Courts as a Forum for Safeguarding the Right of Opposition Parties to Participate in Democratic Processes: A Comparative Analysis of South Africa and Zimbabwe

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Abstract: Courts can play a critical role in protecting the democratic participation of opposition parties. In this article, we examine the role of apex courts in South Africa and Zimbabwe as forums for democratic contestation by opposition parties. Specifically, we critically assess the courts' records in enabling and protecting opposition parties' ability to equally participate in democratic processes. Our analysis focuses on four themes in the courts' jurisprudence: (i) the disenfranchisement of voters perceived to be aligned with the opposition, (ii) requirements for the registration of political parties and individual candidates seeking to participate in elections, (iii) the independence of electoral management bodies to ensure fair and equal participation for all parties, including the opposition, and (iv) the enforcement of electoral justice in cases of alleged unfair or unfree elections. Additionally, recognising the importance of political funding for opposition parties, the article examines the legislative framework governing political party funding. The article demonstrates that while South Africa and Zimbabwe share similar constitutional frameworks and commitments to political rights, their apex courts have taken divergent approaches toward protecting opposition parties. The Zimbabwean Constitutional Court has largely restricted political rights, curtailing the institutionalisation of opposition parties and hindering the development of multi-party democracy. In contrast, the South African Constitutional Court has generally served as an enabling force for institutionalising opposition parties and strengthening multi-party democracy. We attribute the difference in approach to the broader political context: while both countries formally commit to multi-party democracy, Zimbabwe's ruling party has entrenched a system of competitive authoritarianism, which it maintains by, amongst other measures, undermining independence and relegating the courts to a rubber-stamping role for measures that curtail political freedoms. By contrast, South Africa's judiciary has maintained its independence, supporting the protection of opposition rights even within a dominant-party system. We conclude our analysis with the observation that a dominant political party, including a liberation party,

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does not inevitably stifle opposition rights. Independent institutions – such as courts and electoral management bodies – serve as essential bulwarks against such attempts, ensuring the preservation of democratic principles and equitable political participation.
Keywords: Opposition Political Parties; Multi-Party Democracy; Political Party Institutionalization; Competitive Authoritarianism; Political Rights; Judicial Independence; Liberationism

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A. Introduction

Opposition parties are important for the proper consolidation and functioning of democracy.[1] They can offer an alternative vision of governance for the people and can play an important role in exercising oversight and enforcing accountability on the government.[2] However, they can only play this role if they are strong, their rights are protected, and they enjoy equal opportunities (as the ruling party) to participate in democratic processes, including elections. In a multi-party constitutional democracy, the judiciary plays a critical role in protecting political rights, including the rights of opposition parties to meaningfully participate in democratic processes.

In this article, we explore the role played by apex courts in South Africa and Zimbabwe (the South African Constitutional Court and Zimbabwean Constitutional Court) in protecting the rights of opposition parties to participate in democratic processes, in a context where both countries have had a dominant liberation party in government and share similarities in their constitutional frameworks. The analysis in this article is presented in three substantive sections (excluding the introduction and conclusion). We begin by discussing multi-partyism, institutionalization of political parties and competitive authoritarianism, to set the conceptual framework for our analysis of the decisions of the apex courts. After that, we provide an overview discussion of the historical, political, and constitutional context within which opposition parties exist in South Africa and Zimbabwe.

In the last substantive section of the article, we analyse and compare the approaches taken by the apex courts in the two countries when adjudicating cases which affect the ability of opposition parties to participate equally in the democratic process. Specifically, we critically examine and compare the approaches taken by the apex courts from the two countries in (i) addressing the disenfranchisement of voters perceived to be aligned to the opposition, (ii) dealing with requirements related to the registration of political parties and

1 *Vicky Randall / Svåsand Lars*, Party Institutionalisation in New Democracies, Party Politics 5 (2002), p. 5.

2 *William Gumede*, Policy Brief 45: The Role of Opposition Parties in Developing Democracies, Democracy Works Foundation, 20 July 2023, https://www.democracyworks.org.za/what-is-the-role-of-opposition-parties-in-developing-democracies/ (last accessed on 8 April 2025).

individual candidates who wish to participate in elections; (iii) protecting the independence of electoral management bodies to guarantee all parties (including the opposition) fair and equal participation in elections; (iv) and enforcing electoral justice in the face of allegations that elections were not free and fair. Additionally, recognising the importance of political funding for opposition parties, the article examines the legislative framework governing political party funding in both jurisdictions, an area rife for future litigation.

Overall, our analysis will show that while the two countries have similar constitutional frameworks and a similar entrenchment of political rights in their constitution and legislation, the two apex courts have mostly taken diverging approaches to the protection of opposition parties' political rights. In particular, the Zimbabwean Constitutional Court has mostly restrained political rights, limited the institutionalisation of opposition political parties and multi-party democracy. By contrast, the South African Constitutional Court has taken the opposite stance – it has been an enabling force for the institutionalisation of opposition parties and the development of multi-party democracy. We argue that this difference is possibly explained by the fact that while both countries affirm a commitment to multi-party democracy, the ruling party in Zimbabwe has entrenched a system of competitive authoritarianism, a process which involved the capturing of judicial independence and has led to the courts playing a rubber-stamping role for measures designed to curtail political freedoms in general and the rights of opposition parties and individual candidates who stand for office. Finally, the analysis also reveals that the presence of a dominant political party, even one that was a liberation party, will not always lead to the stifling of opposition parties' political rights. The presence of independent institutions, including the courts and electoral management bodies, can be an effective bulwark against any attempts to do so – reifying the importance of these institutions in securing multi-party democracy.

B. Multi-Partyism, Institutionalization of Opposition Parties, and Competitive Authoritarianism

Multi-partyism is a political system where multiple political parties exist and operate as autonomous entities which regularly compete in democratic elections with a serious chance to win the election.[3] The Constitution of Zimbabwe and the Constitution of South Africa recognise a multi-party system of democratic government as a core constitutional value.[4]

3 *Matthias Scantamburlo Davide Vampa / Ed Turner*, The costs and benefits of governing in a multi-level system, Political Research Exchange 6 (2024), pp. 1-2; see also, *K Prah*, Multi-Party Democracy and It's Relevance in Africa, Centre for Advanced Studies of African Society (2012), p. 1; *Manfred J. Holler*, An Introduction into the Logic of Multiparty Systems, in: Manfred J. Holler (ed.), The Logic of Multiparty Systems, International Studies in Economics and Econometrics 17 (1987).

4 Section 3(2)(a) of the Zimbabwean Constitution; Section 1(d) South African Constitution (on the importance of this commitment in the South African context see *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) para 85).

For a political system to be genuinely multi-party in nature, it must have multiple political parties, including opposition parties, that are fully institutionalised.

The institutionalisation of political parties is a "process through which parties acquire value and stability, and in which party operatives have agency".[5] It refers to the patterns of behaviour, attitudes and cultures that either enable or limit a political party from being established in society.[6] An institutionalised political party would, at least, have the following features: it would be organised – (understood in relation to having complex and effective organisational structure and rules, as well as wide geographic spread); it would be deeply embedded in society (understood as including its relationship with voters and civil society); and it would have autonomy from other organisations.[7]

The institutionalisation of political parties is influenced by external and internal factors. The external factors include the availability of resources, access to media, an open democratic space and legal protection for their existence.[8] The internal factors include the ability of a party to adapt, especially following the first group of political leaders and in relation to its membership, coherence in relation to there being consensus about functional boundaries and dispute resolution within the party as well as having a sense of autonomy from other organizations and groupings.[9] While the internal factors are mostly in the hands of the party, in a multi-party democratic system, it is important to ensure that the legislative and policy framework and practices enable rather than limit the institutionalisation of opposition political parties by constraining the external factors that inhibit institutionalization. A government which limits access to political party funding (from the state or private actors), restricts the right to vote and stand for public office, controls and limits opposition parties' access to the media or creates onerous rules that create barriers to the registration and campaigning of opposition political parties, and imposes leaders on opposition parties, puts a strain to the institutionalisation of opposition parties and, thus, undermines multi-partyism. Of course, a party that is not flexible and is unable to extend its pool of membership, does not have clear structures and rules for dispute resolution, or fails to exert its unique identity, undermines its own ability to institutionalise.

