Chapter 3: The Anatomy of Constitutional Justice, Politics and Rights in Zimbabwe

Introduction

Many lawyers think that constitutional interpretation and identity are divorced from politics. While lawyers may not worry about the politics of law, there should worry about the politics of constitutional interpretation. If they invoke historical interpretation in cases involving customary law, Zimbabweans valued social constitutions that existed in Zimbabwe prior to the arrival of the colonialists. In fact, the position of the GoZ is that Zimbabwe was a multicultural society before 1890. The different social constitutions from pre-colonial societies can be used to remodel Zimbabwe's deeply westernized constitutional structure. There are cases where the Zimbabwean courts for instance have followed traditions that shun adultery and protect the sanctity of the monogamous marriage institution.

While the 2013 Constitution of Zimbabwe does not entrench *Ubuntu/ unhu* or humanness as one of the founding values, judges are now mandated to develop customary law principles such as *unhu* or ubuntu. Shona social constitutions for instance have *mhangwa neshwiro* (teachings and wisdom) and these can be used to decide concepts of constitutional justice and identity from a historical constitutional interpretation method. In discharging their constitutional responsibility to develop customary and common law, Zimbabwean judges may draw examples from constitutional justice cases from the English common law. They must appreciate that written constitutional justice in those countries arose from common sense applied by judges and the King's courts. Common sense was nothing more than an individual judge or king's emotions. The common law developed from common sense was used to frame the legal positions that were later supported by the legislature. The established customs of the English people provided the basis for such common sense which later became known as common law. The English Parliament itself is in Westminster, a part of London that has long related to royalty and government.

In Zimbabwe, the Harare Parliament was connected to king NeHarare's royal place. The Mount Hampden Parliament was also first sited by the white settlers who wanted to establish a capital city there. Customary and common laws in Zimbabwe are not codified. Many years before the adoption of the 2013 Constitution, Professor Julie Stewart who teaches women's law and succession at the University of Zimbabwe, lamented how, as a white lecturer, she did not understand Zimbabwean customary law or customs to properly teach them from a normative perspective.[138] Her sentiments influenced former women's law lecturers like Justice Amy Tsanga to write books such as *Taking Law to the People*, that emphasised grassroot approaches to understanding women's law.

Zimbabwe's customs and general law are beautifully depicted in a variety of old and new world literature. Many Europeans who had early contacts with the Shona and Ndebele people documented them well. Zimbabwe's constitutional interpretation of customary and common laws will fail unless judges attempt to understand the true customary law of Zimbabweans who appear before them. Many didactic proverbs, riddles, folktales and sayings demonstrate how diverse Zimbabwe's unwritten social constitutions were from tribe to tribe or language setting to language setting. Zimbabwean judges must develop indigenous common or custom law in the same way that the British have emphasised the importance of ensuring that their common law traditions are accepted by the so-called civilized world. The British common law is nothing more than their customs that were used to even modify the Greek form of direct democracy or popular rule by introducing representative democracy. Later, in the sixteenth and seventeenth century, the common law was used to fill gaps in statutory meaning in cases like *Fermor's case* (1602) 76 Eng. Rep. 800 that laid the rule that if any doubt is conceived on the words or meaning of an Act of Parliament, it is good to construe it according to the reason of the common law. Statutes were unimportant at the time because the courts saw them as exemptions or unwelcome intrusions into the legal framework established by the far superior common law.

The Anglicized form of common law has remained the background or default legal rule, referred to as trite common law positions by Zimbabwean judges

[138] Julie E. Stewart, 'Why I Can't Teach Customary Law.' 14 *Zimbabwe Law Review* (ZLREV.), (1997) 18-29.

(and all common law legal systems). Only judges who observe the *presumption of legislative awareness* and expectations attached to common law traditions change the form of the common law. Unfortunately, after independence, Zimbabwe's legal system continued to revere English common law, forgetting that it was nothing more than English customs glorified as general law. This was accomplished by implementing a Western education system that appears egalitarian/ constitutional and inquisitive.

The university format of teaching constitutional law has largely been responsible for the neglect of Zimbabwe's social constitutions. It explains why a variety of Zimbabwe's customs were not codified. Customary courts have however radicalised the application of living customary law. They have utilised social media to publicise their conceptualisation of customary laws applicable to different provinces in Zimbabwe. While the constitution refers to traditions, customs, and conduct that may conflict with it, most customs and traditions are simply unknown and can be accepted or rejected depending on whether the litigants or the concerned judge knows them. In rare murder and administrative cases, judges (rather than litigants) typically benefit from the input of assessors, who are lay people with extensive knowledge of social and constitutional values related to human life and administrative justice. While court rules give individual judges the authority to direct such assessors, the assessors help ensure that judges who follow the Western general law are not blind to important traditions that unite Zimbabweans. Zimbabwe's journey toward codification of customary and common law must include the assessor's system. Judges must ensure that they keep customary law remains customary law and English common law remains English common law. At some point, Zimbabwe's customary law becomes Zimbabwean common law.[139]

In our opinion, constitutional law education in contemporary Zimbabwe is still based on Western ideals. Zimbabweans must reflect in their recent and known past and follow jurisdictions that teach the foundations of African customary law. Today's English people, for example, know very little about

[139] The customs of the English people became the common law of many commonwealth and Anglo-Saxon countries. As such, Zimbabwe's customs must be a version of the common law that is strictly Zimbabwean if other versions of the common law are to make sense in Zimbabwe.

what happened before the Anglo-Saxon runes between the 5th and 7th Centuries AD. The period from the 7th to 10th Centuries is known as the earliest documented period of the English language. In the 10th to 11th Century AD, the Norman invasion of England became the known period of the usage of the English language. In many ways, England's social, legal and political traditions became Anglo-Francophone. The civil traditions of France and Continental Europe influenced the development of the English common law in many ways. As a result, it is critical for Zimbabwean judges to avoid relying solely on legal texts that seek to place the English common law as distinct from continental Europe's civil law tradition.

