

# JUDICIAL SERVICE COMMISSION



**ADDRESS BY THE HONOURABLE MR JUSTICE**

**LUKE MALABA,**

**CHIEF JUSTICE OF ZIMBABWE,**

**ON THE OCCASION TO MARK THE OFFICIAL  
SEPARATION OF THE CONSTITUTIONAL COURT AND  
THE SUPREME COURT OF ZIMBABWE ON 22 MAY 2020**

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## **INTRODUCTION**

**Ladies and Gentlemen**, the date 22 May 2020 marks seven years after the publication of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. That anniversary is significant to the Judicial Service Commission, the Judiciary, stakeholders in the administration of justice and all Zimbabweans. Section 166 of the Constitution of Zimbabwe establishes the Constitutional Court and provides for its composition. However, at its inception on 22 May 2013, paragraph 18(2) of Part 4 to the Sixth Schedule of the Constitution deferred the operation of the constitutional provisions dealing with the composition of the Court. It provided that for seven years after the date of publication the Constitutional Court consisted of the Chief Justice, the Deputy Chief Justice and seven other Judges of the Supreme Court, who had to sit together as a bench to hear any constitutional case.

The Constitution therefore reposed in the Supreme Court Judges the dual role of presiding over the Supreme Court and the Constitutional Court. That seven-year period from the date of publication of the Constitution expires today. With effect from 22 May 2020, the Constitutional Court will, by operation of law, be constituted by Judges separate from the Judges of the Supreme Court.

Today's ceremony is therefore held to mark the advent of a new era in the judicial history of Zimbabwe. From today, the Constitutional Court will operate separately from the Supreme Court with Judges specifically appointed as Constitutional Court Judges dedicated to the development of the country's constitutional law jurisprudence.

## **CONSTITUTIONAL JURISDICTION – CHOICE**

The Constitution is the supreme law of the land. Its provisions trump and invalidate every law, conduct, custom and practice which is inconsistent with them.

In every constitution-making process there is a time when the makers must decide on the model or system of constitutional jurisdiction to adopt.

The model or system of constitutional jurisdiction adopted by a people in the constitution-making process will depend on the historical and prevailing social, economic and political circumstances of the country.

A special Constitutional Court is one of the principal types of constitutional jurisdiction. This is a system where the constitutional jurisdiction is exercised by a permanent Constitutional Court.

In the constitution-making process of 2013, the people of Zimbabwe adopted for their own purpose a system of constitutional jurisdiction with a Constitutional Court as a specialised tribunal to be the supreme guardian of the constitutional order.

The establishment of constitutional jurisdiction is linked with the desire to guarantee democratic constitutional stability and to prevent constitutional mandates from being eroded.

The objective of constitutional jurisdiction is the defence of the Constitution from possible situations which may threaten its integrity. The establishment of a Constitutional Court in any society is a transition to democracy, the protection of human rights and the rule of law.

## **CREATION OF THE CONSTITUTIONAL COURT**

Section 166(1) of the Constitution of Zimbabwe established the Constitutional Court organised as a tribunal separate from and independent of all other courts. The number of Judges who make up the Constitutional Court is fixed by the fundamental law.

The Constitutional Court is the apex of the structural hierarchy of the courts vested with judicial authority to be exercised for the purposes of protecting and advancing the interests of the people of Zimbabwe.

The establishment of a tribunal with a specific and special function of guarding the Constitution is an expression of deep commitment to a form of constitutionalism. Constitutionalism concerns the set of fundamental rules about the working of an independent and self-governing political community of human beings and their fundamental rights.

The establishment and role of the Constitutional Court as the supreme guardian of the constitutional order is an essential feature of constitutionalism, highlighting the role and importance of the Constitution in the national, legal and political environment.

The establishment of the highest court in the land whose sole jurisdiction is to hear and determine matters requiring interpretation, protection, promotion and enforcement of the Constitution makes such a court the heart of the nation.

