

Chapter 4: Zimbabwe, Homegrown (Autochthonous) Constitutionalism and Cross-Border Constitutionalism

Introduction

The autochthonous are loosely *zvidzazvepo* or the natives. Following countless amendments to the 1980 Lancaster House Constitution and attempts by politicians to impose politically-driven constitutions from 2000 to 2007, the idea of creating a constitutional society with a homegrown constitution was characterized by three important features: the participation of the Zimbabweans in the constitution-making process; the essentially people-driven character of that process; and the adoption of a constitution that has progressive provisions that promote diagonal, vertical and horizontal accountability. People's participation was expressly stated in the general political agreement reached by the political parties that comprised the government of national unity (GNU).¹⁹² People were divided on contentious issues that were left out, such as sexual orientation.¹⁹³ Vertical, horizontal and diagonal accountability are all part of Zimbabwe's principles of good governance that can promote homegrown constitutionalism.¹⁹⁴ Centripetal and centrifugal forces drove the adoption of a homegrown constitution. At home and internationally, the bloodbath in the 2008 June presidential runoff soiled Zimbabwe's human rights dashboard. During discussions about to intervene on humanitarian grounds, Zimbabwe and the Southern Africa Development Community (SADC) acted quickly to end the complicated crisis.

The concept of a peaceful Zimbabwe was created by exogenous forces. Allowing Zimbabweans to resolve their internal problems meant that Zimbabwe's client state status with countries such as China saved the politicians of the day. Political power was never a straight-jacket, according to the motto for interparty negotiations and other slogans like *peace begins me, you and all of us*. The GNU was never based on credentials in the liberation struggle. The influence of SADC and the United Nations (UN) on Zimbabwe's

¹⁹² See Article 6 of the Global Political Agreement, 2008.

¹⁹³ While Zimbabwe's section 56 of the Constitution which deals with non-discrimination was borrowed from the South African Constitution, the provisions in Zimbabwe leave sexual orientation from the grounds of discrimination.

¹⁹⁴ Section 3 (2) (g) and section 9 of the Constitution.

constitutional structure created a sense of *pax in universitate* (peace in universal unity). Peace as a common interest that promotes community solidarity won the day. The degree to which that peace was contextualized depended on the political will of the warring parties in 2008. This included the need to stabilize economic and social conditions that aided Zimbabweans' progress following a peaceful resolution of the political disputes that threatened their survival. Zimbabwe's 2013 Constitution benefited from the UN's Charter-based system that can trigger collective security measures when any country threatens global peace.¹⁹⁵ Zimbabwe benefited from Russia's and China's veto power over non-procedural matters brought before the UN Security Council. It also benefited from the UN Charter's allocation of powers to regional blocs like SADC in dispute resolution and peacekeeping.¹⁹⁶ Because peace cannot be achieved in situations of deep wrongs and instability, the UN Charter promotes functional cooperation and humanitarian or human rights cooperation.¹⁹⁷ The GNU created an atmosphere of political stability and justice and respect for basic human rights.

Zimbabwe needed both positive and negative peace in June 2008. The GNU became a symbol of positive peace in Zimbabwe because it established structures that addressed the root causes of political violence. The need for political opponents to rely on self-help was reduced. GNU provided a platform for the development of friendly relations and peaceful dispositions. It evolved into a social and economic progress platform. All these positive peace pillars were oiled by the exogenous forces that also escalated Zimbabwe's situation to a humanitarian crisis. It also provided negative peace by suppressing serious political violence that used as a weapon to stifle dissent. Even subsequent arrangements on '*peace begins with me, you and all of us*' and political party commitments to avoid and reduce election-related violence stemmed from the need to achieve negative peace. Zimbabwe's government had failed to uphold the responsibility to protect its citizens (R2P).¹⁹⁸

¹⁹⁵ See Article 39 of the United Nations Charter, 1945.

