official in the Ministry of Justice.

division in the Attorney-General's office. Presently, these departments are presently coordinating the work of the IMT on the implementation of the Constitution, with technical and financial support from the Centre for Applied Legal Research and the European Union, and other non-state partners.

Government Ministries are expected to initiate the review of legislation under their purview, or ordinarily administered by such Ministries. The IMT has proceeded to hold various successful workshops (more than 10 to date) where line Ministries have been required to participate and cooperate in reporting progress on alignment of legislation falling under their respective portfolios.

In practice, the alignment has six important stages. *Stage 1* encompasses a line Ministry, or its relevant department finding a gap in the law administered by that Ministry. The responsible department in the Ministry presents proposals for amending laws to the management in the Ministry. Stakeholders or consultants may be engaged or consulted in the identification of gaps or irregularities in the laws. Thereafter, a request for technical and financial assistance is done by the IMT through the office of the Secretary for Justice, Legal and Parliamentary Affairs.

Stage 2 involves the line Ministry officially commissioning the review of legislation through formal documents such as position or discussion papers. Again at this stage, stakeholders may be consulted in the possible analysis of the identified gaps and the review of such legislation. The Law Development Commission may also be engaged in the review.

Under *Stage 3*, the line Ministry prepares a draft Memorandum of Principles and a simple draft Bill. Thereafter, the Legal Drafting Division assists in the drafting of a better version of the Bill.

The draft Bill is then subjected to *Stage 4* where the line Ministry presents it to the Cabinet Committee on Legislation. After this stage, the Bill is presented to Cabinet.

At the fifth stage, the Attorney General's Office prepares the final Bill. This, it should be noted, follows only after Cabinet has approved the Memorandum of Principles presented to it.

The Bill then goes to *Stage 6*. Under this Stage, the Ministry presents the Bill to Parliament and all the parliamentary processes are followed before the Presidents assent to the Bill and it becomes law.

Another important element of the alignment process is the adoption of a *Control List of Legislation* targeted for alignment by the IMT. In essence, this List is an operational law reform document; it comprises all legislation in need of substantive amendments for purposes of alignment with the Constitution.

There is a simple criteria for selecting laws and placing such laws under this List. The first criterion is a selection of those laws that are required to give effect to, and ensure the realisation of, human rights. The second criteria is encompasses those laws that are necessary for government to function. Finally, the last criterion targets laws that are required to avoid interim injustices.

At the inception of this mechanism, 55 pieces of legislation were placed under the original Control List. Thereafter, line Ministries proceeded to identify 17 additional laws to be placed under the Control List. This process has been ongoing, and to date, the IMT has been measuring progress made in the legislative alignment process on the basis of the Control List of Legislation.

