Chapter 1: What Constitutes Zimbabwe's Constitutional Law?

Introduction

Zimbabwe's constitutional law is mainly Anglicized. The teaching of constitutional aspects of the pre-colonial states in Zimbabwe is rare. Customary law courts are also listed in the hierarchy of lower courts. While there is living customary law in Zimbabwe the Government of Zimbabwe (GoZ) and civil society organizations have not pushed the codification of customary law in Zimbabwe. Zimbabwe's constitutional law is now taught in primary and secondary schools as part of the heritage-based curriculum. Universities also teach Zimbabwe's constitutional law under various disciplines such as law, political and administrative studies, governance and public management, and so forth. Zimbabwe has a written constitution which envisages a constitutional democracy. Zimbabwe has more than 14million people. A constitution is the supreme law of a country that shows how the public and private institutions relate and how ordinary citizens demand accountability from state institutions and from each other. Ordinary citizens and other persons benefiting from the constitution are protected by various constitutional provisions affecting the state institutions, national and international agencies, and other juristic or artificial persons who bear duties to uphold constitutional rights. The constitution regulates how national laws and regulations or international laws and norms and administrative practices, customs, and conduct are scrutinised by national courts to determine their compatibility with Zimbabwe's law. The courts can also use the constitution to determine the constitutionality of national laws or the status of Zimbabwe's compliance with international laws and standards.

In terms of Zimbabwe as a sovereign state or populated geographical entity, the country is multilingual and has 16 official languages including English and sign language. The origin of Zimbabwean people is not certain. Different competing views exist. Linguistically, it seems incontestable that Zimbabwean languages are linked to the known history of Zimbabwe's pre-colonial states such as Karanga under Chibatamatosi, 11th Century Mapungubhwe, Buchwa (*Guru/Uswa*), Mutapa, Torwa, Rozvi, and Ndebele state. The Karanga state preceded all states. This created a common language called Karanga around the

Great Zimbabwe ruins, Dzimbabwe, from which Zimbabwe has its etymology. Dzimbabwe also refers to various ruins dotted around Zimbabwe. Tradition says the people known as Karanga were descendants of the chief (*ishe*) and his second wife (*mukaranga washe*). The 11th century Mapungubhwe ruins, now part of South Africa, are believed to have been under the control of the Karanga. Various customs (*tsika namagariro*) were used to govern the chieftaincy or precolonial states. The states developed from single hamlets, a homestead (*mana*), a village (*ruwa*), many villages (*dunhu*), chieftaincy (*ushe*), and kingdom (*umambo*). Each king had senators called *zigadzi*, who worked like the current *sadunhu* or headman in chieftaincies with defined hierarchies of village head, headmen, and chiefs.

Close to the Karanga state was a lesser-known state called the Guru/ Uswa/ Vuswa state in Buchwa. When the Karanga Nevanji or Prince Mutota migrated to what became the Torwa and Tavara areas, he carried people who were referred to as Gorekore or mixed peoples, later called Korekore. The Korekore area was to receive derogatory references as *Gandavaroyi* or area where those accused of wizardry and witchcraft were banished so that they could be devoured by marauding elephants that infested the areas. The Karanga in the northern southern parts of the country would identify other tribes from the highveld as people from uzuru (highveld) or Zezuru. They had subdialects in the Shawasha and Budya areas. They would also identify other people from the eastern mountains as Manyika, from the Karanga word nyika, meaning mountain. They Manyika people had their subdialects in the Ungwe areas of Rusape who were called VaWungwe. Meeting people who came Mozambique and greeted each other using, *Ndauwee* greeting, the Karanga called the people the Ndau people.

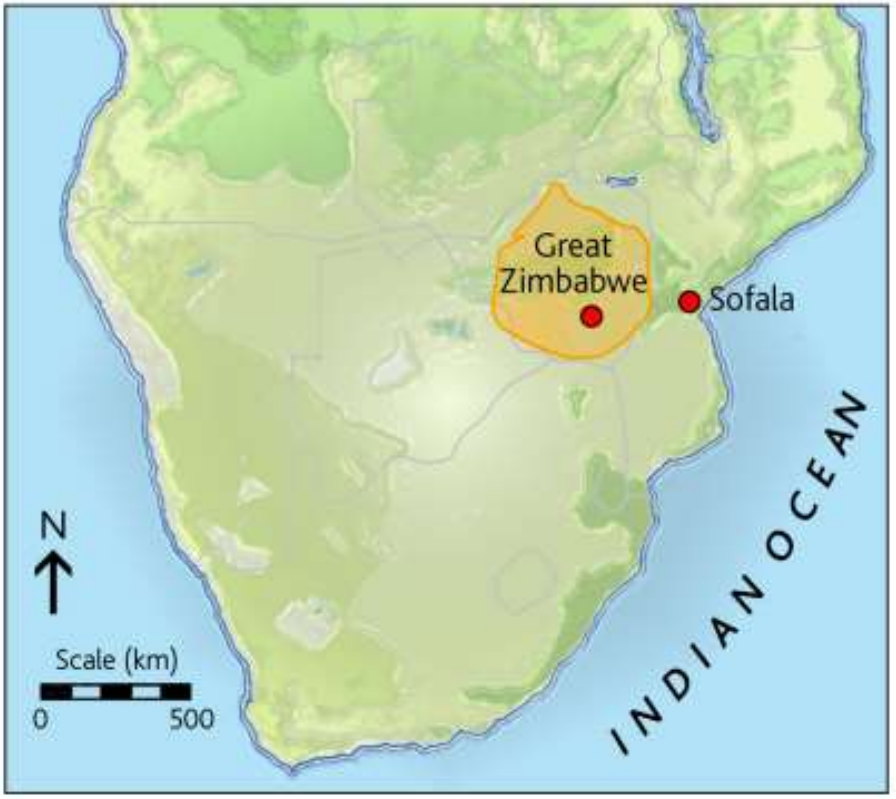
Revisionist theories seem to disassociate Karanga people from the other tribes, arguing that Karanga migration occurred in the later centuries. Some opine that the Great Zimbabwe walls were built by Phoenicians, King Solomon and Queen Sheba, or the Eland people from Mutoko. They deny the existence of Karanga kings like the Great Zimbabwe King Chibatamatosi and his migrant son, Nyatsimba Mutota, as mythical presentations. The etymology of the Karanga and other tribal peoples was also clouded by the usage of the derogatory term Shona to describe the five major dialects of Karanga, Zezuru,

Korekore, Ndau, and Manyika. The term Shona is used to describe how the Ndebele and other Nguni peoples vanquished the tribes above during the Mfecane or time of trouble under Shaka the Zulu. The people were referred as Shona because the Ndebele people mistakenly thought the people were mostly found in the western side of Bulawayo, known as *etshonalonga*. The Ndebele used the name Shona to refer to a people on their way down, bankrupt and of no further account. It was a contemptuous nickname. When raided, the Ndebele would also kill these people's cattle and force them to prepare the intestines in special ways as a sign of their vanquishment.

There were no written constitutional rules then but writings from the Portuguese show that the Karanga state preceded other states such as Munhu/Mwene/ NeMutapa States, Vuswa state, Torwa state, and Rozvi state. The Karanga, Mutapa, and Rozvi states would dominate under kings and vassal chiefs. There were various political rights relating to the trial of subjects such as that a servant had the right to be present during his trial (*muranda nyangonaka haatongerwi mhosva asipo*). Children had the right to be nurtured by the greater society (*mugoni wepwere ndousinayo*). Foreigners had the right to shelter (*mweni haapedzi dura*). Kings and chiefs also derived their power from the people (*ushe idurunhuru* or *ishe vanhu*). There was a form of separation of functions involving the king/ chief, his *dare* (council), warriors, and so forth. The kings or chiefs however could serve as judges and prosecutors, something reflected in ancient kings everywhere, including Rome's Caesar or Caesar's wife. Each kingdom and its vassal chiefs had some constitutional rules relating to politics or exercise of political power.

The state and empire had a duty to protect and promote economic, cultural and social rights through the *Zunde ramambo and gombo* concepts. The *zunde* concept was meant to promote food security and right to social welfare or social security. The *gombo* (virgin) was meant to allow young men of marriageable age to work for virgins and virgin lands. In cases where dominant raiders threatened the economic security of the people, the king warriors would engage in distributive raids that targeted rich people. The raids were known as *guramatanga* or reduce the sizes of rich people's cattle wealth. The cattle would

be used to pay tribute to the Ndebele people who usually carried out their *Dzviti* raids or light wars on the people who came to be called Shona. The etymology of the word Shona is contested and is sometimes linked to Sena people now mostly in Gokwe and San people (not to be confused with the people later identified as Khoisan). There were some collective rights relating to the environment such as the belief that the forest rewards hardworking people (*sango rinopa waneta*) or forests had invisible stewards called *mhondoro* (lions) and angelic beings called *makombwe*. Animal rights were observed through various totems. These beliefs existed many years before environmental rights, green transition or evolution of sustainability concepts. Zimbabwe was a huge mass of land before the advent of colonialism, (see https://www.worldhistory.org/uploads/images/10179.png?v=1726779610-0, accessed 18 February 2025)



TALKING POINT

Some people focus on tribalistic arguments of the origins of Zimbabwe. Most of those tribal arguments have involved Karanga and Zezuru people who had the opportunity of having presidents from Masvingo and Zvimba. Other challenges emanate from arguments raised by people who believed the Ndebele state was the last state and territories must be redrawn. Some people think that tribe must die as was done in Rwanda after the 1994 genocide. Some have even written books questioning if Zimbabweans exist. How useful do you think tribe and tribal differences are in Zimbabwe today? Visit this website, https://www.zim.gov.zw/index.php/en/my-government/provinces/mashonaland-east/9-uncategorised/461-history-of-zimbabwe-2?showall=1, and check what the GoZ thinks about the pre-colonial settings.

Special environmental, animal, territorial, property and indigenous people's rights were entrenched through naming of places. It could be the rush and bustle of river Nyangombe (river of the oxen) near Nyanga; Bindura (a place of trapping of animals); Chinhoyi (land of Zezuru headman Tshinoyi); Chivhu/Chemuvhu (based on acacia robusta plans that grew there and so forth. Harare was Zezuru king Neharare's hill; Runde near Gonarezhou was a river subjected to great floods; Kadoma was a name of a Tonga chief before the present town was named after him. Kariba was kariva or little trap, Karoyi was the property of a muroyi or witch who was drowned in river Karoi. Macheke was a term meaning a place of cultivated fields and gardens. Marondera was land of Marondera, a Zezuru chief. Masvingo originated from the walls of Dzimbabwe guru. Mazowe was the place of elephants, Matendere in Buhera meant enclosures, and Mount Darwin was called Pfura by the Korekore. Shamva was named after shavhi or tsamvi species of wild fig common in that area. Wedza means a place of wealth as it was called by the Mbire people, a section of the Karanga people who settled there and mined iron. They would hide most of the iron and tools in Makwe under Chief Svosve and Mutukwa and Mushwawo. Bembesi was named by Mzilikazi to mean something unpleasant. Bulawayo was founded by Lobengula in 1872 who called it kwaBulawayo, the place of the persecuted man. This angered some regimental forces within the Ndebele who wanted to forget Mfecane under Shaka. In 1816, Shaka the Zulu had named his first city, kwaBulawayo because he had been ill-used by his rivals, 'killed by his enemies,' as the Zulus would say. Dhlo Dhlo was Karanga for zhozho or a head ring, before the place was attacked and ransacked by Zwangendaba's warriors. Figtree was the equivalent of Mutiusinazita or a nameless tree. The belief was that there were gold deposits

under the trees. Gwanda was a name of the grassy shrub growing there. Gweru was the name of a river which flows intermittently, meaning 'dry'.