¹⁹⁶ See Chapter VIII of the Constitution.

¹⁹⁷ For a discussion on positive and negative peace as they relate to the UN, see Robert Kolb (tr. Katherine Del Mar), *An Introduction to the Law of the United Nations* (2010, Hart Publishing) 30.

¹⁹⁸ Daniel Nasaw, 'China and Russia veto Zimbabwe sanctions' (11 July 2008, *The Guardian*) <<https://www.theguardian.com/world/2008/jul/11/unitednations.zimbabwe>> accessed 5 December 2022.

Essentially, the R2P is supported by three equally important and non-sequential pillars listed by Alex J. Bellamy, Sara E. Davies & Luke Glanville, 'Introduction,' in Alex J. Bellamy, Sara E. Davies & Luke Glanville (eds.) *The Responsibility to Protect and International Law* (2011, Martin Nijhoff Publishers) 1:

'the primary responsibility of the state to protect its own populations from genocide, war crimes, ethnic cleansing and crimes against humanity and their incitement; the international responsibility to assist the state to fulfil its RtoP; and the international responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the host state has manifestly failed to protect its population from the four crimes.'

Zimbabwe benefited from the fact that the situation in Zimbabwe did not go beyond the test of situations where domestic means could be used to resolve the crisis before escalating it to international level.¹⁹⁹The UNSC's main point was that Zimbabwe's situation posed a threat to regional security because violence in Zimbabwe appeared to be unabated. There were echoes of a variety of RtoP offshoots, such as individual RtoP and will to intervene (W2I) that focused on the need for the Government of Zimbabwe to respect how individual citizens could be agents of change if the government fails to generate the political will for the international community to stop mass atrocities. To put it in another way, the government must show political will to deal with perpetrators of violence against citizens if it is to stop external intervention.²⁰⁰ Other critical aspects of constitutional interpretation and constitutionalism must be mentioned. Legal certainty, for example, was difficult to achieve in claims sounding in money. In *Mukorera v Ocean Breeze Engine and Cooling Systems* HH 13-08, at the height of runaway inflation that caused numerous social injustices, Makarau JP (as she was then known) took a conservative stance and refused to take a legal reformist approach to currency nominalism, holding that:

"The concept of currency nominalism has been held to be applicable in all aspects of South African law I hold the view that the distortions caused by inflation in the economy should not lead to the wholesale distortion of legal principles that have withstood the test of time in a bid to find legal solutions to a problem that is not legal in nature and origin and may prove to be transient. I am yet to be persuaded that revalorization is part of our law of debt collection".

¹⁹⁹ See the remarks of China's UN ambassador, Wang Guangya cited in Nasaw (n 198).

²⁰⁰ We will not discuss criticism of the RtoP doctrine that see it as a dangerous and imperialist doctrine that threatens to undermine the national sovereignty and political autonomy of weak states.

Following the GNU multicurrency regime, some judges, including Mutema J and Chiweshe JP who succeeded Makarau were also willing to take the same conservative stance despite the clear need to change the laws in *Christopher Shava v Bergus Investments (Private) Limited* HH 226/11.

Overview on the Quest For Indigenous Constitutionalism in Zimbabwe

The goal of this section is to collect several constitutional developments that have inspired Zimbabwe's constitutionalism. Zimbabwe now has a self-made Constitution, and its judges are expected to advance homegrown constitutionalism. Furthermore, Zimbabwe's Constitution entrenches values and provisions that were borrowed from mature democracies and other African countries, and as such, its judges must be prepared to interpret the Constitution through the lens of cross-border constitutionalism. Judges and lawyers in Zimbabwe have had the opportunity to present their interpretive role and discuss ideas on interpretation with established lawyers, trainers, researchers, and colleagues both within and outside Zimbabwe's jurisdiction. The most visible aspect of Zimbabwe's constitutional developments is cross-border constitutionalism. Constitutional law that is much debated in Zimbabwe these days, is not about Anglicizing Zimbabwe's constitutional system (few aspects, in fact, are Anglicized). It is not enough to select specific themes and then run with them based on how they are understood in the English and other legal systems to understand the inspirations for Zimbabwe's constitutionalism. Zimbabwe's constitutional system consists of the benefits of many worlds. The major inspirational tool appears to be cross border constitutionalism.

