Lawful Coups and other Legal Developments in Zimbabwe in 2017 and 2018

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ABSTRACT

This paper provides a commentary on some legal developments in Zimbabwe in 2017- 2018, at the end of the Mugabe Presidency and the ushering in of the Second Republic. It notes how a change of regime initially facilitated by the military was in court found to be legitimate and highlights some of the early legislative changes of the Second Republic.

1. INTRODUCTION AND BACKGROUND

On 21 November 2017, Robert Mugabe resigned as President of the Republic of Zimbabwe, a few days after military intervention.[1] The lawfulness of the military intervention was challenged in the courts.[2] The Constitutional Court decision on the matter was largely academic because an Electoral Proclamation had set 30 July 2018 as the date for elections which would allow for a constitutional change of government.[3] The call for elections raised the question whether Zimbabweans in the diaspora should allowed to vote and, after the poll, the validity of the results was not surprisingly contested the side that was not victorious. The incoming new administration embarked on a legislative programmed aimed at revamping the economy and ensuring that citizens enjoy civil liberties that had been suppressed under Mugabe's presidency. To revamp the economy, Zimbabwe sought to re-engage with the world. These efforts included relaxation of visa regulations for some key countries and seeking to re-join the Commonwealth.[4] This paper discusses the lawfulness of the manner the change of government

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[1] November 2017 Military takeover in Zimbabwe (timeline) available at <https://www.pindula.co.zw/November_2017_Military_Takeover_in_Zimbabwe_%28Timeline%29> accessed 8 May 2018.

[2] See *Joseph Evurath Sibanda and Leonard Leonard Chikomba* v *President of the Republic of Zimbabwe – Robert Gabriel Mugabe N.O.; Minister of Defence, Commander of the Defence Forces of Zimbabwe and the Attorney-General of Zimbabwe* HC 10820/17.

[3] Proclamation 2 of 2018, Statutory Instrument 83 of 2018.

[4] Zimbabwe has revised the visa regime and has moved 28 countries from Category C, that requires visa before travel, to category B under which a visa may be obtained upon entry. Zimbabwe has removed visa

was effected and some of the notable legislative changes introduced. The paper is in two parts. The first part is concerned with cases relating to the change of government, and the second part with the notable legislative developments.

2. CHANGE OF GOVERNMENT

The removal of Robert Mugabe as President of Zimbabwe spanned a period of one week. It began on 14 November 2017, when members of the Zimbabwe Defence Forces announced on national television that they had seized control of the country. On 15 November 2017, the military advised citizens that the intervention was not a *coup d'etat*. On 18 November 2017, the army encouraged members of the public to take to the streets to show their support. On 19 November 2017, the ruling party, Zimbabwe African National Union Patriotic Front (ZANU PF) removed Mugabe as its leader. He was replaced with Emmerson Mnangagwa as Party Leader and First Secretary. On 21 November 2017, a joint session of Parliament and Senate convened to impeach Mugabe. On that day Mugabe initially tried to resign as President by telephone, but was advised by the Speaker to send a resignation letter in compliance with the laws, which he later did. The second Vice President, Phelekezela Mphoko, became acting President as per the constitution. On 24 November 2017, Emmerson Mnangagwa was sworn in as President of Zimbabwe. This whole process, led by the army, was known as 'Operation Restore Legacy', came to an end on 18 December 2017.[5] The resignation of the President in these circumstances raised the question whether this was lawful or a *coup d'état*, and if the latter, whether the courts were the appropriate forum to resolve this issue. Thereafter, elections were held on 30 July 2018, and on 2 August 2018, Emmerson Mnangagwa was declared the winner and installed as President of Zimbabwe.

2.1 Response of the Courts to November 2017 Events

The lawfulness of the events of November 2017 was considered in two cases: *Joseph Evurath Sibanda and Leonard Leonard Chikomba v President of the Republic of Zimbabwe Robert*

requirements for all SADC Countries. See https://bulawayo24.com/index-id-news-sc-national-byo-128136.html.

[5] November 2017 Military takeover in Zimbabwe (timeline) available at <https://www.pindula.co.zw/November_2017_Military_Takeover_in_Zimbabwe_%28Timeline%29> accessed 8 May 2018.

Gabriel Mugabe N.O. and Ors., at the High Court[6]; and *Liberal Democrats and Ors v President of the Republic of Zimbabwe E.D. Mnangagwa N.O. and Ors*., at the Constitutional Court.[7] It was contended in both cases that Mugabe's resignation was a direct result of 'Operation Restore Legacy'. It was also argued that the impeachment proceedings were not in compliance with the constitution, and were intended to facilitate the takeover of power by the military. The applicants essentially believed that Mugabe had been coerced into resigning. The High Court judgment on these issues made reference to the doctrine of necessity. The court ruled that the acts of the military in terms of 'Operation Restore Legacy' were necessary and constitutionally permissible, and therefore lawful. This was due to the fact that section 212 of the Constitution provides that the role of the defence forces is to protect the constitution. In essence the military was preserving the constitution. The courts noted that the actions of the Defence Force of Zimbabwe were narrowly confined to safeguarding the constitution and preventing un-elected persons from taking over constitutional functions. The court also pointed to the fact that the military did not directly take power, but ensured that power was exercised by elected constitutional functionaries. This was indicative of the lawfulness of acts of the military.