However, as observed by some scholars, it has become a common practice for some of the contemporary dictatorships to maintain a constitutional or legal framework that formally recognises multiparty democratic governance but in practice, the regime in government constantly undermines the political and legal system to prevent opposition political parties

5 *Eloïse Bertrand / Michael Mutyaba*, Opposition Party Institutionalisation in Authoritarian Settings: The Case of Uganda, Commonwealth & Comparative Politics 62 (2024), pp. 77-78. See also, *Edalina Rodrigues Sanches*, Party Systems in Young Democracies: Varieties of Institutionalization in Sub-Saharan Africa, Oxfordshire 2018, p. 4; *Samuel Huntington,* Political Order in Changing Societies, New Haven 1968, p. 12; *Randall / Svåsand*, note 1, p. 12.

6 *Randall / Svåsand*, note 1, p. 12.

7 *Bertrand / Mutyaba*, note 5, p. 82.

8 *Randall / Svåsand*, note 1, p. 8.

9 Ibid., p 10.

from participating in democratic processes effectively.[10] This approach to dictatorship is what Levitsky and Way characterise as competitive authoritarianism.[11] In a competitive authoritarian political system, democratic laws and institutions exist on paper, but the regime in power systematically violates core features and or rules of these institutions, including by placing arbitrary restrictions against political rights or conducting elections that are not free and fair, and maintaining institutions of accountability but subvert their independence. In this connection, Levitsky and Way have argued that:

> *"In competitive authoritarian regimes, formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority. Incumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy."*[12]

In essence, while formal democratic institutions exist, these are abused by those in power to give them an advantage over opponents. Thus, there is political competition, but it is not fair. Those in power use a range of methods to skew competition in their favor, including manipulating electoral processes and results, and interfering with the independence of the judiciary and electoral management bodies.[13] Countries whose democratic system comprises multiple political parties but are dominated by a single party are often vulnerable to competitive authoritarianism.

Zimbabwe stands accused of pursuing competitive authoritarianism since the reign of now late President Robert Mugabe and this has been perfected under the incumbent President Mnangagwa.[14] Recent surveys and analysis show that democracy in South Africa appears to be on the decline.[15] This was quite evident during the administration of President Jacob Zuma when the executive appeared to be boldly pursuing a policy of capturing democratic institutions including the office of the National Prosecuting Authority and

10 *Steven Levitsky / Lucan Way*, The Rise of Competitive Authoritarianism, Journal of Democracy 13 (2002), p. 5.

11 Ibid.

12 *Levitsky / Way*, note 10, p. 52.

13 Ibid., p. 54.

14 Ibid., p. 51; see also *Roger Southall*, From Party Dominance to Competitive Authoritarianism? South Africa versus Zimbabwe, in: Matthijs Bogaards / Sebastian Elischer (eds.), Democratisation and Comparative Authoritarianism in Africa, Wiesbaden (2016) pp. 103–108. *Kwadwo Boateng,* Defeating Competitive Authoritarianism in Zimbabwe with Democratic Elections, Democracy from the Margins 22 (2013), pp. 1-3.

15 See Freedom House, Freedom in the World Report 2024, https://freedomhouse.org/country/south-africa/freedom-world/2024 (last accessed on 9 April 2025). Also see *Michael Walsh / Phiwokuhle Mnyandu*, Democracy at Stake in South Africa, Foreign Policy Research Institute, 10 May 2023, https://www.fpri.org/article/2023/05/democracy-at-stake-in-south-africa/ (last accessed on 9 April 2025).

Parliament.[16] Following the recent 2024 national and provincial elections, where no single party obtained an absolute majority, at the very least the multi-party politics necessitated by the need for coalition government *may* turn the tide for South Africa.

Courts can play a critical role in pushing back against the rise of competitive authoritarianism. They can be relied upon to protect the rights of citizens and opposition parties and to enforce accountability on the government. Whether the courts can perform this role depends on their commitment towards defending their independence, as they are often the first targets for capture by competitive authoritarian regimes. Before turning to the entrenchment of multi-partyism and the performance of the South African and Zimbabwean apex courts in protecting it, in the next section, we provide an overview of the context within which opposition parties find themselves in these two jurisdictions.

C. Opposition Parties in South Africa and Zimbabwe

South Africa and Zimbabwe share a common political history – having both been subject to colonial conquest. Following years of political and armed struggle, both countries were liberated by liberation movements which came to power following the introduction of constitutional democracy. Zimbabwe achieved its political independence in 1980, and South Africa achieved equal franchise in 1994.

In Zimbabwe, the Zimbabwe African National Unity Patriotic Front (ZANU PF) has been the dominant political party after winning the first post-independence elections in 1980. Although it narrowly lost parliamentary majority in 2008 to the opposition Movement for Democratic Change (MDC),[17] ZANU PF regained control of government after winning the disputed elections of 2013 and has continued to be the dominant party in government since then. In South Africa, the African National Congress (ANC) gained control of government in 1994 after winning the first democratic elections. It was the dominant party in the South African parliament from 1994 to 2024.[18] In 2024, for the first time, the ANC did not secure a majority, with only 40.2 per cent of the national vote – requiring it to enter into a coalition with several political parties – the Government of National Unity.[19] Although the ANC lost its dominance following the results of the 2024 national elections, it remains the leading party in parliament and government.

16 *Theunis Roux*, Constitutional Populism in South Africa, in: Martin Krygier / Adam Czarnota / Wojciech Sadurski (eds.), Anti-Constitutional Populism, Cambridge 2022, who discusses the rise of populism and the capture of democratic institutions under former President Jacob Zuma's government. See also *Jonathan Hyslop*, Trumpism, Zumaism, and the Fascist Potential of Authoritarian Populism, The Journal of South African and American Studies 21 (2020), p. 464.

17 *Brian Raftopoulos / Shari Eppel*, Desperately Seeking Sanity: What Prospects for a New Beginning in Zimbabwe?, Journal of Eastern African Studies 2 (2008), pp 369-400.

18 Statistics available from Electoral Commission of South Africa, https://www.elections.org.za (last accessed on 9 April 2025).

19 The 2024 Government of National Unity comprises the ANC and several other political parties including Rise Mzansi, Al Jama-ah the Democratic Alliance (DA), Inkatha Freedom Party (IFP),

Since 1994, the most prominent political parties in South Africa have included the Congress of the People (COPE), the Democratic Alliance (DA), the United Democratic Movement (UDM), the Freedom Front Plus (FF Plus), the Economic Freedom Fighters (EFF) and more recently, the uMkhonto weSizwe Party (MKP). These political parties represent a wide spectrum of political and ideological beliefs. While in decline, COPE emerged from the recall and subsequent resignation of former President Thabo Mbeki due to internal political splits in the ANC. Established by former members of the ANC, COPE signalled the possibility of an alternative party representing the Black majority other than the former liberation political parties.[20] The DA could be characterised as a classically liberal political party or more on the conservative side – it was formed by the merger of the conservative National Party and the Liberal Democratic Party.[21] It is currently the second largest political party represented in parliament, previously the leading opposition but now in coalition with the ANC. By contrast, the EFF represents what some call populist, leftist and or radical politics, best exemplified by its commitment to the nationalisation of state resources and the expropriation of land without compensation.[22] The party was formed in 2013 by the expelled president of the ANC Youth League, Julius Malema. While in decline following the 2024 elections, it is still the fourth largest political party represented in parliament. The third largest political party in South African parliament, the MKP, was formed in 2023 and is led by former President Jacob Zuma – who was recalled by the ANC following a trail of corruption scandals, some of which were at the centre of a commission of inquiry into state capture. The MKP's political agenda is a mixture of liberal, traditionalist and leftist ideals.[23] We mention this to highlight the ideological spectrum of political representation in South Africa, characteristic of a multi-party democratic political system.

In post-independence Zimbabwe, the major opposition parties include the Zimbabwe African Peoples Union (ZAPU), which, alongside the Zimbabwe African National Union (ZANU), fought for the independence of Zimbabwe from British colonial rule. ZAPU was forced into a union with ZANU to form ZANU PF in 1987 as part of the political settle-

Patriotic Alliance (PA), Good, the Pan Africanist Congress (PAC), Freedom Front Plus (FF+) and the United Democratic Movement (UDM). See *Velani Ludidi*, Then there were 10 – unity government hits double digits while talks continue over Cabinet posts, Daily Maverick, 23 June 2024, https://www.dailymaverick.co.za/article/2024-06-23-then-there-were-10-unity-government-hits-double-digits-while-talks-continue-over-cabinet-posts/ (last accessed on 9 April 2025).