The starting point for understanding Zimbabwe's cross-border constitutionalism is that Zimbabwe was colonized by Britain and thus has an English common law legal system.²⁰¹ The common law also includes Roman and Roman-Dutch common law principles in commercial law and family law. Roman Dutch law mixes Roman civil law and customary legal principles. Zimbabwe has followed civil practices such as codified contract and delict law, Judges also use jurisprudence from Zimbabwean legal scholars in their judgments which borrows from civil tradition. Judges adopt inquisitorial

²⁰¹ See section 176 of the Constitution

proceedings under the new case conferences and in proceedings relating to maintenance, inquests, custody, or where the High Court is the Upper Guardian of minors. English law also influenced Zimbabwe's procedural rules and constitutionalism from the *Madzimbamuto* case cited in preceding chapters while Roman Dutch law was inherited from South Africa where Rhodes was a Prime Minister when he annexed Zimbabwe in 1890. The civil tradition remains the foundation of Zimbabwe's private law. Judges also use the three common law aspects such as *stare decisis*, use of unwritten customary law, and flexible statutory and constitutional interpretation. A wholly Zimbabwean common law should be context-specific, rights-driven, and decolonized. This enjoin judges to be mindful of Third World approaches to international law (TWAIL), critical legal studies and decolonial approaches to law.

Judges also adopt liberal democratic concepts or values such as the rule of law, separation of powers, human rights, and vested rights. Zimbabwe also has institutional structures that are similar to the British system, such as the legislature, judiciary and executive, albeit with different functionaries or identities.²⁰² Zimbabwe has an *a la carte* or mixed legal system that benefits from many worlds, including common and civil law systems. The Zimbabwean Constitution also envisions the establishment of a customary legal system in addition to the common law legal system.²⁰³ Civil law derives from Roman law, as codified in the *Corpus Iuris Civilis* of Justinian, and evolves because of reforms that mark a new legal life in a nation.²⁰⁴ The Criminal Law (Codification and Reform) Act of Zimbabwe fits in this description because it codifies crimes under the law.²⁰⁵ The criminal procedure in Zimbabwe is governed by the Code and the Criminal Procedure and Evidence Act.²⁰⁶ Despite the existence of a Code in criminal law, Zimbabwe has no Magistrates Court criminal rules.²⁰⁷ The Supreme Court Magistrates Court Criminal Appeals Rules are outdated, frequently confuse accused persons, and are not in

²⁰² For instance, the executive in Britain is led by the Prime Minister while Zimbabwe has a President. The doctrine of separation of powers is also watered down by concepts such as separation of functions and parties in the British system.

²⁰³ See section 176 of the Constitution.

²⁰⁴ Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to The Same Goal,' *Poredbeno Pomorsko Pravo* 40 (2001) 7-32, 8.

²⁰⁵ (Chapter 9:23).

²⁰⁶ (Chapter 9:07).

²⁰⁷ Compare this with the Magistrates Court (Civil) Rules, 2018 (Chapter 7: 10), SI 11 of 2019.

accordance with the Constitution in terms of protecting the accused persons' rights. Much of the interlocutory procedures in criminal proceedings in Zimbabwe are carried out as a matter of routine by prosecutors and courts rather than in accordance with the rules.²⁰⁸ Confusion also arises when the executive issues arbitrary regulations on a regular basis to govern issues such as fines in times of financial, political and legal uncertainty.²⁰⁹ In most cases, such fine schedules are issued without consulting the public or following due process that is a pillar of the rule of law. In fact, the lack of Magistrates Court criminal rules makes it even more difficult for accused persons to assert their constitutional rights in many issues relating to appeals, reviews and bail, because the Magistrates and prosecutors will exercise discretion on how such matters progress, even if that means seriously interfering with accused persons' rights. Rules that establish specific time limits are critical for achieving legal certainty and procedural fairness.