## **ROLE OF THE CONSTITUTIONAL COURT**

The model of constitutional justice adopted by Zimbabwe in 2013 provides for a Constitutional Court which is distinct and separate from the ordinary court system with a different composition, different procedures and having the power to examine the constitutionality of laws passed by Parliament and if necessary annul any such laws found to be in conflict with the constitutional text.

A specialised Constitutional Court dealing with matters of constitutional law only is able to stand supreme and not appear to be a mere part of the Judiciary.

The Constitutional Court controls conformity of the laws to the Constitution, protects the integrity of constitutional principles and ensures internal coherence of the law. It plays an important role in the consolidation of the rule of law. In doing so it must protect and defend the superiority of constitutional law in the judicial order.

The defensive function of the Constitutional Court in the sense of the Court being the supreme guardian of the Constitution is not its only role. Its role is not limited to declaring given norms

unconstitutional and if necessary nullifying them. In many cases the Court confirms the constitutionality of laws and its decisions in these cases have profound consequences. This is because the Constitutional Court does not just defend the constitution, it interprets the Constitution.

The Constitution, despite its supremacy in the hierarchy of sources of law, has been subject to misinterpretation and over-interpretation. The role of the Constitutional Court is to ensure that the Constitution is interpreted in a manner that avoids the depreciation of democratic standards.

Through the interpretation of the Constitution the Constitutional Court provides the other organs of State with conceptual tools and criteria for their conduct.

The Constitutional Court plays a critical role in the creation of legal order. In the sense that the Constitutional Court plays the role of the supreme interpreter of the Constitution, its decisions on constitutional matters are final and binding on all other courts and other powers of State.

The nullification of legislation or declaration of unconstitutionality of conduct is not sufficient to eliminate every effect of the violation or misinterpretation of the Constitution. There is a need for all powers of State to be guided by and comply with the final and binding decisions of the Constitutional Court.

## **COMPETENCES OF THE CONSTITUTIONAL COURT**

The Constitutional Court is the highest court on constitutional matters. It hears and determines only constitutional matters. The Court has original and final jurisdiction over these matters and its decisions are final and binding on all other courts.

The Constitutional Court has exclusive jurisdiction in respect of specified constitutional matters, whilst it shares concurrent jurisdiction with the Supreme Court and the High Court in respect of other constitutional matters.

The Constitutional Court is the only tribunal with the power to nullify an unconstitutional law or conduct of the President or Parliament. The other courts with concurrent jurisdiction on constitutional matters may declare the law or conduct of the President or Parliament unconstitutional but cannot nullify it.

Any order of constitutional invalidity has no force and effect until it is confirmed by the Constitutional Court. The Court has final jurisdiction over whether an act of Parliament or conduct of the President or Parliament is constitutional.

The function of the Constitutional Court as the supreme guardian of the constitutional order is apparent from the nature and scope of its jurisdiction.

Monopolising the power to declare a law null and void with the Constitutional Court aims at preserving due respect of parliamentary acts by all subordinate courts.

To prevent subordinate courts arrogating to themselves the power to examine the constitutionality of law and striking down national laws by means of final orders, the Constitution vests in the Constitutional Court the power to nullify legislation on substantive constitutional grounds of invalidity. The authority to review laws for unconstitutional inconsistency is vested in the Constitutional Court as a specialised court, staffed with Judges chosen for their sound knowledge of constitutional law.

The advantage of the proceedings for the confirmation of orders of constitutional invalidity of laws made by subordinate courts is the prevention of disparate rulings on the validity of laws by different courts. It ensures finality and uniformity in constitutional interpretation.

The Constitutional Court can be a court of first and final instance in respect of a constitutional complaint brought by a person alleging an infringement of a fundamental right or freedom enshrined in the Bill of Rights. Aggrieved citizens may approach the Constitutional Court directly for the enforcement of the fundamental human rights and freedoms through

constitutional provisions giving wider scope for direct access to the Constitutional Court in the public interest.

Judicial review, which is the power of the Constitutional Court to review the constitutionality of law and to protect fundamental rights and freedoms of the individual as a principle of limited government, enjoys strong support in the Constitution.