20 *Sithembile Mbete*, Moving on Up!? Opposition Parties and Political Change in South Africa, Heinrich Boll Stiftung, 14 May 2018, https://za.boell.org/en/2018/05/14/moving-opposition-parties-and-political-change-south-africa (last accessed on 9 April 2025).

21 For a brief discussion of the history and ideological tradition of the party see *Neil Southern / Roger Southall*, Dancing Like a Monkey: The Democratic Alliance and Opposition Politics in South Africa, in: John Daniel et al. (eds.), New South Africa Review 2, Cambridge 2012, pp. 70–71.

22 See for example *Sithembile Mbete*, The Economic Freedom Fighters - South Africa's Turn towards Populism?, Journal of African Elections 14 (2015), p. 35.

23 See UmKhonto weSizwe's Manifesto, https://mkparty.org.za/wp-content/uploads/2024/04/MK-Manifesto-The-Peoples-Mandate-Paths-Final-2.pdf (last accessed on 9 April 2025).

ment to end the genocide perpetrated by the ZANU-led government of Zimbabwe targeting supporters of ZAPU in the Matabeleland and Midlands regions.[24] In 2008, ZAPU withdrew from the union with ZANU PF and continues to exist as an opposition political party to date.[25] In 1989, the Zimbabwe Unity Movement (ZUM) emerged as the main opposition party. It was formed and led by the former Secretary General of ZANU PF, Edgar Tekere, after his expulsion from the ruling party, ZANU PF, following his opposition to ZANU PF's policy of pursuing a one-party state.[26] As a result of state-sponsored violence targeting several of its supporters, ZUM closed shop and ceased to exist by 1996.

In 1999, the Movement for Democratic Change (MDC) emerged as a coalition of students, the labour unions, academics and the women's movement.[27] In 2008, it defeated ZANU PF in the presidential elections. Although by 2008 the MDC had split into two factions[28] who contested in the 2008 general elections as separate opposition parties, the two garnered 110 National Assembly seats, while ZANU PF won 99 seats.[29] ZANU PF refused to hand over power, arguing that the opposition had not won the presidential election by a sufficient majority to form a government.[30] Following mediation efforts brokered by the Southern Africa Development Community (SADC), the MDC and ZANU PF formed a Government of National Unity, which operated from 2008 until 2013. After the disputed general election of 2013, ZANU PF bounced back as the ruling party, and since then, the MDC has been on a decline partly because of state-sponsored violence against its supporters and interference with its internal governance by the ruling party and the State.[31] However, the party remains in existence to date. In 2022, the Citizen Coalition for Change (CCC) emerged as the main opposition party. However, although the party remains in existence to date, it has been on a decline since its defeat in the disputed 2023 elections. The decline of CCC is attributed to weak leadership and vicious interference by the State and the ruling party, which has led the party to split into various splinter groups.[32]

24 *Zenzo Moyo*, Opposition Politics and the Culture of Polarisation in Zimbabwe, 1980–2018: in: Ndlovu-Gatsheni et al. (eds.), The History and Political Transition of Zimbabwe, London 2020, p. 4.

25 Ibid.

26 Ibid., p. 7.

27 *Morgan Tsvangirai*, Morgan Tsvangirai: At the Deep End, London 2011, p. 15.

28 *Brian Raftopoulos*, Reflections on the Opposition in Zimbabwe: The Politics of the Movement for Democratic Change (MDC), in: Stephen Chan / Ranka Primorac (eds.), Zimbabwe in Crisis, London 2007, p. 48.

29 Inter Parliamentary Union, Zimbabwe House of Assembly (2008), http://archive.ipu.org/parline-e/reports/arc/2361_08.htm (last accessed on 9 April 2025).

30 *Brian Raftopoulos / Shari Eppel,* Desperately Seeking Sanity: What Prospects for a New Beginning in Zimbabwe?, Journal of Eastern African Studies 2 (2008), p. 369.

31 *Raftopoulos,* note 28, p. 48.

32 *Justice Mavedzenge*, Critical reflections on Chamisa's leadership style, 2022, https://constitutionallythinking.wordpress.com/law-and-politics/ (last accessed on 9 April 2025).

While to different extents, South Africa and Zimbabwe could be said to have 'liberationism' embedded in the liberation parties' political discourse – the belief that, having fought against the colonial and apartheid regimes and attained democracy, the party has a perpetual and unquestionable right to govern.[33] In this context, voting against the ruling party is often seen as voting against the people's will and in favour of the colonial oppressor. In the South African context, this idea has a particular racial tinge to it in that, for example, voting for the DA (because of the racial composition of its leadership as well as its policy positions on issues like affirmative action and land expropriation) is seen as voting for 'white oppressors'.[34] Thus, even legitimate dissent from the DA party is often dismissed as racist. In the Zimbabwean context, the opposition MDC and CCC have been characterised by the ruling party, ZANU PF, as fronting the interests of the former colonial powers who are accused of attempting to remove ZANU PF from power and reverse the land reform.[35]

D. The Entrenchment of Multi-Party Democracy

Notwithstanding this 'liberationism' attitude of the dominant parties (ZANU PF and the ANC), Zimbabwe and South Africa have adopted constitutions which recognise multiparty democracy, as discussed earlier in this paper. As part of this constitutional framework, the constitutions in both jurisdictions have carved out a special role for the courts within the separation of powers. The South African Constitution empowers the courts to review decisions and conduct by the other branches of the state and enforce the constitution and the law impartially.[36] Similarly, in Zimbabwe, the first post-independence constitution adopted in 1979 recognised the role of the judiciary in checking against abuse of powers by the other two branches of the state, and the current constitution (adopted in 2013) reinforced and maintained this arrangement.[37]

33 *James Hamill / John Hoffman*, The African National Congress and the Zanufication Debate, in: John Daniel / Prishani Naidoo / Roger Southall (eds,), New South African Review 2, Cambridge 2012, p. 56.

34 On the impact of race on voter preferences in South Africa, see *Carolyn Holmes*, The Black and White Rainbow: Reconciliation, Opposition, and Nation-Building in Democratic South Africa, Ann Arbor 2020; *Southern / Southall,* note 21, p. 74.

35 *Zenzo Moyo*, Opposition Politics and the Culture of Polarisation in Zimbabwe, 1980–2018, in: Ndlovu-Gatsheni et al. (eds) The History and Political Transition of Zimbabwe, London 2002, p. 23.

36 Section 172(1)(a) requires the superior courts, when deciding any constitutional matter, to 'declare any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and at (b) empowers the courts to make an order that is just and equitable.

37 See sections 167, 169 and 171 of the Zimbabwean Constitution.

Further, the constitutions in both jurisdictions expressly protect a range of rights related to civil and political participation; this includes the rights to vote,[38] expression,[39] freedom of association,[40] and freedom of assembly.[41] Section 19(1)(a)(c) of the South African Constitution guarantees the right to form a political party, to participate in the activities of, or recruit members for a political party, and to campaign for a political party or cause. Section 19 (2) protects the right to free, fair and regular elections while section 19(3) protects the right of adult citizens to vote in secret and to stand for public office if elected to hold such office.[42] The only constitutional restrictions for voting relate to citizenship; only those classified as citizens can vote. Every person who is eligible to vote can be a member of parliament, excluding those excluded by virtue of their office,[43] unrehabilitated insolvents, persons declared not to be of sound mind, or persons convicted of an offence and sentenced to more than twelve months imprisonment without the option of a fine.[44] In addition, the South African Constitution establishes the Electoral Commission, and according to section 181(2), the Electoral Commission is independent, subject only to the Constitution and law and must act impartially and without fear, favour, or prejudice when conducting elections. The body has the obligation to conduct elections that are democratic, free and fair.[45]

Similarly, section 67(2)(a) of the Constitution of Zimbabwe guarantees the right to establish a political party as well as the right to associate with a political party of choice. Section 67(1)(a) of the Constitution guarantees the right to a free and fair election, including the right to contest in an election as a candidate and the right to vote for a candidate of choice. Further, the Constitution establishes an independent electoral management body with the exclusive mandate to conduct democratic free and fair elections.[46]

38 Section 67(3)(a) of the Zimbabwean Constitution, section 19(3)(a), South African Constitution.

39 Section 61(1) of the Zimbabwean Constitution, section 16(1) South African Constitution.

40 Section 58(1) of the Zimbabwean Constitution, section 17 South African Constitution.

41 Section 58(1) of the Zimbabwean Constitution, section 18 South African Constitution.

42 Following the Constitutional Court's decision in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others,* note 4, persons can stand for public office either through a political party or as individual candidates.

