# Chapter 2: A Sketch of Zimbabwe's Constitutional Interpretation Concerns

This chapter is guided by the following questions: *What prompted Zimbabwe's superior courts to adopt non-constitutional doctrines under the leadership of the late Chief Justice (CJ) Godfrey Chidyausiku and current CJ Luke Malaba? Why do so many constitutional matters fail for technical reasons rather than substantive ones? What does the shift from ordinary statutory interpretation to constitutional interpretation mean Zimbabwean constitutional law practice and study?* In responding to the questions, we note how the constitutional developments that shape Zimbabwe's constitutionalism largely motivate the judges of the day in their interpretative style.

We also applaud the efforts of many organizations that make law more accessible to the public by providing databases. VeritasZim, for example, makes court pleadings available to legal scholars and litigants on their website. The Judicial Services Commission (JSC), Law Society of Zimbabwe (LSZ), various law firms with strong online presence, Musasa Project, WILSA, Legal Resources Foundation, Centre for Advanced Legal Research, ZIMLII, SAFLII, Sabinet, and various library sources provide easy access to legal materials for lawyers. In all of this, if methods of constitutional interpretation or constitutional construction motivate the tenor of a country's legal practice as much as professional experiences do, then the tenor and development of constitutional jurisprudence becomes rich.

Scholars are free to choose the method of assessment for Zimbabwean judges' approaches to constitutional interpretation. One method is to divide the courts into the eras of several Chief Justices (CJ) such as Dumbutshena, Anthony Gubbay, Godfrey Chidyausiku and Luke Malaba. We have yet to benefit from quantitative legal analysis of their contributions to Zimbabwean constitutional jurisprudence. CJs Gubbay's and Dumbutshena contributed to the jurisprudence on the Lancaster House Constitution. CJ Chidyausiku took office at the helm of the contentious land reform program, and as such, he was largely conservative, and a political judge inclined more to judicial restraint

than activism. He however ushered in a seismic shift towards the hands dripping with blood doctrine in Mawarire case which formed the basis of strategic and public interest litigation under the 2013 Constitution. The same description is given to CJ Malaba, who has largely presided over a bench that employs doctrines that are foreign to Zimbabwe. The hope was that he would emulate the progressive ruling he had set in *Mudzuru and Anor v Minister of Justice* CCZ 12/14 when he was still Deputy Chief Justice. Malaba's tenure was also extended following a protracted legal battle to have him leave office on retirement grounds starting with the case of *Kika v Minister of Justice and Ors* HH 264-21. Constitutional avoidance is largely part of the American system of tools for resolving political controversies rather than legal problems.

Some judges of the Constitutional Court lean towards legal realism. They could also write impressive constitutional affirmations using legal realism as espoused by realists like Roscoe Pound. For instance, in the *Mudzuru* case, Justice Hlatswayo wrote the following:

> **HLATSHWAYO JCC:** - I respectfully agree with the Honourable Deputy Chief Justice's reasoning and conclusion that on a proper construction, the Constitution by necessary implication sets the minimum age of consent to marriage at eighteen years. I do so also for the additional reasons pertaining to the structure and scheme of the section, and to the legislative history of the provision which in my view one can fairly take judicial notice of.
>
> The predecessor provisions to s 78 of the Constitution can be found in the Draft Constitutional Proposals 1 of the Parliamentary Select Committee (COPAC) of 26 January 2012 (hereinafter termed 'Proposal 1'), the Draft Constitutional Proposals of 18 July 2012 ('the 18 July 2012 Draft') and the 2000 Draft Constitution of Zimbabwe.
>
> Section 78 of the **Constitution states:**
> **"78 Marriage rights**
> 1 Every person who has attained the age of eighteen years has the right to found a family
> 2 No person may be compelled to enter into marriage against their will
> 3 Persons of the same sex are prohibited from marrying each other."
>
> An equivalent provision in the earlier COPAC Draft, Proposal 1, stated as follows:
>
> **"4.25 Marriage**
> 1 Everyone who has attained the age of eighteen years has the right to marry and found a family and no such person may be prevented from entering into marriage
> 2 No one may be compelled to enter into marriage against their will." [emphasis added]

What is critical to note here is that the COPAC Proposal 1 formulation clearly linked the right to marry with the right to found a family and stipulated the minimum age of eighteen as a requirement for the enjoyment of the right to marry and/or found a family. The next COPAC Draft, the 18 July 2012 Draft, juxtaposes the minimum age of eighteen years with the concept of "marriageable age" in a most confusing manner, thus:

**"4.35 Marriage rights**

1 Every person who has attained the age of eighteen years has the right to marry a person of the opposite sex who is of marriageable age, and no such person may be prevented from entering into such a marriage