2.3 Progress to Date

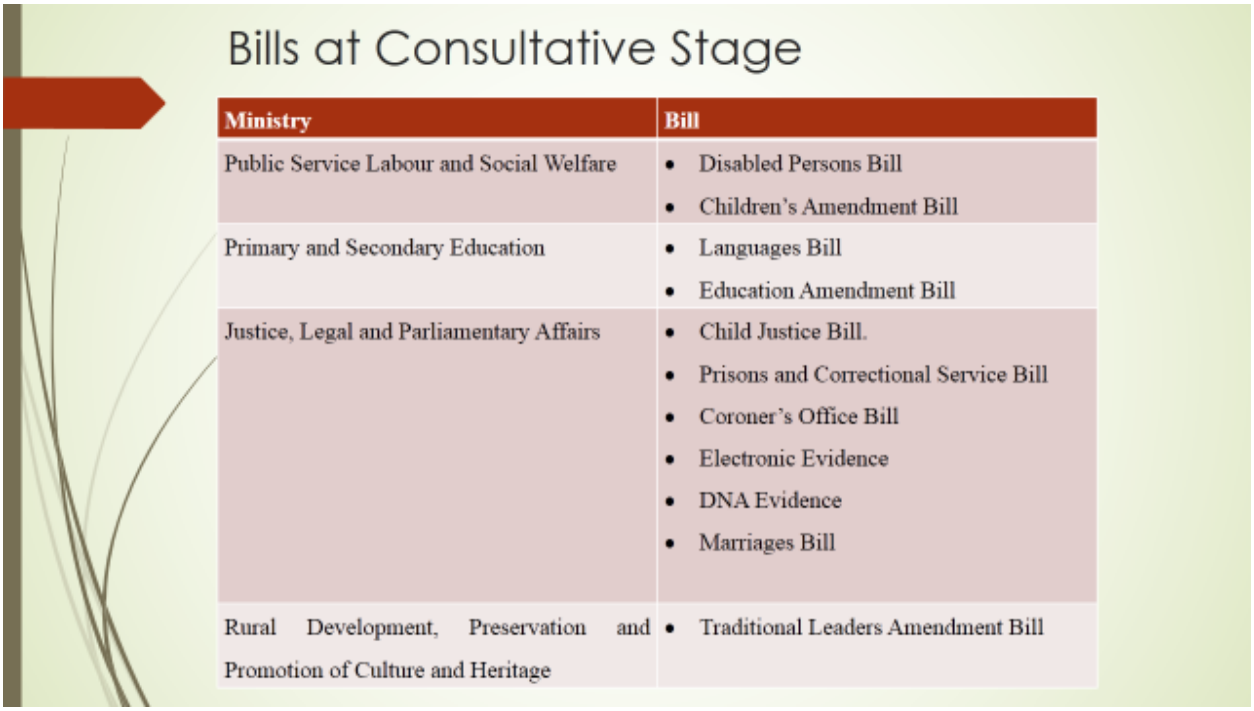
In December 2015, government noted that there were 306 pieces of legislation in the statute book. Of these, government identified that it needed to align 206 laws. Of the 206 pieces of legislation, 51 were aligned through the National Prosecuting Authority Act Chapter 7:20). Two laws were amended by the Public Debt Management Act Chapter 22:21. The General Laws Amendment Act amended 117 Acts. It is also important to note that about 67 Acts have been identified as needing only a simple amendment by making appropriate provisions for the representation of women in statutory bodies.

Some of the important Acts now in operation include the Criminal Procedure and Evidence Amendment Act and the Gender Commission Act. The Land Commission Bill and the Local Government Bill are yet to be finalized. In June 2016, the Minister of Justice, Legal and Parliamentary Affairs informed Senate that 159 pieces of legislation had been aligned with the Constitution.[28] He further stated that delays in the alignment of the remaining laws could be

[28] See *The Herald*, 18/06/16 'Govt aligns 159 laws' available at http://www.herald.co.zw/govt-aligns-159-laws/ accessed on 02 August 2016.

blamed on line Ministries that had not carried out their mandates in the alignment of legislation they administer.

There also various Bills at Consultative stages and these will align various legislation with the Constitution. See Fig. 1 and Fig. 2 below.



Bills at Consultative Stage

Ministry	Bill
Public Service Labour and Social Welfare	• Disabled Persons Bill • Children's Amendment Bill
Primary and Secondary Education	• Languages Bill • Education Amendment Bill
Justice, Legal and Parliamentary Affairs	• Child Justice Bill. • Prisons and Correctional Service Bill • Coroner's Office Bill • Electronic Evidence • DNA Evidence • Marriages Bill
Rural Development, Preservation and Promotion of Culture and Heritage	• Traditional Leaders Amendment Bill

Fig 1. Bills at Consultative Stage

From this clear, it becomes clear that some line Ministries has more tasks of identifying legislation to place under the Control List. This means that these Ministries are likely to suffer delays as the task involves more pieces of legislation.

Further, it is clear that some laws that need alignment are more technical, and require expertise in review and gap analysis. A potential example, from Fig 1 above is the DNA Evidence Bill, or the Electronic Evidence Bill. The possible complexities in the drafting of such Bills detracts heavily from their expeditious drafting, review, debates and final passage into law.

Fig 2 below provides an additional list of laws for either amendment or adoption as new legislation altogether.