43 Section 47(1)(a); anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service; and per section 47(1)(b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council.

44 This applies to crimes committed within or outside South Africa if the conduct for which the person was convicted was a crime in South Africa as well. However, the disqualification ends five years after the sentence has been completed. In *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* [2024] ZACC 6; 2024 (7) BCLR 869 (CC), the South African Constitutional Court confirmed that this rule barred former president Jacob Zuma from standing for office because of his 2020 conviction and 15 month custodial sentence for contempt of court, see *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (5) SA 327 (CC).

45 Section 191(b) of the South African Constitution.

46 Section 232(a) and section 235 of the Zimbabwean Constitution.

Notwithstanding these constitutional guarantees of multi-partyism in both countries, politics has been dominated by a single party, as discussed earlier. In South Africa, and until the elections of 2024, the ANC has been enjoying an overwhelming majority in the legislature. The ANC pursues a policy of 'strict party discipline' which means that MPs tend to vote in line with their political party.[47] The ANC's implementation of strict party discipline has at times undermined the independence of parliament and its ability to perform its oversight role on the executive.[48] Similarly, though to a far worse degree, in Zimbabwe, ZANU PF has utilised its dominance in parliament to undermine the independence of the legislature. As a result, parliament has not been able to hold the executive accountable in a meaningful way since independence in 1980. Instead, parliament has been used to rubber stamp legislative proposals which undermine multi-party democracy, including laws which undermine the independence of the electoral management body, and which undermine the right to vote as well as the right of opposition candidates to contest in an election – curtailing opportunities for the institutionalisation of opposition political parties. Examples of these laws are discussed below as part of examining the approach of the apex court in Zimbabwe when adjudicating disputes which concern the right of opposition parties to participate in democratic processes.

E. Role of Courts: Enabler or Barrier to Opposition Political Participation?

Both the Constitution of Zimbabwe[49] and that of South Africa[50] envisage the judiciary as an independent body with the role to interpret and enforce the law impartially, amongst other objectives, to protect and promote multi-party democracy. In the paragraphs below, we examine how the apex courts in the two countries have adjudicated disputes which relate to threats against the institutionalisation of opposition parties and their right to participate in democratic processes, in a constitutional context where multi-partyism is guaranteed as a core value. Before we do so, a few points on methodology.

First, while courts other than the apex courts in both jurisdictions have powers of judicial review,[51] the article focusses on the jurisprudence of these apex courts, the Consti-

47 *Danwood Chirwa / Phindile Ntliziywana,* Political Parties and Their Capacity to Provide Parliamentary Oversight, Political Parties in South Africa: Do they Underpin or Undermine?, Pretoria 2017. See also *Hamill / Hoffman*, note 33, p. 64 (on how internal democratic centralism in the ANC and the list system of proportional representation has limited ANC MPs autonomy).

48 As the Constitutional Court acknowledged in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 3 SA 580 CC, parliament sometimes failed to execute its accountability and oversight mandate over the executive.

49 Sections 167, 169 and 171 of the Zimbabwean Constitution.

50 Section 165 of the South African Constitution.

51 Section 170 of the South African Constitutional Court empowers the superior courts, which include the Supreme Court of Appeal and the High Courts to declare legislation and conduct inconsistent with the Constitution unlawful. However, such declaration has to be confirmed by the

tutional Court in South Africa and the Constitutional Court of Zimbabwe, as the highest courts of appeal. The Supreme Court of Zimbabwe sat as the Constitutional Court before the two courts were officially separated in May 2020.[52] Second, we have limited our assessment of the Zimbabwean Constitutional Court's jurisprudence to the period following the adoption of a democratic constitution in 2013 that has stronger protection of elements of multi-party democracy.

I. The Right to Vote

Since the advent of South Africa's constitutional democracy, the courts have played an important role in protecting the right to vote – an important and integral aspect of enabling opposition parties to participate in the democratic process. At the core of its jurisprudence is the recognition that the right to vote serves the symbolic function of securing equal membership to the political community and a democratic function.[53]

In *August v Electoral Commission*, the South African Constitutional Court made clear that absent express legislation excluding incarcerated persons from voting, they had the right to vote. According to the court, in addition to being important for democracy, "The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts."[54] Further, the court noted the equalising power of the right to vote by stating how, 'In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.'[55]

The South African Constitutional Court has repeatedly ensured that persons are able to exercise the right to vote. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders*, the court declared legislation that would exclude certain classes of incarcerated persons from being able to vote as violative of section 19 and thus unconstitutional.[56] In *Richter v Minister of Home Affairs*, the court similarly extended the franchise to make sure that persons registered to vote but not present

Constitutional Court. See section 167 of the Constitution of Zimbabwe of 2013 which outlines the judicial review powers of the Constitutional Court.

52 See section 18(2) of the Sixth Schedule of the Constitution of Zimbabwe, 2013.

53 *August and Another v Electoral Commission and Others* 1999 4 BCLR 363, para 17; *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 3 SA 615 CC 2009 5 BCLR 448 CC 12 March 2009, para. 52.

54 *August and Another v Electoral Commission and Others* note 53, para. 17.

55 Ibid.

56 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 3 SA 280 CC.

in South Africa at the time of voting can vote abroad.[57] The case was brought by Mr Richter, who was registered to vote in South Africa but would be in the United Kingdom (for work) on the polling date.[58] Several political parties, including the DA and the Inkatha Freedom Party, intervened in the application. Afriforum (a non-profit) and the Freedom Front Plus served as *amicus* in the case. The court, finding in favour of Mr Richter, held that section 33 of the Electoral Act 73 of 1998, which rendered him ineligible to vote while abroad, was an unjustifiable limitation of the right to vote. According to the court, in addition to the negative obligation not to interfere with the right to vote, the state had an obligation to take positive steps to ensure that the right to vote could be exercised.[59] Seen against the context of a history of the racist disenfranchising of the Black majority – the court's approach to the right to vote is not surprising. Even so, it cannot be ignored how these judgments, together, enable democratic participation and create fertile ground for multi-party democracy.

By contrast, when given the opportunity to rule on the protection of the right to vote for citizens abroad, the Zimbabwean Constitutional Court took the opposite approach.[60] As indicated earlier, similar to the Constitution of South Africa,[61] the Constitution of Zimbabwe[62] guarantees the right to register and vote in elections. Similar to the Constitution of South Africa, the right to vote under the Constitution of Zimbabwe is guaranteed for every citizen, and the only requirements to be met to qualify to exercise this right are that one must be 18 years or older and registered as a voter.[63]

Using its majority in parliament, the ZANU PF government enacted section 72 of the Electoral Act 25 of 2004, which stipulates that the State shall implement measures to enable eligible voters who are outside of Zimbabwe *on government business* on polling day to cast their ballots. This law excludes eligible voters who are outside of Zimbabwe on polling day on private business from casting their ballots. The applicants challenged the constitutionality of this legislative provision, asserting that it violates section 67(3)(a) of the Constitution of Zimbabwe by excluding eligible voters from exercising their right to vote on the basis of their being outside of the Republic on polling day on private business.[64] Similar to the arguments made in the South African case of *Richter v Minister of Home*

57 *Richter v The Minister for Home Affairs and Others* note 53, para 1.

58 Ibid.

59 Ibid., para. 53.

60 *Gabriel Shumba v Minister of Justice, Legal and Parliamentary Affairs* CCZ 04 – 18 (May 2018).

61 Section 19(3) of the South African Constitution.

62 Section 67(3)(a) of the Zimbabwean Constitution.

63 Section 67(3)(a) states that: "Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right – a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and (b) to stand for election for public office and, if elected, to hold such office".

64 *Gabriel Shumba v Minister of Justice,* note 60, pp. 2-3.