The decision of the High Court was endorsed in the Constitutional Court. The Constitutional Court also ruled that the resignation of the president on 21 November 2017 was voluntary. The court pointed to the fact that Mugabe had tried to resign the presidency by telephone and was then advised of the proper procedures, which he complied with. These facts were taken as evidence of the President's free will. The resignation was ruled as compliant with section 96(1) of the Constitution, which provides for the termination of the presidency. The joint sitting of the House of Assembly and the Senate, to commence impeachment proceedings, was also ruled as lawful. This was because a joint sitting of House and Senate to commence impeachment proceeding is mandated by section 97(1) of the Constitution. The change in government was therefore lawful.

2.2 Lawful C*oup d'état's*

The response of both the High Court and the Constitutional Court to the events of November 2017 would appear to be consistent with the jurisprudence on successful usurpation of power,[8]

[6] HC 10820/17.
[7] CCZ10/18.
[8] Tayyab Mahmud 'Jurisprudence of Successful Treason: *Coup d'état* (and) Common Law' (1994) 24 *Cornell Int'l L J* 49.

and with what the courts also did in Zimbabwe's troubled colonial past. For the purposes of this article a *coup d'état* may be described as any change in government occasioned by or facilitated by the use of force. In many post-colonial countries, this is usually through the assistance of the military.[9] In more recent usurpations of power, the military does not directly seize power, but plays a more facilitative role.[10] A *coup d'état*, typically aims only at capturing political power extra constitutionally. Thus, only the part of the constitution relating to formation of executive organs of the state is subverted. The functional framework of the state remains intact. Therefore the judiciary ordinary survives a *coup d'état* and is allowed to determine the validity of the new regime. The courts thus play the role of legitimising the transfer of power. The determination of whether the change was lawful is largely narrowed to whether the constitutional order survived, and such survival is regarded as evidence of the lawfulness of a *coup d'état.* Curiously, in the jurisprudence of successful usurpations of power, the terms validity and lawfulness are used interchangeably.[11] Interestingly, discussions on the nature of the change have shifted. Arguments that in previous iterations were used to validate a *coup d'état* are now used to prove that the actions were lawful.

Lawfulness of usurpation of power is sometimes determined in reference to the principle of strict constitutionalism or Kelsen's jurisprudence. Strict constitutionalism requires that a court cannot give effect to anything which is not law when adjudged by the constitution.[12] Compliance with the constitution is a determination of fact, and largely depends on the factors taken into account.[13] In addition, if the strictures of the law have been complied with, the courts will not delve any further to verify if such compliance was voluntary. Further, judicial imperative is influenced by the need to give at least limited recognition to *de facto*, through extra constitutional regime.[14] There is also increasing recognition that making the letter of the law yield to the political realities does not necessarily mean the diminution of the rule of law.[15]

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[9] Ibid

[10] Increasingly, in the facilitation of the usurpation of power, there is an attempt to align activities of usurpers with the existing constitution and jurisprudence surrounding it. See Mohammed A Arafa, 'Whither Egypt: Against Religions Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or Military coup d'état' (2014) 24 *Ind Int'l & Comp L.* Rev 859.

[11] Arafa (n 10)

[12] Maru Bazezew, 'Constitutionalism' (2009) 3 *Mizan Law Review* 358

[13] Kim Lane Scheppele ,'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23 *Transnat'l L. & Contemp. Probs* 51.

[14] *Madzimbanuto v Lardner-Burke* [1969] 1 AC 645

[15] Mahmud (n 8).

Kelsen has also been relied upon to judge the change lawful if the legal order remains the same and the constitution is intact or changed according to its own provisions.[16] Courts may acknowledge that the act was unlawful, but deem it valid, if it meets the tests of validity.[17] Courts tend to validate events through reliance on Kelsen's doctrine of revolutionary legality and the doctrine of necessity.[18] In the Zimbabwean context, both these theories have been relied upon.[19] In the early cases, success was the only measure of validity.[20] More recently, however, courts also consider the reason why the old constitutional order was overthrown and the nature or character of the new legal order.[21] Kelsen's efficacy test has been modified to require that it must not appear that the usurper regime was oppressive and undemocratic.[22] It is suggested that submission by people must as result of popular acceptance of a *coup d'état*, and not mere tacit submission to coercion or fear of force.[23] Reliance on necessity for validating a *coup d'état* is doctrinally inappropriate.[24] In its classic formation, the doctrine may only be invoked by the lawful sovereign to validate acts which are reasonably required for ordinary orderly running of the state.[25]

Often, in the aftermath of the change in government, there is reference to its acceptance at international law, where the international community bestows legitimacy on such acts.[26] Some courts validate usurpation through reference to the principles of state recognition in international law.[27] Such principles should not applied when determining the validity of an act carried out in the domestic sphere, before a domestic forum. International law exists in a

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[16] Brian H. Bix 'Kelsen, Hart, and legal normativity' 34 (2018) *Norms and Legal Normativity* at http://journals.openedition.org/revus/3984 and https://doi.org/10.4000/revus.3984 (Accessed 13 Jan 2020).