Ntabazikamambo was the hill of the king Chirisamhuru. Inyathi owes its name because Lobengula was garrisoned by the buffalo regiment to the north of Bulawayo. Lalapanzi is a marshy area where cattle sink to their bellies giving the impression of lying down (*lala panzi or rara pasi*). Limpopo is known by many names. It is called *Vhembe* by the Venda people meaning, 'the gatherer;' *Noka e Udi* by the Tswana, meaning a river of steep banks; *Mete* by the Shanganes of Mozambique, meaning, 'the swallower;' *Ngulukudela* by the Ndebele meaning, 'the river that floods or *iliMphopho* (the river of the waterfall). Matobo was corrupted from amaTobo or bald heads, given by king Mzilikazi who humorously remarked that the stones resembled an assembly of his elders. Ntabazinduna was the hill of the headmen. Nyamandlovu was flesh of the elephant. Zvishavane was derived from shava or red-brown iron oxides common there. Chikore was the place of the little cloud where chief Dondo performed rainmaking ceremonies under a tree where a little cloud would gather after the rituals. Chimanimani comes from Mawhenge mountains, meaning rocky place. Chipinge was king Tshipinga's area. Chirinda was a refugee area under Shangane chief Tshirinda, Honde Valley was Muhonde, or river of euphorbia trees and strange rocks called Masimiki or rocks that stand upright. Mutare was river of ore, Nyanga was the place of the celebrated medium Sanyanga, who held sway over the plateau summit of the mountain named after him. Rusape was a river sparing of its waters, Save was the name of a flower *adenium multiflorum*.

Tanganda means flooding river. Umvumvumvu means river of plenty. Vhumba was mubvumbi or the mountains of drizzle. Binga was the name of thick forests that existed before the Tonga people were relocated there during the construction of the Kariba Dam. Dete was reedy river or *rwizi rweshanga*. Hwange was Nambya king Hwange Rusumbani's place, with Nambya as a section of the Rozvi people. Kazungula was named after the tree of the species kigelia pinnata found there. Pandamatenga was a place where Mutenga of the Mlilima people created hunting camps between Botswana and Zimbabwe using groves of mpanda or rain trees (*lonchocarpus capassa*) near Matetsi river. Victoria Falls was Tonga for Mosi o a Tunya or smoke that thunders or rises.

When the Ndebele came, they called it *aManza Thunqayo* (water that rises like smoke). Zambezi was called by the Karanga and Tonga *Sambambezi* or *Shambambizi* river. The Mozambicans called it Kwamo or river of great floods. All these areas were considered sacred and had some 'constitutional' values.

This even paved way for the colonial government and other development practitioners to associate themselves with sacred places such as Concession, Beitbridge, Birchenough Bridge, Chegutu (biblical Ophir place), Nalatale (walls in Ndebele), Mbalambala (kudu area), Plumtree or marula area, West Nicholson, Kwekwe, Cyrene Mission, Mount Hampden (Musitwe mountain meaning the immovable), Mvuma, Norton, Providential Pass near Masvingo, Christmas Pass, Mermaids Pool, Morgenster Mission, Mount Darwin (Biblical Ophir place) and so forth.

Throughout Zimbabwe's history, religion has been closely connected with chiefs, kings, queens, and royal courts. Kings were believed to be representatives of the Supreme Being (Mwari/Mlimo). They were born into royalty. They ruled with spirit mediums called mhondoro and angelic indwelt beings called Makombwe. Early Christians and Muslims also visited Zimbabwe. Religion today is taught in four major religions: Christianity, Judaism, Islam, and Indigenous Religion. Family life in Karanga used to consist of both matriarchal and patriarchal aspects. The matriarchy, *tete vakuru/bambomukadzi*, became the *tateguru*. Later *tateguru* had a masculine description and children assumed patrilineal names and totems. The relationships within the family were mainly arranged under the extended family system. Siblings, Piblings, and niblings were one family. There was no strict emphasis between immediate family and extended relatives. Today, the family is more nuclear, and sibling rivalry abounds. Festivals that had the status of constitutional values included love festivals (*kupanana nduma*), rainy festivals (*mikwerera*), sacred resting days (*zvisi*).

With the language evolution theory which continued under modern Rhodesia that was formalized in 1890, the Shona and Ndebele languages became the dominant languages under the British South Africa Company, settler rule, and after independence. After independence, some revisionist historians began to craft theories that locate Guru/Uswa as some place in Tanzania under, '*we all*

came from Guruuswa or *tose takabva Guruuswa*' mantra. This theory seems to have been popularized by the late Aeneas Chigwedere who began as a school headmaster at Goromonzi and rose to be a brilliant educator and statesman.

Nobody, including revisionist historians and constitutional historians, cared to go beyond the parabola of ancient civilization that is well-documented, including how the Paleolithic era had Africa and other continents joined. Modern Tunisia and Italy were joined by a tongue of land passing through Malta. Europe and North Africa were once joined as one landmass. Somalia and races in the Berber and Alpine Mediterranean were joined. The bridge between Tunisia and Italy sank leaving Malta and the Nile River to assume their current states. People moved to different areas including the San, Sena or Shona. Karanga and Kalanga people were not separated until when the Ndebele brought classes such as *Zanzi (upper Khumalo class)*, *Enhla* 8middle incorporated Nguni-speaking and elite Rozvi) and *Holi/ abahole (lower class citizens)*. Some powerful Karanga people intermarried with the Nguni-speaking people. Venda and Shona shared the same phonemic and phonological attributes and so forth. Whatever the origin of Zimbabwean people, Zimbabwean languages were to be described under some Bantu/ *vanhu/ abantu* connection. The history of Zimbabwean languages, as written language, is relatively young, except for English.

Indigenous languages and the constitution	**Currently left out or removed from mother language**
Ndau	Was formerly part of the five branches of Shona language together with Karanga, Korekore, Zezuru, Manyika. Now Ndau is a standalone official language.
Sena and San	Not officially recognised
Karanga	Not recognised although it shares a lot with Ndau, Kalanga and Xhosa
Korekore	Not included
Zezuru	Not included
Manyika	Not included
Maungwe, Shawasha, Chitoko, ChiGovera etc	Not included

The movement of Cecil John Rhodes to Durban in 1870 had a huge impact in shaping Southern African states into modern countries. Rhodes was the fifth

son of an Anglican clergyman who lived in Stortford, England. Rhodes developed tuberculosis and emigrated to South Africa to recuperate at the farm of his brother Herbert in Natal. He later abandoned the farm and joined the gold rush in Griqualand West. In 1880, Rhodes formed the De Beers Mining Company in South Africa. He bought his competitor, Barney Barnato out in 1888, with a cheque of £5 338 650. He also founded the Gold Fields of South Africa Company in 1887. He began to expand his gold exploration to Zimbabwe using the Rudd Concession and Moffat Treaties. Zimbabwe was now exposed to modern sources of hard international law.

In 1890, Zimbabwe was subjugated and named Rhodesia. In 1890, Rhodes was the Prime Minister of the Cape Colony. By 1893, Rhodes' British South Africa Company (BSAC)was a major force in the economy of Rhodesia despite the outbreak of the *Umvukela* War with the Ndebele people. He attempted to overthrow President Kruger by supporting the Jameson Raid from Zimbabwe into the Transvaal. The Jameson Raid was defeated and Rhodes resigned as the Cape Premier in 1896. His resignation was met with the outbreak of the First Chimurenga or Shona Uprising in Rhodesia. The Shona and Ndebele people were to be vanquished.

Zimbabwe's Modern Constitutional Law

Modern Zimbabwean constitutional law is a branch of public law concerned with the relationship between the State and its citizens. It is also the branch of law that deals with governance of a state and its people. Under Zimbabwe's constitutional democracy, constitutional law theories are built around the supremacy of the constitution. The written constitution is contrasted with other forms of constitutions (written/unwritten, rigid/flexible, military/civilian, unitary/ parliamentary, Republican/ mixed and so on). Zimbabwe's 2013 constitution was autochthonous or homegrown by native Zimbabweans. Zimbabwe's constitutional identity, stability and structure owe a lot to local legal factors. This position is enshrined in the constitutional provisions that obligate international laws to be consistent with Zimbabwe's constitution and laws.

The study of constitutional law follows the country's constitutional identity model. Zimbabwe's 2013 2013 replaced the Lancaster House Conference/

ceasefire Constitution as was shown above.[1] Constitutional law deals with how the country's constitutional development follows legal and political principles espoused in the constitution. It is critical that constitutional issues be kept separate from political decisions, and that this be done in accordance with a country's constitutional model.[2] Courts can declare political and legal traditions that are inconsistent with the constitution to be invalid or unconstitutional.

Political issues or controversies may be prevalent in a constitution that envisions an '*elective dictatorship*' in which power is concentrated in one arm of the state. This position can be found in unwritten constitutions such as the United Kingdom, where the Prime Minister wields political power.[3] In Zimbabwe the executive President wields monstrous political power as head of State, government, commander–in-chief of the Zimbabwe Defence Forces and so forth.[3] He also chairs the National Security Council under the National Security Council Act. The exist of the council also presumes the existence of a secured National Security Council Act. This adds to the executive excesses. Most constitutions also lack accountability mechanisms for monitoring ministerial performance or human rights violations by state officials. As a result, ministers who also serve as part of the executive branch of government base their evaluations on legislative hyperactivity rather than effective results.[4] The executive branch of Zimbabwe combines political (President, Vice President and Cabinet Ministers) and legal institutions (the Attorney General and important institutions that fall under the A.G.). This executive model reflects what is called the executive power excesses. While the constitution envisages the existence of an independent oversight mechanism to make security institutions accountable, the composition of those appointed by the President also leaves a lot to be desired.

