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DIGITISATION OF THE COURTS AND ACCESS TO JUSTICE: THE ZIMBABWEAN PERSPECTIVE

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THEME: A RESPONSIVE AND ACCOUNTABLE JUDICIARY

INTRODUCTION

Access to justice is a fundamental concept underpinning the work of judiciaries the world over. Today, there is hardly any discussion on judicial transformation and the development of the justice system that may be made without reference to the concept of access to justice. Full access to justice for all people is a noble goal that all transformative judiciaries strive for. The concept finds expression in both national constitutions of sovereign States and international law. Needless to say, the ultimate aim of access to justice is the doing of justice to all persons irrespective of status. Presently, most discussions on access to justice focus on how the concept may be actualised into a concrete outcome of constitutional democracy. To this end, significant emphasis has been placed on developing ways in which full access to justice may be achieved. This has resulted in the adoption of digital innovations – digitisation – by various judiciaries, including the Zimbabwe Judiciary, as a way of overcoming the challenges that are faced in justice delivery. Digitisation, which connotes the use of digital technology, inventions and innovations in justice delivery, is adapted to the activities and work of the courts to enhance their ability to discharge their functions of ensuring access to justice efficiently and expeditiously. However, digitisation brings with it unfamiliar methods of operation that challenge the conventional procedures of the courts and the understanding of their roles.

Having said this, I point out from the onset that digitisation is dependent upon and grounded in the understanding of the role of the Judiciary in ensuring access to justice. For digitisation to be fully embraced and effectively used by any Judiciary, consciousness needs to be raised regarding its utility in the attainment of the overall objectives of the courts. It is with these considerations in mind that this paper has been developed and structured.

The paper begins with a broad discussion of the role of the courts in any constitutional democracy. In that part of the discussion, the roles of the courts are traced right from the idea of justice to the emergence of the courts as the institution entrusted with the constitutional duty of ensuring access to justice, safeguarding human rights and freedoms and the rule of law. The first part of the paper is anchored on an understanding of justice and how the courts aid full access to justice. Thereafter, the paper proceeds to discuss the practical and experiential challenges that are faced in justice delivery which have the effect of undermining access to justice.

From this discussion, digitisation is contextualised as a technology that should be used by the Judiciary as an effective tool in the transformation of the system of delivery of justice to resolve disputes expeditiously and at low cost. Digitisation is understood as the adoption and implementation or use of electronic based technology which enables communication of information to be originated to reach many people in different places at once upon the click of a button. It finds application in the justice delivery system through the use of the other

technological tools, such as the electronic case management system and virtual court hearings. The Judiciary finds itself having to strive to achieve the objective of ensuring the delivery of justice in a world where national and human development is driven by rapid development in information communication technology. Judiciaries world over have come to realise and accept that they would let the technological changes taking place pass outside the system they administer in the provision of service to the public at their own peril.

PART A - THE THEORETICAL FRAMEWORK OF ACCESS TO JUSTICE

i. JUSTICE

The attainment of justice is at the centre of all digitisation efforts. For this reason, a discussion on "justice" must be the starting point of this presentation. What is "justice"? The dictionary definition of justice, which is based on its use in jurisprudence, is that justice is "the constant and perpetual disposition to render every man his due".[1] This definition elicits two major characteristics of justice. Justice is constant and perpetual. But justice may also be conceptualised in different terms. I recently had the occasion to discuss the concept of justice at the Access to Justice Symposium organised by the University of Zimbabwe's Faculty of Law. Drawing on various definitions of justice, I reiterated that justice has been defined as "the amount of fairness that people

[1] Black H. M. *et al*, *Black's Law Dictionary,* Fourth Edition, (St Paul's, Minnesota: West Publishing Co., 1968) at p. 1002;

experience and perceive when they take steps to solve disputes and grievances".[2]

Aristotle's conceptions of justice are also important and relevant to any explanation of the idea of justice. For Aristotle, justice connotes "what is lawful and fair, with fairness involving equitable distributions and the correction of what is inequitable".[3] Already, one can tell that fairness and equity are inherent in virtually all definitions of justice. Thus, there are several crucial characteristics of justice that are central to this discussion. As has been said:

> "This definition[s] reveal[s] four important aspects of justice –
>
> 1. [They] show that justice has to do with how individual people are treated;
> 2. The definition[s] underline[s] the fact that just treatment is something due to each person. In other words, that justice is a matter of claims that can be rightfully made against the agent dispensing justice, whether a person or an institution;
> 3. The definition[s] draw[s] attention to the connection between justice and the impartial and consistent application of rules. Justice is the opposite of arbitrariness. The rule concerned must be relatively stable.
> 4. The definition[s] remind[s] one of the fact that justice requires an agent whose will alters the circumstances of its objects. The agent might be an individual person or it might be a group of people or an institution such as the State."[4]

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[2] Adapted from the paper by the Hon. L. Malaba, *Keynote Address on Access to Justice for the Poor, Vulnerable and Marginalised People in Zimbabwe,* (Harare: Judicial Service Commission, 2022) at pp. 2 – 3.

[3] Internet Encyclopaedia of Philosophy, "Western Theories of Justice". Available at: https://iep.utm.edu/justwest/#:~:text=Aristotle%20says%20justice%20consists%20in,correction%20of%20what%20is%20inequitable.

[4] Hon. L. Malaba, *Keynote Address on Access to Justice for the Poor*, *op cit*.

As observed, fairness is among the essential characteristics of justice. It anticipates that all people, by virtue of being human beings, will be treated equally and in like manner. Thus, there can be no fairness when the same standards are applied to people in different circumstances regardless of these differences.[5] As I have remarked before:

> "Pertinent amongst the critical features of justice is the element of fairness. ... There can be no fairness when the same standards are applied to parties that are housed in different planes."[6]

So, too, is equality central to the conceptions of justice. Equality refers to a similar apportionment of rights and duties to parties that are in the same circumstances. Equality and fairness are related concepts in the discussion of justice. For example, fairness of treatment requires the equality of human beings to be taken into account.

It is commonly accepted that there are different types of justice. For example, the latter part of Aristotle's definition is accepted as suggesting the existence of distributive justice and commutative justice. In fact, one of the most common uses of the term "justice" is made in the context of a form of justice described as "legal justice" or "justice according to the law". Legal justice involves the attainment of fairness through the law or legal principles. The existence of legal justice as a distinct species of justice is supported by the befitting observations of H. McCoubrey that:

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[5] Hon. L. Malaba, *Keynote Address on Access to Justice for the Poor*, *op cit*.
[6] *Ibid*.