[17] Mahmud (n 8).

[18] JM Eekelaar 'Principles of Revolutionary Legality' in AW Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press Oxford 1973) at 22.

[19] In the *Madzimbamuto case*, the courts saw no difficulty in accepting Kelsen's doctrine of revolutionary legality, but the court distinguished the situation at hand on the ground that Southern Rhodesia is not a sovereign independent state see *Madzimbanuto v Lardner-Burke* [1969] 1 AC 645

[20] Ibid

[21] Mahmud (n 8).

[22] Arafa (n 10).

[23] Mahmud (n 8).

[24] Mark M Stavsky 'The Doctrine of State Necessity in Pakistan," (1983) 16 *Cornell Int'l L J* available at http://scholarship.law.cornell.edu/cilj/vol16/iss2 (accessed 19 May 2018).

[25] This doctrine has four pre-conditions: first, an imperative and inevitable necessity or exceptional circumstances; second, no other remedy to apply; third, the measures taken must be proportionate to the necessity; and, finally it must be of a temporary character limited to the duration of the exceptional circumstance. This doctrine is ordinarily used to allow courts to validate necessary acts of a usurper because the lawful sovereign would have wanted these acts to be done in the interests of preserving the state. Therefore, this doctrine cannot be used to validate a coup. See Mahmud (n 8).

[26] V Kumar, 'International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond' in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds) *The Power of Legality: Practices of International Law and their Politics* (Cambridge University Press 2016) 157-187.

[27] Kumar (n 26).

separate sphere from domestic law, reliance on the primacy of international law is inappropriate because it suggest that a domestic legal system is subordinate to that of international law.[28] International law should not be relevant in the rules of the domestic sphere.

After a *coup d'état,* judges are guided by practical considerations. The judiciary recognises that they do not have the ability to enforce any judgement against usurpers, while usurpers have the power to abolish the courts or replace uncooperative judges.[29] In the aftermath of a coup, it is important to remember that a judge cannot make an order which he knows will be mere *brutum fulmen* because it cannot be put into effect.[30] Hence such decisions tend to be political in nature. In the few instances where courts refused to validate usurpation, the courts were either beyond the reach of the usurpers or were rebuked by the regime.[31] For instance, in the *Madzimbamuto Case* the Privy Council was outside the reach of the regime.[32] The decision was also not guided by fidelity to the law, but to the British government's position on the issue as reflected in the Southern Rhodesia Act 1965 and the Southern Rhodesia (Constitutional) Order in Council, 1965. The political nature of such decisions is further illustrated by what a Rhodesian court thought of the Privy Council decision in *Regina v Ndhlovu.*[33] The court ruled that the decision of the judicial committee was not binding on the courts in Southern Rhodesia and that the 1965 constitution had become the *de jure* constitution and that through the Unilateral Declaration of Independence, the Southern Rhodesia government had become the lawful government.

The courts may choose not to participate in the process, for example, through resignation from office, or it may declare that the issue is a non-justiciable political question.[34] In the Zimbabwean context, judges have in the past refused to participate in the process through resignation from office. Justices Fieldsend and Young, resigned after the Unilateral Declaration of independence.[35] The decision of a judge to remain in office or resign is,

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[28] Mahmud (n 8).

[29] In reality a court derives its power from the fact that the government in power recognises it and enforces its judgements as orders. See James N. Rosenberg 'Brutum Fulmen: A Precedent for a World Court' (1925) 25 *Columbia Law Review* 783-99 (accessed at https://heinonline.org/HOL/Page?handle=hein.journals/clr25&div=65&g_sent=1&casa_token=&collection=journals on 26 March 2020).

[30] Ibid.

[31] Mahmud (n 8).

[32] *Madzimbamutov Ladner-Burke* [1969] 1 AC 645.

[33] 1968 (4) SA 515.

[34] Carlson Anyangwe *Revolutionary Overthrow of Constitutional Orders in Africa* (UNZA, 2005) 82

[35] Fieldsend AJA resigned from the Rhodesian Bench On 4 March 1968, and Dendy Young J did likewise on 13 August 1968. See JM Eekelaar 'Rhodesia The Abdication Of Constitutionalism' available at https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1969.tb02281 (Accessed 19 May 2018).

however, a matter of personal choice.[36] The doctrine of non-justiciability, through which courts may also refuse to participate in the process of validating an unconventional transfers of power, is well established.[37] This is particularly beneficial because in such cases there is a problem of ascertaining the facts, which is compounded by lack of judicially discoverable standards.[38] Further, the sheer enormity of the issue unbalances judicial decisions because these are highly charged and volatile socio-political events, often accompanied by violence and civil strife.

It would appear that events of November 2017 in Zimbabwe were choreographed to unfold with the jurisprudence of lawful *coup d'état's* in mind. The legal system was left intact. All changes that occurred were in terms of relevant constitutional provisions. The army did not take direct control, but orchestrated popular support for what was going on. When approached, Zimbabwean courts appeared to be drawing from the country's legal history by invoking the doctrine of necessity. For its part, the Constitutional Court relied on strict constitutionalism and Kelsen, stating that these changes occurred in terms of the constitution. This is doctrinally safe, and allows for consistency in the judgments. This was expected, given that the executive had previously shown a willingness to act against an uncooperative judiciary.[39] In any event, there is no value in ignoring the *de facto* situation, particularly when it is seemingly in compliance with the law.