2 Every person who has attained the age of eighteen years has the right to found a family

3 No person may be compelled to enter into marriage against their will."

It is not clear in this draft how the entitlement to marry upon attaining eighteen years can be attenuated by the concept of marriageable age. However, the Draft provisions show that when the drafters formulated the final provision in s78, they were fully cognisant of the term "marriageable age" which may be deployed to leave the fixing of the age of marriage to separate legislation other than the Constitution itself. They chose not to do so and by necessary implication set the minimum age of eighteen in the Constitution. By contrast the equivalent provision in the 2000 Draft Constitution specifically relegates the fixing of the marriage age to separate legislation, thus:

**"27 Marriage**

The State must take appropriate measures to ensure that –

(a) Men and women of marriageable age are free to marry each other and found a family." [emphasis added]

Section 78 is headed 'Marriage rights', yet the main provision (subsection (1)) does not contain the word "marriage". The other subsections are all about marriage. It is thus necessary, and just and equitable, to construe subsection (1) of section 78 as if it read:

1) "Every person who has attained the age of eighteen years has the right to marry and found a family."

The legislative history of the provision, the general scheme of the section itself and a reading of the section in conjunction with the other provisions of the Constitution – all support the view that, by necessary implication, s78 of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe.

Finally, while this judgment may have addressed the issue of child marriages, this is akin to the mending of the roof during the storm in the sense that a myriad of legislative and State resource mobilization measures have become urgent and imperative consequent upon this decision. One can but point out just a few imperatives:

The age of sexual consent which currently stands at sixteen years is now seriously misaligned with the new minimum age of marriage of eighteen years. This means that, absent legislative intervention and other measures, the scourge of early sexual activity, child pregnancies and related devastating health complications are likely to continue and even increase. The upside is that the new age of marriage might have the positive effect of delaying sexual activity or child bearing until spouses are nearer the age of eighteen. The downside is that children between sixteen and eighteen years may be preyed upon by the sexually irresponsible

without such people being called upon to take responsibility and immediately marry them. Thus, there is an urgent need, while respecting children's sexual rights especially as between age mates as opposed to inter-generational sexual relationships, to extend to the under-eighteens the kind of protection currently existing for under-sixteens with the necessary adjustments and exceptions.

And when children beget children, the health, social and economic burdens on the children themselves, their babies and their parents or guardians becomes overwhelming. The provision of the Constitution relating especially to the protection of the family must be urgently activated to meet this challenge. Section 25 of the Constitution under the National Objectives states as follows:

"25. **Protection of the family**

The State and all institutions and agencies of the government at every level must protect and foster the institution of the family and in particular must endeavour, within the limits of resources available to them, to adopt measures for –

(a) the provision of care and assistance to mothers, fathers and other family members who have charge of children; and

(b) the prevention of domestic violence." [emphasis added]

It is also hoped that international and non-governmental organisations – some of which commendably motivated this application – will show the same or even more enthusiasm in the raising of the huge resources noted above and in contributing to the refinement of the local laws both civil and criminal consequent upon this decision as they showed in advocating the abolition of child marriages in Zimbabwe.

Accordingly, I am of the view that the order outlined in the main judgment by the Honourable Deputy Chief Justice is, with respect, the appropriate order in the circumstances.

Surprisingly, the Malaba and Chidyausiku courts applied alien doctrines without justifying why controversy canons of judicial construction designed in America or elsewhere are applied to legal problems which require constitutional cases to be decided on the merits. Their courts have also abandoned the concept of full or partial dissenting judgments from Judges of appeal or specific superior courts. This has resulted in the selection of cases in which they will innovatively exercise their discretion to hear and determine cases technical arguments as was seen in cases such as *Mujuru v President of Zimbabwe* CCZ 8/18, *Sister Berry & Another v The Chief Immigration Officer & Another*, CCZ 4/16, and others. The courts could sometimes innovatively hear important cases on the merits of the case based on some '*doctrine of importance*' as was the case in the *Chamisa v Mnangagwa and others*, CCZ 42/18. Such approach enables the greater society to commend the court's very practical approach. Alternatively, they could be inventive and make liberal pronouncements such

as that litigants '*must wait to come to court with hands dripping blood*' such as the *Mawarire v Mugabe* case, Judgment No. CCZ1/13. Their courts, on the other hand, have issued four important judgments that received widespread public support and protect important constitutional rights such as right to bail (*S v Fanuel Kamurendo and others*, CCZ 84/2015); freedom of expression (*Madanhire and Anor v A.G.* Judgment No CCZ 2/14); and women/ children's rights (*Loveness Mudzuru and Anor v Minister of Justice and Ors*, CCZ 12 of 2015. Surprisingly, before his appointment as CJ, DCJ Malaba (as he was then known) had occasion to admire judges like the late Mr. Justice Wilson Sandura, who relied on dissenting judgements to protect judicial independence and to resolve complex legal problems in Zimbabwe (https://www.herald.co.zw/justice-sandura-hailed/).