The inspiring question is: *how will Zimbabwe, or any other common law country, create indigenous common law in the same way that the English did*? Is it true that a completely new common law will provide legal certainty for many problems that the English common law fails to resolve? We will not go into detail about this, but it is important to note that judges should strive to divide the common law into several categories, such as English, mixed, Commonwealth, Zimbabwean common law, and so on. As in the categorization of the common law, Zimbabwean common law can be called Zimbabwe's customary law. Professor Lovemore Madhuku is one of the constitutional lawyers who has attempted to broaden the meaning of the common law. We frequently notice that there are at least three Madhukus in our conversational analysis with Professor Madhuku as one great contributor to constitutional law in Zimbabwe: the *academic* Madhuku; the *civic* Madhuku and the *political* Madhuku.

Madhuku shifted the University of Zimbabwe Faculty of Law's emphasis away from Marxian traditions under the late Kempton Makamure and Munyaradzi Gwisai toward the transformative power of an academic discipline known as constitutional law. While Madhuku did not make all the developments in constitutional law in the early years from 2000 to the present, the use of academic, civic and political engagements to develop constitutional jurisprudence in an important way became noticeable in Zimbabwe because of what the late President Robert Mugabe referred to as Madhuku's strategies. This strategy saw academic who could jump academic, civic and political ships at any time.

While Professor Madhuku left a constitutional legacy in Zimbabwe during his time as a civic leader, other CJs, such as including Gubbay and Enock Dumbutshena, and academic luminaries like, Reid Rowland, Greg Linington, and the late Walter Kamba, Vengai Guni, and Welshman Ncube were the early active constitutionalists. Justices Tsanga, Chirawu-Mugomba and Hlatswayo also contributed to constitutional justice in Zimbabwe as former law lecturers. There are judges such as High Court Masvingo's Justices Charewa and Zisengwe who were commended by Constitutional Court Judge Anne-Marie Gowora for clearing 1719 criminal cases in 2024 out of a total of 1 909 cases filed in 2023 and 2024. Both judges also finalized 810 civil cases out of 913 cases. The simple statistics show that the judges have a good work ethic. Justice Charewa served in the Zimbabwe Defence Forces as chief legal officer, worked in academia and private legal practice and has cross-border experience in constitutionalism and human rights since she worked at the African Court of Human and Peoples' Rights in Arusha. She even became special assistant to the court's president and served as deputy registrar. She also understands role of constitutional commissions such as the Zimbabwe Human Rights Commission. She was part of the notable judgment on the Chief Justice's tenure in *Kika v Minister of Justice and others*, HH 264/21 which Justice Zhou declared that the Chief Justice had ceased to hold office of Chief Justice of Zimbabwe and judge by operation of the law. They also declared that the extension of tenure as contemplated by section 186 of the Constitution did not apply to other judges who were cited. Justice Charehwa and Mushore agreed with the decision although it was appealed against. Justice Zhou and Mushore practiced law as advocates. Justice Zhou has postgraduate training in constitutional law and lectured delict law at the University of Zimbabwe while Justice Charewa was lecturing civil procedure. Justice Mushore served as legal adviser (Africa) of the International Organization of Consumer Unions at the Hagie in the Netherlands from 1993 to 1999. She had transborder appreciation of international law. Justices Mushore and Tsanga made groundbreaking judgments on statutes of limitations, Justice Tsanga in *Nyika v Minister of Home Affairs* HH 181/16, and *Justice Mushore in Mangwiro v Minister of Justice* HH 172/17.

Justice Zisengwe holds advanced training from Turin and WIPO Worldwide Academy. He has all-round experience in academia, third sector and cross-border jurisprudence since he worked as a judicial officer in Namibia. Justice Zisengwe has thus lived up to his promise when he was appointed when he committed to:

> 'The complexity, diversity and even volume of cases though daunting in prospect, is something to look forward to because it is an honour and privilege to serve society at that level. It is my hope and prayer that I will be able to serve with honour, integrity, and to the best of my ability for justice to be met.'
> Source: Manica Post 6 September 2019.

Justice Kabasa has postgraduate training in women's law and worked as a Labour Court Judge and third sector. Justices Tsanga and Chirawu-Mugomba radicalised the constitutional dimensions of family, succession and women's law while Justice Hlatswayo was involved in the Constitutional Commission Draft that was rejected in the referendum carried out in the year 2000. Today, many actors and judges we have not mentioned participated in the teaching of constitutional law, including law-based organizations, public institutions, universities, faculties, the Law Development Commission, Cabinet, the Attorney General, Law Society of Zimbabwe, Council for Legal Education, Parliament of Zimbabwe, the Zimbabwe Council for Higher Education (ZIMCHE), and the Government of Zimbabwe (through the Ministries of Justice and Higher and Tertiary Education). Litigants who underestimate the judges' ability to appreciate advanced comparative constitutionalism do so at their own peril.