2.3 Right of Zimbabweans in the Diaspora to Vote in Elections

The case of *Gabriel Shumba and Ors v Minister of Justice and Ors*[40] concerned a matter potentially critical to the outcome of the elections called in the process of Zimbabwe's 2017

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[36] In light of the futility of adverse rulings against usurpers, resigning has some advantages. It signals fidelity of judges to the constitution, denies usurpers validity, and is an unmistakable signal of the unlawfulness of the usurpation. Resignation, on the other hand, places an extreme personal burden on judges for acts which have affected the entire state. Further, it may add to the political instability and chaos. It also creates vacancies which usurpers may eagerly fill with sympathetic judges, further eroding orderly administration of justice. Through resignation, therefore, a coup d'état which only affected the executive may affect the larger population. See Anyangwe (n 34)

[37] See JP Cole 'The Political Question Doctrine: Justiciability and the Separation of Powers' *Congressional Research Service Informing the legislative debate since 1914* at https://fas.org/sgp/crs/misc/R43834.pdf (Accessed 19 May 2018); and Paul Daly 'Justiciability and the ''Political Question" Doctrine' [2010] *Public Law* 160 accessed at SSRN: https://ssrn.com/abstract=3451971 on 19 May 2018).

[38] Mahmud (n 8).

[39] The relationship between the executive and the judiciary in Zimbabwe was one of mistrust. The Executive was in the past never shy to purge the judiciary of unwanted judges. See *Justice in Zimbabwe a Report Compiled by the Legal Resources Foundation, Zimbabwe* WO 41/84 30 September 2002 available at https://www.ecoi.net/en/file/local/1412677/ds475_02652zwe.pdf (accessed 30 August 2018).

[40] *Gabriel Shumba & 2 Others* v *Minister of Justice Legal and Parliamentary Affairs and 3 Ors* CCZ/4/18

lawful *coup d'état*. This was the right of Zimbabweans in the diaspora to vote in the elections. Not for the first time, electoral laws which prohibited some Zimbabweans outside the country from voting in the elections were challenged in this case.[41] It was contended that by failing to provide for voting by Zimbabweans in the diaspora, the Electoral Act of Zimbabwe was inconsistent with the 2013 Constitution, as well as international law[42] reflected in Judgments of the African Court of Human Rights.

As regards the Electoral Act, it was first contended that section 23, requiring that persons should be resident in the constituency where they wish to register as a voter, infringed section 67(3) of the 2013 Constitution,. This essentially gives all citizens who are 18 years and above the right to vote. This must, however, be read together with paragraph 1(2) of the fourth schedule of the 2013 Constitution, which permits Parliament to prescribe residency requirements that are not inconsistent the constitution. The second argument was that section 72 of the Electoral Act, under which postal ballots may be cast only by government employees posted abroad, infringed section 56 of the 2013 Constitution. This is the equality and non-discrimination clause in the Constitution.

The court agreed with the respondents that the issues being raised by the applicants had already been resolved in the case of *Bukaibenyu* v *The Chairman of the Zimbabwe Electoral Commission and Others*,[43] and that provisions of the 2013 Constitution cited were not different from comparable provisions of the previous constitution.[44] The court ruled that section 67(3) of the 2013 Constitution had to be read with the constitution as a whole. The right to vote as provided in the constitution was not absolute. Thus, the right to vote is subject to the individual

[41] See *Registrar General of Elections & Ors v Morgan Tsvangirai* SC 2002(1) ZLR (S); *Madzingo and Others* v *Minister of Justice and Others* 2005 (1) ZLR 171 (S);

[42] See, for example, Article 13 of the African Charter on Human and Peoples' Rights; Sections 4, 1.1, 4.1.8 and 5.1.8 of the SADC Principles and Guidelines Governing Democratic Elections; and Article 25 of the International Covenant on Civil and Political Rights.

[43] CCZ 12/17.

[44] In this case, concerned with the Lancaster House Constitution, it was noted that elections in Zimbabwe were provided for in the context of a constituency system. The South African electoral system, which permitted voting by those in the diaspora, was not comparable. It was based on proportional representation. A constituency system such as Zimbabwe's establishes a nexus between a voter and a parliamentary representative. The court said: 'Under the Zimbabwean electoral system, a voter votes not only as a citizen of this country but also to protect his or her rights and interests as a resident of the constituency in which he or she is registered.' In *Shumba and Ors*, the court explained that this position is strengthened by section 161 of the 2013 Constitution, which provides that for purposes of electing members of parliament the county should be divided into 210 constituencies. This was interpreted to mean that these constituencies must be in Zimbabwe. This constituency system not only provided for the election of local representatives, but also for the election of the President of the Republic. This was due to the fact that section 92 of the 2013 Constitution which provides for the election of the president and vice president by registered voters throughout Zimbabwe

being registered as voter in a voter's roll of a constituency.[45] The Fourth Schedule of the 2013 Constitution provides that citizens have a right to be registered on the 'most appropriate roll'.[46] The loss of residency affects the right to vote in a particular constituency only, which occurred in the very narrow circumstances provided by section 23 of the Electoral Act as read with section 33 of the Electoral Act. A person is entitled to vote in a constituency in which they have an interest, which is safeguarded by the requirement of residency.