Affairs, the applicants based their claim on the fact that the Constitution of Zimbabwe[65] imposes only three requirements for one to be eligible to vote and these are that one must be a citizen, must be 18 years or older, and must be registered as a voter, and therefore, the State must implement measures to enable eligible voters who are outside of the Republic on polling day to cast their ballot if they so choose.[66]

The Constitutional Court of Zimbabwe dismissed this application, holding that the Constitution of Zimbabwe contemplates that only eligible voters inside the political borders of the Republic can vote in an election and that there is no obligation on the State to facilitate voting by eligible voters who are outside of the political borders of Zimbabwe on polling day on private business.[67] The court based its decision on section 92(3), read together with section 160 of the Constitution of Zimbabwe. At the time this case was decided, section 92(3) of the Constitution of Zimbabwe stated that, "The President and the Vice President are directly elected jointly by registered voters throughout Zimbabwe, and the procedure for their election is as prescribed in the Electoral law." Section 160 states that:

> *"For the purpose of electing Members of Parliament, the Zimbabwe Electoral Commission must divide Zimbabwe into two hundred and ten constituencies. For the purpose of elections to local authorities, the Zimbabwe Electoral Commission must divide local authority areas into wards according to the number of members to be elected to the local authorities concerned."*

It is clear from the above that section 92(3) of the Constitution of Zimbabwe applies to presidential elections, while section 160 applies to elections for Members of Parliament and Municipal Councils. The two constitutional provisions regulate two different elections and cannot be read together as suggested by the court. Section 92(3) of the constitution, which regulates voting in presidential elections, simply states that the President is directly elected by registered voters "throughout Zimbabwe." The phrase "throughout Zimbabwe" includes the territory covered by Zimbabwean embassies in foreign countries.[68] Therefore, if an eligible voter presents themselves at a Zimbabwean foreign embassy, they should be allowed to exercise their right to vote in a Zimbabwean presidential election because they are within the Zimbabwean territory. The applicant in *Gabriel Shumba v Minister of Justice* argued that the Zimbabwean government already has mechanisms to allow those who are on government business outside of the Republic to cast their ballots at foreign embassies, and these same mechanisms must be made accessible to the rest of Zimbabweans who

65 Section 67(3)(a) of the Zimbabwean Constitution.

66 *Gabriel Shumba v Minister of Justice,* note 60, pp. 2-3

67 Ibid., p. 11.

68 By virtue of the concept of extraterritoriality as recognised in the Vienna Convention on Diplomatic Relations of 1961 of which Zimbabwe is State Party and ratified the Convention on 13 May 1991.

are eligible voters and are outside of the Republic on private business on polling day.[69] The court rejected the applicant's claim even though the claim was consistent with the Constitution of Zimbabwe, as demonstrated above.

The approach taken by the Constitutional Court of Zimbabwe is in sharp contrast to the approach taken by the Constitutional Court of South Africa in *Richter v Minister of Home Affairs*, discussed above. The difference in the approach taken by the two Courts can be explained by the difference in the degree of independence that the judges of the two courts enjoy. Whereas the judges of the Constitutional Court of South Africa enjoy independence to enforce the law impartially, their counterparts in Zimbabwe lack such independence as a result of the ruling party's entrenchment of competitive authoritarianism.[70] As argued by Levitsky and Way, in competitive authoritarian jurisdictions, courts are generally used to legitimate draconian laws that are meant to protect the hegemony of the ruling elite.[71]

In essence, the court in *Gabriel Shumba v Minister of Justice*, rubber-stamped unconstitutional legislation which denied millions of Zimbabweans their right to vote in the presidential election. This is because Zimbabweans working in the diaspora are feared to be aligned with the opposition parties, whether or not this is true is unclear. However, it is common cause that most of them were forced out of the country due to the economic crisis orchestrated by the ruling party (ZANU PF)'s corruption. The ruling party feared that to allow these voters to participate in the elections could leave ZANU PF more vulnerable to electoral defeat.[72] Thus, whereas the Constitutional Court of South Africa nullified section 33 of the Electoral Act of South Africa, which unconstitutionally denied South Africans in the diaspora their right to vote, the Zimbabwean Constitutional Court endorsed a similar legislative provision. Three years later and ahead of the 2023 presidential election, section 92(3) of the Constitution of Zimbabwe, which clearly recognised the right of eligible voters in the diaspora to vote in presidential elections and which the Constitutional Court had failed to enforce in *Gabriel Shumba v Minister of Justice*, was expunged from the Constitution through a controversial constitutional amendment[73] that was proposed by the executive and was rubber-stamped by the ZANU PF dominated legislature.

69 *Gabriel Shumba v Minister of Justice* note 60, p. 15.

70 On the dire state of judicial independence in Zimbabwe see Also see *Justice Mavedzenge*, The Price They Pay for Their Independence: Understanding the Persecution of Judges in Africa as Retribution for their Impartiality, Southern African Public Law 13 (2024); and *Biance Mahere*, The selective application of the right to bail in Zimbabwe, Journal on Democracy, Governance and Human Rights in Zimbabwe (2023), pp. 29-33.

71 *Levitsky / Way*, note 10, p. 54.

72 *Justice Mavedzenge*, Taking Stock of Zimbabwe's 2018 Elections and Evaluating Prospects for Democratic, Free and Fair Elections in the Future, Southern African Public Law 36 (2021), pp. 13-19.

73 Section 4 of the Constitution of Zimbabwe Amendment Act 2 of 2021.

II. Requirements for Electoral Participation

While protecting the right to vote is crucial, political participation also requires that individual candidates and parties have real opportunities to stand for public office, giving substance to the right to vote. A supportive and permissive infrastructure is crucial for this to be the case – there should be minimal barriers for individuals and parties to qualify to stand for public office. At the same time, democratic stability requires independent candidates and political parties to show some seriousness in their choice to stand for public office, necessitating laws that set specific requirements for running for office and serving in government.[74] Requirements like financial deposits and proof of electoral support are common for political parties not already represented in government. However, since these requirements could be misused to limit political participation, to support rather than thwart multi-party democracy and to enable the institutionalisation of political parties, legislation should, ideally, strike a fine balance between ensuring seriousness in candidates and parties standing for public office and maintaining fairness when setting requirements for their participation.

1. Registration and Electoral Participation Fees

The core legislation governing political parties' participation in national and provincial elections in South Africa is the Electoral Act 73 of 1998 and the Electoral Commission Act 51 of 1996. The Electoral Act's requirements for the registration of political parties are quite permissive. To register at the national level, a party needs to submit a name, party logo, the party's constitution, a deed of foundation signed by 1000 registered voters and a fee of 500 ZAR; at the provincial level, the deed of foundation needs to be signed by 500 registered voters and, only 500 ZAR has to be paid; at the local level only 300 signatures are required and, the fee is 200 ZAR.[75] However, once registered, they need to pay a deposit in order to contest elections.[76] In contrast with the registration requirements in South Africa, there is no requirement for registration of political parties in Zimbabwe. They need only submit nominations for candidates on their party-list to the Zimbabwean Electoral Commission.[77] Overall, both South Africa and Zimbabwe have fairly permissive registration requirements, the problem arises after registration - the requirement of electoral deposits to contest elections.

74 *Mbuzeni Mathenjwa*, Election Deposit and Democracy in Developing Countries: A Comparative Overview in Selected Southern African Development Community Countries, Journal of African Elections 16 (2017), pp. 180-198, p. 193.

75 See section 15 of the South African Electoral Commission Act read together with the Regulations for the Registration of Political Parties, 2004 GN R13 in GG 25894.

76 See sections 26 and 27 of the South African Electoral Act.

77 *Collen Chibango*, The Registration and Regulation of Political Parties in Zimbabwe: A Key Pillar in Prospects for Free and Fair Elections, The Journal On Democracy, Governance And Human Rights In Zimbabwe 1 (2022), pp.13-19.