Teaching of Constitutional Law and Third Sector Influence

While the teaching of law (and constitutional law) has been liberalized to include substantive law, quality assurance managers must ensure that serious concerns about examination leakage do not result in the production of half-baked lawyers or bad apples who will jeopardize the Constitution's constitutional responsibilities, including those relating to academic freedom and administrative justice.[140]

[140] See for instance, NewsdzeZimbabwe, UZ Exam Leaks Linked to Big Wigs, (27 November 2022) http://www.newsdzezimbabwe.co.uk/2022/11/uz-exam-leak-linked-to-bigwigs.html accessed 4 December 2022.

Zimbabwe's inspiration for constitutionalism has also been influenced by a culture of constitutional literacy fostered by civil society and human rights organizations. The JSC no longer has a monopoly on the production of Zimbabwe Law Reports. The involvement of organizations such as Veritas Zimbabwe and Legal Resources Foundation means that the collection of legal resources has become more open. Veritas Zimbabwe has gone above and beyond to collect all materials other than the Courts' judgments. Scholars can now decipher the details of the applicants' and respondents' cases, and various correspondences from other interested parties. Statutory instruments, post-Cabinet meeting briefings, pandemic updates, Acts of Parliament, and specific group aspects such as Veritas Women can all be found on the Veritas Zimbabwe website.[141] The Legal Resources Foundation provides resources; action-based empowerment; legal services, research, and advocacy.[142]

The birth of an indigenous constitutionalism in 2013 that judges must use to develop Zimbabwe's version of the common and customary law, is every constitutional lawyer's compass and sounder. Many Zimbabweans who also participated in the constitutionalism of Zimbabwe serve as inspiration for modified constitutional interpretation today. Zimbabweans first rejected a politically driven constitutional draft, the Constitutional Commission Draft, in 2000, after many years under a ceasefire Constitution, the Lancaster House Constitution. They also rejected the Kariba Draft Constitution, a politically smuggled draft sponsored by ZANU PF and the two Movement for Democratic Formations (MDC and MDC-T). Despite opposition to the 2013 Constitution as a bad constitution, approximately 3 million Zimbabweans, or 94.5% of the population, voted in favor of its adoption. Zimbabwe is not the only country where political events can shape people's lives. The political agenda in a nation will inevitably produce constitutional documents and institutions with political consequences, as was the case with the compromise Constitution enacted between 2009 and 2013 by the government of national unity.

Constitutional Interest

Constitutional justice and interest trigger the Zimbabwean society's commitment to the highest or supreme law and the founding values that bind

[141] veritaszim, accessed 4 December 2022.
[142] Legal Resource Foundation - LrF (lrfzim.com) accessed 4 December 2022.

them. Because it juxtaposes constitutional rights, duties and responsibilities, a constitution is both an asset and liability. The liabilities include the hurried provisions that encourage easy amendment provisions to the constitution, and those that expose the Constitution's full frailty in times of public emergency[143] and unreasonable restrictions of constitutional rights.[144] Zimbabweans now have transformative opportunities to demand constitutional justice through substantive and procedural constitutional law. Constitutional interest is used as a tool in a society to obligate superior courts in Zimbabwe to interpret the Constitution by giving full effect to the Bill of Rights and constitutional provisions. The constitutional structure envisions a situation in which the judges must not provide inadequate remedies for constitutional violations.[145] Constitutional interest also helped us to classify Zimbabwe's constitutional model as an *a la carte* constitutional model allowing for domestic, regional, and international human rights systems to be used to develop constitutional interpretation jurisprudence.[146] The constitutional responsibilities placed on judges to develop common and customary law also trigger the constitutional interest to make sure judges do not loosely apply concepts of judicial comity, judicial notice, or judicial discretions.[147]

Constitutional interest also encourages judges and lawyers to move with the spirit of the times. For example, in political and constitutional circles, the constitution is taught simply as some social contract. The social contract approach to democratic and constitutional theory has changed or been abandoned in most common law systems that have Anglicized philosophy of constitutionalism and constitutional rights. The social contract is used to explain how the general populace has rights and must be treated as equal sovereigns to their political counterparts. The Constitution exemplifies this social contract in which ordinary citizens and those in power: 1) agree on the type of government they want, 2) intend to follow that governance model, 3)

[143] Section 87 of the Constitution.

[144] See the general limitation or restriction clause in section 86 of the Constitution. See also the absence of key definitions to what for instance, constitutes compelling reasons that a judge can use to deny an accused person the right to bail, section 50 (1) (d) of the Constitution.

[145] See section 46 on holistic interpretation and & 85 of the Constitution on liberalization of legal standing and access to remedies such as declaration of rights, compensation and so forth. Sadly, the Constitution does not demonstrate the way our democracy or democratization can be financed to promote judicialization of constitutional gains.

[146] Section 46 of the Constitution.

[147] Section 176 of the Constitution.

set the terms and conditions in a Constitution and other laws, 4) agree on formalities such as having a written/ unwritten, flexible/ rigid, military/ civilian, Constitution, and 5) agree on methods of terminating, renewing or varying the social contract. This social contract was manifested during the French Revolution, when ideals such as *'liberty, fraternity and equality'* were prominently featured.