On the issue of discrimination, the court ruled that by permitting diaspora votes for government employees, section 72 of the Electoral Act was not discriminatory, but effecting lawful differentiation. The court ruled that differentiation is not discrimination, since discrimination can only occur when people who were similarly placed are not treated in the same manner.[47] The court ruled that persons who voluntarily leave the country to pursue personal opportunities in a foreign country are not similarly placed as government employees that are posted by the state to advance the needs of the state. Since they are not similarly placed, it is not discriminatory to treat them differently. The court further pointed out that the loss of voting rights due to a failure to meet the residency requirements for a particular constituency is not peculiar to citizens based in the diaspora. Citizens resident in Zimbabwe are also subjected to the loss of their voting rights for a particular constituency when they cease to be resident there. In that regard, those in the diaspora were not being treated any differently from citizens resident in the country. Therefore, electoral laws were not *ultra-vires* the 2013 Constitution. The court also ruled that the voter registration requirements for President were the same as those for electing members of parliament. Thus an exemption from the constituency requirement could not be made for presidential elections since these were governed by the same rules.[48]

On the issue of consistency of the Electoral Act with international law, the applicants sought to enforce a judgment obtained at the African Court of Human Rights which required the government of Zimbabwe to provide voting facilities for citizens based in the diaspora.[49]

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[45] Section 1(1) of the Fourth Schedule provides that a citizen aged 18 and above is qualified to be registered as a voter in constituency.

[46] Section 23 of the Electoral Act did not violate section 67(3) of the 2013 Constitution. Since section 1(2) Fourth Schedule of the 2013 Constitution provides for the promulgation of electoral laws which may provide for additional residency requirements to ensure that persons are registered at the most appropriate roll.

[47] *Greatermans Stores (1979)(Private) Limited t/a Thomas Meikles Stores and Another* v *Minister of Public Service, Labour and Social Welfare and Another* CCZ 2/18.

[48] The court's interpretation was bolstered by section 155(2) (a) of the 2013 Constitution which outlines the principles of the electoral system. It provides that the state must ensure that citizens that are qualified in terms of Schedule 4 of the 2013 Constitution are registered as voters.

[49] See *Gabriel Shumba v Republic of Zimbabwe* 288/2004 available <http://www.achpr.org/files/sessions/51st/comunications/288.04/288_04_gabriel_shumba_v_zimbabwe.pdf>

However, section 327(2) of the 2013 Constitution provides that international law is not binding on Zimbabwe unless it has been approved by parliament and incorporated into domestic law. Unfortunately, the treaty establishing the African Court on Human and Peoples Rights had not been domesticated into Zimbabwean laws. The court therefore ruled that judgments of the African Court on Human Rights were not binding on Zimbabwe because that treaty had not been domesticated in Zimbabwe.

2.4. Challenging Results of the 2018 Elections

Results of the harmonised parliamentary, local government and presidential elections held on 30 July 2018 were challenged in *Nelson Chamisa v Emmerson Dambudzo Mnagagwa and Ors*.[50] On 2 August 2018 the Zimbabwe Electoral Commission declared that Emmerson Dambudzo Mnagagwa had been duly elected President of Zimbabwe after garnering more than half the number of votes cast in the poll. The applicant, one of 22 other participants in the Presidential poll, sought an order declaring the following: first, that the elections were not conducted in accordance with the law and were not free and fair; second, that results announced by the Zimbabwe Electoral Commission, and the declaration of the winner as duly elected as President of Zimbabwe, be declared as unlawful and of no force or effect and be accordingly set aside; and third, that the applicant, Nelson Chamisa, be declared the winner of the presidential poll.

The constitutional court stated that it was thus incumbent on the applicant to prove why the results should be declared invalid. The court stated that it recognised substantial compliance with the laws, if the acts or omissions did not affect the result. Therefore, an election would be declared void only if the court is satisfied from the evidence provided by the applicant that the legal trespass were of such a magnitude that they have resulted in substantial non-compliance with the law. In addition, the trespass must have affected the results of the elections. Therefore, election results will be overturned in limited and specific circumstances where the results were a product of fraud, or where elections were so poorly conducted that they could not be said to

accessed 28 May 2018. The African Commission gave the following order: 1. That Zimbabwe allows Zimbabweans living abroad to vote in the referendum of 16 March 2013 and the general elections thereafter, whether or not they are in the service of the Government; 2. That Zimbabwe provides all eligible voters, including Gabriel Shumba the same voting facilities it affords to Zimbabweans working abroad in the service of the Government; and 3. That Zimbabwe takes measure to give effect to its obligations under the African Charter in accordance with Article 1 of the African Charter, including in areas of free participation in government.