Foreign Affairs	• International Treaties Bill
Finance	• Public Finance Management Bill
Environment, Water and Climate	• Environmental Management Bill • Water Amendment Bill • Water and Waste Water Regulatory Bill
Welfare Services for War Veterans, War Collaborators, War Political Detainees and Restrictees	• Veterans of the Liberation Struggle (Rights and Benefits) Bill
Tourism and Hospitality Industry	• Tourism Amendment Bill
Health and Child Care	• Medical Services Amendment Bill

Fig. 2 (Source: Interview with officials from Ministry of Justice; 2016)

It should be observed that there is little doubt that the rather sophisticated procedures that are put in place by the Control List mechanism needs constant monitoring, supervision and evaluation, particularly in the interests of progress. In order to ensure this, the IMT adopted another tool, the Control List Bill Tracker. This mechanism tracks the progress of each Bill earmarked for alignment. Under this system, the IMT further developed three indicia to measure progress, namely (a) action taken on Bill (b) action taken but more work to be done, and (c) action not yet taken. Finally, this Control List Bill Tracker is constantly updated on the basis of information submitted to the IMT Technical Committee by Line Ministries during IMT Bi-Monthly meetings.

All in all, there is little doubt that the legislative alignment process has proved a highly technical task with a multiplicity of tasks, substantive or procedural. Its involvement of all government departments makes it an even more daunting task. The human and financial implications cannot be understated. Thus, a discussion of this process is incomplete if it does not highlight the major

challenges that have characterized this process, admitting that some of the challenges detract heavily from progress and positive outcomes. Further some of these challenges are deep rooted, as they should be understood both generally, and also specifically, in the context of Zimbabwe's social, economic and political system.

One of the major challenge has been funding of the programme. Funds are necessary for various consultative processes, workshops and stakeholder engagement activities. Reliance on governmental funding has not been adequate as the government continues to face serious financial problems. The government has not set aside a separate budget for this process, and relies on external funders. In the 2016 national budget, the Minister of Finance revealed that the European Union had availed US$11 million under the European Development Fund "in support of governance and institution building, targeting Parliament, the Judiciary, the Immigration Department, and the Zimbabwe Electoral Commission as well as Constitutional alignment."[29] The adequacy of these funds is questionable.

Another challenge necessarily derives from the complexities involved in driving and coordinating the inter-ministerial institutional framework. The Inter-Ministerial Taskforce coordinates the process, but it can only do so much. There is need for legal expertise to understand the Constitution as a whole, identify relevant parts that should be interpreted and understood before identifying gaps in legislation. The working definition of the alignment process, illustrated above, alludes to the difficulty in carrying out the review.

Further, the alignment process is one of the most important tasks that each Ministry is seized with at the moment. This however is in addition to the various other tasks that government departments normally do. This means that there is more work for government departments, and this new kind of work might be neglected occasionally as officials attend to other competing commitments. A clear example is the fact that the Minister of Justice himself is also the national Vice President, and has at various occasions been appointed as Acting President.

There are other nagging challenges as well that are connected with poor linkages between the legislature and the Executive, lack of clear departmental strategies in carrying out the review process, lack of meaningful non-state actor involvement to harness public awareness, expand

[29] See 2016 *National Budget Statement*, paragraph 1337. See also 2015 *Mid Term Fiscal Review*, paras 904 – 905.

funding opportunities and enhance national ownership of the process. To this extent, the space for civil society is minimal, and is restricted to the consultative processes.

3. Challenges in Achieving Constitutionalism in Zimbabwe

Government's commitment in the alignment process is a necessary step in a transition to a new constitutional system. The passing of new laws, or amending of existing laws to be consistent with the new Constitution goes a long way in promoting the ideals, aspirations, principles, norms and values in the Constitution. Whether the alignment process will completely replace a previous legislative system and substitute it with another that promotes rule of law, human rights, judicial independence, separation of powers and other essential features of constitutionalism remains to be seen. However, a number of challenges need to be addressed before the alignment process establishes a new legal regime that completely suppresses the opportunities for undemocratic conduct that existed in the previous system. A number of the challenges towards constitutionalism therefore exist, and needs to be explored.