At a structural level, if all other courts have rules to guide them, it makes legal sense to discourage reliance on the rules from other courts, such as the High Court, the Supreme Court and the Constitutional Court, to determine how accused persons who appear before Magistrates' Courts must assert their constitutional rights and freedoms to challenge the allegations levelled against them. While criminal law reflects some elements of civil legal systems, customary law in Zimbabwe is another area that is likely to benefit from codification soon. Courts in Zimbabwe are required to modify customary law in the same way that they modify common law in Zimbabwe.²¹⁰ The extent to which customary law in Zimbabwe can be reconciled with the common law and civil law in the country, and the significance of customary law to Zimbabwe's legal system, is largely dependent on codification of various aspects of customary law in Zimbabwe. This will make it easier for Zimbabweans to choose between general law and customary law easily and to

²⁰⁸ In many situations challenging placement of accused persons on remand is a waste of time even if you raise important constitutional averments. The same goes with instances where magistrates unnecessarily descend into the arena or refuse to recuse themselves. Clear rules are needed on many issues such as the role of intermediaries in sexual offences; private prosecution; appearance of amicus organizations and scholars and so forth.

²⁰⁹ See for instance Criminal Law (Codification and Reform) (Standard Scale of Fines) Notice, 2021 (Chapter 9: 23) SI 25/ 21.

²¹⁰ See section 176 of the Constitution.

seek protection from the Constitution regarding which aspects judges of superior courts should modify in accordance with the Constitution.²¹¹

It may also be necessary to identify the aspects of civil law that may be subjected to constitutional interpretation. Caslav Pejovic observes in relation to civil law that:

‘The main features of civil law systems are civil codes which are authoritative and contain a lot of general rules and other principles, often lacking details. One of the basic characteristics of the civil law is that the courts main task is to apply and interpret the law contained in a code, or a statute to case facts. The assumption is that the code regulates all cases that could occur in practice, and when certain cases are not regulated by the code, the courts should apply some of the general principles used to fill the gaps.’²¹²

If Zimbabwe is to codify customary law, a great deal of information is required to ensure that judges of superior courts are properly guided on what they would modify as customary law as contemplated by section 176 of the Constitution. This is significant in light of the 16 languages (and thus cultures) officially recognised by Zimbabwe’s Constitution.²¹³ Added to this is the idea that culture is made up of highly contested codes and representations that necessitate poetic, political, historical and linguistic processes.²¹⁴ This is linked to the need for judges to examine customary law through the lens of dialogic and discourse approaches to democracy.²¹⁵ Suzan Williams, for example, notes how dialogic democratic theory can ensure that customary legal systems do not discriminate against specific rights in that:

‘If the problematic culture is a majority culture, then the question becomes whether legal sources of human rights-such as a constitution or international convention-should be understood to prevent the majority from expressing its culture through discriminatory customary legal rules. Whatever one thinks of the theoretical arguments in this context, there is a powerful pragmatic problem with simply choosing equality rights over culture in this situation: it often does not work very well.’²¹⁶

²¹¹ Section 176 of the Constitution.

²¹² Pejovic (n 204) 9.

²¹³ See section 6 of the Constitution.

²¹⁴ James Clifford, ‘Introduction,’ in James Clifford & George E. Marcus, *Writing Culture: The Poetics and Politics of Ethnography* (1986, University of California Press) 2.

²¹⁵ See in detail approaches in this regard from Susan H. Williams, ‘Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption,’ 18 (2) *Indiana Journal of Global Legal Studies* (2011) 65-85, 65.