> "'Justice' is a commonly encountered term of legal rhetoric and to deal 'justly' is held out as a fundamental aspiration of a legal system. At the same time, the intention which this rhetoric supposedly reflects is often less than clear. In practice, a distinction is drawn between 'justice according to the law' and 'justice' as an ideal form of dealing. In the former case, little more is meant than the proper operation of a given system, albeit subject to some very basic expectations of due process. In the latter case, an external standard is being advanced by reference to which the operation of the legal system may be evaluated."[7]

The justice that is enforced by the Courts is justice according to the law. In the American case of *State ex Rel. Department of Agriculture* v. *McCarthy*, 238 Wis. 258, 299 N.W. 58 (Wis. 1941) at para. 270, the Supreme Court of Wisconsin made the pertinent observation that:

> "The justice to be administered by the courts is not an abstract justice as conceived of by the judge, but justice according to law or as it is phrased in the constitution justice 'conformably to the laws.'"

Most references to "justice" in this paper denote justice according to the law. This is because justice to the law is what the courts are concerned with. Justice is an inherent entitlement of every human being. No "States have ... discretion in deciding whether or not to grant justice. It ought to and does exist independently of the agenda of the Government".[8]

[7] H. McCoubrey and N.D. White, *Textbook on Jurisprudence* (Blackstone 3rd ed, 1999) at 297.

[8] Hon. L. Malaba, *Keynote Address on Access to Justice for the Poor*, *op cit*. at p ….

ii. THE EMERGENCE OF THE LAW – A SYSTEM OF PROTECTION

Sir Gerrard Brennan commented that: "Justice is the fundamental value which monitors the scope and content of the law".[9] Quite often, there are academic controversies about the relationship between law and justice. Some scholars argue that law and justice are essentially the same. However:

> "The law and justice are two distinct concepts, with justice being the legitimate aim and end of the law. The law is normally used as a means to ensure justice. The law is an integrated mechanism whose primary aim is the resolution of disputes in a manner that achieves justice."[10]

Clearly, there is a correlation between the law and justice. Law and justice are designed to mutually complement each other. On the one hand, reliance on the law requires a full understanding of the concept of justice, while justice significantly depends on the law to be realised. The law cuts across all human activity. Due to the centrality of the law and its enforcement in our daily lives, various theories attempt to explain the origins of the law and the emergence of the state. Of these theories, the Kantian theory of the origin of the law and the state is most suited for the discussion presented herein.

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[9] Hon. Sir Gerard Brennan, "2007: Law and Justice Address – Law for All: Justice for Each", Law and Justice Foundation, 2007. Available at: http://www.lawfoundation.net.au/ljf/app/35B368B724DB0A72CA2573860001CBC9.html#:~:text=Justice%20is%20the%20fundamental%20value,it%20works%20injustice%20to%20some.

[10] Hon. L. Malaba, *Keynote Address on Access to Justice for the Poor*, *op cit*.

Immanuel Kant propounds a theory known as the "original contract". Terry Hopton summarised the essence of Kant's original contract theory in the following terms:

> "The original contract designates [that] the constitution means the form of government rather than general legal provisions as such. In other words, the constitution designates who is the sovereign organ and whether this organ comprises one or several people. The validity of the sovereign is thus derived from the original contract and 'it is the Idea of that act that alone enables us to conceive of the legitimacy of the state'. The contract is thought of as being an expression of the will of the people in the sense that they, at least implicitly, accept it."[11]

There are several characteristics of the original contract that are reproduced in many constitutions today. By virtue of the "original contract," many constitutional democracies are understood as having obligations to the people who constitute the sovereign. One of these obligations relates to the nature and purpose of the laws that a sovereign may promulgate to regulate human behaviour. Kant's theory postulates that:

> "The sovereign must recognise the 'original contract' as an idea of reason that forces the sovereign to 'give his laws in such a way that they could have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a will' (8:297)."[12]

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[11] Hopton, Terry. "KANT'S TWO THEORIES OF LAW." *History of Political Thought* 3, no. 1 (1982): 51–76 at pp. 61 - *62*. Available at: http://www.jstor.org/stable/26212252.

[12] Stanford Encyclopaedia of Philosophy, "Kant's Social and Political Philosophy", (Department of Philosophy, Stanford University, 2022). Available at: https://plato.stanford.edu/entries/kant-social-political/#:~:text=The%20sovereign%20must%20recognize%20the,%E2%80%9D%20(8%3A297).%20google%20scholar.

The origin state and the law may be perceived through the lens of the original contract. In this regard, emphasis must be placed on the fact that the original contract is an idea of reason. Thus, a digital Encyclopaedia commented on "the idea of reason", from Kant's perspective, in the terms below:

> "... reason thinks of all cognitions as belonging to a unified and organised system. Reason is our faculty of making inferences and of identifying the grounds behind every truth. It allows us to move from the particular and contingent to the global and universal. ... In this fashion, reason seeks higher and higher levels of generality in order to explain the way things are. ... The entire empirical world, Kant argues, must be conceived of by reason as causally necessitated ... Each cause, and each cause's cause, and each additional ascending cause must itself have a cause. Reason generates this hierarchy that combines to provide the mind with a conception of a whole system of nature. ...."[13]

The original contract is anchored on reason. It presupposes that all rational human beings would agree to the state and the law. In other words, the original contract may not be proved by historical evidence but only through reason. Kant, quoted by the Stanford Encyclopaedia of Philosophy, explains this scenario thus:

> "This original contract ... is not a historical event but only an idea of reason, that is, is a concept generated by reason itself with no possible empirical reference that is used by reason to guide empirical thought or action. Any rights and duties stemming from an original contract do so not because of any particular historical

[13] Internet Encyclopaedia of Philosophy, "Immanuel Kant: Metaphysics". Available at: https://iep.utm.edu/kantmeta/#H7.

> provenance, but because of the rightful relations embodied in the original contract. No empirical act, as a historical act would be, could be the foundation of any rightful duties or rights. The idea of an original contract limits the sovereign as legislator. No law may be promulgated that 'a whole people could not possibly give its consent to' ... The consent at issue, however, is also not an empirical consent based upon any actual act. The set of actual particular desires of citizens is not the basis of determining whether they could possibly consent to a law. Rather, the kind of possibility at issue appears to be one of rational possible unanimity based upon fair distributions of burdens and rights in abstraction from empirical facts or desires."[14]

The foregoing exposition of the original contract has two concepts embedded in it. These are the concepts of justice and the law. The concept of the law arises since the sovereign, which is established by the original contract, may only promulgate laws that the people would consent to in terms of the original contract. On the other hand, the concept of justice arises from the description of the nature of the consent required for a law of the sovereign to attain validity and legitimacy. As is said in the above excerpt, the consent that is contemplated "appears to be one of rational possible unanimity based upon fair distributions of burdens and rights in abstraction from empirical facts or desires." Self-evidently, fairness in the distribution of burdens and rights is a preeminent feature of justice.