As a result of the influence of chief justices or judges who give reasoned dissents, it is noted that the '*interpretation model*' of the Bill of Rights serves as a starting point for encouraging judges to write dissenting opinions.[99] This interpretation model provides the various aspects that comprise the various interpretative tools that an individual judge or respective litigants can draw the attention of the judge to. Borrowed constitutional doctrines such as avoidance doctrines must be applied only if they can be transformed into the constitutional tradition espoused by the Constitution. Constitutional reforms and the forces driving those reforms create a constitutional tradition. It assists members of a polity in avoiding reliance on artificial versions of constitutionalism that are incompatible with the Constitution.[100] Constitutional traditions extend beyond the need to identify constitutional moments on human rights in court decisions, such as 1789 in France or 1948 following the adoption of the Universal Declaration of Human Rights. When making any comparative aspect, it is necessary to distinguish that improve the jurisprudence on constitutionalism. Cesare Pinelli, for example, observes monumentally:

[99] Section 46 of the Constitution.

[100] Cesare Pinelli, The Formation of a Constitutional Tradition in Continental Europe since World War II, 22(2) European Public Law (2016) 257-268, 258.

> 'It is worth noting that, while the Preamble of the 1789 Declaration of Human and Civic Rights assumes 'ignorance, forgetfulness or contempt of the rights of man to be the only causes of public misfortunes and the corruption of Governments', the Preamble of the 1948 Universal Declaration (of Human Rights/UDHR), first asserts that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'[101]

The distinction made above aids in capturing the normative continuities in constitutional systems at the national and international levels, but only in a cosmetic way. The above evolutionary model introduces the spirit of the times introduced by the Declarations of 1789 and 1948 and provides an account of how different societies in different eras had to approach the problems associated with the disregard of human and fundamental freedoms. While the French Revolution was heavily influenced by philosophers and philosophy, the UDHR was influenced by democratic waves seeking to protect various generations of human rights and freedoms that had been threatened by the two World Wars. Cesare Pinelli goes on to say about the differences:

> 'Rather than adjourning the 1789 Declaration, the Universal Declaration changed the premises on which human rights were grounded. In the former, 'ignorance, forgetfulness or contempt of the rights of the man' are evils condemned in abstract terms, resting upon the Enlightenment's premise that self-evident truths are potentially available to everybody.

The Universal Declaration casts a dark shadow on that certainty, referring to 'barbarous acts which have outraged the conscience of mankind': contempt for human rights is condemned in the light of historical circumstances, after which nothing could be taken for granted in the conduct of human affairs. Hence the reference to 'the inherent dignity…of all members of the human family', hitherto not mentioned in the Declarations or in constitutional documents.'[102] The need to adopt the human interest or human factor content in real terms expands the scope and pace of normative focus in the two Declarations. The UDHR is a soft law document that was drafted in a more globalized and universal world. Since 1948, the world has witnessed the adoption of numerous human rights

[101] Pinelli (n 100) 260.
[102] Pinelli (n 100) 261.

instruments at both the United Nations (UN) and regional levels. The Zimbabwean Constitution contains constitutional rights and freedoms that can be interpreted in terms of the UN's nine thematic human rights instruments.[103] These include the racial discrimination instrument;[104] civil and political rights; economic, social and cultural rights; women's rights; children's rights; and others. The existence of books such as Roseline Hanzi's book, *Zimbabwe's status of compliance with human rights instruments* (2011, Zimbabwe Lawyers for Human Rights) has motivated us to also show Zimbabwe's human rights commitment that is shown below.

| | | | |
|---|---|---|---|
| International Convention on the Elimination of All Forms of Racial Discrimination :1753 | Signature: Ratification/Accession: 1991 | NA, | |
| International Covenant on Civil and Political Rights :1753 | Signature: Ratification/Accession: 1991 | NA, | ✓ |
| Optional Protocol to the International Covenant on Civil and Political Rights :1753 | Signature: Ratification/Accession: NA | NA, | |
| Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty :1753 | Signature: Ratification/Accession: NA | NA, | |
| International Covenant on Economic, Social and Cultural Rights :1753 | Signature: Ratification/Accession: 1991 | NA, | |
| Optional Protocol to the International Covenant on Economic, Social and Cultural Rights :1753 | Signature: Ratification/Accession: NA | NA, | |
| Convention on the Elimination of All Forms of Discrimination against Women :1753 | Signature: Ratification/Accession: 1991 | NA, | |
| Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women :1753 | Signature: Ratification/Accession: NA | NA, | |

[103] The UN is an intergovernmental organization to which Zimbabwe is a member. The Courts in Zimbabwe are obligated to interpret treaties to which Zimbabwe is a party using the approaches adopted by the committees that monitor the implementation of these thematic treaties.