There are a number of challenges that negate achievement of constitutionalism and the rule of law in Zimbabwe. To reiterate, the greatest challenge is not in the Constitution's provisions; it is in constitutional practise. It is the failure in the implementation of the letter and spirit of the Constitution as a whole. It also relates to establishment of constitutional institutions that supports democracy, the rule of law, judicial independence and democratic accountability. A constitution with beautiful provisions that cannot be practically translated into reality is a paper tiger, and will not be able to drive social change and transform the rule of law landscape in order to entrench constitutionalism.

Zimbabwe's 2013 Constitution brought a new supreme law, but did not destroy a system. It replaced a constitutional framework, but did not create a bridge that would enable a break with past constitutional practise and lead the nation to a new constitutional culture. There was a change in the legal provisions, but not a change in the personnel to administer or implement them; the political, economic and legal administrative system remained the same. Inevitably, institutions that were fingered in massive human rights violations such as the security services sector have not been reformed. Government's approach to obeying court orders has not changed, and a clear example relates to the blatant refusal by the Prosecutor-General to comply with the orders of the High Court and the Supreme Court to grant a certificate for private prosecution.

The police department has continued to deny democratic space to the pro-democracy movement such as civil society, by insisting that they have the sole right to grant permission before peaceful demonstrations can be commenced, despite the law requiring persons only to notify the police of their intention to hold protests.

True, the Constitution has been lauded for the manner in which it now entrenches political rights. However, the political playing field has not been level. Space for opposition politics is constantly squashed, senior opposition leaders are constantly harassed and subjected to abuse by the ruling party institutions. The government has denied political opposition the right to make use of the national television for its own purposes, in the same way the ruling party does. Political privileges granted to the ruling party are not extended to opposition politics. On various occasions, the ruling party has unlawfully commandeered public state and private property for the purposes of holding party activities such as political meetings, party primary elections, demonstrations and marches.

One of the most problematic trend relates to the space for civil society. Beginning in the early 2000s and under the 1980 Lancaster House Constitution, the government has always considered civil society as foreign funded, and thus unable to meaningfully contribute to national politics, or other national issues. Civil society is regarded as the enemy of state with foreign agendas. Rights groups and special interest organisations representing the diverse social sectors of Zimbabwe's populace have thus been subjected to harassment, abuse and constant investigations. The meaning of this is that the potential positive contributions from civil society in democracy, rule of law, political accountability and constitutionalism has not been respected or considered at all. Civil society thus operate at the edges of mainstream politics, and their contributions are seen as foreign recommendations meant to put national security at risk and give rise to regime change. Again, an easy explanation for this is that the system has not changed; abuses, a culture of unaccountability, constitutional violations and unjustified government attitudes against civil society have not changed.

Another area that exemplifies the problematic continuity is the judiciary. The contribution of the judiciary to rule of law, constitutionalism, respect and protection of human rights and freedoms cannot be overstated. The judiciary can do this through constitutional adjudication or judicial

review. In one case, the Israel Supreme Court recognised the importance of judicial review, declaring that;

> "Judicial review is the soul of the Constitution itself. Strip the Constitution of judicial review and you have removed its very life."[30]

The judiciary is critical in enforcing the Constitution against the government, thus averting a constitutional crisis. As Grimm warns, if the government does not obey the Constitution, there is no superior power to enforce the law against it.[31] Accordingly, Grimm asserts, if the essence of constitutionalism is the submission of law to politics, the very essence of constitutional adjudication is to enforce constitutional law against the government.[32] Yet another scholar contends that the existence, persistence and stability of a democratic regime requires, in the very least a semi-autonomous, supposedly apolitical judiciary to serve as a neutral umpire in disputes concerning the "scope and nature of rules of the political game".[33]