[50] CCZ 42/18

have conducted in substantial compliance with the law. The applicant was unable provide the court with evidence meeting the standard set. The court therefore found that the applicant's allegations were without particularity and specificity. It ruled that there was no excuse for not presenting the required evidence, since the Electoral Act contained provisions that would have facilitated obtaining of the required evidence. As the applicant had failed to prove his case to the standard required, the application was not granted. The question that arises from this judgment is whether the standard set is too high and hardly likely to be satisfied by most applicants? In Zimbabwe, as elsewhere in Africa, are presidential election petitions always likely to fail?[51]

3. LEGISLATIVE DEVELOPMENTS

The legislative programme of the government installed after the 2018 elections included passing of laws required for further implementation of the 2013 Constitution such as the Land Commission Act[52] and the National Peace and Reconciliation Act.[53] The programme also included amending the Electoral Act,[54] the Indigenisation and Economic Empowerment Act,[55] and Regulations relating to production, possession and supply of cannabis for medicinal and scientific purposes.[56]

3.1 Land Commission Act

To underscore the importance of the land issue to Zimbabweans, section 296 and 297 of the 2013 Constitution provided for the establishment of a Land Commission to be responsible for certain aspects of Zimbabwe's controversial land redistribution exercise which attempted to reverse colonial legacy pertaining to land ownership in Zimbabwe.[57] The Land Commission

[51] M Azu 'Lessons from Ghana and Kenya on why presidential election petitions usually fail' (2015) 15 *African Human Rights Law Journal* 150-166 at http://dx.doi.org/10.17159/1996-2096/2015/v15n1a7 (accessed on 12 June 2020).
[52] No 12 of 2017, Chapter 20:29, promulgated and entered into force on 26 February 2018. See General Notice 143/2018.
[53] No. 11 of 2017, Chapter 10:32, promulgated and entered into force on 5 January 2018.
[54] Electoral Amendment Act, No 6 of 2018, promulgated and entered into force on 28 May 208.
[55] The Indigenisation and Economic Empowerment Act, No 14 of 2007, Chapter 14:33, was amended through the annual Finance Act No. 1 of 2018.
[56] Dangerous Drugs (Production of Cannabis for Medicinal and Scientific Use) Regulations 2018, Statutory Instrument 62 of 2018.
[57] The land redistribution exercise was accelerated by the promulgation of the Land Acquisition Act, Cap. 20: 10, in 2012.[

is specifically to be responsible for autonomous administration of agricultural land.[58] To achieve this, some laws relating to agricultural land were amended,[59] others were repealed and replaced,[60] and the Land Commission Act crafted as the preeminent statute on agricultural land. The Act also attempted to amend and codify the common law relating to property transfers. It mandated the Land Commission to create a separate registry for agricultural land, with its own Registrar, and for transfer of some of the functions of the Registrar of Deeds to the Commission, in is so far as these pertain to agricultural land.[61]

This Act seeks to fulfil constitutional aspirations pertaining to the administration, management and distribution of agricultural land for all Zimbabweans.[62] There is a desire to reverse racist colonial policies that prevented indigenous people from owning agricultural land.[63] This is evident from the adoption of the definition of the term 'indigenous person' as established by the Indigenisation and Economic Empowerment Act.[64] Whether a person is indigenous is one of the factors to be taken into account when distributing agricultural land.[65] The Minister responsible for this Act is empowered to make regulations limiting the number of pieces of land that a person may own, and rights of non-indigenous Zimbabweans and non-resident Zimbabweans to own, lease or occupy agricultural land.[66] The Minister is also notably empowered to acquire agricultural land through means other than those specified in the Acquisition of Land Act such as acceptance of bequests and donations.[67] There is a hint in this

[58] Section 6 of the Land Commission Act. Agricultural land is defined in section 72(1) of the 2013 Constitution as 'land used or suitable for agriculture, that is to say for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including: (a) the keeping or breeding of livestock, game, poultry, animals or bees; or (b). the grazing of livestock or game; but does not include Communal Land or land within the boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land survey.'

[59] For example, the Land Acquisition Act, Cap. 20: 10

[60] For example, the Agricultural Land Settlement Act, Cap. 20: 01, and Rural Land Act, Cap. 2018.

[61] Sections 38 -42 in Part VIII of the Act

[62] The functions of the Land Commission as described in section 297 (1) of the 2013 Constitution include: '(a) to ensure accountability, fairness and transparency in the administration of agricultural land that is vested in the State; (b) to conduct periodical audits of agricultural land; [and] (c) to make recommendations to the Government regarding (i) the acquisition of private land for public purposes; [and] (ii.) Equitable access to and holding and occupation of agricultural land … '

[63] The following are some of the pieces of legislation that prevented indigenous Zimbabweans from owning agricultural land: Land Apportionment Act of 1930; Land Tenure Act of 1965; and the Regional, Town and Country Planning Act, No. 22 of 1976.

[64] Section 2 of the Indigenisation and Economic Empowerment Act which defines 'indigenous Zimbabwean' as any person who, before the 18th April 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest.

[65] Section 21 of the Land Commission Act.

[66] Ibid

[67] Section 16 of the Land Commission Act

provision that it may not always be necessary to resort to compulsory acquisition or expropriation of required agricultural land.