[104] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 by UN General Assembly resolution 2106 (XX).

| | | | |
|---|---|---|---|
| **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment :1753** | Signature: Ratification/Accession: NA | NA, | |
| Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment :1753 | Signature: Ratification/Accession: NA | NA, | |
| **Convention on the Rights of the Child :1753** | Signature: Ratification/Accession: 1990 | 1990, | |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict :1753 | Signature: Ratification/Accession: 2013 | NA, | ✓ |
| Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography :1753 | Signature: Ratification/Accession: 2012 | NA, | |
| Optional Protocol to the Convention on the Rights of the Child on a communications procedure :1753 | Signature: Ratification/Accession: NA | NA, | |
| **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families :1753** | Signature: Ratification/Accession: NA | NA, | |
| **International Convention for the Protection of all Persons from Enforced Disappearance :1753** | Signature: Ratification/Accession: NA | NA, | |
| **Convention on the Rights of Persons with Disabilities :1753** | Signature: Ratification/Accession: 2013 | NA, | |
| Optional Protocol to the Convention on the Rights of Persons with Disabilities :1753 | Signature: Ratification/Accession: 2013 | NA, | |

**United Nations Human Rights Office of the High Commissioner (2022).**

From the preceding commitment chart, the Zimbabwean human rights system can also benefit from the instruments under the African Union that governs the rights of humans and peoples in Africa;[105] such as women[106] and children.[107]We

[105] Date of Adoption: June 01, 1981, and Zimbabwe ratified this treaty on 30 May 1986, see ‹https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf› accessed 22 November 2022.

[106] See the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted in Mozambique on 11 July 2003. Zimbabwe ratified the protocol, see https://maputoprotocol.com/thecountries-that-have-ratified-it accessed 22 November 2022.

[107] African Charter on the Rights and Welfare of the Child, Date of Adoption: July 01, 1990. Zimbabwe ratified this treaty on 19 January 1995.

note that in some cases, Zimbabwean courts have been praised for progressively interpreting women's and children's human rights in accordance with the Bill of Rights interpretation model. The *Mudzuru* case provides a conspectus on methods of constitutional interpretation for women and children.[113]In that case, DCJ Malaba followed the guidelines on legal standing of the applicants under section 85 of the Constitution; compared the provisions of section 78 of the Constitution relating to marriage rights[108] and marriageable age with those laid out in section 22 (1) of the Marriages Act[115] and the Customary Marriages Act. [109] The decision is significant in distinguishing children's constitutional rights from other rights. The court specifically found that the duty-based provisions in section 44 of the Constitution guarantee the protection of children's rights in the Constitution.[110] Section 44 imposes duties on the State and every individual, including juristic persons; state institutions and government agencies at all levels to respect, protect, promote and fulfil the rights enshrined in the Constitution.

Three major themes emerge from the *Mudzuru* case. First, since the adoption of a homegrown Constitution in 2013, Zimbabwe has become a unitary state that does not treat men and women's enjoyment of human rights differently. Simply put, Zimbabwe is not a differentiated society in terms of men's and women's human rights in the binary sense.[111]Second, the elaborated rights of specific groups that were formerly marginalised and are still vulnerable can benefit greatly from purposeful interpretation of the Constitution.[112]Third, there has been a shift from a patrilineal and ordinary legislative interpretation tradition of 'what the ordinary law is to the specific-group rights regime that is distinguished by considering what the Constitution contemplates for each

[108] The court embossed the provision that 'no person, male or female in Zimbabwe may enter into any marriage including an unregistered customary law union or any other union including one arising out of religion or a religious rite, before attaining the age of eighteen (18),' see page 1 of the *Mudzuru* judgment. [115] Chapter 5:11.

[109] Chapter 5: 07.

[110] *Mudzuru* case, p 2 of the judgment.

[111] It may be a differentiated society in situations of sexual orientation since it deliberately leaves out sexual orientation as a ground of discrimination in section 56 of the Constitution.

[112] These rights include women (80); children (81); elderly (82); persons with disabilities (83) and veterans of the liberation struggle (84).

specific holder of constitutional rights and freedoms.[113] This is gleaned from the Court's willingness to adopt the purposive interpretation advanced by the applicants' lawyers to make a judicial finding that section 78 (1) on marriage rights, as read with s 81 on children's rights, showed that the age of 18 years has become the minimum age of marriage in Zimbabwe.[114]By doing so, the Court demonstrated its willingness to reject a strict, narrow and literal interpretation based on the international human rights inspiration that influenced the framing of marriage rights in the Constitution.[115]

Zimbabwe's Bill of Rights interpretation model is hybrid in that it aims to be aspirational, protective, and promotional of justiciable constitutional rights and freedoms. Because it is provided for by the Constitution, we can call this hybrid model the internal constitutional model. As a result, judges and litigants must interpret the Bill of Rights and Freedoms as contemplated or anticipated by the Constitution. Prior to the deliberate inclusion of interpretation provisions in the Constitution, and prior to the adoption of broad, generous and purposeful interpretation such as *Mudzuru* approach, Zimbabwean Courts demonstrated a willingness to interpret the Constitution as an extraordinary statute. *Capital Radio (Private) Limited v The Broadcasting Authority of Zimbabwe and 2 Ors* is the leading case in this endeavor.[116]This case provides useful starting point for understanding how the Zimbabwean Supreme Court that served as a Constitutional Court in special circumstances sought at the time, to achieve a framework of analysis on how the Constitution's supremacy must be understood in a constitutional democracy. In two ways, this case was significant. First, as an intervener, the Attorney General of Zimbabwe (AG), Zimbabwe government's leading lawyer or law firm, utilised the third-party intervention method. The AG used this case to influence the provisions of the Administrative Act in 2004 that allowed the AG to intervene in administrative proceedings as a matter of choice and law.