Under the Lancaster House Constitution, there was a general intellectual belief that courts should do more in face of blatant government abuses. Courts, indeed, appeared to baulk under the pressure that came with these expectations of enforcing the Constitution against an intransigent government. Various examples can be cited, and these includes the failure by courts to strike down various laws as unconstitutional even if it was beyond doubt that such laws made deep inroads in constitutional rights. These laws included the Public Order and Security Act, Access to Information and Protection of Privacy Act, the Presidential Powers (Temporary Measures) Act, electoral laws (that were passed by the President alone, in terms of the Presidential Powers Act).[34] Yet another law that was abused for political purposes was the Criminal Procedure and Evidence Act. Under the now repealed section of this Act, if a prosecutor lodges an appeal against a decision admitting bail to any accused person, the person is bound to stay in remand for

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[30] *United Mizrahi Bank Ltd v. Migdal Village*, HCJ 6821/93.

[31] Grimm, 16.

[32] Grimm, 17.

[33] R Hirschl 'The political origins of the new Constitutionalism' (2004) 11 *India Journal of Global Legal Studies* 73.

[34] In an address before a SADC meeting to resolve Zimbabwe's election crisis, Professor Welshman Ncube explained one of the reasons for the crisis; "The new Constitution provides that an Act of Parliament, that is, a law passed by Parliament and assented to by the President must make provision for the conduct of all elections provided for by the New Constitution. A substantial part of the 'law' under which it is proposed to conduct the 2013 elections is not contained in any Act of Parliament and has not been passed by Parliament but has been brought into 'effect' by way of Regulations made under the Presidential Powers (Temporary Measurers) Act. We believe that the legality of these amendments to the Electoral Act effected by Regulations is in serious doubt."

a minimum of seven days after being granted bail. Within those seven days, the State could decide not to pursue the appeal at all (which was usually the case), or lodge the appeal on flimsy grounds that would be rejected by the higher court. The remanded person will only taste freedom on the eighth day after his initial admission to bail.

It was as a result of these legal developments that there was a general lack of trust in the preparedness of the judiciary to condemn state actions and lean in favour of human rights, democracy, justice, accountability, fairness or equality. The judicial system has not changed much from the system that characterised the previous constitutional system. It has to be admitted that there has been progress in the selection of candidates for judicial office, but the fact remains that there hasn't been any fundamental changes in judicial attitude in cases pitting the government and people's rights and freedoms, or their democratic rights. Again, the fact remains that there is a new constitutional document, but the system has not fundamentally changed.

In addition to these unsettling positions, the new constitutional framework has not been able to muzzle the reality of Executive supremacy in as far as the relationship between the arms of government is concerned. The Executive has enormous powers, and the Legislature panders to its will. The Judiciary has no such power, and judges have continued to be subject to harassment when they rule against the government in politically sensitive cases.[35] The Prosecutor-General's office has not been spared; there has been harassment on occasions where the PG has lawfully exercised his discretion, albeit in a manner that is perceived as endangering the interests of the ruling party.[36] The Legislature has blatantly failed to hold the Executive to account on numerous occasions relating to corruption in sectors such as mining, public procurement, energy contracts, unjustified travelling costs, multiple farm ownership, abuse of public funds, among other issues of national importance.

From another angle, it could be claimed that the greatest challenges in the struggle for constitutionalism in Zimbabwe is critically linked to the struggle for legitimacy. At independence to date, the national political leadership has sought legitimacy not from

[35] See *The Herald* "Justice Hungwe under probe" available at http://www.herald.co.zw/justice-hungwe-under-probe/ accessed on 04/08/16. Newsday 'Plot to oust judge thickens' available at https://www.newsday.co.zw/2013/04/04/plot-to-oust-judge-thickens/ accessed on 04/08/16.
[36] Newsday 'Tomana arrested over Mugabe farm bombing' available at https://www.newsday.co.zw/2016/02/03/tomana-arrested-over-mugabe-farm-bombing/ accessed on 04/08/16.

democratic, constitutional processes but from their participation in the liberation struggle that brought freedom. Unlike other African countries that has gone past this phase, the leadership of Zimbabwe's political government has not changed hands since independence. Unsurprisingly, the 'assault on constitutionalism' has taken place under one regime that has neither evolved nor transformed itself. This political governance has failed to change the source for legitimacy from liberation war credentials to human rights, respect for rule of law or constitutionalism.