The relationship between the law and justice is manifest in almost all theories of the origins and the purpose of the law. According to Kant,

[14] Stanford Encyclopaedia of Philosophy, "Kant's Social and Political Philosophy", *op cit*.

the source of the moral law is the rational will or power endowed upon every person:

> "... the will of a moral agent is autonomous in that it both gives itself the moral law (is self-legislating) and can constrain or motivate itself to follow the law (is self-constraining or self-motivating). The source of the moral law is not in the agent's feelings or inclinations, but in her 'pure' rational will, which Kant identifies as the 'proper self' ..."[15]

It is for this reason that Kant takes the view that legitimate laws "are those under which we could think of ourselves as free, equal, and independent citizens, voting unanimously to commit to them and make them our own."[16]

Freedom is a central idea in Kant's philosophy. It explains the existence of the state and the law as well as the role of the courts in terms of "giving effect to the law". Freedom, as Kant explains, is the only innate right of human beings provided that it is exercised and coexists with "the freedom of every other in accordance of universal law".[17] In the context of Kant's philosophy, freedom must be understood, as "independence from being constrained by another's choice", which has been simplified as freedom of action.[18] Kant adds that there is no right to unlimited but "freedom insofar as it can coexist with the freedom of

[15] Stanford Encyclopaedia of Philosophy, "Kant and Hume on Morality", (Department of Philosophy, Stanford University, 2022). Available at: https://plato.stanford.edu/entries/kant-hume-morality/.
[16] Alex Jensen, "*Kant's Theory of Justice*", University of Minnesota, Dec. 2018. Available at: https://cla.umn.edu/philosophy/story/kants-theory-justice.
[17] Stanford Encyclopaedia of Philosophy, "Kant's Social and Political Philosophy", *op cit.*
[18] *Ibid*.

every other in accordance with universal law". [19] As a result of the controlled nature of individual freedom:

> "Rightful freedom for each individual is limited, and the state is not an impediment to freedom but is the means for freedom. State action that is a hindrance to freedom can, when properly directed, support and maintain rightful freedom if the state action is aimed at hindering actions that themselves would hinder the rightful freedom of others and thus be wrongful uses of freedom. Given a subject's action that would limit the freedom of another subject, the state may hinder the first subject to defend the second by 'hindering a hindrance to freedom'. Such state coercion is compatible with the maximal freedom demanded in the principle of right because it does not reduce overall freedom but instead provides the necessary background conditions needed to secure rightful freedom. The amount of freedom lost by the first subject through direct state coercion is equal to the amount gained by the second subject through lifting the hindrance to actions. State action sustains the maximal amount of freedom consistent with identical freedom for all without reducing it."[20]

The Stanford Encyclopaedia of Philosophy adds that, in Kantian philosophy, freedom is simply the first of the bases of the principles underlying the state.[21] There is also "the equality of each with every other as a subject" and "the independence of every member of a commonwealth as a citizen".[22] In this regard, "equality" is formal. It asserts that each person in a state is equal to every other member in a state before the law.

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[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid*.

Given that, according to Kant, moral law derives from each person's pure rational will, there may be conflicts when one person asserts his or her rational will (moral agency) against another. Drawing largely from Kantian philosophy, Alex Jensen suggests that:

> "It's in these kinds of circumstances that problems of justice arise when one person's exercising her moral agency undermines the agencies of others. 'It's not good enough for us to simply act on the basis of our moral capacities', says Holtman, 'so we are going to have to find some way of structuring our interactions so we can do the best job we can to mitigate agency being undermined'. For Kant, the task of structuring our interactions in this way falls to political institutions, through which we conceive of our fellow citizens as free, equal, and independent. 'In Kant's political philosophy', Holtman elaborates, 'the legal system is the framework of coordination through which citizens take each other into account in this way'.[23] [Emphasis added]

The idea that a person who is exercising his or her moral agency may undermine the agency of another person necessitates a system of protection. In this regard, the original contract provides a rational justification for state power and law. This usually results, among other things, in a form of a legal system. Thus, the proposition that a legal system is a framework for the coordination of each person's exercise of his or her moral agency leads to Kant's conceptions of justice. Using the "universal principle of right", Kant states that" "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with

[23] Alex Jensen, "*Kant's Theory of Justice*", University of Minnesota, Dec. 2018. Available at: https://cla.umn.edu/philosophy/story/kants-theory-justice.

everyone's freedom in accordance with a universal law".[24] The universal principle of right is a concept of justice. Justice would, therefore, be concerned with ensuring that every person's exercise of his or her freedom is consistent with universal law and does not infringe upon other people's innate freedom.

Consequently, the legal system is intended to ensure justice and freedom for all people. It provides for rights and obligations and distributes them fairly in order to achieve a state in which all people are equal. The custodians of the power reposed in this system are the courts, which are administered by the Judiciary. In this way, the Judiciary serves the people in order to ensure that every person retains his or her innate freedom, equality and independence.

The emergence of the concept of justice as a foundational value and the legal systems for enforcing it is closely tied to the perpetual nature of justice. What constitutes a system of justice is "the institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members' behaviour; and that, as a consequence, are central to strengthening the normative framework (laws and rules) that shapes public and private actions".[25] Today, more often than not, justice systems are embedded

[24] Stanford Encyclopaedia of Philosophy, "Kant's Social and Political Philosophy", (Department of Philosophy, Stanford University, 2022). Available at: https://plato.stanford.edu/entries/kant-social-political/#:~:text=The%20sovereign%20must%20recognize%20the,%E2%80%9D%20(8%3A297).%20google%20scholar.

[25] Hammergren, Linn; Dory Reiling and Adrian Di Giovanni, *Justice Sector Assessments – A Handbook*, World Bank (Washington, DC: 2007). Available online at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ JSAHandbookWebEdition_1.pdf, cited in Klaus Decker, "Chapter 13: Justice System", in World Bank, *Enhancing Government Effectiveness and Transparency: The Fight Against Corruption*, (World Bank, Kuala Lumpur, 2020) at 318.

in different forms of constitutional democracies. A constitutional democracy is a government in which people vote for "representatives or laws, and in which the laws are authorised and constrained by a constitution".[26] Taken from another perspective, various societies across the world adopt constitutions within which they provide laws and the legal means by which they can guarantee the perpetuity of justice. These means usually exist in the form of a court system that is administered by a carefully selected Judiciary.

iii. THE EMERGENCE OF THE COURTS IN ENFORCING JUSTICE

The courts have emerged as a guarantee of the protection of the rights and interests of justice as outlined above. In short, courts are there to bring the law to life by taking it and embedding its provisions in the fabric of our day-to-day life. The law on its own cannot regulate societal relations in the absence of an impartial arbiter to apply a common standard to both juristic and natural persons. Its effectiveness would be curtailed without independent judicial fora whose conduct is not dictated by self-serving interests.