Zimbabwe has a constitutional presidential model in which political actors outside of Parliament can wield political and legal power. The Cabinet, for

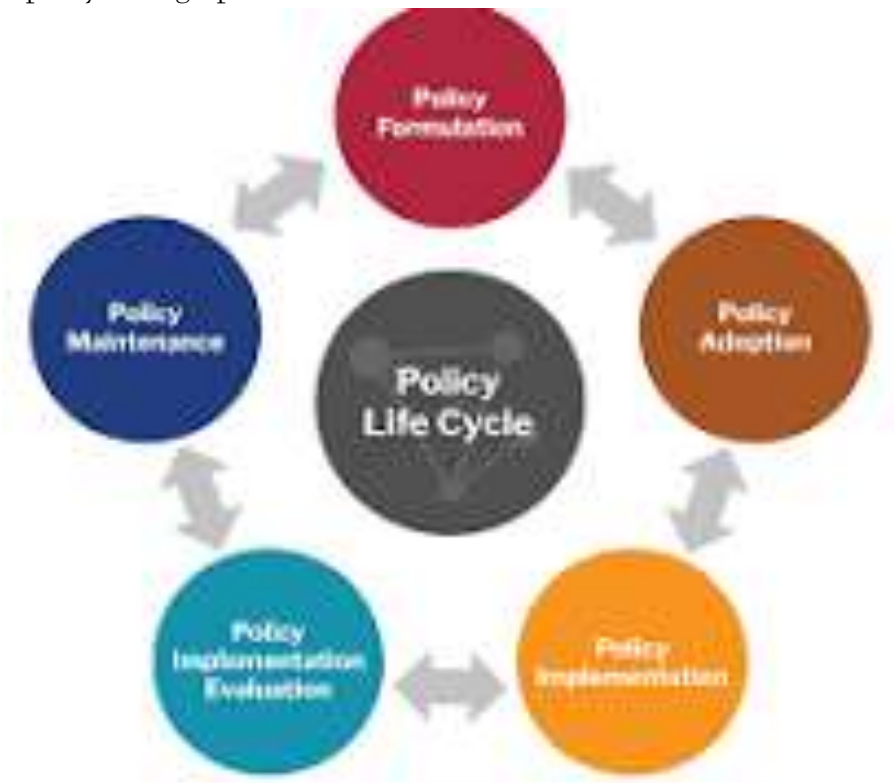
[1] See Sharon Hofisi and Eldered Masunungure, Rule of Law or Rule by Law, Journal of *Good Governance in Africa*, 2020.

[2] See Sir John Baker QC, 'The Unwritten Constitution of the United Kingdom,' (2013) 15 *Ecc LJ* 4–27, 6. [3] Baker (n 2) 6.

[3] See section 89 of the Constitution of Zimbabwe where the president has many offices; section 116-117 where he also serves as part of the Legislature and issues relating to his appointment of judges and commissioners of independent institutions.

[4] Baker (n 2) 8.

instance, initiates the legislative agenda long before Parliament decides to begin the law-making processes. Ministers discuss and advice the President on isues that are turned from policy to law. The policy cycle is all about who owns the policy and legal processes as shown below.



A SIMPLIFIED VIEW OF THE POLICY PROCESS

Constitutionally, the Zimbabwean Cabinet has evolved into a legal-political institution. This is because when included in constitutional provisions or involved in law reform discussions, a cabinet transforms into a legal-political institution. It gains formal recognition and authority within the constitutional framework, shaping the executive branch's role in legislative governance. This evolution signifies a structured and constitutionally sanctioned mechanism of decision-making, policy formulation, and law implementation within the government. To this extent, political issues may thus have no legal solutions unless the written constitution contains provisions limiting political powers,

such as founding values on good governance;[5] civil and political rights; or generally an expansive Bill of rights.

A written constitution serves as a model for governance by providing a foundational document or blueprint that outlines the structure of government, delineates powers, and guarantees justiciable fundamental rights. It has obvious advantages when compared to partially written or unwritten constitutions in that there is clarity of structure which helps in preventing the abuse of power by fostering a stable political environment. It also serves as a legal foundation for the state, providing the basis for all regulations and laws. It protects human rights and freedoms against potential government overreach.

A written constitution also entrenches rights based on the idea of entrenchment of rights that refers to the process of making certain provisions, especially fundamental rights, more difficult to amend. This prevents their arbitrary amendment. It also enhances the justiciability of rights by providing a clear legal basis for citizens to challenge violations of their rights in courts of law. Judges can refer to constitutional provisions to adjudicate cases involving alleged infringements on fundamental rights. This ultimately establishes the rule of law, ensuring that all individuals, including government officials, are subject to and accountable under the law. This fosters a constitutional society based on legal principles rather than arbitrary decisions or what Thomas Hobbes called the violent human nature.

The doctrines of entrenchment and justiciability that empower judges to review instances where constitutional rights and freedoms are violated, explain how such rights and freedoms are guaranteed. Factors to be considered in determining the justiciability of rights include the existence of an ordinary statute to give content to the constitutional right, the frame and content of the right, the forum where remedies can be obtained, and the academic or hypothetical nature or otherwise of the relief. The logical conclusion is that non-justiciable rights are not constitutional rights but can be protected using directive principles in the constitution. It has been stated that the Zimbabwean Constitution contains a supremacy clause that places a high

[5] See for instance the principles such as responsiveness, accountability, transparency and justice in section 3 (2) (g) of the Constitution of Zimbabwe 2013 ('the constitution); principles of public administration in section 194ff of the Constitution or the Bill of Rights in Chapter 4 of the constitution from sections 44ff.

value on the relationship between state institutions and between individuals and the State.[6] Any law, custom, practice or conduct that contradicts the Constitution is unconstitutional to the extent of its inconsistency.[7]

The relationship between constitutional law and politics is rooted in the concept of the rule of law that is principle of institutional morality characterized by two central characteristics: legal certainty and procedural fairness.[8] The definition of the rule of law as legal certainty is broad, and it includes how individuals can seek individual redress and how public officials and private individuals must be held accountable to one another through clear rules.[9] This is linked to the need for the virtues of rules to include legality, certainty, congruence to purpose, and accountability (vertical, diagonal and horizontal).[10] This also speaks to the need to limit discretion to achieve the interests of justice.[11] For instance, any form of discretion can be checked in a three-pronged fashion:

> First is the '*confining*' of discretion through rules, akin to legalisation and wherever possible discretion should be shaved down to the minimum compatible with the task to be performed. Discretion can also be controlled through '*structuring*' through open procedures such as rule-making procedures which administrative agencies must comply with before issuing their regulations. Third, there is '*checking*' of discretion by means of a second look internally and not necessarily through the courts.[12]

The first pillar of confining discretion obligates rule-makers to act objectively so that rules are predictable and are applied consistently. Structuring discretion obligates rule makers to act transparently and to promote participatory democratic governance. This could be achieved through consultative forums, oversight institutions and other accountability mechanisms contemplated by the constitution. Checking discretion involves

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[6] See section 2 of the Constitution.

[7] Section 2 of the Constitution.

[8] Jeffrey Jowell, 'The Rule of Law Today,' in Jeffrey Jowell & Dawn Oliver, *The Changing Constitution* (2000, Oxford University Press) 3.

[9] Jowell (n 8) 8.

[10] Jowell (n 8) 9.

[11] Ibid.

[12] See K.C. Davis, *Discretionary Justice* (1969) cited in Jowell (n 8) 9.

strong oversight mechanisms such as internal audits of skills and practices, supervisory evaluations, and internal checklists. For Zimbabwe, the rule of law as procedural fairness includes procedural protection that is also known as due process or natural justice. Natural justice is codified in administrative law under the Administrative Justice Act (Chapter 10: 28) and has been made justiciable in sections 68 and 69 of the Constitution. The right to be heard for instance has many facets under section 69 of the Constitution. These include the prohibition on condemning someone without giving them the opportunity to be heard or influence the outcome of the decision against him.[13] According to Jeffrey Jowell, such safeguards allow those affected to argue their case and, where a reasoned decision is required, to give formal and institutional expression to the influence of reasoned argument in human affairs through the process of justification.[14]

Albert Venn Dicey defined the rule of law as the rule or supremacy of the law.[15]Albert V. Dicey defined the rule of law in three ways. First, it implies that individuals should not be subjected to wide discretionary powers. As a result, Dicey claims:

> 'No one is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraints.'[17]

This interpretation of the rule of law has been interpreted as meaning that broad official powers are arbitrary powers which no one should be forced to submit.[16] As a result, 'Whenever there is a discretion there is room for arbitrariness,' and 'discretionary powers should be excluded from regular law.'[17] This approach is critical in constitutional interpretation, particularly when judges take judicial notice of certain issues during court proceedings or create arbitrary practice directives, notes and so forth. For example, some instructions concerning the setting down of election and constitutional cases are simply onerous and endanger democratic litigation in Zimbabwe. Litigants

[13] See also Jowell (n 8) 13.

[14] Ibid basing on Lon Fuller's understanding that the publication of decisions provides people with the opportunity to criticize arbitrary decisions and goes a long way in achieving accountability (and the rule of law).

[15] Albert V. Dicey, *The Law of the Constitution*, (1885, ed. by E.C.S Wade 1959), 189.

[16] Jowell (n 8) 5.

[17] Dicey (n 15) 188, cited in Jowell ibid.

should beg the courts of law to avoid arbitrary reliance on judicial discretion, particularly when judges refuse to consider the merits of constitutional matters by relying on technical issues or doctrines such as constitutional avoidance.[18]

Second, the rule of law entails the equal submission of all classes to a single law administered by the ordinary courts. Third, Dicey defined the rule of law as the absence of a separate written constitutional code and the creation of constitutional law as the result of the judicial decisions determining the rights of private persons in specific cases brought before the courts.[19] The third meaning is specifically used to distinguish the rule of law as it applies to Britain that has a partially written or unwritten Constitution, and this has largely contributed to Dicey's conceptualisation of the rule of law being heavily criticised.[20] W.A. Robson contended that Dicey misinterpreted French law because the droit administrative was not intended to exempt public officials from the rigors of private law, as Dicey claimed, but rather to allow public administration experts to determine the extent of official liability.[21] We have purposefully chosen to explain the rule of law because Zimbabwe's constitutionalism has largely been built largely on the contestability of this notion of procedural fairness, particularly from the early 2000s to date.[22] Furthermore, the teaching of constitutional law in Zimbabwe has largely relied on the concepts of Dicey's version of the rule of law without questioning its applicability to Zimbabwe's constitutional democracy.

The Constitution has clauses that make the people of Zimbabwe the repositories of state and governmental authority.[23] The Constitution's main preamble is enmeshed in the rule of law that limits the powers required in a

[18] Zimbabwean judges have often been crafting practice directives that are arbitrary especially when it comes to directives that bear on election matters. Often when judges raise the issue of 'taking judicial notice of something, they descend into the arena of the litigants and abandon the role of the court and case manager even in instances that depart from a consideration of the rule of law as reason, consent or constitutionalism. Sometimes they use the aspect of judicial notice to harass litigants' lawyers or justify why judicial restraint is to be applied in the case.

[19] Dicey (n 15) 195.

[20] See for instance W.A Robson, *Justice and Administrative Law* (1928, 2nd edition 1947) 343, cited in Jowell (n 9) 5.

