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IRIS GRADUATE STUDENT SUMMER FIELDWORK AWARD 2021

Judicial Review in Common Law Africa; The Emergence of Constitutional

I was privileged to be an IRIS scholar in the summer of 2022. My 2021 award was deferred to 2022 because new variants of COVID resulted in cancellation of flights from southern Africa.

I am a human rights lawyer from Zimbabwe. My research investigates the emergence of constitutional courts in common law Africa, with a focus on Malawi, Zambia and Zimbabwe. Constitutional courts are typically found in Francophone/civil law Africa. African countries with common law traditions are increasingly establishing their own specialized courts as evidenced by developments in South Africa (1994), Zambia (2016) and Zimbabwe (2013). Scholarship has overwhelmingly focussed on South Africa at the expense of important developments in the rest of the sub- region. My research addresses this lacuna by tracing the judicial histories of Malawi, Zambia and Zimbabwe, situating them in the global literature and accounting for contemporary institutional choices. It theorizes judicial design whilst assessing its effect on constitutionalism and human rights enforcement.

My summer research was designed to reveal reasons behind textual provisions at the input side, explore how they are implemented during the judicial process and how these rulings are received at the output side. It assessed the entire value chain of constitutional justice in Zimbabwe by structuring interviews for three distinct groups: the constitution maker, the constitutional interpreter and the constitutional litigator. Through the funding I

received from IRIS, I spent ten weeks in Zimbabwe, attending at the National Archives of Zimbabwe and conducting eleven interviews with the following personnel:

- The Chief Justice of Zimbabwe
- The Deputy Justice of Zimbabwe
- The Judge President of Zimbabwe
- Two Constitutional Court Judges
- The former Minister of Constitutional and Legal Affairs
- A former Co-Chairperson of the Constitutional Select Committee of Parliament and prominent constitutional litigator
- One former member of the Management Committee of the Constitution Making Process and prominent constitutional litigator
- One prominent constitutional litigator
- One constitutional professor and prominent constitutional litigator
- One Zambian constitutional professor

These interviews revealed that the institutional choice for a stand-alone Constitutional Court was informed by Robert Mugabe's poor human record. Its establishment is more akin to the post-World War II popularization of constitutional courts, unlike in Zambia where the same court was more closely tied to the popularity of the South African court. The Zimbabwean court was designed as a popular court or people's court to de-link the judiciary from the powerful executive created by Robert Mugabe. The judicial interviews revealed that this popular authority is only regarded as hortatory and incidental to the judicial power, with judges not viewing themselves as the people's faithful representatives, but only as agents of the law which makes an abstract reference to the people.

It also became clear from interviews this new jurisdiction has its drawbacks due to the alienating effects of specialized jurisdiction. Some constitutional judges feel unfairly removed from general law jurisdiction whilst litigators feel the specialized jurisdiction unduly restricts access to constitutional justice. Overall, I was able to conclude that this new institutional structure has been instrumental in increasing visibility of constitutional

justice and thus bolstered legal mobilization for constitutional implementation. Novel access to televised proceedings has also increased legal literacy and popular rights consciousness. More importantly, judicial self-consciousness appears to now be firmly rooted in the idea of constitutional guardianship – representing a shift from ordinary appellate judging to being constitutional jurists. Thus, in spite of political rights activists' critique of court's cautionary approach when dealing with the most sensitive political matters, the Court has used its unique powers in favour of such vulnerable groups as women and children. The Court has also been instrumental in providing a platform for settlement of presidential election disputes to avoid post-electoral violence.

Overall, my summer research highlights that constitutional courts *can be* a vector for positive change, even in new and developing democracies. Textual sources of legal authority can be a basis for shifting the human rights culture of a society. However, these still require other contextual factors to support such change which ranges from popular rights consciousness to legal mobilization. A constitutional court can thus be an important catalyst for generating the necessary legal mobilization to produce constitutional justice.