To illustrate the constitutional interest in a society, we use the fairness constitutional model that was designed by John Rawls to show how members of a society can show interest in their constitutional order. John Rawls proposed the concept of '*justice as fairness*' as the core of the democratic tradition that replaces the social contract or acts as a variation on the social contract.[148] The social contract is replaced by each individual's inviolability that is founded on justice and cannot even be overridden by the welfare of society as a whole.[149] Justice, according to John Rawls, is a comprehensive doctrine that cannot be reduced to economic, political, or social definitions of what is justice and fair. Associational justice is important to Rawls, and individuals must be able to enjoy both liberty and freedom. The Germans appear to have modified Rawls' liberal form of theory by involving citizens in their communities and viewing community life as essential for integration, recognition and emotional support.[150]In the German Basic Law or Constitution, communitarianism is defined as 'not the freedom from community and association, but freedom to associate in shared ways of life.'[151]The people's sovereignty clause, '*we the people of Zimbabwe*,' can also provide useful starting points for judges.

Freedom, as defined by a conservative, liberal and universalistic communitarianism, becomes the debate over whether or not communities promote or obstruct the fulfilment of human self-determination.[152] Equality becomes a question of what characteristics specific individuals, groups, or even all humans share (or should share), or under what conditions a community is

[148] John Rawls, *A Theory of Justice*, Revised Edition (1999, Belknap Press).
[149] Rawls (n 148).
[150] See Winfred Brugger, 'Communitarianism as the Social and Legal Theory behind the German Constitution,' 2 (3) *International Journal of Constitutional Law* (2004) 431-460, 431.
[151] Brugger (n 150) 434.
[152] Brugger (n 150) 437.

formed (or should be formed).[153]The Universalist will respond to the question by focusing on the fundamental interests of all humans, whereas the conservative will narrow or particularize the equality by focusing on what unites humans or members of a community.[154] The liberal will take a balanced approach.[155] In affirmative or critical sense, fraternity becomes an aspect of solidarity with an emphasis on interactions at family level or with all human beings. This latter sense can be applied to section 17 the Constitution's vision of gender equality in Zimbabwe.

The Connection Between Constitutional Law And Politics

Politics is ubiquitous. The concept of *'law is higher than the government'* summarizes the relationship between ordinary law and politics. While the power to do politics is thought to be everywhere, it is always somewhere, if not elsewhere. Judges who have done postgraduate studies in international relations, public administration, or governance are quicky to appreciate the ubiquity of state politics and how a polity's Constitution may both serve as a supreme law or political road map. The constitution prevents politicians from descending into snollygoster camps or from hiding behind theories like political realism, Machiavellianism, democratic dissonance, authoritarianism, regime change agenda, bald national interests, and other practices that trivialize the Constitution. Lawyers must assist judges to separate between state politics and the politics of constitutional interpretation. The promulgation of the National Security Council Act is also a sensitive area where litigants must tread cautiously when defending their clients. We suggest that they can hold the bail hearings or other hearings on camera and avoid media publicity. If media is invited, reportage guidelines must be gleaned from the court's directions. We believe that there is a National Security Act suspended in the air and where possible, lawyers must not politicize security related clients. Before alleging politicization of cases, they must first deal with the offence or criminal allegations levelled against their clients. This will make sure that the client is not sacrificed at the altars of political and lawyerly or

[153] Brugger (ibid).
[154] Brugger ibid.
[155] Ibid.

legalistic expedience. Appreciation of constitutional law and politics means astute lawyers remain perceptive and shrewd.

They can be resilient or bounce back even where they feel the courts have thrown justice outside the window or deliberately choose to frustrate them through litigation fatigue. Constitutionally resilient lawyers would not be euphoric about winning cases or politicizing litigation processes. Admittedly, they have a right to be irate, frustrated or pensive and so forth. Euphoria must be replaced with euphony and the judge's inquisitorial role must not be compared to fexting, phubbing, deep liking, or catfishing on social media controversies against individual judges. While some judges adopt political philosophies, litigants have a duty to bring passionate and trusted perspectives to the often-misunderstood subject of constitutional litigation. The Constitution assumes the existence of a value-based sovereign for whom the norms and constraints of the Constitution are intended. Values are thought to have supremacy characteristics, and they are fundamental tenets that provide the necessary guidance on how government and good governance should be conditioned.

Alternative approaches (instinctive and ideological) values must have their form and content aligned with the constitution. We can focus on four major constitutional aspects that make up a democratic constitutional system: constitutional review; indigenous constitutionalism; constitutional justice; and constitutional rights as principles. When a judge engages in political judicial philosophy, lawyers can respectfully implore them to avoid descending into the arena, engaging in judicial restraint, acting as lawyer for one of the parties (*Tsvangirayi v Mugabe* CCZ 71/13 & CCZ 20/17 where judgments were written when a notice of withdrawal of the petitions were made) or take judicial notice considerations constitutionally. Lawyers act outside the courtroom before, during, and after the electoral cycle. Those who litigate on urgent basis, sometimes nocturnally, are aware of institutional challenges were some institutions may not accept service or reveal their identities for endorsement on the court documents. Some electoral cases are resolved through criminal law. Political decisions relating to diaspora Zimbabweans, non-citizens, or independence of the Zimbabwe Electoral Commission have been common in Zimbabwe's constitutional society. There are case Laws which tread between