The law is a result of the will of the people and, accordingly, the law provides for the creation of courts to give effect to its provisions.[27] The courts in essence are an embodiment of the notion of equal treatment

[26] Fred E. Foldvary, Democracy, Constitutional. In: Chatterjee, D.K. (eds) *Encyclopaedia of Global Justice*. Springer, Dordrecht, 2011. Available at: https://doi.org/10.1007/978-1-4020-9160-5_42. Accessed on 10 November 2022.

[27] See Speech by The Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe, On The Occasion of the Official Opening of The 2019 Legal Year Theme: Consolidating The Rule of Law.

with a common standard for all those who access them. Their distinct status as repositories of justice accords their interpretation of the law with the authority to protect potential victims and rein in flagrant violations of the same. The Judges who preside in the courts are in essence duty bearers that deliver justice to the subjects of the law.

The interaction between the courts and the law has given rise to what is termed the rule of law. In brief, this is the recognition of the supremacy of the laws and the acceptance that individuals, corporate entities, the State and all its organs are subject to the law and are all equal before the law. The courts then come to the fore as the guardians of this equal standard. However, it is imperative to note that the courts themselves are bound by the same laws that they endeavour to protect.

In constitutional democracies courts have been recognised as a vital cog in the administration of justice. This is identifiable through the structure of the State where the Judiciary is recognised as a third of the tripartite arms of State. Judiciary authority is separate from the spheres of influence of the Legislature and the Executive, whose own roles are delineated in adherence to the principle of separation of powers.

All three principally exist to uphold the rule of law. The courts, however, are the last line of defence to the concept of the rule of law. They are the final arbiter and the vanguard that holds together the system of justice. They hold to account every action and ensure that no-one acts outside the demands of the law. The power of the courts is also clarified through the compelling nature of its orders. No party, inclusive

of the State itself, can contradict lawful and binding orders by the courts. The presumption that orders made by the courts are grounded in the law is supported by the authority vested in the courts to direct the Executive to enforce their orders.

The role of the courts in a constitutional democracy is governed by a rule-based system which emanates from the constitutional text itself. The Constitution governs the conception of the Judiciary, its functions and guiding principles.

Judicial authority is exercised not arbitrarily but within the confines of principles prescribed by the Constitution. The principles do not only highlight justice as a foundational value, they also entrench its conception as an inherently human entitlement claimable against any party through the institutions appointed by law for the purpose of doing justice to all who deserve it irrespective of status. Section 165 of the Constitution provides the following guiding principles:

> "**165 Principles guiding Judiciary**
>
> (1) In exercising judicial authority, members of the Judiciary must be guided by the following principles —
>
> (a) justice must be done to all, irrespective of status;
>
> (b) justice must not be delayed, and to that end members of the Judiciary must perform their judicial duties efficiently and with reasonable promptness;
>
> (c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.
>
> (2) Members of the Judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must

strive to enhance their independence in order to maintain public confidence in the judicial system.

(3) When making a judicial decision, a member of the Judiciary must make it freely and without interference or undue influence.

(4) Members of the Judiciary must not —

(a) engage in any political activities;

(b) hold office in or be members of any political organisation;

(c) solicit funds for or contribute towards any political organisation; or

(d) attend political meetings.

(5) Members of the Judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.

(6) Members of the Judiciary must give their judicial duties precedence over all other activities, and must not engage in any activities which interfere with or compromise their judicial duties.

(7) Members of the Judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law."

I also draw attention to the equivalent provision in the Constitution of Zambia, that is, Article 118(2), which reads thus:

"**Judicial Authority, System of Courts and Independence**

118. (1) …

(2) In exercising judicial authority, the courts shall be guided by the following principles:

(a) justice shall be done to all, without discrimination;

(b) justice shall not be delayed;

(c) adequate compensation shall be awarded, where payable;

(d) alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted, subject to clause (3);

(e) justice shall be administered without undue regard to procedural technicalities; and

(f) the values and principles of this Constitution shall be protected and promoted."

Due to the intertwining of justice and the law, the courts must be bound by set values and principles in the performance of their duty of sustaining the law. This applies to the Judiciary as an institution and to the Judge as an individual. The persona of the Judge is critical because it is from the consciousness of the Judge that a discussion of the role of the court in a constitutional democracy may be made. The Judges embody the values expected of the courts in general when dispensing their duties.

Given the observation that the courts ought to be underpinned by a value-based system that aids the delivery of justice, the Constitution of Zimbabwe has established certain in-built mechanisms. This is consistent with the law's quality of pre-determination. The key values in respect of the courts relate to the independence and impartiality of the Judiciary. The citizenry's trust in the role of the courts as an effective guarantee of the rule of law and impartial arbiter is anchored in the perception of its neutrality in disputes.

Section 164 of the Constitution of Zimbabwe guarantees the independence of the Judiciary from external influence as a central feature in the makeup of the courts. It provides the following:

> "**164 Independence of Judiciary**
>
> (1) The courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.
>
> (2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore —
>
> (a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;
>
> (b) the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.
>
> (3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them.
>
> (4) Nothing in this section is to be construed as preventing an Act of Parliament from vesting functions other than adjudicating functions in a member of the Judiciary, provided that the exercise of those functions does not compromise the independence of the judicial officer concerned in the performance of his or her judicial functions and does not compromise the independence of the Judiciary in general."

Similar provisions are also contained in the Constitution of Zambia. Article 122 of the said Constitution provides for the functional independence of the Judiciary in the following terms:

> "122. (1) In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority.
>
> (2) A person and a person holding a public office shall not interfere with the performance of a judicial function by a judge or judicial officer.
>
> (3) The Judiciary shall not, in the performance of its administrative functions and management of its financial affairs, be subject to the control or direction of a person or an authority.
>
> (4) A person and a person holding a public office shall protect the independence, dignity and effectiveness of the Judiciary.
>
> (5) The office of a judge or judicial officer shall not be abolished while there is a substantive holder of the office."

The above extract illustrates the interplay between the law and the courts in that, despite their independence, Judges in dispensing their constitutional mandate also bow to the demands of the law - the Constitution. This reinforces the ideal that no one should be above the law. The centrality of this ideal in the Zimbabwean legal system is highlighted by section 2 of the Constitution which stipulates that:

> "**2 Supremacy of Constitution**
>
> (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
>
> (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

See also clauses (1), (2) and (3) of Article 1 of the Constitution of Zambia, worded thus:

> "**Supremacy of Constitution**
>
> **1.** (1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.
>
> (2) An act or omission that contravenes this Constitution is illegal.
>
> (3) This Constitution shall bind all persons in Zambia, State organs and State institutions."