As noted above, electoral deposits are a routine requirement for unrepresented political parties or individuals seeking to stand for public office. However, a high deposit could deter political participation for new entrants who have yet to gather a support base from which to draw donors, creating a situation where only the elite can stand for office.[78] In South Africa, the fairness of electoral fees to contest national elections was dealt with in the *Economic Freedom Fighters v President of the Republic of South Africa*.[79] While not a decision of the Constitutional Court, this judgement is a high court decision and is instructive of the relative deference a court could take to the detriment of opposition parties. The High Court, in this case, had to consider the lawfulness of section 27(2) of the Electoral Act, which, when read together with its regulations, required new political parties to deposit 200 000 ZAR to contest in the national assembly or 45 000 ZAR to contest for seats in the provincial legislature. The EFF argued that as a new political party, it did not have sufficient funds to pay the fee. Dismissing the case, the court held that, absent proof of the irrationality of the fees, it could not usurp the powers of another branch of government.[80]

Given the fact that fair competition can be distorted by the requirement of fees, privileging elite groups with access to resources, and in the context where political parties who are not already represented in the parliament are not eligible for public funding, the court's approach to this case is troubling.[81] This is especially the case when, as were the facts in this case, the increase in fees was announced close to the 2014 elections,[82] creating the risk that the increase may have been a deliberate attempt to limit participation in the elections.[83]

In a similar vein, leading up to the 2023 national elections in Zimbabwe, the Zimbabwean Electoral Commission passed regulations which increased the registration fees to stand for office from 1000 USD to 20,000 USD for presidential elections and from 50 USD to 1000 USD for parliamentary elections.[84] A very steep increase that had a prohibitive impact on the exercise of the right to stand for public office.[85] These regulations were chal-

78 *Mathenjwa,* note 74, p. 193.

79 *Economic Freedom Fighters v President of South Africa (*16247/14) [2014] ZAGPPHC 109 (11 March 2014).

80 Ibid., para 23.

81 *Loammi Wolf*, The Electoral Deposit Requirement: Economic Freedom Fighters v The President and Others, South African Journal on Human Rights 32 (2016), p. 377.

82 The increase in fees were announced on 6 December 2013, in *R 969 Government Gazette 37133,* national elections were held on 7 May 2014.

83 *Wolf,* note 81, p. 385.

84 Electoral (Nomination of Candidates) (Amendment) Regulations 2022 (No.1), Statutory Instrument 144 of 2022 (S.I. 144/22); see also, *Hove v Parliament of Zimbabwe* (12 of 2023) [2023] ZWCC 14 (20 October 2023) p. 2.

85 *Linda Mujuru,* Zimbabwe's 19000% Increase in Fees to Run for Office Excludes Underrepresented Candidates, Global Press Journal, 23 August 2023,
https://globalpressjournal.com/africa/zimbabwe/zimbabwes-1900-increase-fees-run-office-excludes-underrepresented-candidates/ (last accessed on 9 April 2025).

lenged in *Hove v Parliament of Zimbabwe,* where the applicant, the leader of an opposition political party (the Nationalist Alliance Party) brought a procedural challenge arguing that Parliament had approved the increase in fees without executing its obligation in section 152(3)(c) of the Zimbabwean Constitution, which required it to ensure that all regulations comply with the Constitution.[86] According to the applicant, had Parliament exercised its obligation, it would not have approved the regulations because they were in conflict with the political rights guaranteed in section 67 of the Zimbabwean Constitution.[87] While the court found in favour of the applicant in that Parliament had not complied with its Section 152(3)(c) obligation, it refused to entertain the arguments related to the unconstitutionality of the regulations. Instead, the court gave a remedy which required parliament to discharge its section 152(3)(c) obligation – an ineffective remedy for the vindication of section 67 of the Zimbabwean Constitution.

In both jurisdictions, the courts have taken a deferent approach in cases which challenge the payment of fees to participate in elections. While both courts cite the need to ensure the seriousness of political parties as a valid justification for the fees, it is trite that there are other mechanisms to gauge such seriousness.[88] Ultimately, both courts' deference to the discretionary powers given to the electoral commissions in setting these fees has limited opposition parties' ability to participate in elections.

2. Signatures and Proof of Support for Individual Candidates

Another requirement that could be abused to limit political participation is the requirement to show that a candidate has sufficient support. Following the South African Constitutional Court's finding in *New Nation Movement v President of the Republic of South Africa,* allowing independent candidates to stand for public office, the state was required to draft legislation allowing individual candidates to stand for political office by the 2024 national and provincial elections,[89] the Electoral Amendment Act 1 of 2023. The Amendment Act, among other things, provided the requirements that independent candidates would have to meet to stand for office. In *One Movement South Africa NPC v President of the Republic of South Africa and Others,* the applicants challenged section 31 B of the Amendment Act.[90] The provision required independent candidates who wished to stand for office to submit signatures of registered voters amounting to 15 per cent of the quota in the previous election in the region in which the independent candidate sought to stand for office. The

86 *Hove v Parliament of Zimbabwe,* note 84, p. 3.

87 *Hove v Parliament of Zimbabwe,* note 84, p. 2; *Economic Freedom Fighters v President of South Africa,* note 83, para 17.

88 *Wolf*, note 81, pp. 390–393.

89 *New Nation Movement NPC and Others v President of the Republic of South Africa* note 4, paras. 121–125.

90 *One Movement South Africa NPC v President of the Republic of South Africa and Others* 2024 2 SA 148 CC.

applicants in the case argued that the signature requirement was violative of the section 19(3)(b) right to stand for public office and the section 18 right to freedom of association. A majority of the court held in its favour on this, with Kolapen J concluding that the signature requirement was an unreasonable limitation of the rights to stand for public office and the right to freedom of association.[91] Ultimately, the requirement for signatures was set at a 1000 signatures, a less onerous requirement – one aligned, as discussed earlier, with the requirement for the registration of political parties. In the Zimbabwean context, persons seeking to be elected to parliament need only procure five signatures of support to be eligible to stand for public office.[92]

III. Access to Political Party Funding

After registration, submitting signatures, and having paid the fees to contest elections, real political participation is costly – consolidating a voter base and running a political campaign requires access to adequate funding. In the ideal setting, the state would provide some support for registered political parties who have shown seriousness in their intent to contest in elections – failing which, the lack of access to funds could limit opposition parties' political participation. Before turning to our analysis of the different jurisdictions' approach to political funding, it is important to note that, in contrast with the issues discussed above, political funding has not received much judicial attention except for the South African Constitutional Court's decision that requires political parties to disclose private donations above a certain threshold.[93] That said, we thought it important to discuss the legislative landscape for political funding because it plays an important role in enabling the institutionalization of political parties and multi-party democracy, for reasons that will be clear below, it is also an area rife for litigation in both jurisdictions.

In South Africa, the Political Party Funding Act 6 of 2018 provides for two sources of funding for political parties already represented in Parliament– private funding and funding from the state. The source of this state funding is the public purse (from the Represented Political Parties Fund) and donations received from private sources (the Multiparty Democracy Fund), which are distributed by the state in proportion to the party's representation.[94] By contrast, new political parties not already represented rely solely on private funding. This creates an unequal funding landscape – privileging those parties already represented.[95] Further, section 8(1) of the Political Party Funding Act prohibits political parties from

91 Ibid., paras. 342-343.

92 Section 46(1)(a) of the Zimbabwean Electoral Act, 2004.

93 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC).

94 See sections 2 and 3 of South Africa's Political Party Funding Act.

95 *Geo Quinot*, Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right, South African Journal on Human Rights 25 (2009), p. 400 (who argues that this restriction undermines the commitment to participatory democracy in South Africa).

receiving donations from foreign governments or foreign government agencies, organs of state, state-owned enterprises, as well as foreign persons and entities. In relation to donations from foreign persons and entities, political parties, per section 8(4) of the same Act, can receive up to 5 million ZAR in donations for the purpose of skills and policy development.

Zimbabwe's Political Party Finance Act of 2002 makes it difficult for opposition parties to access funding. First, in relation to state funding, only political parties that have at least five per cent representation in parliament have access to this funding, and it is allocated in proportion to their representation.[96] In addition, the Political Party Finance Act prohibits political parties and individual candidates from receiving all forms of foreign donations.[97] Given the dominance of ZANU-PF in parliament, this means that they receive the lion's share of public political party funding, and most opposition political parties are not able to raise funds through donations from the diaspora, not even for skills and policy development, as is possible in the South African case.

In both jurisdictions, the funding landscape for opposition political parties is quite limited – posing a threat to the institutionalisation of political parties and multi-party democracy.

IV. Protection of the Independence of the Electoral Management Body

In a constitutional democracy and in order for opposition political parties to participate meaningfully in democratic processes, there must be adequate legal guarantees that elections are free, fair and credible. All political parties, including the opposition, must be treated fairly when they participate in an election. To achieve this, independent electoral management bodies are established to conduct elections. As discussed earlier in this paper, both in Zimbabwe[98] and South Africa,[99] the constitutions provide for the establishment of an electoral management body and guarantee its independence. However, in a context of competitive authoritarianism or attempts to introduce competitive authoritarianism, parliaments are captured by the executive, and they tend to enact legislation which undermines democratic institutions such as the electoral management body in order to subvert their independence and shield the ruling party from electoral competition from the opposition.[100] When this happens and upon being petitioned, it is the role of the courts to enforce the constitution and protect the independence of these democratic institutions, necessitating, of course, their own independence.