constitutional rights and politics such as *Timba v Chief Elections Officer & Others* SC 69/15; *Mliswa v Chairperson of ZEC & Others* EC 03/15; *Shumba v Chairman of the Zimbabwe Electoral Commission and Another* (EP133/08), *Makone and Another v Chairperson of the Zimbabwe Electoral Commission and Another* (EP 17/08) [2008]; *Zimbabwe Electoral Commission (2) The Chairperson Of The Zimbabwe Electoral Commission v. The Commissioner General Zimbabwe Republic Police & 19 Ors* CCZ 64/13 and *Madzingo and Others v Minister of Justice Legal and Parliamentary Affairs and Others* SC 22/05. During one elections litigation course attended by one of us, emphasis was placed on various scenario mapping strategies such as:

What are the Issues Arising?
What steps could have been taken prior to Election Day?
How could lawyers have secured a different outcome?

Administrative decisions that are taken at different court levels can easily be politicized in terms of outcomes, even under the integrated electronic case management strategy. Judges of other courts within the court hierarchy can mind map on potential points of law if the case is dismissed. This is common sense. Writing about law and politics, Cerar (2010), the relationship between law and politics, *Annual Survey of International and Comparative Law*, Vol. 15 (1) 8-30, saliently noted in the abstract that:

The law functions in relation to politics in three basic aspects, namely as a goal, a means, or an obstacle. First, politics can define certain predominantly legal values or institutions as its goal. In this case the political understanding of these values or institutions becomes almost identical to an authentic legal understanding of the same values or institutions. Second, politics can comprehend the law merely as a means for the fulfilment of certain political interests. In this case politics is neutral in its attitude toward the law. Finally, politics can interpret law as an obstacle on the way toward the realisation of certain political goals. In this situation either politics prevails over law, or vice versa. In the first case politics effectuates its solutions at the expense of the rule of law, while in the second case the autonomy of law is preserved through the decisions of the highest courts or by other actions taken by lawyers, intellectuals, associations, organizations, and the public to stop illicit acts of political actors. Law and politics create their own pictures of reality. Sometimes those pictures overlap, sometimes they differ. Yet, there is something that the law should never include in its sphere; namely, the differentiation of adversaries according to a purely political criterion. This leads to a strict separation between "ours" and "yours", or, in its most radical expression, to a strict separation between friend and enemy. When the latter occurs, politics inevitably prevails over the law and reduces or damages the autonomy of the rule of law.

The article helps lawyers to appreciate institutional, normative, and process-related dimensions in a constitutional polity. For example, there is no reason to issue practice directions that impose prohibitive elections fees for presidential candidates who are elected jointly and severally by all registered voters. The practice direction would serve as an institutional, normative and political process related hindrance to the realising political rights in Zimbabwe. Politics is also inherent in matters that could relate to the National Security Council as a constitutionally established council. A lot of political decisions were taken including disbanding the SADC Tribunal that can be compared to Brexit. Human rights litigation depends on political doctrines, margins of appreciation, progressive realisation of ECOSOC rights, and reliance on the Universal Periodic Review (UPR) or the African Peer Review Mechanism. International protection of human rights is difficult under restrictive laws. There has been furore over the purpose of the Patriotic Act enacted on 4 July 2023 which criminalizes willful injury on the sovereignty and national interest of Zimbabwe specifically relating to sanctions or armed intervention in Zimbabwe or overthrowing the government. This Act, while found in countries such as America, can limit the ability of Zimbabweans or third sector practitioners to file shadow reports on international forums since they would be afraid of being watched under the Act. National interests are also defined by the President of the day who also heads the National Security Council. It would also be difficult for institutions like JOC, civil society, and media organizations to be heard because they are not part of Cabinet. National interests are at the end of the day, defined by the political party in power or its leaders.

Constitutional Review and Related Issues

Constitutional review is concerned with how Constitutional Courts or courts that serve in that capacity review legislation, either in the abstract or in relation to the actual controversy. In contrast to the '*American*' or other cross-border models, in which all courts have the authority to adjudicate constitutional issues while deciding legal cases and controversies, most European countries review legislation in the abstract.[156] Lawyers must

[156] Victor F. Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization,' 2 (3) *International Journal of Constitutional Law* (2004) 461-491, 461. [166] Comella (n 165) 462.

understand the schema legislation, ontological guidelines, distinctions between abstract, base, amending, and consolidated Acts and so forth. There are analysis links such as Zimbabwe's Law Portal, articles and subdivisions, EU directives and so forth governing EU law. Zimbabwe follows the American model by adopting either political or avoidance doctrines to avoid declaring a statute as unconstitutional. Judges have taken a political approach, postponing the implementation of their decisions until the legislature or executive has addressed public concerns. This was followed by Justice Rita Makarau declaring the provisions of POSA unconstitutional. POSA was subsequently repealed and replaced by the Maintenance of Peace and Order Act.