²¹⁶ Williams (n 215) 68.

Susan Williams goes on to argue that dialogic democracy theory provides valuable tools for a legal system to protect both customary law and the equality of its women (and other vulnerable) citizens.²¹⁷ Dialogue in the cultural community helps ensure that the customary legal system can create legal incentives and capacities for vulnerable members of the community, such as women, to shape the customary law of their communities.²¹⁸ Because it is obviously regarded as foreign or alien, Western-type general law in Zimbabwe rarely achieves this ability for women to easily influence their cultures in the community. Zimbabwe's current education reforms toward heritage-based Education 5.0 that guides universities and the Ministries of Primary and Secondary and Higher and Tertiary Education, can greatly benefit from the codification of customary law. Law schools in Zimbabwe, such as the University of Zimbabwe, are also teaching foundations in law in Zimbabwe and can carry the torch on consultancy and research work in this area. Many organizations that work on customary practices, such as Musasa Project, Zimbabwe Women Lawyers Association, Women in Law Southern Africa, Padare Men's Forum, and others, can play an important role in codifying customary law in Zimbabwe. Furthermore, judges who have long taught women and succession law, such as Justice Sylvia Chirawu-Mugomba and Amy Tsanga, can play a huge role in interpreting the Constitution as it relates to customary law or using gender-specific approaches such as the grounded approach, feminism and vulnerability. They are also best placed to oversee a Customary Law Codification Commission in future together with other judges who took family law litigation seriously such as Justice Chitakunye during his days at the High Court.

Justice Chirawu-Mugomba, for instance, has demonstrated commitment to the need for judges to follow the Constitution in their judicial roles. She has been a marvel to watch in the High Court's family court and civil divisions as an all-rounder in the civil society, academia, legal practice and the bench. She mentions, for example, that:

'Historically women were perceived as being incapable of studying law, let alone being judicial officers. So, being on the bench breaks that myth. Another reason that women are important in the judiciary, is that women judges bring different

²¹⁷ Williams (n 215) 65.

²¹⁸ Ibid.

perspectives to the bench, according to their experiences. They contribute to the development of the law as per s176 of the constitution of Zimbabwe. Female judges bring a culture of thoroughness and hard work.”²¹⁹

The judge has also demonstrated her determination to interpret the law in accordance with her constitutional responsibilities, noting, for example, that:

‘I have also contributed significantly to the development of jurisprudence in family and the law of succession including child rights, based on my experience in teaching at the university, she says. I am also on a quest to add to the development of common law and customary law.’²²⁰

The same attributes can be said Justice Amy Tsanga who taught at the University of Zimbabwe’s Women’s Law Centre for many years. She also wrote a book on taking the law to the people²²¹ and co-edited another one on women and the law.²²² Other female judges, such as Justice Mwayera, have also defended the sanctity of marriage in Zimbabwe by upholding adultery claims under Zimbabwe law.²²³ In any customary case, the examples that an individual judge chooses can overwhelmingly centre on contested issues that can either be ventilated by the High Court or other superior courts such as the Supreme and Constitutional Courts. In terms of the common law in Zimbabwe, judges must provide clarity on what is meant law by Zimbabwe’s common law. The common law is a broad one, and its application can be perplexing in the absence of clarity from the judges in a constitutional system. What features of the common law should be considered, for instance, if Zimbabwean judges adopt a common law definition from the standpoint of homegrown constitutionalism? In general, statutes are the primary sources of law in common law systems, as are Court decisions rendered in a largely adversarial system.

²¹⁹ Raoul Wallenberg Institute, Women Judges Matter: Meet Hon Justice Sylvia Chirawu-Mugomba from Zimbabwe,’ <https://rwi.lu.se/news/women-judges-matter-meet-hon-justice-sylvia-chirawu-mugomba-fromzimbabwe/> accessed 23 November 2022.

²²⁰ Raoul Wallenberg Institute (n 232).