Thus, the courts have emerged to give effect to the provisions of the Constitution and all other laws that are founded upon it. They interpret and apply the law in specific cases that are brought before them. The decisions given by the courts by extension also attribute meaning to the laws passed by the Legislature. The interpretation of laws by the Judiciary has in some quarters been equated to law-making even though this is a misconstruction of the role of the Judiciary when one gives due regard to the principle of separation of powers. The supreme responsibility of the courts is to ensure that the rights of the citizenry are safeguarded when they are threatened by other State organs, agencies, private entities or natural persons.

iv. THE COURTS AND ACCESS TO JUSTICE

Implicit in the acceptance that the courts are duty-bound to give effect to the law, is their additional obligation to ensure that there is effective

access to justice.[28] When exercising judicial authority courts are not only to be independent, they must also be accountable to the people from whom judicial authority is derived. The juxtaposition of the values of independence and accountability connotes the idea of responsibility. The idea of the supremacy of the Constitution demands that all obligations imposed on the Judiciary, such as ensuring an efficient, effective and transparent administration of justice, are obeyed by members of the Judiciary, individually and collectively. It is a hallmark of a democratic society that the general population has the right of access to justice. This is because they have to be able to access the court system that is set up for the purpose of delivering justice. The concept of access to justice can be defined in a narrow sense, which is the formal ability to appear in court, or in a broader sense, which encompasses the removal of economic, technical and physical barriers to access.[29]

The digitisation of courts blends in with the broader sense of access to justice as it is a holistic measure aimed at eradicating obstructions that preclude the courts from dispensing their justice function. This ensures that there is equality for parties who depend on the courts to protect and enforce their rights. The importance of access to justice is also underscored by its recognition as a fundamental element of the right to a fair hearing in the Constitution of Zimbabwe. Justice as an inherently

[28] See Letto Vanamo, Access to Justice: A Conceptual and Practical Analysis with Implications for Justice Reforms, *IDLO Voices of Developments Jurists Paper Series*, Vol. 2. No. 1, 2005

[29] See Keynote Address by The Honourable Mr Justice Luke Malaba, Chief Justice of Zimbabwe, Presented on the Occasion of the Annual Access to Justice and Pro-Deo Review Conference.

human value of universal application demands that the court or the tribunal to which every person who desires to have his or her or its rights or obligations determined should not only be a creature of law, it must act in a manner prescribed by the law which ensures that the proceedings move speedily, fairly and are in public and are completed within a reasonable time. Delayed resolution of cases by the Judiciary is a breach of the constitutional obligation.

Section 69(3) of the Constitution provides that:

> "(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
>
> **(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute**.
>
> (4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum." [Emphasis added]

See also, Article 18 of the Constitution of Zambia.

From the foregoing, the status of the right to a fair hearing as a fundamental right means that it can be linked to the foundational value of human dignity which informs the content of all fundamental rights in Chapter 4 of the Constitution of Zimbabwe. Inherent dignity is

regarded as the source of justice that demands equality of treatment as addressed in the discussion of justice earlier on.

Upon close examination, it is also observable that the fundamental right of access to justice is closely linked to the observance of the rule of law. The dictates and demands of the law cannot be met when the right of access to justice is frustrated. The Zimbabwean scholar Admark Moyo posited the following on this aspect:

> "The right to access to courts is essential for constitutional democracy and the rule of law. Its significance lies in the fact that it outlaws past practices of ousting the court's jurisdiction to enquire into the legal validity of certain laws or conduct. A fundamental principle of the rule of law is that anyone may challenge the legality of any law or conduct. **In order for this entitlement to be meaningful, alleged illegalities must be justiciable by an entity that is separate and independent from the alleged perpetrator of the illegality.** Access to court and the rule of law both seek to promote the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters into their own hands. **Thus not only is the right of access to court a bulwark against vigilantism, but also a rule against self-help and an axis upon which the rule of law rests.** Unless there are good reasons (self-defence or necessity for instance), no one should be permitted to take the law into their own hands. Thus this is intended to ensure that individuals do not resort to the law of the jungle. The threshold enquiry which must be met to access the right is that there must be a dispute capable of resolution by law, and once this is present factors such as independence, access, impartiality as well as fairness are triggered … Ensuring equal access to courts and tribunals involves substantial activity on the part of states. **They must ensure that judicial systems are organised so that all individuals who may find themselves in**

<u>their territory or subject to their jurisdiction can access the courts</u>." [Emphasis added]

v. BARRIERS TO ACCESS TO JUSTICE

The system of delivering justice is fraught with shortcomings and challenges. Challenges refer to anything that undermines the Judiciary's ability and efforts to deliver justice. On the other hand, shortcomings refer to the failure of the judicial system to meet the standards put in place by the Constitution for delivering justice. The challenges faced by and shortcomings of the Judiciary in executing its task of delivering justice include case backlogs, corruption, laziness and inefficiency, delays, high operating costs and the physical inaccessibility of the courts to some people.

The challenges and shortcomings that Judiciaries encounter should be viewed in the context of the functions of delivering justice and giving full effect to justice systems. Each challenge or shortcoming is a subtraction from the ideal state of justice that every society desires. I briefly discuss the prevalent challenges and shortcomings encountered in the delivery of justice.

a. Case backlogs — Generally, a backlog of cases arises when cases remain pending before a court for a period longer than that provided for by a statute or other judicial guidelines. A Canadian Action Committee on Court Operations in Response to COVID-19 defined a backlog as "a higher number of cases coming into the court system

than the number of cases resolved during the same period".[30] Case backlogs undermine the purpose of the establishment of the justice system. If the courts take too long to resolve disputes, the people lose hope in the resolution of their cases.

b. Corruption — There are several ways of defining corruption. Public corruption has been defined as "the misuse of public office for private gain".[31] Svensson aptly points out that:

> "Corruption is an outcome — a reflection of a country's legal, economic, cultural and political institutions. Corruption can be a response to either beneficial or harmful rules. For example, corruption appears in response to benevolent rules when individuals pay bribes to avoid penalties for harmful conduct or when monitoring of rules is incomplete — as in the case of theft. Conversely, corruption can also arise because bad policies or inefficient institutions are put in place to collect bribes from individuals seeking to get around them (Djankov, LaPorta, Lopez-de-Silanes and Shleifer, 2003)."[32]

Corruption occurs in several forms and at several levels. It may take the form of collusion between judicial officers and litigants or between litigants and court officials. Litigants may attempt to bribe judicial officers in order to obtain a favourable resolution of their cases. They may also offer bribes to court officials in order to

[30] Action Committee on Court Operations in Response to COVID-19, *Roadmap to Recovery: Orienting Principles for Reducing Court Backlog and Delay*, at p. 2. Available at: https://www.fja.gc.ca/COVID-19/pdf/Orienting-Principles-Reducing-Backlog-and-Delays.pdf.

[31] Svensson, Jakob. "Eight Questions about Corruption." *Journal of Economic Perspectives*, 19 no. 3, (2005): 19-42 at p. 20. Available at: DOI: 10.1257/089533005774357860.