[21] Ibid.

[22] For more issues see cases such as *Commercial Farmers Union and Ors v The Minister of Lands and Rural Resettlement and Ors* Judgment No. SC 31/10.

[23] See the main preamble under the '*We the People of Zimbabwe*' clause.

constitutional democracy. It is a type of normative consent based on the idea that the rule of law envisaged a situation in which the governance of a polity is contingent on the consent of the governed.[24] The Constitution also establishes three branches of government: the executive, legislature and judiciary. The concepts of separation of powers, separation of functions and separation of parties connect these branches. Politicians elected to the legislature for example, support their political party's legal interests even though they are technically considered independent. In parliament, political parties have chief whips and leaders. Some judges are also perceived to be appointed primarily based on their political party affiliations, resulting in a '*judge for the system*' analogy. While separation of powers is a constitutional doctrine in Zimbabwe, the executive's excess powers give the impression that there is separation of functions rather than powers. The other arms or branches are determined by how executive power is exercised. In some cases, the conflation of political parties, security institutions and government institutions complicate matters further. Such conflation refers to the intertwining or improper blending of these distinct entities, often leading to challenges in maintaining a healthy separation of powers and preserving democratic principles. This gives the impression that the branches' separate functions are nothing more than a division of political parties or political party interests. Further, there is partisan influence on security and government, politicization of institutions, abuse of state power, erosion of checks and balances, undermining of the rule of law, and presence of corruption risks.

When considering conflation of state institutions, careful considerations of constitutional and political issues is required. The assumption is that judges and lawyers who represent litigants must assist the Zimbabwean society in devising methods to separate constitutional and political questions. We should note right away that constitutional law is broad. It may address issues such as:

- the amendment process.
- the relationship between central government and devolved provinces.
- scope of central and devolved powers.
- public administration, national institutions and others.

[24] See T.R.S Allan, 'The Rule of Law as the Rule of Reason, Consent and Constitutionalism' (1999) 115 *LQR* 221.

- Independent constitutional commissions and other national institutions. Because the book focuses on judicial functions related to constitutional interpretation, it is also informed by the concept of judicial review.

Judicial review is important in constitutional interpretation because it is a constitutional doctrine that empowers courts (particularly superior courts) to declare unconstitutional executive and legislative acts as such.[25] The term superior is ambiguous because magistrates' courts review cases from traditional courts and so on. The judicial review doctrine is important for litigants who approach courts of law in written constitutional systems. In the absence of a written constitution, judges must rely on common law, soft laws or constitutional conventions.[26] The doctrine of judicial review is important in determining how committed a country's judges are to the constitutional frameworks that govern judicial independence and accountability. Judges must strive to be impartial arbiters in dealing with all litigants who approach them because they serve both as court managers and case managers. It has been observed that judicial impartiality means:

> 'To do right, that is to decide cases impartially, and in accordance with the law, judges must be independent to all litigants and also of all who might directly or indirectly seek to influence the outcome of a legal action, including their fellow judges who are not sitting on the particular case.'[27]

The preceding seminal remarks demonstrate that judges must be prepared to demonstrate direct and indirect impediments to the exercise of their judicial functions. In a country like Zimbabwe, where there has been concern about judicial packing by the executive, judges must work to assuage litigants' fears by dealing with constitutional issues on the merits. They must also not solely rely on constitutional avoidance doctrines in politically sensitive matters while favoring judicial activism in others. Furthermore, Lord Hodges' remarks elsewhere necessitate the application of the principle of judicial comity as

[25] The leading case in this regard is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[26] See A. Le Sueur, 'Parliamentary accountability and the Judicial System,' in N Bamforth & P Leylands (Eds) *Accountability in the Contemporary Constitution* (Oxford University Press, 2013).

[27] Lord Hodge, 'Upholding the Rule of Law: How we preserve Judicial Independence in the United Kingdom? (*Lincoln's Inn Denning Society*, 2016).

contemplated by the Constitution, particularly in relation to how judges are permitted to regulate their processes.[28]

Using Hodge's criteria, judicial independence should include inter alia:

> 'Clear constitutional commitments to the independence of the judiciary and the rule of law; exclusion or at the very least, minimization of political considerations as an influence on the appointment and promotion of judges; adequate finance; personal immunity from suit from acts and omissions related to the exercise of judicial functions; security of tenure; separation of powers; accountability; role recognition by judges; performance and moral authority; (and) maintaining political and public understanding and support.'

The logical corollary to this is that litigants' lawyers must also point out instances where they believe any of the pillars of constitutional law are not upheld.[29]These principles must be read in conjunction with the Constitution's principles on judicial independence (including personal, institutional, administrative, interpretive, managerial, leadership and financial independence). As a result, judicial independence is not limited to a single country but can and has occurred in a variety of constitutional systems. Judicial independence can be defined by internal or institutional laws in a specific jurisdiction or can be derived from principles from mature or developed constitutional systems and institutions that seek to promote the independence of judges.

The Essential Features of the Constitution of Zimbabwe

We have seen that Zimbabwe has essential features alluded to above. We may spend some discussion on founding values as they focus on the country's constitutional democracy, whose tenets are listed in the Founding values provisions.

The Founding Values of Democracy

The rule of law, constitutional supremacy; vested rights; good governance principles; separation of powers and other values are enshrined in the Constitution.[30] In some sections above, we discussed the concept of the rule of

[28] See section 176 of the Constitution.

[29] Further guidance can also be obtained from the International Association of Judicial Independence and World Peace, *Mount Scopus International Standards of Judicial Independence* (19 March 2008).

[30] Section 3 of the Constitution.

law in section 1 above. Perhaps a distinction should be made between the rule of law rule-book conception and rights conception of the rule of law. This is important in assessing judicial commitment to rights constitutionalism in Zimbabwe. Ronald Dworkin presents these two pillars as opposing ideals. The rule-book conceptualisation of the rule of law, for example, is based on the premise that:

> 'The power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all.'[31]

Using Dworkin's definition of the rule of law, judges are obligated to follow the rule-book conceptualisation of the rule of law by imposing such a rule in ordinary adjudication.[32] The judges can do so by interpreting what rules' makers intended, also known as legislative intent.[33]This differs from Dicey's approach to limiting or constraining judicial discretion if it is found to be arbitrary.[34] Many Zimbabwean cases under the Lancaster House Constitution emphasised this strand of the rule of law. The teaching of the rule of law in undergraduate legal studies also emphasised this strand because students were taught constitutional law as an introductory course or module. The use of this approach resulted in judges taking a haphazard approach to determining the constitutionality of statutes pertaining to contentious programs such as the land reform.[35]It also resulted in disputes over the legitimacy of judgments from regional courts such as the now defunct Southern Africa Development Community (SADC) Tribunal. Following judgments that denied litigants who had succeeded in challenging Zimbabwe's arbitrary land reform laws, the Zimbabwean judges refuse to give litigants the opportunity to enforce the judgments, citing policy considerations.

Ronald Dworkin's rights-based approach to the rule of law has not been widely adopted in Zimbabwe but took shape under democratic experimentalism after the promulgation of the 2013 Constitution. Dworkin's approach to rights constitutionalism is because Dworkin also influenced Britain's Bill of Rights

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[31] Ronald M. Dworkin, *A Matter of Principle* (1985, Oxford University Press 5) 11.

[32] See Brian Jansen, 'Dworkin's Rights Conception of the Rule of Law in Criminal Law: Should Criminal Law be Extensively Interpreted to Protect Victims' Rights? *Netherlands Journal of Legal Philosophy*, 2, (2017):160-176.

[33] Ibid.

[34] See Dicey (n 15) above.

[35] See the *CFU* case (n 22) and cases cited in that case.

jurisprudence. The rights conceptualisation compares with Dicey's procedural fairness and legal certainty.[36]It is a step above the rule-book approach that risks being dismissed in some situations as a mere democratic tenet whose pillars may not be applicable to written constitutions.[37]This approach simply assumes that:

> 'Citizens have moral rights and duties with respect to one another, and political rights against the state. It insists that these moral and political rights be recognised in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable.'[38]

This compares with the Bill of Rights in Zimbabwe that now imposes duties on state functionaries, state institutions and agencies, and natural and juristic persons,[39] and imposes obligations on right holders.[40] For Zimbabwe, the concepts of rights have moved beyond moral obligations. These duties have been codified in ordinary statutes and made legally enforceable or justiciable by the Constitution. For example, codified rules of natural justice relating to the right to be heard experienced a seismic shift in *U-Tow Trailers V City of Harare and Anor* 2009 (2) ZLR 259 (H) 267 F-G; 268 A-B where it was held that:

> "That the promulgation of the Act brings in an era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law. The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s 3 (3) of the Act, apply. Because of the foregoing, I find that the decision by the first respondent summarily to terminate the lease agreement between itself and the applicant was an administrative action carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Act applies to that decision. The Act provides that an administrative authority which has the responsibility or power to take any administrative action which may adversely affect a right, interest or legitimate expectation of any person shall, inter alia, act reasonably and in a fair manner. The Act proceeds to define what a fair manner, for the purposes of the Act, entails and this includes adequate notice of the nature and

[36] See Dicey (n 15) above.

[37] See in detail the case of *in re Chinamasa* 2000 (12) BCLR 1294 (ZS) which dealt with vicious criticism of a High Court decision relating to the conviction and sentence of United States nationals for weapon possession.

[38] Dworkin (n 31) 11.

[39] Section 44 of the Constitution.

[40] Section 47 of the Constitution for instance provides for a presumption on the existence of other people's rights when interpreting the Bill of Rights. See also section 59 of the Constitution which obligates those exercising their freedom to petition and demonstrate to do so peacefully.

> purpose of the proposed action and a reasonable opportunity to make adequate representations, in my view, an embodiment of the *audi alteram partem rule*."[41]

Following the passage of the Administrative Justice Act,[42] natural justice principles were transformed from a matter of administrative discretion to a matter of legal requirement. They are now enshrined and justiciable as constitutional rights to administrative justice.[43]Using the rule of law or other values listed in section 3 or section 194ff of the Constitution, judges are obligated to ensure that their approach to constitutional interpretation in relation to the Bill of Rights is guided by the founding values of the constitution and other values contained in other constitutional provisions.[44] The core national values that are used to democratize a country are typically referred to as founding values. These principles and values are linked to the type of democracy practiced by a particular country. Zimbabwe practices constitutional democracy, with many modifications.[45] Zimbabwe has had various forms of democracy since it became a colony of Britain in 1896. It also benefits from borrowed or cross-border constitutionalism from common law jurisdictions with written constitutions, such as the USA, whose Constitution declares the people to be the source of sovereign power in the country. Zimbabwe's constitution also borrows from Canada, Kenya, and South Africa's constitutions in many ways.