The Land Commission has also been mandated to conduct investigations and to settle some disputes relating to the supervision, allocation and administration of agricultural land.[68] The outcomes may be orders providing for specific remedial measures and or reports with appropriate recommendations to relevant authorities.[69] These powers are important because they increase access to justice for members of the public that are affected by administrative decisions relating to agricultural land. The Commission, however, has no mandate to investigate a complaint or attend to a dispute where the matter is before the courts.

The Act provides for development by the Minister, after consulting the Commission, of various types of land settlement schemes, and the terms and conditions upon which agricultural land may be allocated in such schemes.[70] The schemes may involve issue of offer letters, leases, (including leases for a period of 99 years), grants, and permits.[71] The allocation criteria for land includes an assessment of the capacity and ability of applicants use the land in question productively. Use and occupation of allocated land is regulated by the Minister. All entitlements pertaining to the land are also regulated. It is an offence, for example, to purport to alienate the land otherwise than in terms of the lease or conditions upon which it was granted, or without written authorization or consent of the relevant authority.[72]

3.2 National Peace and Reconciliation Commission Act

This Act was promulgated to allow for national reconciliation. Zimbabweans have suffered a number of atrocities, many of which were committed by state agencies and political parties. Victims have never had any meaningful redress.[73] The National Peace and Reconciliation Commission Act was passed to provide transitional justice for victims of these atrocities in fulfilment of the requirements of sections 251-253 of the 2013 Constitution. It is expected that

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[68] Sections 8 to 9
[69] Section 14
[70] Section 22
[71] Section 23. Section 24 provides that the Minister may not issue a 99 year before referring the application to the Commission for consideration and report. But the Minister is not bound to comply with the recommendation or report of the Commission
[72] Section 63
[73] The most notable atrocities were *Gukurahundi* between 1983 and 1987, in which it is estimated that 20 000 people were killed; then there was Operation *Murambatsvina* in 2005 in which it is estimated that 700 000 people were for forcibly displaced. There was also ZANU PF sponsored election violence in 2002 and 2008. For more details see https://encyclopedia.ushmm.org/content/en/article/zimbabwe-overview. (Accessed 8 May 2018).

the commission shall operate for a period of 10 years, which suggests a belief that such atrocities will never be repeated.[74] The nature of these events made it difficult, if not impossible, for persons affected to receive justice through the normal judicial system. In some instances in which entire communities were affected, victims and or perpetrators are deceased, rendering a judicial system reliant on primary evidence highly unsuitable. Further, the criminal justice system only provides for punishment, which does not facilitate reconciliation. The acknowledgement of the atrocities would allow the communities to begin to heal from the effects of the atrocities. The key functions of this commission as outlined in the 2013 Constitution include:

> ‘(a) to ensure post-conflict justice, healing and reconciliation;
>
> (b) to develop and implement programmes to promote national healing, unity and cohesion in Zimbabwe and the peaceful resolution of disputes;
>
> (c) to bring about national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the provision of justice; and . …
>
> (e) to develop programmes to ensure that persons subjected to persecution, torture and other forms of abuse receive rehabilitative treatment and support. …[75]

The commission is empowered to utilise various methods to provide justice, such as conciliation and mediation of disputes among communities, organisation, groups and individuals. To this end, it is empowered to investigate any event the instance of the victims, relatives of a deceased person or any competent person.[76] Once a determination has been made, the commission may provide a wide array of remedies. These include the issuance of documents or directions for government departments to implement specified remedial action. Some remedies may require legislative intervention. The Commission is therefore empowered to report directly to parliament.[77] However, the Commission does not have the mandate to resolve a matter that is already before the judicial system.[78]

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[74] Section 251(1) of the 2013 Constitution.
[75] Section 252
[76] Section 8 of the National Peace and Reconciliation Act
[77] Section 253 of the 2013 Constitution
[78] Section 8 (3) of the National Peace and Reconciliation Act

Gender mainstreaming is integral to the effective functioning of the Commission.[79] The law is cognisant that many atrocities committed during conflicts are gendered, and that women may have different experiences from men, such as rape.[80] Therefore, investigation and resolution of such conflicts requires a gender perspective and the provision of a dedicated gender focal person in every committee, or body established by the Commission.[81] Further, due to the highly traumatic and invasive nature of gendered violations, victims may not be willing to come forward. The commission is therefore empowered to reach out to the victims of the violation.[82] Gendered violations may be investigated in a manner that is most comfortable for the victims, and the law permits victims to provide evidence in private.[83]

3.3 Electoral Amendment Act 2018

The noteworthy changes brought about by this Act include creation of Metropolitan Provinces as areas within which elections could be conducted, and inclusion of the Human Rights Commission among persons and entities to act as election observers.[84] The Act also provides for gender mainstreaming in the electoral process.[85] There are specific provisions for gender balance in administration staff for elections, with requirements that at every level half the administrators have to be women.[86] Unfortunately, the role of women in political parties is not as clearly provided for. There is no specification of minimum numbers of women that political parties are expected to field in elections. Political parties are merely required to respect the right of women to participate in elections. In the male dominated political arena of Zimbabwe, prescriptive requirements may be needed to ensure that there are more female candidates in elections.