[113] For instance, the constitutionality of the Marriages Act as an ordinary statute could not be used to justify government's lame excuse that girls mature faster when compared to their male counterparts and as such the minimum marriage provisions were not at variance with section 78 of the Constitution which envisages that anyone below 18 years of age is a child.

[114] See *Mudzuru* judgment, p 3.

[115] Ibid.

[116] SC 162/2001.

Secondly, it follows that a superior courts in Zimbabwe must seek a way to interpret the Constitution in a comprehensive and holistic manner. The key criteria in this endeavor thus include, but are not limited to, Zimbabwe's historical and current tenor of constitutionalism. More importantly, treating the Constitution as a living document identifies what is worthy of being built into Zimbabwe's constitutional identity. In other words, the identities or important features provided by the Constitution must be regarded as significant, particularly if those provisions distinguish Zimbabwe from other constitutional identities around the world.

Constitutional interpretation is thus considered to be a subset of legislative interpretation based on the idea that the Constitution, despite being a written law enacted in the country, has unique characteristics.[117] It has been noted that:

> "Mainstream accounts of constitutional interpretation take it to be a special case of legislative interpretation. It is a special case because Constitutions, unlike statutes and regulations, are characteristically single, basic, rigid, vague, and enduring laws. Nevertheless, it is still legislative interpretation because constitutions properly so called are supposedly written laws enacted by a supreme authority. Their content is for the most part determined by the political choices of the constitutional lawmaker, notwithstanding the fact that the object of those choices is to some extent determined by the very nature of the task-namely, to establish a government, not the legal regime...it follows that the problems of constitutional interpretation are continuous with those of statutory interpretation.'[118]

Another source of authority is the canons of constitutional interpretation found in the realm of the concept of constitutionality or non-posited basic norms.[119] The modes of constitutional interpretation, or 'ways of determining a specific meaning of a provision within the Constitution,'[120]are linked to a court's judicial review authority. This was clarified in *Marbury v Madison*[121] in which the US Supreme Court explained its powers to review the constitutionality of federal governmental action.[122] The US courts have also gone a long way toward distinguishing between constitutional interpretation

[117] G.A. Ribeiro (2020) 'What is constitutional interpretation.' New York University Colloquium.

[118] Ibid, 1-2.

[119] Ibid.

[120] B.J. Murrill (2018) '*Modes of constitutional interpretation*.' Congressional Research Service Report.

[121] n (25), 5 U.S. (I Cranch) 137 (1803).

[122] Id, p. 1.

that is based on determining the meaning of the Constitution through constitutional interpretation methods, and constitutional construction that is based on constructing the text of the Constitution itself.

Litigants should be wary of a judge's use of methods of constitutional interpretation or proclivity to rely on constitutional construction. It should be noted that constitutional interpretation relies on traditional legal tools to determine meaning, such as the text and structure to ascertain meaning.[123] Constitutional construction, on the other hand, supplements the meaning derived from such traditional interpretative methods with materials outside the text, such as moral or pragmatic considerations.[124] Such constructions should be used sparingly when the text is so broad or undefined that faithful but exhaustive reduction of legal rules is impossible.[125]

We can also conclude from the classification of Zimbabwe's mixed legal system classification that litigants should be familiar with both common law and civil law constitutional interpretation. Zimbabwe is frequently referred to as a common law legal system. This classification is based on Anglicized origins and the influence of Roman-Dutch law. There is scarcity of literature explaining why Zimbabwe is classified as a common law country. There is no literature that attempts to distinguish between the common law and civil law features in Zimbabwean law. We can say that many aspects of Zimbabwe's legal system lean toward the common law tradition. As a result, we can examine how codified laws are limited to the Criminal Law (Codification and Reform) Act rather than the entirety of Zimbabwe's laws. To summarize, the common law interpretation method requires interpreters to go beyond the text and elaborate the body of law that has developed primarily through case law or judicial precedent when interpreting the Constitution.[126] This requirement stems from the realisation that there are constitutional law principles that are difficult to reconcile with the language of the Constitution, and many other

[123] K. Whittington, *Constitutional construction: divided powers and constitutional meaning* (1999, Cambridge University Press).
[124] Id.
[125] Id.
[126] D.A. Strauss (1996) 'Common law constitutional interpretation.' *The University of Chicago Law Review* 63 (3) 877-935, at p. 877.

settled principles that may be inconsistent with judicial precedent or original interpretations of such rules.[127]

The need for judges to reconcile the text with evolving understandings of what the Constitution requires can be gleaned from constitutional interpretation in any form. David Strauss,[128]for example, emphasises five major points that demonstrate how constitutional law and constitutional interpretation benefit society, including the need to:

> 'Trace principles of constitutional law to the Constitution of the State; resort to original understandings of the Constitution in instances where the constitutional text is unclear; determine the legitimacy of constitutional interpretation by considering whether the departure from the text or the original understandings violate traditional legal tools of interpretation; assess whether judges are usurping their powers by insufficiently paying attention to the text or the original understandings of the doctrine; and help in deciding how textualism and originalism can be modified by other methods of constitutional interpretation or constitutional construction as the case may be.