96 Section 3(2) Political Party Finance Act, 2002.

97 Section 6, Political Party Finance Act, 2002.

98 Sections 232 and 235 of the Zimbabwean Constitution.

99 Sections 181(1)(f) and 190(1) of the South African Constitution.

100 *Levitsky / Way*, note 10, p. 57.

In South Africa, the courts have made clear that the Electoral Commission has a wide scope of independence.[101] In one of its early judgements, *New National Party v Government of the Republic of South Africa and Others*, Langa DP highlighted the scope of the Electoral Commission's independence. The case concerned a challenge against the constitutionality of provisions in South Africa's Electoral Act, which stipulated that potential voters could not use identity documents issued to them in terms of old legislation to identify themselves when seeking to register and vote in the general election coming up on 2 June 1999. Rather, potential voters were now required to use the bar-coded identity documents issued in the new dispensation.[102] In the course of this dispute, the Director General of the Department of Home Affairs and the Director General of the Department of Treasury averred before the court that their departments were legally empowered to make certain decisions about the Electoral Commission, including decisions regarding the allocation and management of the budget of the Electoral Commission, and accounting to Parliament on behalf of the Electoral Commission.[103]

Although the crux of the matter, in this case, did not concern the independence of the Electoral Commission, the court seized the moment to clarify the correct constitutional position on the degree and scope of independence that the South African Electoral Commission must enjoy from the executive, in light of the averments which had been made by the Director General of the Department of Home Affairs. The court clarified that the Electoral Commission's constitutionally guaranteed independence implies the independence to manage its own budget, the autonomy to preside over its administrative affairs and to account directly to parliament without having to be represented by the Department of Home Affairs or any executive branch of government. Such clarification was important because South Africa was a mere five years into its journey as a constitutional democracy. Therefore, there was a need for the court to set a clear and strong legal precedence which would compel the executive to shift its attitude and appreciate that under the new constitutional dispensation, the Electoral Commission was now an autonomous body and was no longer a "line function" [104] or a department under the executive branch of government. In a way, the clarification by the court in this case set South Africa on a progressive trajectory as a constitutional democracy where elections have mostly been held in a manner that is free, fair and credible.

The Constitutional Court of Zimbabwe has taken the opposite approach compared to its counterpart in South Africa. Four years into its constitutional democracy, the court was asked to interpret the scope of the constitutional independence of the Zimbabwe Electoral Commission. As indicated earlier in this paper, section 235 of the Constitution

101 *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191; 1999 (5) BCLR 489.

102 Ibid., paras. 8-9.

103 Ibid., para. 83.

104 Ibid.

of Zimbabwe states that the Zimbabwe Electoral Commission is "(a) independent and not subject to the direction or control of anyone… (c) must exercise its functions without fear, favour or prejudice although it is accountable to Parliament for the efficient performance of its functions."

Prior to the adoption of the new Constitution of Zimbabwe in 2013, and similar to pre-1994 South Africa, the Zimbabwe Electoral Commission was treated and perceived as a department under the management of the executive branch of government. This was illuminated by the enactment of section 192(6) of the Electoral Act of Zimbabwe, which stated that administrative regulations made by the Zimbabwe Electoral Commission "shall not have effect until they have been approved by the Minister and published in the Gazette." The Minister referred to in this provision is the Minister of Justice. In *Mavedzenge v Minister of Justice,* the applicant argued that by requiring the Minister's approval before the election management body can proclaim its administrative regulations, section 192(6) of the Electoral Act prevented the Zimbabwean Electoral Commission from exercising its functions, including managing its administrative affairs independent of direction, control or interference from the executive, and this undermines the constitutionally protected independence of the electoral management body.[105]

In response, the Minister of Justice advanced two arguments in defence of the constitutional validity of the impugned provisions. First, he argued that the Minister's powers to approve regulations drafted by the electoral management body before they can be implemented were constitutionally valid because the power of the electoral management body to promulgate regulations was delegated authority from parliament, and the Minister is the executive member responsible for the administration of the Electoral Act and is accountable to parliament concerning the operations of all institutions established under the Electoral Act, including the electoral management body.[106] The Minister, therefore, argued that he cannot be accountable to parliament on behalf of the electoral management body if he is not empowered to supervise and authorise draft regulations developed by the electoral management body. Secondly, he argued that as the Minister in charge of the administration of the Electoral Act, he enjoys powers to approve regulations drafted by the electoral management body in order to ensure that they comply with government policy.[107]

The Minister's arguments, highlighted above, are similar to the arguments made by the Director General of the Department of Home Affairs in *New National Party v Government of the Republic of South Africa and Others.* However, whereas the Constitutional Court of South Africa decided to protect the independence of the South African Electoral Commission, the Zimbabwean Constitutional Court in *Mavedzenge v Minister of Justice*

105 *Mavedzenge v Minister of Justice, Legal & Parliamentary Affairs & 2 Ors* (CCZ 5 of 2018; Constitutional Application 32 of 2017) [2018] ZWCC 5 (31 May 2018).

106 See para. 21 of the First Respondent's opposing affidavit in *New National Party v Government of the Republic of South Africa and Others,* note 101.

107 Ibid.

upheld and endorsed the view of the executive branch that despite the adoption of the then new Constitution which clearly stipulated that the electoral commission was independent of executive control, the executive can still enjoy the powers to control the enactment of administrative regulations by the electoral commission, and that the executive is accountable to parliament on behalf of the electoral commission. As a result, and unlike in South Africa, the Zimbabwean opposition's political participation, as will be seen below, has been curtailed because of the failure of the Zimbabwe Electoral Commission to conduct elections that are free, fair and credible due to executive interference.

V. Enforcing Electoral Justice

In order for opposition parties to meaningfully participate in democratic processes, including elections, they must be guaranteed effective relief to redress any violation of their right to participate in a democratic process. Having formally adopted constitutional democracy as a system of governance, both South Africa and Zimbabwe enshrine the right to free and fair elections in their Constitutions, as indicated above. Under both Constitutions,[108] the courts have jurisdiction to hear and determine electoral disputes and ensure that adequate relief is granted in order to safeguard the integrity of elections. However, the courts' approach in the South African case of *Kham v Electoral Commission,*[109] and the Zimbabwean case of *Chamisa v Mnangagwa,*[110] illuminates a sharp contrast in their willingness to vindicate electoral justice.

In the *Kham v Electoral Commission* case, the South African Constitutional Court was petitioned to overturn the result of eight by-elections which had been conducted in the Tlokwe Municipality in 2013.[111] The applicants, former members of the ANC who left the party to run as independent candidates, argued that the electoral process had been fraught with serious irregularities which undermined the integrity of the electoral process and, therefore, the election was not free and fair. The alleged irregularities included the failure by the Electoral Commission to timeously provide the applicants (who were running as independent candidates in the election) with the voters' roll, and allegations that persons who were not on the ward's voters' roll voted in the election.[112] The Electoral Commission did not deny these allegations. Instead, it argued that although ineligible voters voted in the elections, the number of such voters was insignificant to determine the winner of the election.[113]

108 See section 93 of the Constitution of Zimbabwe of 2013, and 172 of the Constitution of South Africa.

109 *Kham and Others v Electoral Commission and Another* 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC).

110 *Chamisa v Mnangagwa* (CCZ 42 of 2018) [2018] ZWCC 42 (24 August 2018).

111 *Kham and Others v Electoral Commission,* note 109, para 1.