²²¹ See Amy Tsanga, *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe*, (2003, Weaver Press Zimbabwe).

²²² See Amy Tsanga & Julie Stewart, *Women and Law: Innovative Regional Approaches to Teaching and Research*, (2011, Weaver Press Zimbabwe).

²²³ See for instance Daniel Nemukuyu, ‘Adultery Damages Test Case Spills into ConCourt,’ (2 February 2016, The Herald Newspaper) < <https://www.herald.co.zw/adultery-damages-test-case-spills-into-concourt/> > accessed 23 November 2022.

In the common law system, judges must thus play a dominant role in developing case law or legal precedent based on precepts or doctrines such as *stare decisis*. The doctrine of *stare decisis* is not codified, but it directs common law courts to follow higher court decisions.²²⁴ However, the idea that common law is created by case law is only partially correct because it is also dependent on the statutes that judges interpret in the same way judges in civil law systems do.²²⁵ In that sense, both civil and common law loosely become ‘judge-made law,’ though the term has mostly been used to describe common law in England. In England, common law evolved because of appellate judges influencing specific laws and policies, particularly in commercial areas of the law such as contract, property and tort (delict).²²⁶

The judge’s role is also important in the interpretation of statutes. It has been argued that the common law enhances the role of judges in three ways. First, judge-made law preserves freedom through apolitical judicial decisions rather than centralized and arbitrary legislative law-making.²²⁷ Second, legal realism as a tradition, particularly in mature democracies such as the United States of America (and even Zimbabwe), allows judges to make decisions based on their political and other beliefs that is beneficial because judges can balance each other through different approaches.²²⁸ To support this point of view, Nicola Gennaioli & Andrei Shleife cite Judge Benjamin Cardozo (1921: 177) who notes that:

‘The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.’²²⁹

The preceding remarks make sense because each judge is exposed to various legal philosophies and may end up favoring one over another. Some judges are political and legal philosophers, while others are legal puritans, utilitarian,

²²⁴ See Pejovic (n 204) 9-10.

²²⁵ Ibid, 10

²²⁶ Nicola Gennaioli & Andrei Shleife, ‘The Evolution of Common Law,’ 115 (1) *Journal of Political Economy* (2007) 43-69, 43.

²²⁷ Gennaioli and Shleife (n 226) 44.

²²⁸ Ibid. It is argued here that judges have some philosophical viewpoint that guides their interpretation whether political, social, historical, religious or institutional.

²²⁹ Ibid, 44-45.

constitutionalists, legalists, positivists, realists, reformists, activists, gatekeepers, feminists, and so on. They must apply their legal philosophy in a way that does not give the impression that they are not institutionally and individually independent of the other branches of government. This brings us to the third point: common law assists judges in developing the law in specific areas such as commercial law and economics, and other areas of the law where there are inefficient legal rules that require interpretation from the courts.²³⁰

Judges in Zimbabwe must be mindful of Zimbabwe's *a la carte* legal rules when designing a model of constitutional interpretation in a mixed system. While it is obvious that judges in common law systems develop the law through case law, it has been lamented that there is a lack of a conceptual structure on how the courts are allowed to create the law in a way that does not conflict with the legislature's role in making the law.²³¹ Again, because Zimbabwe has a mixed legal system, litigants' lawyers and judges may need to strike a balance between being conceptual and being pragmatic when dealing with cases. Judges and lawyers should go beyond the description of civil law systems as codified or inquisitorial jurisdictions and common law systems as adversarial or court decision jurisdictions when distinguishing between lawyers in civil and common law jurisdictions, for example. It has been observed that:

'The civil law is based on codes which contain logically connected concepts and rules, starting with general principles and moving on to specific rules. A civil lawyer usually starts from a legal norm contained in a legislation, and by means of deduction makes conclusions regarding the actual case. On the other hand, a lawyer in common law starts with the actual case and compares it with the same or similar legal issues that have been dealt with by courts in previously decided cases, and from these relevant precedents the binding legal rule is determined by means of induction. A consequence of this fundamental difference between the two systems is that lawyers from the civil law countries tend to be more conceptual, while lawyers from the common law countries are more pragmatic.'²³²

When Zimbabwean courts interpret the common law, for instance, the pillars of the common law that are relied on must be clear. To begin, in England,

²³⁰ Ibid, 45.