National Objectives

The Constitution includes objectives that serve as a priority list for Zimbabweans to follow. Some critical issues, such as social security, are listed in the national objectives but must be made justiciable or legally binding under the Bill of Rights. The rights to social security and development must be included in the Bill of Rights for courts of law can properly protect, promote, respect and fulfil them as justiciable rights. The national objectives are

[41] See also *Danai Mabutho v Women University in Africa and Anor* HH 698-15 where this view was reiterated.

[42] Chapter 10: 28.

[43] See section 68 and 69 of the Constitution.

[44] Section 46 of the Constitution.

[45] See Sharon Hofisi, 'The Mosaic of our Democracy,' (11 April 2018, The Herald) ‹ https://www.herald.co.zw/the-mosaic-of-our-democracy/› accessed 18 November 2022; see also Sharon Hofisi, 'A Relational Approach to Supporting Democracy in Zimbabwe,' (21 March 2018, The Herald)‹ https://www.herald.co.zw/a-relational-approach-to-supporting-democracy-in-zim/› accessed 18 November 2022.

analogous to directive principles if they are used as tools for constitutional interpretation. As such, they are employed to comprehend the constitutional dimensions of state policy and to serve as normative starting points for such policy. National objectives, when used to protect constitutional rights, serve as supplemental information for the content of justiciable rights. This is particularly the situation in social, economic and cultural rights which require judges to develop standards of review for such rights considering state policy, laws and other measures. They are also critical in determining the government's commitment to democratic ideals and to the democratization of the state.

They also assist the international community in determining whether a country is following international human rights instruments, standards, and norms. Rights included in the national objectives, such as social security, are not justiciable and rely on the state's willingness to amend the Bill of Rights through a referendum to be made justiciable. The right to social security is no longer a question of social welfare but a matter of development. This is due to Zimbabwe's adoption of a developmental social pillar in all aspects of work, including the transformation of institutions like social welfare into social development. This highlights the importance of Zimbabwe making the right to social security and legal aid justiciable. Alternatively, the African human rights system can be used to translate the principles of social security into a justiciable right linked to the right to development protected in Article 22 of the African Charter on the Human and Peoples' Rights that focuses on the need to improve the well-being of humans and peoples of Africa. Article 22 of the ACHR provides that:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development

The primary goal of the right to development is to improve the well-being; one can never properly develop if a right is not asserted in a way that constitutionally obligates a duty holder to respect, protect, promote, fulfil or

uphold the right. Many of the critical issues identified in the national objectives should have been included in the Bill of Rights. Furthermore, when Zimbabwe amended its Constitution, a referendum should have been held to determine many aspects of the Bill of Rights that need to be amended to protect many categories of rights. This is because Zimbabwe went a long way to include other categories of rights in the Bill of Rights, besides civil and political rights.

The Bill of Rights

A justiciable Bill or Declaration of Rights contains a list of constitutional rights that are enforceable under a written or unwritten Constitution. Countries that lack fully written Constitutions, such as the United Kingdom have Bills of Rights derived from various statutes including the Human Rights Act. Regional systems and courts may have an impact on how constitutional rights are defined terminologically. For example, when discussing the protection of rights European citizens under the European Convention on Human Rights (ECHR), the ECHR, refers to the rights as fundamental rights. The term '*human rights*' is used by the European Court of Human Rights to refer to the rights of people living outside Europe or who are non-Europeans. The terms '*human and peoples*' rights' are used in the African human rights system to create duties and rights to be upheld by states and their citizens. The African human rights system is thus unique in because the State and its citizens are duty holders. Historically, the French Revolution inspired the Declaration of the Rights of Man (gender-inclusive). Zimbabwe's Constitution refers to rights and freedoms.

The Bill of Rights addresses both substantive and procedural issues concerning justiciability of constitutional rights. In many ways, the Zimbabwe's Declaration of Rights in Zimbabwe is expansive and progressive. The Bill of rights has four duties listed in section 44 of the constitution which are to protect, promote, fulfil and respect human rights.

44 Duty to respect fundamental human rights and freedoms

The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter

The duties to uphold human rights and freedoms apply to both the state and private persons (natural and artificial or legal persons).

45 Application of Chapter 4
(1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
(2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
(3) Juristic persons and natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them

Parliament has the primary responsibility for protecting through positively legislating for new rights and negatively refraining from legislating against existing rights. Zimbabweans must not be complacent about the extent of their fundamental rights and freedoms. They should use the presumption in favour of human rights to assess bills which parliament introduces. Responsible Portfolio Committees must monitor and report on the impact of bills on rights, including monitoring delegated legislation for infringements of rights under the constitution and regional or international human rights instruments. Political parties in Zimbabwe can also improve the culture of interaction and fight polarization so that cross-party cooperation can be enhanced. Courts and litigants should move towards creating protection agencies within state institutions. Currently the individual complaints mechanism can be utilised in this regard.

Rights holders should also respect the presumption not to preclude other people's rights which demonstrates that the Constitution assumes the existence of other people's rights.[46]

47 Chapter 4 does not preclude existence of other rights
This Chapter does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution.

Thus, the enjoyment of human rights is contingent on this presumption. This presumption makes justiciable all the other constitutionally protected presumptions. Lawyers were introduced to some presumptions in statutory

[46] Section 47 of the Constitution.

interpretation. The presumption of retroactivity shows that constitutional amendments must not apply retroactively unless explicitly indicate so that there is stability in legal rights and duties. The presumption of constitutionality shows that the legislature's laws are presumed constitutional unless proven otherwise. The victim has reverse onus to justify otherwise. In India, the case of *Keshavananda Bharati v State of Kerala* (1973) Supp. (1) S.C.R 1 upheld this position but went further to develop the basic structure doctrine of protecting fundamental rights following a constitutional amendment. The presumption against implied repeal protects constitutional continuity because the provisions of the constitution are presumed not to be repealed by later legislation unless expressly stated, see *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (UK) on the position that laws do not automatically override earlier ones unless explicitly stated. The presumption in favour of the exclusiveness of fundamental rights shows that multiple interpretations must be cured by upholding fundamental rights to foster a sustainable culture of human rights, see *Maneka Gandhi v Union of India* AIR (1978) SC 597 (India). The presumption against the restriction of common law rights shows that interpretation should not restrict common law rights unless clearly intended by the laws so that common law traditions are protected within constitutional frameworks, see *R v Secretary of State for the Home Department, ex parte Simms* 1999] UKHL 33 (UK) which held that fundamental rights must not be curtailed by ambiguous statutory wording because unqualified meaning may have passed unnoticed in the democratic process. The presumption of legislative intent to comply with international law shows that constitutions are interpreted in harmony with international law. International law is considered to be real law and states should comply with global norms they are a party to, see *Minister of Home Affairs v Fisher* [1979] 3 ALL ER 21 [1979] 2 WLR 889 which took an interpretation favouring international treaties using the doctrine of construction of the constitution.

The presumption against excessive delegation or the non-delegation doctrine assumes that the legislature does not delegate excessive power to the executive so that checks and balances under the separation of powers doctrine are maintained, *Whitman v American Trucking Associations* 531 U.S 457 (2001). The case showed that while Congress could give agencies some discretion in setting regulations, they may not consider financial effects when making

environmental regulations. Most presumptions are framed from the constitutional values in section 3 of the Constitution. There is a presumption for instance, that legislation is not intended to interfere with vested property rights and in administrative law, that it is not intended to oust the jurisdiction of the courts, see, *Anisminic Ltd v Foreign Compensation Commission* [1984]1 NZLR 116 at 121. Courts and litigants who shun presumptions must emphasise on the argument that presumptions themselves are not common law rights but only give limited protection to people's legitimate expectations. They however protect common law rights through presumptions of political communication jurisprudence, see *Australian Capital Television Pty Ltd v The Commonwealth* (1992) HCA 45.

Presumption	**Case**	**Main issues**
Presumption against retroactivity	*Mawarire v Mugabe & Ors*	The order sought by the applicant to compel President Mugabe to proclaim election dates sought to take effect before the end of Parliament's term. Implicitly, the Constitutional Court upheld the presumption against retroactive application of election-related laws by making an order that compelled the President to follow constitutional timelines.
Presumption of constitutionality	*Mpofu v ZESA 2020*	The Court presumed the constitutionality of some statutory provisions and shifted the burden of proof to the applicant to demonstrate that the said provisions had been violated
Presumption against implied repeal	*Tsvangirai v Mugabe CCZ 2017, CCZ 71/13*	The President's authority to proclaim election dates was challenged implying that newer constitutional provisions repealed older ones. The court found that this was not so unless explicitly stated, maintaining legal continuity.

Presumption in favour of fundamental rights	*Mawere v Registrar General and Ors 2013*	A Zimbabwean with foreign citizenship sought recognition of his Zimbabwean citizenship under the 2013 Constitution. Applicant's right was upheld because the court reinforced the relevant presumption.
Presumption against the restriction of common law rights	*Don Nyamande v Zuva Petroleum and Chawira v Minister of Justice*	In the Nyamande case, the employer was given the common law right to terminate the employment contract on notice to the employee, a right wwhich for long was not exercised. In the Chawira case, the court upheld the common law rights challenging death row placement as amounting to inhumane treatment. Although it did not outlaw the death penalty, the Court had utilised the presumption.
Presumption of legislative intent to comply with international law	*Government of Zimbabwe & Ors v Fick & Ors* 2013 (5) SA 325 (CC)	The case relating to the enforcement of SADC Judgment against Zimbabwe following land expropriation without compensation showed that international tribunal decisions are enforceable under crossborder constitutionalism, showing that domestic legislation intends to comply with international obligations. Zimbabwe had to respond by moving to disband the SADC Tribunal.
Presumption against excessive delegation	*CHRA v Minister of Local Government, Public Works and National Housing CCZ 3/24.*	Section 314 of the Urban Councils Act (Chapter 29:15) was challenged on the basis that the responsible minister is given monstrous powers that can override decisions of elected councillors.

It also includes three positive duties to protect, promote and fulfil human rights and freedoms, and a negative duty to respect human rights and freedoms on the part of state, state institutions and juristic bodies.[47]It also includes guiding principles for applying founding and other principles, foreign law, international law, and constitutional provisions to the interpretation Bill of Rights.[48]

46 Interpretation of Chapter 4

(1) When interpreting this Chapter, a court, tribunal, forum or body—

(a) must give full effect to the rights and freedoms enshrined in this Chapter;

(b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;

(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;

(d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and

(e) may consider relevant foreign law in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

The Bill of Rights also contains general limitations[49] and special limitations[50] on the enjoyment of human rights and freedoms in the Constitution.

86 Limitation of rights and freedoms

(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or freedom concerned;

(b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;

[47] See section 44 of the Constitution.
[48] Section 46 of the Constitution.
[49] Section 86 of the Constitution.
[50] Section 87.

(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
(e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
(f) whether there are any less restrictive means of achieving the purpose of the limitation.
(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
(a) the right to life, except to the extent specified in section 48;
(b) the right to human dignity;
(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
(d) the right not to be placed in slavery or servitude;
(e) the right to a fair trial;
(f) the right to obtain an order of habeas corpus as provided in section 50(7)(a).