112 Ibid., paras 7-12 and 47.

113 Ibid., para 14.

The Constitutional Court of South Africa rejected the arguments by the Electoral Commission, nullified the results of the election and ordered that the elections be redone.[114] In its reasoning, the court held that the focus had to be on the impact the irregularities had on the exercise of the right to stand for public office, "not on whether they would have won or lost had the arrangements for the by-elections been different and not suffered from the flaws of which they complain".[115] While it did not provide a clear definition of what a free and fair election entails, the court did find that whether or not an election is free and fair is a value judgment that requires the court to look at whether everyone entitled to vote was able to register to do so; in the context of municipal elections, that persons vote in the wards in which they are eligible.[116]According to the court, on the one hand, it had to hold the Electoral Commission "to the high standards that its constitutional duties impose upon it". However, the court would have to be satisfied "on all the evidence placed before it that there is real – not speculative or imaginary – grounds for concluding that they were not free and fair." Mere doubt or a feeling of disquiet would not suffice to nullify an election.[117]

Further, the court made clear that the right to free and fair elections protects the "freedom to participate in the electoral process *and* the ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms".[118] (our emphasis) The ability to compete, according to the court,

> *[d]emands the freedom to canvass; to advertise; and to engage in the activities normal for a person seeking election.' Phenomena like "no go" areas; the denial of facilities for the conduct of meetings; disruption of meetings; the destruction of advertising material or the intimidation of candidates, workers or supporters, could all prevent an election from being categorised as free and fair.*[119]

Ultimately, the court emphasised that the results of an impugned election can be nullified if the election *process* did not comply with the law, regardless of whether there was quantitative evidence to demonstrate that the irregularities distorted the results of the election. As indicated by the court in para 86, the basis of this approach is section 190(1)(b) of the Constitution of South Africa which requires the Electoral Commission to conduct elections that are free and fair, and according to the court, implies a duty to conduct elections in which every eligible person is free to take part in, and with others, on relatively equal terms.

114 Ibid., para. 127.
115 Ibid., para. 85.
116 Ibid., para. 34.
117 Ibid., para. 91.
118 Ibid., para. 86.
119 Ibid.

The Constitution of Zimbabwe contains similar provisions which create an obligation on the Zimbabwe Electoral Commission to ensure that elections are free and fair.[120] In addition, the Constitution of Zimbabwe guarantees the right to an election that is free and fair.[121] However, in the *Chamisa v Mnangagwa* case, the Constitutional Court of Zimbabwe took an opposite approach compared to the one taken by its South African counterpart in *Kham v Electoral Commission*. Although the *Chamisa v Mnangagwa* case in Zimbabwe concerned a challenge against the results of a presidential election, while the *Kham* in South Africa involved a challenge against the results of municipal elections, the two cases are similar in the sense that they involve a constitutional challenge against the results of an election on the basis that the election had been fraught with irregularities which made it fail to comply with the constitutional standard of a free and fair election.

In *Chamisa v Mnangagwa* the petitioner alleged that the election had been fraught with several irregularities so much that it could not be classified as an election that met the constitutional standard of being free and fair. Some of the irregularities proven by the petitioner include that the opposition had been prevented from campaigning in some voting districts while voters in some areas had been subjected to violence and intimidation by the ruling party, ZANU PF.[122] In addition, credible evidence was adduced demonstrating the involvement of the military and other security forces in intimidating voters to vote for the ruling party, ZANU PF. The applicant in the case, Nelson Chamisa, was the leader of the CCC and had run as the CCC's candidate for the presidential election. Chamisa argued that the irregularities in the presidential election were enough for the court to nullify the election. The Constitutional Court of Zimbabwe dismissed this argument and held that: "the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections".[123] The court clarified that this implies that:

> *"A court will declare an election void when it is satisfied from the evidence provided by an applicant that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws. Additionally, a court must be satisfied that the breach has affected the result of the election."*[124] *(our emphasis)*

From the above, it is clear that to nullify election results, the Zimbabwean Constitutional Court requires the irregularities in the electoral process to be substantial *and* there must also be proof that such irregularities affected the outcome of the elections. This a very high threshold, significantly higher than that set by the South African Constitutional Court,

120 Section 155(1) of the Zimbabwean Constitution.

121 Section 67(1)(a) of the Zimbabwean Constitution.

122 *Chamisa v Mnangagwa,* note 110, pp. 50-56.

123 Ibid., p. 83.

124 Ibid., p. 84.

wherein, as seen in the *Kham v Electoral Commission* case, irregularities in the electoral process can nullify election results. This high threshold negates the constitutional principle enshrined in section 155(1) of the Constitution of Zimbabwe that *electoral processes,* and not *just results*, must comply with the constitutional standards of being free and fair. In peremptory terms, section 155(1) states that:

> *"Elections, which must be held regularly, and referendums, to which this Constitution applies must be (a) peaceful, free and fair; (b) conducted by secret ballot; (c) based on universal adult suffrage and equality of votes; and (d) free from violence and other electoral malpractices."*

This principle is also enshrined in the Constitution of South Africa.[125] Whereas the Constitutional Court of South Africa in the *Kham v Electoral Commission* decided to protect and enforce this constitutional principle, its Zimbabwean counterpart decided to ignore it by insisting that violations which demonstrate that an election was not free and fair are inadequate to nullify the election unless statistical evidence is provided which shows that *the outcome* of the election was distorted by those violations. This, again, demonstrates the divergent approaches between the two courts when adjudicating in disputes which relate to the participation of opposition parties in democratic processes. Such divergence, notwithstanding similarities in the law between the two countries, is attributable to the difference in the degree of independence enjoyed by the judges of the two courts. Despite attempts to introduce competitive authoritarianism in South Africa, especially during the Zuma administration, the Constitutional Court has defended its independence and is thus, able to protect the Constitution and deliver electoral justice as demonstrated by its decision in the *Kham v Electoral Commission*. On the other hand, its counterpart in Zimbabwe appears to have succumbed to capture by the ruling party and may have become a victim of competitive authoritarianism and thus, is unable to protect the Constitution, particularly on issues which affect the right of the opposition to participate effectively in democratic processes as exemplified by its decision in *Chamisa v Mnangagwa*.

F. Conclusion

In a constitutional democracy, opposition political parties have the right to participate in democratic processes meaningfully and effectively. In a similar fashion, the Constitutions of South Africa and Zimbabwe recognise multi-partyism as a core principle and value of governance. The two Constitutions establish independent electoral management bodies with the mandate to conduct democratic, free and fair elections. They also underpin the independence of courts and mandate them, through judicial review powers, to protect and enforce the Constitution. Despite these similarities in the constitutional frameworks of the

125 Section 190(1)(b) as interpreted by the Constitutional Court in *Kham v Electoral Commission,* note 109.

two countries, an analysis of the way the apex courts in the two countries have adjudicated cases which involve the right of opposition parties to participate in democratic processes reveals a sharp contrast.

In this article, we have analysed and compared the manner in which the High Court and Constitutional Court of South Africa, when compared to the Constitutional Court of Zimbabwe, have dealt with cases which concern the right of opposition parties to challenge electoral fraud and seek electoral justice, attempts to disenfranchise voters perceived to be aligned to the opposition and attempts to subvert the independence of electoral management bodies in order to shield the ruling party from competition by the opposition.

The analysis shows that, whereas the Constitutional Court of South Africa has mostly demonstrated commitment to push back against limitations on opposition political party's rights, in turn protecting the constitution and safeguarding multipartyism, its counterpart in Zimbabwe appears to have been rubberstamping and providing legal legitimacy to otherwise unconstitutional manoeuvres by the ruling party to undermine the participation of opposition parties in democratic processes. The difference in the attitudes of the two apex courts is attributable to the ability of the Constitutional Court of South Africa to defend its independence and the failure of its sister Court in Zimbabwe to withstand the rise of competitive authoritarianism. Perhaps this is because right from the commencement of the democratic era in 1994 in South Africa, judges have been appointed through procedures which have, to a large extent, ensured that only competent, impartial and independent candidates are appointed as judges.[126] In Zimbabwe, whilst the country adopted a democratic constitution in 2013, the judges who had been appointed in the pre 2013 constitutional era remained in office and most of these judges had demonstrably been partial towards the ruling party.[127]

Further, the analysis has also shown that while the dominance of a liberation political party can limit the institutionalization of other political parties and create a truly multi-party democracy, this outcome is not inevitable. Having strong institutions, in this case, independent courts and an independent electoral management body can go a long way in securing multi-party democracy by creating fertile ground for opposition parties to exercise their political rights.

126 On the judicial appointment process in South Africa see, *Chris Oxtoby*, The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission, Journal of Asian and African Studies 56 (2021), pp. 34-47.

127 *Lovemore Chiduza*, Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?, Potchefstroom Electronic Law Journal 17 (2014), p. 36. Also see *Baart Simbisai*, Mugabe Judges Appointments Stink, Zimbabwe Independent, 19 July 2013, https://allafrica.com/stories/201307191229.html (last accessed on 9 April 2025).