²³¹ Pejovic (n 204) 10.

²³² Pejovic (n 204) 10. See also, Pier.G. Monateri, 'Understanding Civil Law,' *Conference Paper* (January 2015, Researchgate).

where the term originated, common law refers to judge-made law, and precedents considered include very old court cases. The common law in the United States (and perhaps in Zimbabwe) refers to the common law rules brought over from England when the US (and perhaps Zimbabwe) became a nation.²³³ If we accept the argument that English common law was developed by Judges rather than Parliament in England, and that these judges created and defined crimes such as felonies, murders, and so on,²⁴⁶ we can conclude that common law in England began or evolved from common sense or moral rights. Common law countries should develop their own common law traditions, according to the modern approach. This is reflected in the view that American courts abandoned the English common law tradition and developed their own as the number of their decisions grew.²³⁴ Caution has been issued that understanding the limitations of common law requires understanding the distinction between, say, the common law tradition followed by the United States (or Zimbabwe, South Africa, Kenya, Zambia, Botswana or Namibia as common law countries), and other nations that follow the English model and the civil law tradition which developed in Europe.²³⁵

Zimbabwean judges have not yet presented a Zimbabwean version of the common law that differs from the English, American or Canadian versions. Until Zimbabwe has its own common law, it can rely on English and other jurisdictions that follow the Anglicized model. While the Constitution distinguishes between customary and common law, it appears that Zimbabwean superior courts can modify the Anglo-model of the common law to produce wholly Zimbabwean elements of the common law. This is especially true given that English judges used common sense to shape the tenor of crimes before Parliament legislated them. As a result, it is expected that Zimbabwean judges will not continue to postpone the implementation of their judgments simply because they want to wait for Parliament to pass legislation to that effect. Courts themselves can create common law crimes that Parliament can be ordered to legislate if the courts are clear in their creation of such crimes.

²³³ H.B. Kerper, *Introduction to the criminal justice system* (1979, 2nd ed., West Publishing Company) 27. ²⁴⁶ W.R. LaFave, *Criminal law* (2000, 3rd ed., West Group) 70).

²³⁴ Kerper (n 233) 27.

²³⁵ Kerper (n 233) 27.

Conclusion

The preceding analysis has demonstrated when courts control the judicial atmosphere from an informed position and as dictated by the legal system in which they operate, they should not feel alone. Every day, come to learn how to improve their adjudicative approach from litigants and legal scholars. Zimbabwe's mixed legal system requires judges to not only actively participate developing or modifying the common law, but also to consider legal scholars from various jurisdictions to correctly apply common law and civil law rules. In another sense, litigants should address various legal doctrines to draw the court's attention to specific methods of interpretation. Every Constitution contains some internal and external aids to interpretation. As we have seen, Zimbabwe's homegrown constitution and cross-border constitutionalism require considerable thought. As a result, judges should decide the applicability of constitutional principles derived from common law systems that it follows. Zimbabwe follows both Anglicized and Americanised versions of the common law. As previously discussed, the Anglo-model is followed from the value-based approach to the rule of law and separation of powers (separation of functions or parties). The Americanised version is followed considering a written Constitution and canons of judicial restraint such as the constitutional avoidance doctrine. There are also influences from common law countries such as South Africa and Canada's adjudicative approaches. Zimbabwean judges should create Zimbabwe's own common law as a term of art, interpretive control mechanism and part of constitutional norms to be embedded in Zimbabwe's indigenous constitutionalism.