While Strauss' fifth point about originalism may not be applicable to Zimbabwe, it does help to demonstrate why Zimbabwean judges must strive to modify borrowed methods of constitutional interpretation in a way that is consistent with the Constitution's interpretation chapter.[129] Because the Constitution now provides for three to four generations of human rights in a justiciable manner, litigants and courts of law must be familiar with the philosophy and theories of human rights. Some theories are discussed in chapter 12 of this book. Zimbabwe's Constitution recognises fundamental rights and freedoms that are given special constitutional protection against interference, even by Parliament.[130]Because Parliamentary sovereignty does not precede constitutional sovereignty in Zimbabwe, judges must avoid the

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[127] Id.

[128] Ibid, 878.

[129] See section 46 especially the provisions relating to the use of foreign law.

[130] See section 44 of the Constitution and contrasts this with the position in the United Kingdom where there are no rights that are fundamental in the sense of constitutional protection. See also Lord Lester of Herne QC, Human Rights and the British Constitution,' in Jeffrey Jowell & Dawn Oliver, *The Changing Constitution* (2000, Oxford University Press) 91.

traditional and restrictive English theory on human rights where the judge's constitutional task is to:

> 'Faithfully and strictly to interpret the will of Parliament, expressed in detailed legislation, to be read according to its so-called plain meaning, and to declare the common law when it is incomplete or obscure. In accordance with this constitutional orthodoxy, if either the textual analysis of the words of a statute or the court's interpretation of the common law has undesirable consequences, the matter must be corrected by the legislature and not the courts.'[131]

Lord Lester contends that rigid legalism, written Constitutions and Bills of Rights provide no surety where there is benevolent exercise of administrative discretion by public officials acting as platonic guardians of the public interest, accountable to the legislature and the people through their political masters.[132]This viewpoint is critical, particularly, in countries where the state institutions and political party systems are entwined, such as Zimbabwe. It is also obvious, particularly in cases involving Members of Parliament, that there is no due process when the Speaker of Parliament has the authority to recall elected officials without due process. The courts, led by Justice Malaba, have not protected MPs in accordance with the Constitution, beginning with his tenure as Deputy Chief Justice,[133] and continuing through his tenure as CJ where he considers the recall provisions as unambiguous.[134]

In the *Madzimure* case, Malaba, then DCJ, took a shocking and abhorrent approach to interpreting the relevant constitutional provisions. We are not sure what his comments about the status of section 129 (1) (k) of the Constitution mean. He simply stated that:

> 'A Member of Parliament loses his or her seat in the specific circumstances prescribed under s 129 of the Constitution. Section 129(1) (k) of the Constitution provides for one of the circumstances prescribed. One cannot read any other value into the section, because s 129(1) (k) of the Constitution is a complete provision that is not subject to the Bill of Rights. The wording of s 129 (1) (k) of the Constitution is clear. Like any other provision of the Constitution, s 129 (1) (k) is a fundamental law, partaking of the status of supremacy of the Constitution, against which the validity of conduct can be measured. *It is not permissible to import notions from other constitutional provisions to impose a*

[131] Lord Lester (n 130) 91.
[132] Lost Lester (n 130) 91.
[133] *Madzimure and Ors v The President of the Senate and Others Judgment* No. CCZ 8/19.
[134] CJ Malaba has maintained the narrow interpretation of recall provisions as settled position.

*duty that was not intended to be part of the requirements of a particular constitutional provision*. (Italicisation is intentionally made).'

The judge did not explain why the wording of is not subject to due process of the law, even if we use the human rights conceptualisation of the rule of law. There were no comparable provisions cited to support such a line of reasoning. The other surprising aspect is that the reasoning was simply agreed upon by other judges in this case. If the judges continue to favor the plain meaning of the rules, it is preferable that they set the pace for amending the Bill of Rights to reflect the position that advances the development of constitutional democracy.

When viewed through the lens of constitutional interpretation as a living instrument, the approach in the *Madzimure* case is problematic. For example, Vincent Samar[135] contends that interpreting the Constitution from a human rights standpoint necessitates the following:

> 'Constitutional interpretation should proceed from the assumption that the Constitution remains binding law and should be used to privilege human rights if most citizens are to continue to find legitimacy in the Constitution's status as higher law. Theories of constitutional interpretation have either failed to account for cross-generational legitimacy or have widened interpretation in a way that threaten the importance of the constitutional document. Constitutional interpretation seems to be non-responsive to social and economic conditions in a society. The court should follow the legal tradition in a country. For instance, the living Constitution approach follows a common law-like approach which enjoins courts to resort to precedent or custom to create constitutional change but should give precedence to the Constitution's language and structure. Human rights serve as the glue for binding different interpretations together under a high ordered set of values, whether by adopting amendments or court interpretations.'