Prior to the enlargement of the European Union in 2004, eight countries had constitutional courts: Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal and Spain.[166]Three of the remaining seven, namely, Denmark, Sweden and Finland, rarely find a statute unconstitutional.[157] The constitutions of Finland and Sweden establish the '*clear mistake rule*,' which states that 'only when the statute is unconstitutional beyond any reasonable doubt may a court set it aside for the purposes of deciding the case.[158] Because it lacks a Constitutional Court, Ireland delegated constitutional review authority to the High Court and Supreme Court. Before the adoption of the 2013 Constitution, there was an '*Irish position*' in Zimbabwe. The difference with Ireland is that, at the request of the President, the Supreme Court of Ireland can rule on the constitutionality of legislation before it is enacted.[159]Unfortunately, Acts of Parliament in Zimbabwe are usually promulgated to show opposition politicians that party A controls the legislature or wields political power. The president of a political party in power forgets that they are a product of direct democracy that differs from how parliamentarians gain power. Greece gives all the courts the authority to declare legislation unconstitutional if they believe it is unconstitutional,[160] though the Special Highest Court resolves cases involving the constitutional validity of statute that arise among the supreme

[157] Ibid.

[158] Article 14 of the Swedish Constitution and section 106 of the Finnish Constitution. See further Jaakko Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' 48 *AM. J. Comp. L.* (2000) 345.

[159] Article 34 of the Constitution of Ireland 1937, cited in Comella (n 155) 462.

[160] Article 93, s 4 of the Greek Constitution.

courts.[161] Because judges are either prohibited by the Constitution or lack capacity, the Netherlands and the United Kingdom (both before and after Brexit) lack a system of constitutional review of legislation.[162]

When petitioning Zimbabwe's courts to declare statutes as unconstitutional, the above models must be applied to the Constitution and Zimbabwe's constitutional model. Lawyers and judges must also consider the structural features in the Constitution relating to decentralization of powers to declare statutes unconstitutional from the High Court, Supreme Court and Constitutional Court. Because only the Constitutional Court has the final say on whether a statute is unconstitutional, it has some centralization features. The other structural feature is abstract review, in which courts examine statutes in the abstract and declare them unconstitutional with general effects (obligations *erga omnes*). Zimbabwe's courts are hesitant to declare statutes unconstitutional in this format. Typically, they grant partial relief or postpone the operation of their declarations of invalidity for a set period to allow the executive to address the issue.

Two approaches are typically used when triggering constitutional review. One, litigants use constitutional challenge to strategically test or challenge the statute. In Zimbabwe, public interest groups typically use this route. In other countries, public institutions such as the government, ombudsman, the prosecutor general, parliament, and so on file the challenge within the deadlines set by the Constitution after the official publication of the statute.[163] State institutions in Zimbabwe rarely, if ever, challenge the constitutional validity of statute. This has given rise to allegations of conflation between state institutions at all levels, resembling Machiavellian governance. Even when Parliament is normally controlled by a dominant opposition or ruling political party, statutes are rarely challenged as unconstitutional by successive Parliament.

Secondly, the other option to trigger constitutional review is to raise constitutional concerns. If an ordinary judge is seized with a particular case, he

[161] Article 100, s 1 of the Greek Constitution.
[162] Human Rights Act 1998, c 42 England.
[163] Comella (n 156) 464.

or she may refer the applicable statute to the Constitutional Court if he or she believes it is unconstitutional or doubts its validity.[174]Using this route, the Court does not decide the case but simply determines the relevant statute's constitutionality.[164] Zimbabwe appears to follow this procedure, but in critical cases, the Constitutional Court stymies it by invoking the so-called '*wrong format*' arguments. It begs the question of common sense why the Constitutional Court judges do not simply correct the anomaly and regulate the processes of the other superior courts as the Constitution requires. It appears to allow this procedure through its constitutional referral system, in which a court can refer a case to the Constitutional Court.

The third procedure is initiated by applicants who file a constitutional complaint, raising constitutional arguments, and requesting that a case be referred directly to the Constitutional Court.[165] The Constitutional Court unanimously agreed in the *Kamurendo* case that section 121 (3) of the Criminal Procedure Act violated sections 13 (1) and 18 (1) of the Lancaster House Constitution (now iterated in sections 49 and 50) of the 2013 Constitution. All of this requires balancing constitutional review with the form of representation envisaged in the Constitution. According to Robert Alexy, balancing is part of discursive constitutionalism that links the concept of balancing to constitutional rights, constitutional review, and representation.[166]Balancing is based on a rational form of argument that is based on a weight formula which is more pronounced in German constitutional law, for example, where it is required by a more comprehensive principle, namely, the principle of proportionality (*VerhältnismäBigkeisgrundsatz*).[167] In Zimbabwe, a special type of mandatory constitutional review exists, in which litigants approach the courts to compel state institutions or functionaries to comply with constitutional provisions. This was done in the case of *Nyasha Chiramba v Minister of Justice* HH 584/22, to compel the Ministry of Justice to create a code of conduct for Zimbabwe's Vice Presidents.

[164] See Article 142, s 3 of the Belgian Constitution, and constitutions of Spain, Australia, Italy, Luxembourg and Spain.

[165] See the famous case of *S v Fanuel Kamurendo and others* CCZ 84/2015.

[166] See Eobert Alexy, 'Balancing, Constitutional Review, and Representation,' 3 (4) *International Journal of Constitutional Law* (2005) 572-581, 572.

[167] Ibid.