[32] *Ibid*.

circumvent court rules. For example, a litigant who has failed to file court papers on time may bribe a court official to accept the papers.

Corruption challenges the idea of justice and the purpose of the establishment of the courts. Once corruption is involved, there cannot be fairness in the treatment of litigants. Without fairness, there is no justice. As a result, where corruption is allowed to thrive the courts or the Judiciary perpetuate injustice. In any form, corruption amounts to an abdication of judicial duty.

c. **Laziness and inefficiency** — Efficiency is a measure of "the useful work done as a proportion of the resources employed, that is, for every set of inputs, there are two outputs, work and waste".[33] One can readily identify a relationship between the foregoing definition of efficiency and the dictionary definition of laziness, which is "the quality of not being willing to work or use effort".[34] By virtue of human nature, laziness and inefficiency may creep into the court system. Where court officials are lazy, persons approaching the courts are neglected by the system that is intended to provide protection to them. Inefficiency, which may arise from administrative arrangements within the court system, also has the same effect as laziness. The difference is that, with inefficiency, efforts that should be directed towards the delivery of justice are expended in fruitless endeavours. Again, this negates the purpose of

[33] "Systemic Efficiency". Available at: https://ebrary.net/215364/business_finance/systemic_efficiency. Accessed on 15 November 2022.
[34] Cambridge Dictionaries, s.v. "laziness". Available at: https://dictionary.cambridge.org/dictionary/english/laziness. Accessed on 15 November 2022.

the courts of ensuring that everyone obtains justice according to the law by the expeditious resolution of his or her case.

d. Delays — William N. Cain curiously points out that "Over 700 years ago, the Great Charter of England [*Magna Carta*] classified 'delay' in the administration of justice in the same category with its 'sale' or outright 'denial'."[35] Delays in the administration of justice occur in different forms. They may begin in court registries as a result of the conduct of tardy court officials. They may also be caused by the conduct of litigants who take dilatory points and seek postponements of matters for ulterior motives. They may even be caused by courts that take a long time to dispense justice by not rendering judgments. Finally, one other cause of delays is the late preparation and transmission of records of proceedings for appeals or reviews.

It is obvious that delay negates the purpose of litigation. The Hon. Austin Abbott, in an article, revealed the effect of delays in the administration of justice when he remarked that:

> "When men are involved in controversy the immediate effect of a resort to litigation is to take the question out of their hands, and render private passion futile, and when the question is finally decided by a disinterested tribunal, the state itself enforces the decision, thus precluding future controversy. A quarrel stops the progress of affairs. The law lifts the quarrel, and lets affairs go on. It is as when the whole current of traffic in a city street is

[35] William M. Cain, *Delay in the Administration of Justice*, 7 Notre Dame L. Rev. 284 (1932). Available at: http://scholarship.law.nd.edu/ndlr/vol7/iss3/2

stopped by two angry drivers of colliding teams. The law takes the contestants out of the line, and lets traffic proceed."[36]

e. **High operating costs and limited resources** — For the ordinary person, it is tempting to believe that courts have no other costs beyond the construction of the courthouses and the remuneration of members of the Judiciary. On the contrary, many court systems have high operating costs incurred during the day-to-day running of the courts. A study by Marcus Manuel and Claire Manuel on the goal of achieving access to justice by 2030 for all commented that:

> "Legal advice and assistance is inaccessible for millions of people. The reasons, as highlighted in a recent UN Global Report on Legal Aid (UNDP and UNODC, 2016), include the lack of an organised legal aid system, the limited number of lawyers to cover legal aid needs, geographical inaccessibility, and lack of awareness of the availability of legal advice and assistance. ... The police, often the entry point to the formal justice system, are typically underfunded, can be products of a colonial past and may be structured as predatory, regime-serving, command and control organisations ('forces' rather than 'services')."[37]

Limited resources and the underfunding of justice systems present a significant challenge for access to justice. In the absence of the resources to pay for the operating costs, courts will struggle to deliver justice.

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[36] Abbott, Austin. "Delay and Uncertainty in the Administration of Justice." *The American Law Register and Review* 44, no. 6 (1896): 349-360 at 350.

[37] Marcus Manuel and Clare Manuel, '*Achieving Equal Access to Justice for All by 2030: Lessons from Global Funds*' Working Paper 537, July 2018 at p. 9. Available at: www.odi.org/ publications/11161-achieving-equal-access-justice-all-2030- lessons-global-funds. Accessed 11 November 2022.

f. Physical barriers and geographical inaccessibility of the courts

— Physical barriers constitute physical infrastructure or features that make access to a building difficult or impossible for a person with a disability. A Lapkin, in an article on the problems of access to justice in rural Ukraine, discusses the geographical barriers to access to justice as "organisational problems" in the following terms:

> "Organisational problems cover a wide range of issues related to creation of appropriate conditions for going to the court and obtaining judicial protection. … First of all, that is lack of transport infrastructure whereupon people experience difficulties to reach the court. ... Transportation costs are expensive for rural residents and are constantly rising."[38]

The fact that people may not even be able to access the courthouses where they can get justice for any wrongs against them is troubling. In several countries, the danger of this shortcoming was revealed by the COVID-19 pandemic during which many people could not access the courts due to lockdowns. During the periods in which most courthouses were closed, many people were unable to obtain justice for several causes they intended to place before the courts.

In the adoption of appropriate technological innovations to enhance the efficiency and effectiveness of the justice delivery system, thereby addressing the challenges and shortcomings of it, policymakers must give effect to the correct principles of access to justice. These are that:[39]

[38] Lapkin, Andrii. "The problems of access to justice in rural areas (on the example of Ukraine)." In *SHS Web of Conferences*, vol. 68, p. 01018. EDP Sciences, 2019 at pp. 6 – 7.

[39] See Smith Roger, *Justice – Redressing the balance*, Legal Action Group, 1997.

1. Access to justice is a constitutional right of each citizen.

2. Interests of citizens should predominate in policies on access to justice, not interests of providers of services.

3. The goal is not only procedural justice but also substantive justice.

4. People need legal assistance both in civil and in criminal law matters.

5. Access to justice requires policies that deploy every possible means towards attaining the goal, including reform of substantive law, judicial procedure, legal education, legal information, and legal services.

6. Policies on legal services need to deploy a 'portfolio' approach of a wide range of provisions and arrangements, some publicly funded and some not, some provided by lawyers and some not.

7. Programs and reforms must take account of the realistic level of resources, but these should be seen as limiting policies rather than defining them.

8. Within civil law, more attention should be given to the particular legal needs of poor people excluded from legal aid.