Constitutional review as embracing aspects of judicial review is an essential feature of constitutional democracy born out of the fundamental principles and values of the supremacy of the Constitution, the rule of law, separation of powers, judicial independence and fundamental rights and freedoms of the individual enshrined in the Bill of Rights. Judicial review as a power is clearly implicit in the principle and value of judicial independence.

The Constitution reserves certain specific powers of constitutional review for the Constitutional Court. The Constitutional Court has exclusive jurisdiction to hear and determine validity of the electoral processes leading to the appointment of a President, to hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President, and to determine whether Parliament or the President has failed to fulfil a constitutional obligation.

In the exercise of the powers of judicial and constitutional review, the Constitutional Court is held to the highest standard of judicial independence. It is not enough for justice to be done but must be seen to be done. The Court is under a constitutional obligation to uphold its duty of independence, dignity, accessibility and effectiveness. The Constitutional Court must be subject only to the Constitution.

## **EFFECT OF CONSTITUTIONAL JURISDICTION**

The powers vested in the Constitutional Court as a specialised court show the importance the people attach to the institution as the guardian of the Constitution and upholder of the principles

and values of supremacy of the Constitution, the rule of law and protection of fundamental rights and freedoms in the Bill of Rights.

A true constitutional democracy is based on the capacity of citizens to enforce their fundamental human rights and the effectiveness with which the Courts protect these rights. It is important for the public to understand the essence of the Constitutional Court and the overall design of constitutional jurisprudence and constitutional justice.

From the beginning, constitutional complaints constituted a major source of litigation in the Constitutional Court. The complaints of infringement of fundamental human rights and freedoms enshrined in the Bill of Rights have become an important feature of the administration of the constitutional justice in the country. The jurisprudence developed shows that the Constitutional Court has asserted its independence in the adjudication of constitutional matters.

The powers of the Constitutional Court must continue to be exercised with the intention to uphold the supremacy of the Constitution and to promote a modern and rational model of constitutional adjudication.

The constitutional complaint procedure has also served as an escape hatch for litigants dissatisfied with the performance of subordinate courts.

Several constitutional complaints, in appropriate circumstances, are brought against judicial decisions alleged to have violated fundamental rights and freedoms guaranteed by the Constitution. The right of any person alleging infringement of a fundamental human right or freedom enshrined in the Bill of Rights to approach the Constitutional Court for appropriate relief is an essential and critical factor in the development of constitutional consciousness in the citizenry.



It is clear that the Constitutional Court is a judicial organ. The judicial character of the Court means, among other features, that it cannot act on its own accord. It can only act in legal proceedings initiated by others in specific cases provided for in the Constitution and in accordance with prescribed procedures.

The effectiveness of the Constitutional Court can only be assessed to the extent that constitutional disputes are brought before it. Its decisions must be explicitly grounded on the dictates of the Constitution. Its independence and impartiality are guaranteed by its status and the legal procedures it follows.

It goes without saying that constitutional jurisdiction can only be exercised within a framework of procedural rules. It is a requirement not only of the idea of security of the legal order but also of the guarantee of equal protection of the law, a fundamental principle of justice that is inherent in a democratic constitution oriented towards the rule of law. In 2016 the administrative procedural rules regulating proceedings in the Constitutional Court were gazetted. The Rules now set out the administrative processes for the filing, processing and determination of matters by the Constitutional Court.

The principles of the supremacy of the Constitution and the rule of law mean that all organs of State as well as ordinary citizens are subject to the law and must obey its mandates. They are thus in a position of subordination to the Constitution.

The creation of the Constitutional Court with the competence to annul unconstitutional laws makes it possible to maintain the principle that all powers are subject to the law, while at the same time guaranteeing that the law will conform to the Constitution.

The rule of law is not a talisman to be waived about when it is convenient to do so and discarded when the situation is not favourable to one's interests. It is a reality. It is the foundation of any

democratic society and is essential to the cohesion of a community. The Constitutional Court is obliged to take the lead in upholding the rule of law.