Indigenous or Autochtonous Constitutionalism

Indigenous constitutionalism is linked to internal democracy. It occasionally creates constitutional quandaries that prevent ordinary people from embracing the benefits of constitutionalism. Constitutionalism, in any form, must assist ordinary people or the generality of the population in determining a state's democratic and moral standing in the modern world. [168] Cross-state constitutional discussions shape national norms and doctrines, but constitutions that transition from the colonial legacy to independence typically abandon representative democracy or representative government for pragmatic reasons. The debate over constitutional nativity becomes critical in autochthony constitutional debates when new charters seeking to respond to colonial charters are adopted. These new charters, on the other hand, rarely create 'indigenized' new spaces for democracy and risk serving as calcified monuments or symbols of compromise after periods of crises. Zimbabwe's 2013 Constitution is a product of compromise after the rejection of the Constitutional Commission Draft in 2000. Other drafts, such as the Kariba Draft, were also rejected because they were party based charters smuggled into the public domain. Under the government of national unity (GNU) (2009-2013), the 2013 Constitution was ratified. This Constitution is not wholly autochthonous because it benefits from cross-border/trans-national constitutionalism. It is autochthonous because its supremacy clause has the force of law,[169] and it speaks to Zimbabwe's own history of the liberation struggle and diverse peoples. [170] Because of its uniqueness, Zimbabwe's Constitution should not be referred to as Amendment 20 because it is not an amendment. While an amendment was used to replace the Lancaster Constitution, the 2013 Constitution is the result of the people's sovereign will that ratified the compromises of the political parties that represented them between 2009 and 2013.

Many vestiges of colonial and Anglo-Saxon constitutions, such as the rule of law, separation of powers, three branches of government and nominated state officials, still exist in Zimbabwe. While Zimbabwe has no monarchy, there are

[168] See Margaret A. Burnham, 'Indigenous Constitutionalism and the Death Penalty: The case of the Commonwealth Caribbean,' 3 (4) *International Journal of Constitutional Law* (2005) 582-616, 583.

[169] Section 2.

[170] See the main preamble to the 2013 Constitution.

legalistic manifestations of a monstrous presidency that reflect some monarchical absolutism. [171] The autochthonous nature of Zimbabwe's Constitution is also evident in many areas where Zimbabwe combines versions of nativity and comparative constitutionalism. While Zimbabwe borrows from many worlds, the Constitution contains many features that create a constitutional identity that can be described as Zimbabwean.

Constitutional Rights

The inclusion of a Bill or Declaration of Rights in the Constitution marks Zimbabwe's departure from the Westminster model of fundamental rights and freedoms.[172]The inclusion of Bills of Rights marks a transition from reliance on common law to the explicit grant of judicially enforceable rights.[173]Margaret Burnham sees Bills of Rights as important because the Constitution grants the courts the power of judicial review and establishes constitutional supremacy.[174]Some rights such as right to strike, are conditional, possibly because English common law did not recognise such a right.[175]This does not imply that Zimbabwean courts must read or interpret freedom to petition or demonstrate in accordance with the frozen concept theory that is used in parliamentary systems of sovereignty, and reduces the Bill of Rights from higher to ordinary law.[176]Bills of Rights are also important if the ideals of freedom, fraternity and equality mentioned in the introduction to this chapter are followed by courts in their adjudicative roles. Zimbabwe's preamble emphasises solidarity or fraternity, while the concepts of equality and freedom are incorporated into the content of many rights or freedoms from section 44 to 87 of the Constitution. Furthermore, Bills of Rights adhere to the universalism model of human rights protection advocated by soft laws like the Universal Declaration of Human Rights.

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[171] See section 89 of the Constitution where the President is head of government, head of state and commander in chief of the Zimbabwe Defence Forces.

[172] See Chapter 4 of the Constitution, sections 44-87.

[173] See Burnham (n 168) 596.

[174] Burnham (n 168) 596.

[175] See section 59 of the Constitution; Cf. Burnham (n 180) 597 citing the case of *Collymore v A.G of Trinidad and Tobago* [1997] 12 W.I.R. 5 (CA) [1970] A.C. 538.

[176] Zimbabwe is a constitutional sovereign state. For further details, see Walter S. Tarnopolsy, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms,' 44 *Law and Contemp. Problems* (1981) 169.

Other countries follow regional courts and bloc charters such as the European Convention on Human Rights; the African Charter on Human and Peoples' Rights; and the Inter-American system. Bills of Rights in some countries were intended to preserve the status quo rather than to confer expanded rights against the state.[177] When it comes to preserving colonial legacies like the death penalty, this has been the case in countries with retentionist policies. Some countries that still use the death penalty assert categorically that they do so in accordance with international human rights standards.[178]For example, some argue that the death penalty falls outside the purview of the human rights regime because international law permits it, and it is a matter squarely within the domestic jurisdiction of sovereign states.[179]Zimbabwe also retained the death penalty for males aged 21 to 79 but this has now been changed.[180]The existence of such legacy saving clauses that transport colonial legal systems into independence era, has been compared to the constitutional Frankenstein's monster that destroys the founding instruments' central covenants and leaves behind a pitiful heap of unrealised hopes.[181]The monster is compared to mythological figure Prometheus, who created humans from clay and gave them fire.

Simply put, under a retentionist system, a constitution becomes high sounding nothing, much like the tall and emotional Frankenstein who tries to fit into the human society but is rejected. The amendment of Zimbabwe's Constitution through amendments 1 and 2 demonstrates how both the protagonists and antagonists of the amendments have undermined the integrity of Zimbabwean constitutionalism. The protagonists have used the simple formula of controlling two-thirds in parliament, whereas the antagonists have not sought the Court guidance to clarify this area of immature and rushed or hurried amendments intended to consolidate political power through the judicialization of politics.