From the outset, Parliament represents the will of the people who elect their representatives to do so. Courts cannot be seen to ratify the mere production of a recall letter to remove a Parliamentarian simply because a political party claims that the Parliamentarian is no longer representing its interests. This is purely counter-majoritarian behavior. Second, the Court's insistence that section 129 (1) (k) is unambiguous endangers constitutional provisions that are simply framed similarly to section 129 (1) (k). The Malaba Court has not

[135] V.J. Samar (2019) 'Rethinking constitutional interpretation to affirm human rights and dignity.' *Hastings Constitutional Law Quarterly* 47 (6) 83-144, 83-84.

specified which provisions are framed similarly to the recall provisions. Zimbabwe's legal tradition is one that values constitutional supremacy over presidential and parliamentary sovereignty. In the absence of Court clarification on related provisions, the Court is required to demonstrate procedural fairness and legal certainty if its decision is to be legitimate. It has been demonstrated that the rule of law can also threatened by a court's adjudication failure, in which the Court is guilty of violating the rule of law.

Whether it is constitutional interpretation from the text, or original understandings, or from other approaches such as common law or human rights, the starting point should be the galvanized famous words of American judge, Chief Justice Marshall that constitutional interpretation must proceed on the basis that, '*it is the constitution we are expounding*.'[136] Terrance Sandalow contends that Chief Justice Marshall intended the Constitution to be read as a document meant to last for centuries and adapting to the various crises of human affairs.[137]Thus, constitutional interpretation should take precedence over moral code interpretation. Similarly, constitutional law should be viewed as the result of a continuous process of valuation carried out by those entrusted with the task of constitutional interpretation.[146]

We argue that the focus should be on a constitutional interpretation regime that cannot and should not be limited to treating the constitution as an ordinary statute. The preferred focus is beneficial in many ways. To begin, constitutional law primarily addresses special relationships and concepts relevant to statecraft and governance. There is no single concept known as constitutional law, and all the aspects so considered together provide a context for constitutional interpretation. Second, focusing on the entire Constitution rather than just one part, such as the Bill of Rights, is important because, as this book has demonstrated, constitutions provide the legal and political roadmaps for a polity. The emphasis on many of a constitution's the special concepts or provisions, such as a preamble on popular sovereignty, national objectives, founding principles or values, declaration of rights, supremacy

[136] *McCulloch v, Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

[137] T. Sandalow (1981) 'Constitutional interpretation.' *University of Michigan Law Review* 79: 1033-72. [146] Id, 1034.

clause, establishment clauses and so on, reflects the need to treat such concepts as self-contained aspects. In fact, constitutional concepts, like commercial law, are very succulent.

Thirdly, constitution-making that is followed by widespread adoption of a progressive constitution must be celebrated and should have a distinct jurisprudential impact in a polity. The Zimbabwean Constitution created the opportunity for courts, ordinary and active litigants, lawyers and academics to contribute to constitutional interpretation jurisprudence. Considering this, the individuals identified above must be prepared, first, as custodians of the Constitution and the creators of the constitution, to develop the jurisprudence innovatively. The goal of constitutional interpretation in democratic contexts is to foster a long-term democratic and legal culture and to make a polity's democratization efforts visible.

The essential aspects of a constitution should be interpreted primarily from a functional jurisprudential standpoint. Those who advocate for a particular model of constitutional interpretation must be familiar with the rules, doctrines, and general comments of human rights bodies, presumptions, and philosophical considerations that apply to specific constitutional provisions, clauses, rights and duties. The question that every interpreter must always strive to answer is: *what is the relationship between the special rules or concepts that apply in constitutional law*? The question assists the judge or those involved in a constitutional matter to, *inter alia*:

- Ascertain the significance of constitutional interpretation to the evolution of constitutionalism and constitutional experimentalism in Zimbabwe.
- Ascertain whether constitutional clauses are mandatory.
- Ascertain the nature of a state's constitutional systems and how examples from other jurisdictions influence a polity.
- Ascertain the essential internal features or aids to interpreting a national Constitution.
- Ascertain the nature of polity's constitutional clauses, such as whether they are eternal, establishment, and self-executing, absolutely framed, exhaustive, non-exhaustive clauses and so on.

- ✦ Ascertain whether the listed grounds in a constitutional provision are exhaustive.
- ✦ Ascertain whether or certain constitutional rights are absolute.
- ✦ Ascertain whether there are any substantive or procedural requirements to be met before awarding an effective remedy.
- ✦ Ascertain whether there are any practice directions or existing doctrinal aspects that must be considered when pursuing certain constitutional remedies.