The Electoral Amendment Act also introduced a Code of Conduct for political parties, candidates and other stakeholders participating in elections.[87] The code notably addresses

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[79] Section 9.
[80] For more information on gendered violence in conflict situation see United Nations Security Council 'Report of the Secretary-General on Conflict-Related Sexual Violence' S/2017/249 15 April 2017 New York, at http://www.un.org/en/events/elimination-of-sexual-violence-in-conflict/pdf/1494280398.pdf (accessed on 6 May 2018).
[81] See section 9 (n 79)
[82] Ibid.
[83] Ibid .
[84] Section 21 of the Electoral Amendment Act, 2018.
[85] Section 3
[86] Section 31
[87] Section 36 repeals and replaces the 4th Schedule of the Electoral Code of Conduct for Political Parties and Candidates and other stakeholders.

issues such as violence and offering and taking of bribes. Provision was also made for a multi-party liaison committee to facilitate communication and resolution of disputes or concerns quickly. Also outlined in the Code is the role of the media, and its relationship with the political parties.

3.4 Amendment of Indigenisation and Economic Empowerment Act

For reasons that are not readily apparent, as noted above,[88] the new administration in Zimbabwe employed the Finance Act, No. 1 of 2018, to amend several statutes, including the Indigenisation and Economic Empowerment Act.[89] was amended through the annual Finance Act. The Finance Act annually makes provision for the revenues and public funds of Zimbabwe. The Indigenisation and Economic Empowerment Act provides for indigenisation of the economy of Zimbabwe and for support measures for the economic empowerment of indigenous Zimbabweans. It was promulgated to reverse the effects of a century of racial injustice which locked indigenous Zimbabweans out of the economy.[90]

The 2018 amendment changed the basis for reserving sectors of the economy. The dichotomy is now between citizens and non-citizens and no longer between indigenous and non-indigenous citizens.[91] Sectors are now reserved for all citizens; non-citizens can only operate in those reserved sectors with the written permission of the Minister. In addition, the forced sale of shares to indigenous Zimbabweans has been repealed.[92] Non-citizens may not be the sole investors in designated extractive business which include diamond mining and platinum extraction. They can only hold a maximum of 49% of the shares. The rest of the shares in designated sectors can only be held by designated entities such as the Zimbabwean Mining Corporation.

3.5 Dangerous Drugs (Production of Cannabis for medicinal and scientific use) Regulations 2018

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[88] See n 55 above

[89] See sections 39 to 46 in Part VIII of the Finance Act, 2018. The Indigenisation and Economic Empowerment Act, Cap. 14: 33, is amended under section 42 of the Act.

[90] For more information of how indigenous Zimbabweans were locked out of the economy see E Chitsove 'Indigenisation Laws and Bilateral Investment Treaties in Zimbabwe' 24 *UBLJ* (2017) 70-90.

[91] Section 42 (1) of the Finance Act 2018 provides for insertion of a new section 3A on Reserved Sectors of the economy in the Indigenisation and Economic Empowerment Act..

[92] Ibid.

These Regulations seek to legalise acquisition, possession and supply of cannabis for medicinal and scientific purposes,[93] but do not affect use of cannabis for recreational purposes, which is still unlawful.[94] The Regulations allow licenced persons, with licensed sites, to produce or import cannabis.[95] Licenses are issued only to upstanding citizens and persons ordinarily resident in Zimbabwe. If there is fear that the applicant may divert cannabis to the illegal market, the license will not be granted. The licencing fees outlined in the first schedule are prohibitive. A production licence costs US$50 000.00. Its renewal costs US$20 000, and the annual return fees are US$15 000.00.[96]

Strict guidelines are provided for the growth, storage and distribution of cannabis with different rules of production for medicinal or scientific purposes.[97] There are clear rules to prevent contamination of cannabis, such as prohibition of the use of pesticides.[98] The packaging, labelling and shipping of cannabis is also regulated. Cannabis may be acquired, possessed and supplied by health professionals and persons permitted to write and fill medical prescriptions.[99] Suppliers are required to keep a record of all products, the recipients and quantities, which records are to be retained for at least five years.[100] Further, cannabis may not be advertised without the permission of the Minister.[101]

[93] The Regulations were made in terms of section 6 (1) of the Dangerous Drugs Act, Cap. 15:02.
[94] See for example section 157 of the Criminal Law (Codification and Reform) Act, Cap. 9:23.
[95] Regulation 4 of the Dangerous Drugs (Production of Cannabis for medicinal and scientific use) Regulations, 2018.
[96] Fees are indicated in the First Schedule of the Dangerous Drugs (Production of Cannabis for medicinal and scientific use) Regulations, 2018.
[97] Regulations 33 to 37 of the Dangerous Drugs (Production of Cannabis for medicinal and scientific use) Regulations, 2018.
[98] Ibid
[99] Regulation 64. Persons authorised to handle cannabis include medical practitioners, dental practitioners, veterinary surgeons, pharmaceutical chemists and qualified nurses.
[100] Regulation 65.
[101] Regulation 80.