87 Limitations during public emergency
(1) In addition to the limitations permitted by section 86, the fundamental rights and freedoms set out in this Chapter may be further limited by a written law providing for measures to deal with situations arising during a period of public emergency, but only to the extent permitted by this section and the Second Schedule.
(2) A written law referred to in subsection (1) and any legislative measures taken under that law, must be published in the Gazette.
(3) Any limitation which a written law referred to in subsection (1) imposes on a fundamental right or freedom set out in this Chapter must not be greater than is strictly required by the emergency.
(4) No law that provides for a declaration of a state of emergency, and no legislative or other measure taken in consequence of such a declaration, may—
(a) indemnify, or permit or authorise an indemnity for, the State or any institution or agency of the government at any level, or any other person, in respect of any unlawful act; or
(b) limit any of the rights referred to in section 86(3), or authorise or permit any of those rights to be violated.

It also includes the four generations of human rights and freedoms, with civil and political rights (first generation); economic, social, and cultural rights (second generation), and group/ collective rights or group rights (environmental rights) (third generation) taking precedence. The generations are not intended to prioritise a specific category of rights. Civil and political rights followed theorists like Hegel, Kant, Bentham, Rousseau and Locke who saw '*true*' freedom as one that proceeds from one's desire to be subjected to the common good, to rationality and through the ballot box. These rights were

included in the ICCPR. Some European countries are part of the European Convention on the Protection of Human Rights and Fundamental Freedoms while African countries are part to the African Charter on Human and People's Rights. Second generation rights are contained in the International Covenant on Economic, social and cultural rights (IESCR). International human rights norms combine positive rights and natural rights. ECOSOC rights are part of positive international law, and their scope and implications are constitutionally described in sections 74-77 of the Constitution.

The Bill of Rights also specifies the nature and content of human rights and freedoms. It is the content of a human right or freedom that makes it justiciable or non-justiciable. It is also the form or content that encourages judges to exercise judicial restraint when invoking non-constitutional doctrines such as the avoidance doctrine or subsidiarity. It also provides for the distinction between relative[51] and absolute rights.[52] In protecting human rights in the constitution, the first step is to encapsulate the right in an authoritative rule, a statutory or international legal norm that is binding so that the right does not merely become at best an expectation and at worst an aspiration. The other step will be to decide the appropriate method of applying the norm, including establishing the person to be bound and how. International law and diplomacy may be used as other steps where the victim lacks legal standing to enforce a right conferred by international law. Domestic or municipal laws might provide remedies such as declarations of rights, specific performance and so forth. Constitutionally protected rights may be enforced through judicial review of constitutionality of legislation. Judges who feel that this approach may substantively reduce the legislative power, orders suspending the operation of the remedy may be imposed to prevent conflict between state arms.

The Schedule of the Constitution

The Constitution's schedule contains vital information on the delegation of powers to state bodies, functionaries, and institutions. It amplifies what the substantive constitutional provisions say. The resolution of constitutional

[51] For instance, freedom to demonstrate and petition government in section 59 of the Constitution is relative upon being exercised peacefully.

[52] See the rights such as right to life and freedom from torture which are non-derogable as contemplated by section 86 (3) of the Constitution.

disputes is dependent on the schedule's exemptions or clarifications on how certain provisions; offices; positions or functions must be interpreted. This is directly linked to the importance of the constitution as a supreme law of the land and the country's political or policy roadmap. The discussion of the five features is not exhaustive. When the late President Mugabe fired his Vice President, Emmerson Mnangagwa, in 2017, the schedule became an issue. The question became whether a Vice President is subject to the President of the Republic. Other issues concerning the schedule are related to the type of democracy that explains the nature of the Zimbabwean presidency or legislature. A President (and Vice President) is clearly elected directly by jointly registered voters, whereas parliamentarians are indirectly elected through representational democracy.

Because the running mate clause (now removed through an amendment) had not implemented for the first two election terms, Vice Presidents were at the mercy of the President. The election of a VP based on the running mate clause means that Zimbabwe will not face a constitutional crisis if a President is deposed, resigns, or dies in office beginning in 2023. He or she is automatically succeeded by his running mate. Following Mugabe's resignation, Zimbabwe was ruled by five Presidents in quick succession. Mugabe became the country's second President in 1987, succeeding Canaan Banana, albeit as executive president. When Mugabe resigned or was forced to resign that ever way is correct, Vice President Mphoko 'took over' as President by virtue of the Constitution. He was unavailable and eventually became incapacitated. The Speaker of Parliament became the *de facto* President, signing letters of invitation to Head of States and Governments before the transition of power to the fifth President, Emmerson Mnangagwa, took office on November 24, 2017. The schedule and other significant features demonstrate that constitutions, in whatever form they are framed, can have a variety of significant features, depending on whether they are prescriptive or procedural.[53]

Some Key Aspects from Constitutional Law

Constitutional law also provides insights on the traditional sources, theories, processes, structures and instruments that are involved in making, interpreting

[53] See more detail IDEA, 'What Is a constitution? Principles and Concepts (August 2014) ‹ https://constitutionnet.org/sites/default/files/what_is_a_constitution_0.pdf › accessed 22 November 2022.

and applying ordinary laws and the Constitution.[54] To this extent, constitutional interpretation becomes:
'a special case of legislative interpretation – special because constitutions have peculiar characteristics, yet still a case of legislative interpretation because they are written laws enacted by a supreme political authority.[55]

Essentially, every lawyer is *presumed to know or be knowledgeable about the law*, particularly the critical relationship between constitutional law and other branches of the law. This presumption is critical for understanding one's own legal system and other legal systems. The constitutional lawyer should also know the sources of constitutional law such as:

- The constitution
- National laws
- Precedents or previously decided cases
- Administrative constitutional law
- Legal writings
- Codified laws
- Foreign laws
- International law

Constitutional law and interpretation help lawyers and judges in a country to have a better understanding of their own legal system's rules and institutions from a new perspective and in a better way.[56] Zimbabwean lawyers are required to work *de lege ferenda*, because the case law of judges create precedents which can be considered trite law. Lawyers can also work *de lege lata* in cases where foreign and international laws are used to fill gaps in domestic law. Judges and lawyers who value various areas of comparative law as they relate to constitutional interpretation can benefit from the best of both the *de lege feranda* and *de le lege lata* worlds.

The Zimbabwean constitution also requires lawyers to understand the country's legal system. As a result, the constitutional lawyer who is dealing

[54] For general appreciation of Zimbabwean law, see Lovemore Madhuku, *An Introduction to Zimbabwean Law*, (African Books Collective, 2010).
[55] Gonçalo de Almeida Ribeiro, 'What Is Constitutional Interpretation?' *New York Colloquium*, ‹What is Constitutional Interpretation.pdf (nyu.edu)›accessed 13 November 2022.
[56] Michael Bogdan, *Comparative Law* (1st Edition, Kluwer, 1994) 28.

with cases that are before political, extraordinary or doctrinaire judges must also demonstrate how the Constitution serves as the foundation of the State's legal order and as a power-map tracing the normative relationships between government and citizen.[57] This position was considered in common law jurisdictions such as Great Britain where the constitutional lawyer and the political scientist are forever undivided.[58] This observation is significant, particularly in Zimbabwe, where constitutional law is primarily taught in law schools without due guidance of authoritative texts that can be properly critiqued by legal scholars and judges.[59] Most lawyers in legal practice before the introduction of master's degrees in law at the UZ and MSU got an appreciation of constitutional law (and mostly ordinary statutory interpretation) at undergraduate level. They were taught mainly using principles of foreign theorists, jurists and philosophers because of the absence of literature that provide a Zimbabwean constitutional perspective.

The teaching of constitutional law did not put any emphasis on constitutional interpretation and comparative constitutional law as part of the course outlines.[60] Most lawyers in Zimbabwe who attended law school in Zimbabwe during the University of Zimbabwe's monopoly on legal education were introduced to constitutional law by Professors Welshman Ncube and Lovemore Madhuku. Other emerging law schools have different constitutional lecturers, some of which were taught during their undergraduate studies by Professor Madhuku or had postgraduate studies in foreign jurisdictions. Law schools in Zimbabwe however took long to introduce students to constitutional interpretation or advanced legal training. Even the proliferation of law schools and lecturers simply meant that lawyers were now taught constitutional law and human rights in a variety of ways, depending on the lecturer's training or schools attended. Professor Madhuku took an Anglicized approach because of his training in the United Kingdom. Other lecturers who were educated in South Africa conducted comparative studies, particularly in

[57] See Ivo Duchacek, *Power-Maps: Comparative Politics of Constitutions* (Santa Barbara: ABC-Clio, 1973).

[58] See S.A. de Smith, The Lawyers and the Constitution, Inaugural Lecture delivered at the London School of Economics (10 May 1960) 6.

[59] The five law schools in Zimbabwe, University of Zimbabwe (UZ); Midlands State University (MSU); Great Zimbabwe University (GZU); Zimbabwe Ezekiel Guti University (ZEGU) and Africa University (AU) teach constitutional law at undergraduate level. The differences in teaching are noticeable at master's levels for MSU and UZ.

[60] See also Madhuku (n 54) ibid.

areas of judicial selection and economic, social and cultural rights. Those lawyers who had been educated in the United States such as the late E. Zvobgo were outspoken supporters of the separation of powers, castigating parliamentarians who did not assert their independence as *'Parliament's foolish lot or partly wise.'* Zvobgo was also instrumental in turning Zimbabwe's presidency into an executive presidency, leading to the abolition of the Prime Minister's position in 1987.

Some lawyers are now benefiting from attending law schools which offer advanced modules linked to constitutional law such as human rights law, international law and international humanitarian law. We hope that law schools will teach advanced constitutional or comparative constitutional law, international or regional protection of human rights, and various human rights systems to enable lawyers to properly defend constitutional rights.

The expansion of legal education to include degrees such as the LLBS and Honours in Substantive law has introduced law to students from a variety of disciplines, including media, history, political science, development studies, and administration. If those students are appointed to the judicial bench or practice law, Zimbabwe's constitutional interpretation will take on new dimensions. Lawyers who remain in silo projects of '*legal puritans*' are likely to be left behind. As a result, legal educators must expand their curricula to include legal and political theory. They can no longer afford to focus on the doctrinal approach to law which attempts to separate legal arguments from political and policy debates. Law after all is a product of policy and political institutions and should be taught from a functional approach.