**Other Structural Concerns with Emphasis on Accessing Effective Constitutional Remedies**

Structural concerns deal with a lot of issues relating to parties, beneficiaries, application of the Bill of Rights and so forth.

a) Amicus curiae should make an application to join the proceedings as a friend of the court. The issues relating to consent from the main litigating parties must be addressed and they have to demonstrate a need to present the arguments which would have been left out, overlooked, or underestimated by the main parties. The application should be made to the Chief Justice whether orally or in written form, see the Constitutional Court's Rules.
b) State actors and non-state actors are duty bearers and the Bill of Rights apply horizontally, diagonally, and vertically.
c) The purpose of limitation should be canvassed in detail when rights come into conflict
d) Internal modifiers relating to right to petition government must be understood as part of interpreting the scope of the right
e) Laws of general limitation can be Acts of Parliament or official government policies adopted to limit rights. This creates problems since ***policy is not law and law is not policy***.
f) The courts are still to define laws of general application through the lens of the nature of the right, the purpose of the limitation, nature and extent of the limitation, relation between limitation and its purpose and less restrictive means to achieve the purpose. The courts, see the *Teddy Bear Clinic for Abused Children & Anor v Minister of Justice and Constitutional Development (Justice Alliance of South Africa, Trustees for the time being of the*

*Women's Legal Centre Trust, and Tswaranang Legal Advocacy Centre as Amici Curiae)*, 2013 (2) SA 168 (CC).

g) Constitutional remedies are usually lost on technicalities, and the courts struggle to balance laws of general application and making a finding that a right has been violated.

h) The general principles about constitutional remedies are not usually discussed under the concept of effective remedy and sometimes are granted using the separation of powers doctrine in mind when courts suspend the operation of their orders. Declaration of invalidity for instance have not been resolved using the doctrine of objective constitutional invalidity based on the law which was unconstitutional from the day it was passed. The instance when courts can suspend the declaration of invalidity have not been canvassed in detail or with sufficient reasons or with conditions attached to timelines in terms of allowing the courts to monitor Parliament or the Executive's compliance with the order. Constitutional damages remain a polemic and debatable part of Zimbabwean law. Declarations of rights remain a discretionary and weak remedy. Courts usually stop after the declaration because the courts cannot instruct any organ of state to comply with the order. Zimbabwean courts shy away from ordering structural or supervisory orders which, until the court is satisfied, the court will take down the order.

i) The courts in Zimbabwe are still to pronounce authoritatively on substantive and formal equality, including equality of outcomes. The presumption of unfairness has not been litigated based on comparative interpretation with South Africa's sections 9 (1), (3), (4) and (5) on equality before the law, restitutory equality, prohibition of unfair discrimination, horizontal application of the prohibition against unfair discrimination, and presumption of unfairness. Most cases only end on equal benefit and protection. Equality before the law has not been based on nuanced arguments distinguishing between mere and arbitrary differentiation. The same is true for factors which constitute unfair discrimination. Our courts are still to engage deeply into the two steps inquiry between discrimination and unfairness inquiry. Neither have shown whether we have a closed system, nor have they attempted to discuss discrimination under unlisted grounds of discrimination. The court are still to engage in ventilating intersectional discrimination based on

many grounds like race, class and gender, see Mahlangu case in South Africa. Distinctions between hidden or disguised discrimination and direct or indirect discrimination remain shrouded in mystery.

j) There are delays in shaping constitutional remedies relating to transformative transitional justice such as damages, unconditional apology, audit of lifestyle, and so forth to promote equal enjoyment of rights or spearhead the promulgation of laws equivalent to South Africa's Black Empowerment Act

k) A nuanced analysis of the distinction between protected, unprotected and hate expression is still to be discussed in Zimbabwe, see *Afriforum v Malema* 2011 (6) SA 240 (EqC).

l) Political rights are still to be protected for various people including prisoners, diaspora vote, and those suffering from cognitive disabilities. The right to know the state funding provided to political parties or the private funders is still a mystery.

m) The court sometimes simply reversed orders on protection of ECOSOC rights without reasons, see *City of Harare v Mushoriwa*. Distinctions between qualified and unqualified rights have also not been properly canvassed. The courts have not yet developed the concept of judicial enforcement of qualified ECOSOC rights in Zimbabwe. Standards of review of ECOSOC rights are still to be developed, including the reasonableness requirement, minimum core content requirements, progressive realisation, and judicial review.

## Conclusion

The logical corollary to the development of the concepts of constitutional interest and constitutional justice in Zimbabwe is that the criteria used to select judges as the final interpreters of the supreme law should be based on advanced constitutional law or constitutional interpretation knowledge. Alternatively, judges must demonstrate a compelling need to employ constitutional interpretation methods that go beyond the plain meaning of constitutional provisions. If superior court judges are appointed on merit, including advanced training in comparative constitutional law or constitutional law and human rights, the potential for innovative and right-based constitutional interpretation can be greatly realised. This means that judges must thoroughly prepare for appointment into the Constitutional Court

through judicial activism, extensive reading, and scholarship or advanced legal training. A merit-based approach to appointing judges of the Constitutional Court would encourage judges of other superior courts to interpret the Constitution broadly and purposefully.