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[177] Margaret DeMerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (University of West Indies, 1992) 15.

[178] See Burnham (n 180) referring to Basdeo Panday, the Trinidad and Tobago Prime Minister at a 1999 meeting of the Permanent Council of the OAS.

[179] Panday ibid, see ‹ http. www.oas.org/OASpage/press2002/en/Press99/092399.htm› accessed 30 November 2022.

[180] See section 48 of the Constitution.

[181] Burnham (n 168) 606.

Constitutional Justice

In Zimbabwe, the adoption of a justiciable constitution represents the pinnacle of constitutional justice. Constitutional justice envisages the need for procedural constitutional law. According to the Constitution, judges have the constitutional responsibility to develop or modify the common law and customary law in Zimbabwe.[182] There is a presumption that the existing common law and customary law at the time of the adoption of the 2013 Constitution was incompatible or inconsistent with the expansive bill of rights introduced by this Constitution. The drafters of the 2013 Constitution did not explain why common law and customary law needed to be changed. They also failed to define what constitutes common law or customary law in Zimbabwe. The answers are not even provided in the Constitutional Select Committee (COPAC) preparatory documents which could serve as aids to constitutional interpretation. We propose that judges who are likely to resolve constitutional questions summon the drafters to explain some of the Constitution's missing links or terse provisions. In jurisdictions such as the United States of America (USA), the practice has been to wrestle with the original intention of the drafters who have died. The drafting process in Zimbabwe, of course, raised security concerns, and it remains to be seen whether the drafters can reveal the rationale behind the framing or content of specific rights and freedoms in the interests of constitutional justice.

During the drafting process, it was noted that the COPAC drafters were placed in a secret location in the Eastern Highlands to plug data leaks.[183]The drafters are well-known and can be interviewed or provide guidance on areas where legal certainty is lacking. Former High Court Judge Justice Moses Chinhengo; Priscilla Madzonga and University of Zimbabwe Lecturer, Brian Crozier are the three drafters. While ZANU PF accused them of lifting information from foreign constitutions to suit the aspirations of the two Movement for Democratic Change formations in the GNU[184] they were never given an opportunity to publicly explain the motivations behind the framing and content of the provisions in the Constitution. Governance and constitutional models based on a ratified constitutional structure must always treat the

[182] Section 176.
[183] African Research Bulletin, 'Zimbabwe: Constitutional Drafters Moved,' 49 (1) *ARB* (2012).
[184] Ibid.

people as the repositories of governmental power. Our setting is Zimbabwe, but the challenges to constitutional democracy are universal. Zimbabwe, a constitutional society of 14-16 million people, is a unique phenomenon that does not require silo monopoly, rhetoric or political correctness from the powers that be. Dialogic engagement rather than rhetorical adherence to cheap politics is needed to foster long-term constitutional democracy in Zimbabwe. Zimbabweans must approach governance issues in the spirit of the Constitution. Intense discussions about governance and constitutional models have been summarized, for example, from the perspective of India as follows:

> 'We will open the box that we see as given, with logic and reason, yet avoid rhetoric. Our passion will be concrete. These intense conversations will help us discover more friends than we think we have and trigger logical sensitivities (what may otherwise be called revolutionary or radical) towards certain issues. We must approach the problem in the spirit of right is right even if no one is doing it, wrong is wrong even if everyone is doing it. We are not attacking anybody, only our problems. If the constitutions of the day are causing our journey to stall, then we seek to address them with double diligence. We are in a positive mode; we are looking for solutions. These problems and their solutions are right here, for none of those problems fell from the sky.'[185]

Reflecting on the fundamental concepts of constitutional justice in Zimbabwe demonstrates that every informed citizen can help to build a Zimbabwe that values such justice. When Zimbabweans first debated the need for a people-driven constitution at the turn of the millennium, they intended to create a constitutional society that respects the sovereignty of the Constitution[186] and the people,[187] and the other sovereigns such as the Parliament,[188] the republic of Zimbabwe,[189] and the President.[190] The mosaic of Zimbabwe's constitutional democracy provides the primary reason for respecting the many sovereigns espoused by the Constitution.[191]The crucial question in constitutional justice protection is whether it will be guided by the judges' commitment to direct

[185] Atul Khanna, *Between You and Me: Flight to Societal Moksha* (2018, Bloomsbury India) xi.
[186] See the constitutional supremacy clause in section 2 of the Constitution.
[187] See the main preamble and the devolution preamble in the Constitution.
[188] See section 116 and 117 of the Constitution. Section 119 also makes Parliament a unique sovereign since all institutions of the state are accountable to it.
[189] See section 1 of the Constitution.
[190] See section 89 and 92 of the Constitution.
[191] Sharon Hofisi, 'The Mosaic of our Democracy,' (11 April 2018, the Herald) https://www.herald.co.zw/themosaic-of-our-democracy/ accessed 5 December 2022.

democracy. In Zimbabwe, judges are elected by the President or by their peers. This implies that they are directly accountable to the people.

When they consolidate the state's gains in direct defiance of the people's will, they risk being removed from office along with leaders in the executive arm of government.