Insistence on the liberation war as the sole criteria for political leadership of the nation has however failed to appeal to all generations in Zimbabwe. Quite deliberately, there seems to be no preparedness on the part of Zimbabwe's founding fathers to embrace a political behavioural change that can promote the rule of law and constitutionalism. The much vaunted claims to founding fatherhood of the nation, or messianic attributes no longer hold sway in the eyes of the citizenry that is more interested in democracy, human rights, economic development and constitutionalism. Increasing tension and conflict between the government and the citizenry witnessed in the past ten years subjects the leadership to an identity crisis. The founding fathers cannot sell any policy that widely resonates with the populace, and its legitimacy holds, at least to some extent only amidst an elite few or rural peasant communities. One can therefore conclude that the greatest challenge of constitutionalism in Zimbabwe since independence in 1980 is this rejection of constitutionalism and the rule of law by the political leadership as a legitimacy tool, and the insistence by the regime that only participation of its leadership in the liberation war is the sole source of legitimacy. Accordingly, the political leadership has not seen the utility of embracing the constitutionalism agenda for its own interests or for national interest oriented human developmental objectives.

4. Conclusion

The struggle for constitutionalism in Zimbabwe is an ongoing struggle. It is a quest by a people against a government that has no respect for the ideals and norms venerated in a constitutional state characterised by constitutionalism. The struggle's main objective is ensuring that political power is subject to the law, and is not abused against the interests of the people who put the government in power in the first place. It is a struggle to ensure that the government complies with the law, and the good values, standards and principles in such laws. The legislative alignment process is one avenue of contributing to this quest; governmental abuses on the basis

of laws that predated 2013 must be struck off and be made compliant with the 2013 Constitution. Until a full alignment takes place, there is no guarantee that the repressive laws of the *ancien* regime remain good law, and maintain a system the people voted to discard.

Civil society participation in legislative making consultative processes is as important as its role in constitution making. These organisations are critical in engaging governments as much as they are important in engaging the citizenry. What this research has highlighted is that the working environment is not only tough, but the government of the day will not rest until the space for civil society participation and consequent influence in national social, political, cultural and political issues of the day is squashed, or diminished to insignificant levels.

The issue of legislative alignment provides the civil society with an opening into legislative participation. In truth, the opening is not wide enough; neither is it well structured to guarantee positive outcomes. However, if such openings can be utilised, civil society can use them to participate in this process, as well as create a permanent dialogue framework with government.

It should always be borne in mind that the government has demonstrated very limited respect for the Constitution in instances where this supreme law has appeared to go against its interests. As a source for legitimacy, the ruling political elite has chosen the liberation struggle, deliberately ignoring the fact that the struggle itself was waged on the basis of various injustices the Constitution condemn, and aspirations the Constitution holds dear. Civil society can contribute to this discourse about the nexus between constitutionalism and the liberation struggle in similar ways it has preaches the discourse of human rights, rule of law and socio-economic justice, among other national issues.

Be that as it may, there is no escaping from the fact that civil society has no option but continue to push for necessary social, economic and legislative reforms. If need be, this push must be expanded to drive constitutional changes and government's commitment to constitutionalism. By so doing, civil society can instigate social change, educate society and expose the citizenry to important national issues of the day, even in compromised environments. Such endeavours are critical in the gradual achievement of positive outcomes in relation to human development, human rights protection, public participation in consultative processes; attainment of the rule of law and electoral democracy and ultimately constitutionalism in Zimbabwe.