As a result, judges rely more on literature from legal scholars, case law, judge's researchers, and judicial colloquiums to gain an understanding of how to interpret the Zimbabwean Constitution. Historically, the Lancaster House Constitution, 1980, [61] did not include a broad interpretation provision governing how Zimbabwean courts of law must interpret the Constitution.[64] The need for lawyers to understand how Zimbabwe differs from other jurisdictions in terms of how it uses legal doctrines, methods of constitutional interpretation, or approaches to the adoption of foreign law is linked to the

[61] This was repealed and replaced with the Constitution of Zimbabwe, 2013 ('Constitution).

arguments raised above on the teaching and practice of constitutional law. In Zimbabwe, judges are still invoking foreign doctrines that are long abandoned in their country of origin or would have been modified from the classical sense.[62]

Evolution of the Formalised Constitutional Structure of Zimbabwe

Britain's colonialism greatly influenced Zimbabwe's constitutional structure when it turned into a modern state in 1890. While Zimbabwe had constitutions in 1923 and 1961 under British rule, there was no judicial demonstration of inner logic and coherence in constitutional interpretation until the case of *Madzimbamuto v Lardner Burke* [1969] 1 AC 645. In many ways, this case introduced a seismic shift in constitutional interpretation, demonstrating how judges can go a long way toward exposing the relationship between constitutional law and politics on one hand, and constitutional rights and freedoms on the other. The judges' task was to balance legal and political doctrines such as *de facto* and *de jure* recognition and the doctrine of necessity. This difficult task demonstrated how a codified constitution must serve as a foundation for analysing and interpreting constitutional provisions. Another important aspect in this case was that the interpretations from the judges of the Rhodesian High Court, Supreme Court and Privy Council differed concerning the *de facto* or *de jure* status of the Unilateral Declaration of Independence (UDI) government under Ian Smith. The was landmark because it showed that:

- Southern Rhodesia had become a self-governing British colony in 1923
- The Westminster Parliament passed the Southern Rhodesia Act 1965 which declared that Southern Rhodesia remained a colony and provided for the Queen to exercise her legislative powers by Order in Council.
- the Southern Rhodesia (Constitution) Order 1965 was made; s.2(1) declared the new 1965 Constitution void, whilst s.3(1) temporarily suspended the power of the Legislative Assembly

[62] See for instance, Sharon Hofisi, *The doctrine of constitutional avoidance as a nemesis to public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis* (University of Zimbabwe, 2018), ‹The doctrine of constitutional avoidance as a nemesis to public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis | Semantic Scholar›accessed 13 November 2022.

- The acts, orders and legislation made by an illegal regime are considered invalid and cannot override the right of the United Kingdom Parliament, as the lawful sovereign, to make laws.
- The convention that the United Kingdom Parliament does not legislate on matters within the competence of the Legislative Assembly without the agreement of the Government of Southern Rhodesia is not legally enforceable.

After independence, Zimbabwean judges such as Justices Gubbay, Muchechetere, Sandura, McNally, Dumbutshena, Chidyausiku and others shaped the constitutional structure in different ways under the 1980 Constitution, particularly in terms of the protection of the rule of law or in curbing rule by law or lawfare in the protection of civil and political rights. Problems relating to human rights, including ECOSOC adjudication, were mainly resolved from the perspective of civil and political rights (CPRs) which were justiciable in the constitution. Economic, social and cultural rights (ESCRs/ECOSOC) were claimed through CPRs since ESCRs were not entrenched in the constitution and as such, were not consistently considered as justiciable fundamental rights.[63] Progressive changes occurred with the introduction of a home-grown constitution in 2013. It changed the way judge-made customary and common laws are considered and how judges should develop such laws. This was because informative legal scholarship on ESCR greatly increased and became accessible to Judges although they did not mention such legal work in their judgments.[64] Landmark cases were also made and pronounced such as *Danai Mabutho v WUA and Anor*, HH 698/15 and *Amos Makani v Arundel* CCZ 7/2016 (right to education), *Mapingure v Minister of Home Affairs* SC 22/14 (right to healthcare), *Mushoriwa v City of Harare* HH 195-14, *City of Harare v Mushoriwa and Anor* SC 228/14, and *TK Hove v City of Harare* HH 205/16 (right to water), *Chitungwiza Residence Trust v Chitungwiza Municipality* HH 52-15

[63] See in general Ntandokayise Ndlovu, *Protection of socio-economic rights in Zimbabwe. A critical assessment of the domestic framework under the 2013 Constitution of Zimbabwe* (Achor Academic Publishing 2016); Howard Chitimira, 'An Analysis of Socio-Economic and Cultural Rights Protection under the Zimbabwe Constitution of 2013,' 61 (2) *Journal of African Law* (2017) 171-196, 174.

[64] See for instance, Justice Mavedzenge & Douglas Coltart, *A Constitutional Law Guide towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights* (Zimbabwe Human Rights Association); Prosper Chitambara, *A Compendium on Social-Economic Rights in Zimbabwe* (Labour and Economic Development Research Institute of Zimbabwe, 2017). Noah Maringe, *Freedom of association for private sector employees in Zimbabwe: a comparative analysis*.

and *Chitungwiza Residents Trust v Minister of Local Government and Public Works and Anor* HH 599-22, and the recent Chitungwiza Residents Trust case that was confirmed by the Constitutional Court (freedom from arbitrary eviction).

In terms of the nexus between constitutional structure and judicial interpretation, lawyers with advanced legal training in Zimbabwe have begun to scrutinise the work of superior courts in many ways such as the Constitutional Court's role in the protection of human rights[65]and the use of constitutional avoidance to discourage strategic and public interest litigation;[66] judicial selection strategies[67] and so forth. This makes legal scholars in Zimbabwe as contributors to the source of law in Zimbabwe both on a *de jure* and *de facto* basis. Constitutionally, judges of superior courts in Zimbabwe are obligated to either develop customary and common law of Zimbabwe and to regulate their own processes. This is despite the surprising omission of case law on what is considered to be law under the definition sections in the constitution.[68] What this means is that judges must interpret the laws (including the Constitution), to help the lawmaker (The Legislature) to reform the law in line with the Constitution (and international law) and litigants to benefit from certain of the law when they resolve their disputes through courts of law.

While constitutional interpretation is a result of judicial discretion, lawyers who appear before courts of law must strive to improve the quality of interpretation by filing well researched pleadings.[69] Robert Park notes

[65] See in detail, J Mavedzenge 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years' (2020) 20 *African Human Rights Law Journal* 181-205.

[66] Hofisi (n 62).

[67] Gift Manyatera, 'A Critique of the Superior Courts Judicial Selection Mechanisms in Africa: The Case of Mozambique, South Africa and Zimbabwe,' (University of Pretoria PhD Thesis, 2015); see also Tabeth L. Masengu, 'what Lies beneath: The Complex Nature of Appointing Women Judges in Zambia and South Africa,' (University of Cape Town, PhD Thesis, 2020). See also Owen Murozvi, a critical analysis of the mandate of the National Peace and Reconciliation Commission (NPRC) in achieving transitional justice in Zimbabwe.

[68] Section 332.

[69] See Mark Fischler, 'An Integrated Approach to Constitutional Interpretation,' *Journal of Integral Theory and Practice*; see also Robert E. Park, 'How Lawyers Read the Constitution: An Introductory Bibliography,' 26 (1) *American Studies International* (April 1988), pp. 2-34.

monumentally in respect to the role of judges in enforcing the American Constitution that:

'The power to enforce the rights and powers afforded by this most important document in the nation's political life-the very instrumentality of securing liberty, political representation and limits to governance-lies largely in the hands of a judiciary and a profession that are politically unaccountable. So, if I shall argue, the Constitution is not itself an objective source of rights, this professional class enjoys unique and often invisible controls over the recognition, expression, and protection of constitutional rights and powers.[70]

Judges must however link constitutional interpretation to the constitutional history that obligates judges to exercise judicial review because of their sworn duty to uphold the Constitution.[71]The remarks by Robert Park and those of Chief Justice Marshall in the *Madison* case show at least four important issues that explain the nexus between constitutional interpretation and the duty of judges to uphold the Constitution.

Firstly, nuanced common law traditions to which Zimbabwe's constitutional law owe a lot of comparisons aid the development of democracy and democratization in a country if judges commit to the traditions that legitimate constitutional democracy. At the same time, however, country-specific judges can provide constitutional resources which serve as resources which litigants in a specific constitutional structure or society could utilise to further the independence of judges from peer, litigant or political threats. Second, constitutional common law in mature democracies affected the constitutional democracies of the countries that borrowed constitutional doctrines. Not only was Zimbabwe's progressive constitutional democracy affected by its contact with American, South African, Canadian and Kenyan influences. It has been a major contributor to what is called the modification of constitutional traditions since Zimbabwe has an *a la carte* constitutional identity that enjoys the best of many worlds. Zimbabwe now has a mixed tradition that has legal doctrines enmeshed in the Constitution and non- constitutional traditions that are borrowed and invoked by judges as part of judicial restraint in Zimbabwe.[72] This has given rise to new forms of constitutional doctrines or constructions

[70] Park (n 69) 2.
[71] See *Madison* case (n 25).
[72] See Hofisi (n 62).

such as avoidance, prolonged reservations of judgments, deference, moot, ripeness and other doctrines.[73]

Third, borrowed doctrines applied by judges in Zimbabwe have immensely affected the litigants and outcomes of constitutional matters in a way that threatens the supremacy of the Constitution. For example, the Constitutional Court, the apex Court in constitutional matters has been the leader of judicial restraint in constitutional matters that bear on the interpretation of human rights and freedoms.[74]Surprisingly, the High Court has been innovative in its use of judicial activism to protect the constitutional rights and freedoms which are usually threatened by the invocation of various forms of judicial restraint by either the Supreme Court or Constitutional Court.[75]

Fourth, constitutional interpretation has been threatened by the Constitutional Court's reliance on constitutional construction as a canon of judicial creation that relies more on avoidance or judicial restraint to avoid the determination of courts on the merits. Amongst worrisome cases are those that deal with arbitrary confiscation of property by security institutions; the right to life; freedom of association; and many others.[76]The concern in this book is that judges of superior courts must not rigidly lean on judicial restraint or constitutional avoidance as they seek to canonize rather than constitutionalize the interpretative regime in Zimbabwe. If the canons of judicial constructions and creation are invoked, they must be applied in their modern form. Zimbabwe's judges have been criticised for invoking classical doctrines of constitutional avoidance which have been abandoned or modified in jurisdictions they originate such as the USA and South Africa.[77]

As we will show in this book, there has been lack of nuanced court judgments or dissenting opinions on why constitutional interpretation in Zimbabwe

[73] ibid.
[74] Ibid.
[75] Ibid.
[76] See in detail the discussion Sharon Hofisi, 'The ConCourt and the Avoidance Doctrine,' (11 October 2017, The Herald) ‹ https://www.herald.co.zw/the-concourt-and-the-avoidancedoctrine/› accessed 18 November 2022.
[77] See Hofisi (n 62). See also Tawanda Rest Zvekare, 'The applicability of the doctrine of constitutional avoidance to constitutional adjudication in Zimbabwe,' ‹https://www.semanticscholar.org/paper/Theapplicability-of-the-doctrine-of-constitutional-Zvekare/c098b327ef20ec227a872c046ac94d2b27a2e7ccA› accessed 18 November 2022.

must not be threatened by unanimous or frequent use of contemporary doctrines of judicial restraint that largely apply in jurisdictions where judges are professionally independent such as the USA. Zimbabwe's model of judicial selection often receives a backlash that is expressed in political or patronized terms. It is the duty of judges to allay the general populace of the fears that they resist constitutional doctrines and rely on canons of construction to frustrate litigants who bring constitutional matters that upset the political establishment of the day. Although the use of canons of judicial canons is justified in situations where lawyers flagrantly disregard the rules of the courts or the presumption to know the law, the frequent reliance on lengthy reasons on why such doctrines must be used to create backlogs in constitutional matters has made judicial restraint to dominate the constitutional order in Zimbabwe.