9. The full potential of technological advances must be harnessed …".

The courts in Zimbabwe have taken a leap forward to give full effect to the aforesaid principles. At the height of the COVID-19 pandemic, physical attendance in the courtroom became impossible, creating a formidable barrier to access to justice. This situation was untenable

when contrasted with the features of justice such as promptness, efficiency and expediency. In addition, it is often aptly remarked that "justice delayed is justice denied". The impossibility of courts physically convening did not stall human interaction which inevitably required the intervention of the courts to settle disputes.

The pendency of such litigation created an unsavoury scenario where the Judiciary was disabled from dispensing its primary justice function. The intervening period was also characterised by strict curfews and restrictions of movement which impeded physical access to the courts. This unpleasant experience, coupled with the Judicial Service Commission's longstanding drive to harness technological advancement, resulted in the inception of the Integrated Electronic Case Management System ("I.E.C.M.S."). The I.E.C.M.S. is essentially a measure of digitisation.

The underlying agenda behind digitisation was to enable the redefinition of a court in order to ensure access to justice would not be unduly frustrated and also take advantage of the advancement of information technology since the turn of the millennium. The defining feature of a court has ceased to be the gathering of people in a courthouse. Rather, it now encompasses a virtual setting where litigants convene to access justice. This illuminates the purpose of digitisation as not solely aimed at uprooting the decades of practice in the courts but addressing deficiencies in the enforcement of the right of access to justice.

Reverting to the I.E.C.M.S., it is a web and computer-based system that manages and tracks court processes filed in the court registries. The system has aided the Zimbabwean Judiciary's meticulous adherence to the guiding principles established under section 165 of the Constitution. The immediate gains have been in the increased promptness and efficiency with which members of the Judiciary dispose of cases. This is because through mediums such as virtual hearings, participation in legal proceedings is no longer dependent on the physical appearance of litigants.

Also, transport costs for litigants have been scaled down. The Supreme Court in non-constitutional matters and the Constitutional Court have no permanent seats outside of the capital city. Thus, previously litigants from other parts of the country were forced to travel to Harare to file pleadings and attend court hearings. This often resulted in unnecessary postponement of proceedings. The I.E.C.M.S. has filled the void and ensured that access to justice becomes more widespread with economical and physical barriers to the finalisation of cases being broken down.

The benefits of the digital platform have been reaped by both the courts as duty bearers and litigants as the beneficiaries and subjects of the justice system. The increased transparency and awareness of judicial operations arise from the greater involvement of litigants as they can electronically track the progress of their cases through the system. Conversely, the impartiality of the courts is enhanced by the digital interactions between courts and litigants due to the streamlined nature

of court processes which in turn cultivates confidence in the role of the Judiciary. Digitisation means that the court acts with greater transparency, as all its activities are digitally recorded and traceable, thus increasing public confidence in the courts.

I must also emphasise the efforts of the Judicial Service Commission in Zimbabwe to give effect to the Judiciary's agenda to facilitate greater access to justice through the establishment of e-filing centres. These centres are an embodiment of the commitment to ensure that access to justice through digitisation does not preclude potential litigants. These fall into groups of persons who -

a. Do not have adequate access to e-resources that are essential for filing on the IECMS platform; OR
b. Do not have the necessary skillset that is required to access the online platform on their own.

The fully trained staff manning these centres become the bridge that ensures that the litigants in remote areas and from socially and economically disadvantaged backgrounds are not precluded from benefitting from this inclusive process. As a matter of fact, the poor, vulnerable and marginalised people were the key target group in the transition from a paper-based system of work to the I.E.C.M.S..

vi. SIGNIFICANCE OF ICTs IN THE TRANSITION TO THE I.E.C.M.S.

A question that pervades the digitisation of court processes relates to the necessity for transition. Many traditionalists and conservatives critique and in some instances attempt to resist the transformative elements of the I.E.C.M.S. However, it is apparent from the various spheres of day-to-day activities that digital technology has been transforming the operation of public services in several countries and regions.[40] Thus, it is clear that technology and the internet are not passing fads but mainstays of present and future human relations. The influx of technology is also regulated by the law. As a result, justice ought to embrace the appropriate technology in the quest to transform the legal system for the delivery of justice due to its symbiotic relationship with the law.

Moreover, technology has become a large part of the very person who is a subject of the law and requires justice. Therefore, digitisation and automation of the court process through the I.E.C.M.S. is a recognition of the need for change. People expect those who have the responsibility of managing the needs of the justice delivery system to adopt modern technological tools to enhance efficiency and effectiveness in the resolution of disputes. This also enhances equality of treatment as the Judiciary transforms in accordance with public demands. As indicated previously, constitutional values such as judicial impartiality are greatly aided by this transition. It has become an inescapable reality that the information communication technology in its different but

[40] Frederic Drabo, *The Digitization of Court Processes in African Regional and Sub Regional Judicial Institutions*, Walden University, 2021.

coordinated application, such as in electronic case management, virtual hearings and digitisation, are assuming a permanent role in the justice delivery services.

Moving away from the confines of the Judiciary, the transition to the I.E.C.M.S. is also in line with the objectives and policy thrust of the Government of Zimbabwe. Currently, Zimbabwe has a pro-e-governance policy. This is embodied in the **National Development Strategy 1 (NDS1)** which stipulates the following in Chapter 7:

> "**Digital Economy**
>
> 527. Information Communication Technologies (ICTs), are key enablers of economic development, hence their entrenchment across all national development strategies for universal access to be attained by 2030 is indispensable.
>
> 528. Knowledge intense products and services rely on ICTs. During the NDS1 Period, in an effort to move the economy towards production of complex products and services, Government will promote the development of ICTs. This will improve Zimbabwe's international ranking on Country and Product Complexity which as of 2018 was 109 out of 133 countries.
>
> 529. During the NDS1 Period, in order to enhance ICTs usage, measures will be put in place to develop smart programmes such as smart Government systems, smart agriculture, smart health and smart transport and safe cities through using ICTs.
>
> 530. Implementation of e-Government services has progressed steadily, through investments in the requisite ICT infrastructure, introduction of e-services to the citizenry in areas such as health, education, research and development, as well as the creation of Community Information Centres in some of the disadvantaged communities.

531. Over the past decade, great strides have been achieved in the uptake and use of Information Communication Technologies, as evidenced by the high active mobile penetration rates of 94.2% and the internet penetration rate, which stood at 59.1%, as at the first quarter of 2020. Further, the COVID-19 pandemic presented new opportunities for the sector, which can be fully exploited during the Strategy Period.

532. **Notwithstanding the positive strides, the ICT sector is faced with challenges related to underutilisation of ICT infrastructure as reflected by slow pace in embracing ICTs in service delivery, particularly e-government**." [Emphasis added]

The transition to the I.E.C.M.S. is an aid to the development of e-governance. Courts are the essence of the promotion and protection of the rule of law. Good governance is an essential element of the rule of law. By moving away from the traditional paper-based system to a digital platform, the Judiciary ensures that the other arms of State responsible for the development of ICT take cogent steps to improve internet penetration and connectivity in remote areas. The constitutional principle of the separation of powers demands that there be a system of delivery of justice powered by appropriate information communication technology adopted and implemented by the Judiciary for the purpose of ensuring efficiency and effectiveness in the resolution of disputes by the courts.