People have very high expectations of the Constitutional Court, particularly with regard to the protection of fundamental human rights and freedoms. It is the basis upon which the values of constitutionalism are developed and protected.

## **COMPOSITION OF THE CONSTITUTIONAL COURT**

The professional qualifications for appointment to the office of Judge of the Constitutional Court mean that no Judge can sit on the Constitutional Court bench without being outstandingly competent in the field of constitutional law. It also means that Judges are chosen from among people constrained by the tradition of their profession to act independently and impartially.

In the past, Judges sitting as Constitutional Court Judges have been those already appointed and sitting as Supreme Court Judges. Section 177 of the Constitution extends the appointment criteria for Constitutional Court bench to any person at least forty years old, with a sound knowledge of constitutional law, having served as a Judge or having been qualified to practise as a legal practitioner for a prescribed period.

The critical criterion for appointment is a sound appreciation and knowledge of constitutional law. The focus on experience and constitutional knowledge highlights the integral part that the Constitutional Court must play in any constitutional democracy.

**Ladies and Gentlemen**, allow me to fully acknowledge the hard work and diligence of all the Judges of the Supreme Court who have had the task of doubling up as Judges of the Constitutional Court for the past seven years. They have worked tirelessly to balance their workloads in the two courts. I appreciate that it was an onerous task for the Judges to continue as both Supreme Court and acting Constitutional Court Judges.

I thank each and every Judge of the Supreme Court who has dedicated the past seven years to this dual role. Without your hard work and dedication, the transitional period could not have been successful.

The separation of the courts entails that from today the Constitutional Court will, in terms of section 166(1) (a) and (b), consist of the Chief Justice, the Deputy Chief Justice and five other Judges of the Court.

Due to circumstances beyond the control of the Judicial Service Commission, the provisions of section 166(2) of the Constitution, which authorise and empower the Chief Justice to appoint acting Judges of the Constitutional Court for a limited period, have been invoked to ensure composition of the Court as the Constitution dictates.

These appointments are only for a very limited period and the substantive appointment of permanent Judges for the Constitutional Court will be done in due course in terms of the Constitution.

Prior to today's separation the Supreme Court consisted of the Chief Justice, the Deputy Chief Justice and thirteen other Judges. Following the appointment of acting Judges of the Constitutional Court, it may also become necessary to increase the number of Judges in the Supreme Court. These appointments will be done in due course in accordance with the Constitution.

The Constitutional Court will remain housed here at Mashonganyika Building, while the Supreme Court will be accommodated at the Supreme Court Building between Nelson Mandela and Kwame Nkrumah Avenues adjacent to the Parliament of Zimbabwe building.

## **THE FUTURE**

Zimbabwe is a constitutional democracy undergirded by a Bill of Rights. The implication of this concept is that the Constitution is the supreme law of the land. Every law is subordinate to

the Constitution and must be consistent and *intra vires* the constitutional provisions. It is critical and non-negotiable that all existing laws be aligned to the Constitution.

The Constitutional Court has wide powers to develop its own constitutional jurisprudence. A specialised Constitutional Court is expected to guarantee a high standard of judicial reasoning.

Continuity of the Court's jurisprudence is of great importance. The Constitutional Court is the living symbol of the Constitution. It is a living symbol of a law destined to endure for many decades to come. This means that the Constitutional Court has to transcend and act above and beyond the changes occurring in the political arena. It must be consistent in its approach, which must be subject only to the Constitution.

As the final authority that gives meaning to the constitutional norms and values of a nation, the Constitutional Court is the basis upon which the foundational values of constitutionalism must be developed and protected.

The Constitutional Court must remain committed to its integral role in the consolidation of the rule of law as the defender of the Constitution. It must continue to act independently, impartially and effectively.

## **CONCLUDING REMARKS**

With these few remarks, **Ladies and Gentlemen**, allow me to declare the Constitutional Court and the Supreme Court officially separated.

**I THANK YOU.**