In many ways constitutional avoidance and its variant forms seem to threaten judicial independence. Unelected judges who should serve as court and case managers in critical cases override and exclude constitutional ethos unanimously simply to delay the finalization of constitutional matters. This approach clearly creates minority majority on the part of judges, something antithetical to the counter-majoritarian dilemma. This does not necessarily mean that canons of judicial creation undermine constitutionalism, but it at least explains why judges who are politically appointed may threaten the constitutional structure in a society. However, many of the issues discussed in this book point to the need for litigants through their lawyers to also innovate on ways to implore the courts to be.

Comparative Constitutional Interpretation

Comparative constitutional interpretation depends on the quality of constitutional documents that are submitted before a judge; the type of the judge and the ability of the judicial bench and litigants (especially legal representatives) to appreciate comparative aspects of constitutional interpretation as they apply to Zimbabwe. To do so, the judges must also understand the concept of comparative in general. Comparative law is a term of art which does not really focus on how separates the parts of legal systems

are.[78] Three illustrations have been made to show how the 'comparative' in comparative law or other aspects of the law can be interpreted to mean:

'(*Firstly*, the comparing of different legal systems with the purpose of ascertaining their similarities and differences. *Secondly*, working with similarities and differences that have been ascertained, for instance explaining their origin, evaluating of the solutions utilised in the different legal systems, grouping of legal systems into families of law, or searching for the common core of the legal systems. *Third*, the treatment of the methodological problems connected to the study of foreign law (*italicised words added for clarity*).'[79] While the term comparative law is normally used in course outlines or studies of foreign law, it must be made clear that studies of foreign law in and of themselves alone do not fall within the framework of comparative law.[80]

What this entail is that judges are at large to interpret the constitution based on their knowledge that is obtained because of advanced studies in law; doctrine of judicial comity; constitutional requirements; or judicial doctrines that are normally invoked in a legal system. This point however means that the judge must appreciate the similarities and differences correctly and not merely in an incidental fashion.[81] What is gleaned from the above is that some expert knowledge on what is compared is needed on the part of the judge, judges' researchers and the litigants' lawyers. As such, a point worth reproducing from Michael Bogdan's discussion of comparative law as a legal method or science is that comparative law must not be used casually and in piecemeal fashion. Bogdan thus notes:

'Not long ago, comparative law was regarded as being a playhouse for escapist theoreticians having rather peculiar interests. Comparative jurists used to be for example facetiously defined by their colleagues as jurists who when in their own country pretended to be experts on foreign law, while abroad representing themselves as experts on the law of their home country. Today however, it is generally recognised that comparative studies can greatly contribute to legal education and research.'[85] There are two corollaries to the above quotation when it comes to interpretation of the constitution or

[78] See for instance Gutteridge, *Comparative Law* (2nd edition, Cambridge, 1949).
[79] See Michael Bogdan, *Comparative Law* (1st Edition, Kluwer, 1994) 18.
[80] Bogdan (n 82) 19.
[81] See Walter J. Kamba, 'Comparative Law: A Theoretical Framework,' 23 *ICLQ* 489 (1974). [85] Bogdan (n 82) 25.

ordinary law in general. First, judges who have acquired some advanced studies in law can use comparative constitutional law and interpretation methods to increase a society's knowledge of the legal system as a social phenomenon.[82] This is because lawyers, lecturers and students can see, hear and think about rules and institutions differently without consciously or instinctively being bound by certain legal solutions suggested by lawyers who do not knowledge of comparative legal systems.[83]

In terms of the Constitution of Zimbabwe, judges are obligated to know some comparative aspects of the law beyond Zimbabwe especially when interpreting constitutional rights in the Declaration of Rights.[84] They are obligated to use international law and foreign law when interpreting the constitution. This means lawyers and judges must also strive to apply the relevant rules and aids of constitutional interpretation which are needed for the protection, promotion, respect and fulfilment of human rights and freedoms in the Constitution. This guideline, provided by the interpretation part of the Constitution,[85] is not without problems and depend on how judges and lawyers appreciate various aspects of comparative constitutional law. The comparative approach is also enriched by a system which allows broadened legal standing for interveners, amicus curiae, and other claimants to participate and perhaps provide nuanced heads of argument on constitutional interpretation methods. Comparative interpretation also shows that some rights like right to vote or participate in politics cannot be claimed by juristic persons.

Constitutional Matters

A set of aids, theories, or rules used by judges to interpret ordinary statutes or constitutions as extraordinary statutes distinguishes modern constitutional systems. These interpretive tools are sometimes institutionalized in form of

[82] While Faculties of Law such as the University of Zimbabwe and Midlands State University have LLM or master's Degrees in Constitutional Law, undergraduate students are normally exposed to ordinary methods of statutory interpretation. Methods of constitutional interpretation are also not taught as substantive aspects of courses such as Human Rights Law. As such, students of advanced legal studies in Zimbabwe must all be forced to do modules on comparative constitutional interpretation to help them use the constitution as a starting point in their various fields of specialization.

[83] Bogdan (n 79) 28.

[84] Section 46 of the Constitution.

[85] Ibid.

theories and canons of interpretation. This is closely related to the history, type, and model of a country's Constitution. In the case of written constitutions, the judiciary in the USA has played a role in developing methods of interpreting the US Constitution. In many societies, constitutional interpretation remains the litmus test for judicial impartiality in deciding constitutional matters. In relation to constitutional matters, for example, litigants must ensure that when approaching the Constitutional Court directly, they do so only when their matter is truly constitutional. The Zimbabwean Constitution allows litigants, in the interests of justice and with or without leave, to approach a Court directly to decide a constitutional matter. [86] This principle has been interpreted by litigants' lawyers to be applicable to the context of the Constitution as a whole, and the role and place of the Court in a constitutional framework.[87]

The Constitutional Court, on the other hand, held that once a person alleges a violation of a constitutional right, all the other provisions governing access to the Court are not suspended.[88] This means that the mere allegation of a violation of a fundamental right must be weighed against other principles governing direct access to the Court.[89] The rationale for the Constitutional Court's position in the *Denhere* case was that other courts, such as the Supreme Court, have exclusive jurisdiction over non-constitutional matters. As a result, applicants cannot simply seek protection under the Bill of Rights in situations where the non-constitutional matter does not constitute an infringement of the constitutional rights that in the *Denhere* case, was the right to equal protection from the law provided under section 56 (1) of the Constitution.

Legitimacy of Judicial Decisions

The legitimacy of judicial decisions, like any other issue involving the courts' adjudicative discretion, is central to constitutional interpretation. For example, the question has been raised: can decided case x be a legitimate

[86] Section 167 (5) (a) of the Constitution.

[87] See Lovemore Madhuku's remarks as reiterated by the Court in *Denhere v Denhere and Another* Judgment No. CCZ 9/19.

[88] Per CJ Malaba justifying the position on the basis that the Constitutional Court is specialized court that deals with constitutional matters only.

[89] Malaba (n 88).

decision in a just system?[90] The legitimacy war is based on the fact that, on the one hand, a constitution does not contain substantive values that it embodies, and on the one hand, where conscientious moral choices of judges are legitimated, constitutional interpretation may provide substantive justice better than any other theory.[91]According to Philip Bobbitt, as cited in the Harvard Law Review, a constitution is written law that must be construed using the current methods of legal construction. As a result, judicial review becomes the forum through which people (in Bobbitt's case, Americans) discuss their Constitution. Courts typically rely on judicial precedents to help them interpret cases.[92]

Judicial precedents generally provide the standards, rules, and principles that should be applied in similar cases.[93] While judicial precedents are important, constitutional interpretation requires that judges must not limit their decisions by relying solely on past decisions.[94] To ensure the legitimacy of judicial decisions, Philip Bobbitt, for example, contends that judicial precedents can only be relied on if the principles they establish are part of a well-reasoned written opinion.[95] This is significant in making the application of the law predictable, consistent, and stable for many players in the legal fraternity, including lawyers, judges, legislators, and state institutions that rely on the decisions rendered.[96]

Furthermore, while superior courts can take the, '*we were wrong*' approach and overturn incorrectly decided cases, the legitimacy of constitutional interpretation is dependent on the Court overturning the decision to demonstrate that the previous case was misguided in a way that vitiates the application of the doctrine and exceptions of *stare decisis*. As a result, the courts will be able to take the '*we are now right*' approach to constitutional

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[90] Harvard Law Review, 'Note: Legitimacy and Justice in Constitutional Interpretation,' 106 (5) *Harvard Law Review* (Mar. 1993), pp. 1218-1223, 1218.
[91] Harvard Law Review (n 90)
[92] See Michael J. Gerhardt, *The Power of Precedent* (2011 Oxford University Press) 147-48.
[93] See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982, Oxford University Press) 7.
[94] See Michael J. Gerhardt, 'The Role of Precedent in Constitutional Decision-making and Theory, 60 *Geo. Wash. L. Rev.* (1991) 68, 76.
[95] See Bobbitt (n 93) 42.
[96] Gerhadt (n 94) 85ff.

interpretation. As a result, judicial review must use constitutional interpretation as a tool to demonstrate that courts are the guardians of constitutional principles in terms of how they are developed and preserved.[97] Constitutional interpretation falls into this category because it is important in promoting the values that are clearly enshrined in a country's Constitution. This is because constitutional values shape a nations' constitutional identity and provide normative principles that ensure everyone's comfort.[98]

Conclusion

This chapter addressed the critical aspects of Zimbabwe's constitutional law in general.

These features highlight how distinct Zimbabwe's constitutional system is from others. It demonstrates that Zimbabwe has the best of both worlds. The concept of experimental constitutionalism has put it in jeopardy. The following chapter provides a scoping analysis of approaches to constitutional interpretation in Zimbabwe based on previous court decisions. It is intended to show how different judges can be classified into schools of judicial interpreters. It is hoped that Zimbabwean will take a leaf from the book and devise their own system of interpreting the country's relatively new Constitution.

[97] Bobbitt (n 93) 4.

[98] See for instance in relation to South Africa<http://www.dac.gov.za/content/11-why-are-constitutionalvalues-important> accessed 19 November 2019.