PART B - DIGITISATION AS MEANS OF ACCESS TO JUSTICE

This part highlights the practical steps that have been undertaken by the Zimbabwean Judiciary in providing for digitisation, which is mainly anchored by the I.E.C.M.S..

It has been shown that digitisation of the electronic based case management system enhances efficiency in the use of human and material resource utilisation. It combats the scourge of corruption. The Judiciary is therefore under the obligation to change the ways it is accustomed to in the doing of the business of the administration of justice.

THE IMPLEMENTATION PHASE AND PROCESS

In order to prevent a drastic overhaul in the entire court system, the transition to the I.E.C.M.S. was initiated in phases. This was to give the Judiciary time to monitor the utility of the online platform as opposed to the traditional paper-based system. The I.E.C.M.S. was officially launched in the Constitutional Court, the Supreme Court and the Commercial Court Division of the High Court on 01 May 2022. This launch was preceded by an arduous and extensive training period which involved the judicial system's stakeholders. These stakeholders included judicial officers, the Zimbabwe Republic Police (ZRP), Zimbabwe Prisons and Correctional Service (ZPCS), the Law Society of Zimbabwe, the Attorney General's Office, the National Prosecuting Authority (NPA), the Zimbabwe Anti-Corruption Commission (ZACC), the Ministry of Justice, Legal & Parliamentary Affairs through the Legal Aid Directorate, and members of the public.

Pilot tests were conducted in the aforementioned courts in the months leading up to the launch in a bid to familiarise court staff with the digital functions. Support staff were trained in accordance with their area of work and their roles. For example, the Registry staff members were educated on the endorsement of electronic signatures, a valuable process when validating documents electronically filed by litigants. In addition, all pre-existing case files were uploaded onto the digital platform's server in order to enhance transparency and curtail allegations of inequality.

The Judicial Service Commission also took the initiative to include prison inmates in the digitisation drive through the commissioning of virtual courts on 07 February 2022 in the Harare High Court, the Harare Magistrates Court, the Harare Remand Prison and the Chikurubi Maximum Prison. At the height of the COVID-19 pandemic, inmates' access to justice was significantly hamstrung by the health restrictions that prohibited physical gathering and movement. Following the successful launch in May 2022, the Judicial Service Commission completed the process of linking an additional nine Provincial Magistrates' courts to at least one Prison facility within their areas of jurisdiction to the virtual court system. Furthermore, e-filing centres were established across the country to enable litigants without access to the necessary gadgets or internet connections to participate in the first phase of the digitisation thrust. Each e-filing centre was assigned to trained e-filing officers who assist litigants with all their e-filing

queries as well as computers and internet broadband connectivity for accessing the I.E.C.M.S. platform for filing purposes.

The results thus far are encouraging and reflect promise in the ability to unlock greater efficiency in the system as all the relevant stakeholders familiarise themselves with the I.E.C.M.S.. Since the launch of the digital platform, a total of 1004 cases have been filed as of 21 November 2022. Impressively, 520 cases have been finalised by the Judges, which represents a fifty percent clearance rate. An improvement or maintenance of this trajectory will ensure that the courts are not overly burdened with an unnecessary backlog. This highlights digitisation as an appropriate response to the difficulties associated with the human element in litigation.

A change management programme has been put in place as an ongoing process to ensure acceptance of the new methods of doing things in the Judiciary. The assessment and analysis of the problems bedevilling the justice delivery system of a country from the perspective of the need to adopt and use appropriate technology as a solution requires change of mind-set on the part of judicial and non-judicial members of staff. The habit of wanting to do the same thing by using the same methods and procedures simply because they are familiar even though they do not produce the desired results is the bane of the Judiciary. Those who seek to resist the introduction of technological innovations into the justice delivery systems to ensure that the implementation of methods and procedures produce speedy, efficient and effective resolution of

disputes will not admit to being victims of fear of change. There is therefore the need for the adoption and implementation of an aggressive and continuous change management programme. There should be no room for choice where there are rules of practice and procedure introducing the electronic or computer based system of case management.

It is easy and tempting to speak about the advantages of the adoption of digital technology in the justice delivery system. There must in addition be produced of concrete outcomes of the new measures that support the decision to adopt digitisation. Statistical data must be generated at the end of every month showing the performance of the courts and individual judicial officers. Of particular interest would be cases that were completed and disputes resolved together with the time taken to have a case completed from the time of its filing to the time of final resolution of the dispute by the court.

It is also important to point out the fact that the adoption of technological innovations in the justice delivery system comes with its own dangers. It gives rise to the involvement of private economic self-interests more than ever before. The involvement of actors and actions driven by considerations of self-interest in profit-making rather than pursuit of justice delivery looms large. That also gives rise to other questions such as internet penetration and connectivity all going into the issue of access to justice.

The decision to adopt and implement digitisation of the justice delivery system carries with it costs. The nature of funding and its source will determine the success of the digitisation project in the long term. Government funding is the best. It is a constitutional obligation.

CONCLUSION

In summation, the Zimbabwe Judiciary has undertaken an overhaul of the traditional paper system in favour of digitisation. This objective has been achieved through the adoption of the Integrated Electronic Case Management System (I.E.C.M.S.) as the new method for filing court processes and management of case files in the Constitutional Court, the Supreme Court and the Commercial Court Division of the High Court. The initial phase of its implementation is known as Phase 1. Early indications suggest that the migration to the virtual platform has enhanced the efficiency of the Superior Courts in disposing of matters. The imminent second phase of the I.E.C.M.S. implementation will incorporate the High Court, the Labour Court, the Administrative Court, the Magistrates Courts and the Sheriff of the High Court. It is due for roll-out in 2023.

The paper has sought to highlight that the drive to digitisation is not borne out of a fanciful pursuit for change but is meant to ensure that courts dispense their constitutional mandate more effectively and efficiently. It is anchored on serving the interests of justice and furthering the courts' role as duty bearers who give effect to the law on

behalf of its subjects. The adoption of the I.E.C.M.S. by the Judiciary in Zimbabwe is a purposeful initiative consistent with the process of constitutional transformation. Whilst powered by digital technology, the system remains underpinned by the constitutional obligation of adherence to the fundamental court values of equality before the law, fairness, competence, accessibility, impartiality, integrity, timelines, independence of decision-making, transparency and certainty. The values give content to principles which define actions constituting the standards of conduct by which the members of the Judiciary must be measured and measure themselves.

I Thank You!