Bibliography

1. Sunday Mail 'General Chiwenga fires waring shots' available at http://www.sundaymail.co.zw/general-chiwenga-fires-warning-shots/ accessed on 07/08/2016.
2. The Herald 'Army warns destabilisers' available at http://www.herald.co.zw/army-warns-destabilisers/ accessed on 07/08/16.
3. *The Daily Nation* 'Zimbabwe military chiefs still won't salute premier' available at http://www.nation.co.ke/news/africa/1066-630358-6s7130z/index.html accessed on 07/08/16.
4. Newsday 'Parliament to discuss Brigadier-General Nyikayaramba's statements' available at https://www.newsday.co.zw/2011/07/13/2011-07-13-parliament-to-discuss-brigadiergeneral-douglas-nyikayarambas-statements/ accessed on 07/08/2016.

5. LC Backer 'From constitution to constitutionalism: A global framework for legitimate public power systems' (2009) 113:3 *Penn State Law Review* 671.
6. See M. Rosenfeld 'Modern Constitutionalism as Interplay Between Identity and Diversity' in M Rosenfield (ed) *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 1994.
7. VA Vlasihin 'Political rights and Freedoms in the context of American Constitutionalism: A view of a concerned Soviet Scholar' (1989) 84 *NW University Law Review* 258.

8. SA De Smith and R Brazier *Constitutional and administrative law* (1998).

9. C Young Africa 'An Interim Balance Sheet' in Democratisation in Africa 64.

10. HK Prempeh 'Africa's constitutionalism revival: false start or new dawn?' available at http://icon.oxfordjournals.org/ accessed on 02 August 2016.

11. *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (H).
12. *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement and Others* 2001 (3) BCLR 197 (ZS).
13. Minister of Lands and Ors v Commercial Farmers Union 2001 (2) ZLR 457 (S).
14. Chavunduka & Another v Commissioner of Police & Anor 2000 (1) ZLR 418 (SC).
15. G Feltoe A Critical Analysis of Zimbabwe's Electoral Laws in relation to the SADC Principles and Guidelines (2006).
16. R Saunders and T Nyamunda Facets of Power: *Politics, Profits and People in the Making of Blood Diamonds in Zimbabwe* (2016) Weaver Press.
17. Nathaniel Manheru 'Operation Hakudzokwi: Reasserting authority in the wild' available at www.newzimbabwe.com.
18. Note, 'Counterinsurgency and constitutional design' (2008) 121 Harvard Law Review 1622.
19. The Herald, June 20, 2015 'Speaker fumes' available at http://www.herald.co.zw/speaker-fumes/ accessed on 02 August 2016.
20. The Herald, June 5, 2014 'New laws: the long road ahead' available at http://www.herald.co.zw/new-laws-the-long-road-ahead/ accessed on 02 August 2016.
21. The Herald, 18/06/16 'Govt aligns 159 laws' available at http://www.herald.co.zw/govt-aligns-159-laws/ accessed on 02 August 2016.
22. Ministry of Finance and Economic Development: 2016 National Budget Statement.
23. Ministry of Finance and Economic Development: 2015 Mid Term Fiscal Review.
24. United Mizrahi Bank Ltd v. Migdal Village, HCJ 6821/93.
25. R Hirschl 'The political origins of the new Constitutionalism' (2004) 11 *India Journal of Global Legal Studies* 73.
26. The Herald "Justice Hungwe under probe" available at http://www.herald.co.zw/justice-hungwe-under-probe/ accessed on 04/08/16.
27. Newsday 'Plot to oust judge thickens' available https://www.newsday.co.zw/2013/04/04/plot-to-oust-judge-thickens/ accessed on 04/08/16.

28. Newsday 'Tomana arrested over Mugabe farm bombing' available at https://www.newsday.co.zw/2016/02/03/tomana-arrested-over-mugabe-farm-bombing/ accessed on 04/08/16.

Non- State Actors Alliance (NSAA) Partners:

National Association of Non- Governmental Organisations (NANGO)

National Association of Youth Organisations (NAYO) Africa

National Association of Societies for the Handicapped (NASCOH)

Evangelical Fellowship of Zimbabwe (EFZ)

Women's Coalition of Zimbabwe (WCOZ)

Zimbabwe National Chamber of Commerce (ZNCC)

Zimbabwe National Council and Welfare of Children (ZNCWC)

Zimbabwe Congress of Trade Unions (ZCTU)

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