CHAPTER 5: MOTIVATIONS FOR LITIGIOUS LITIGATION UNDER AN INTERNAL MODEL OF CONSTITUTIONAL INTERPRETATION IN ZIMBABWE

INTRODUCTION

The purpose of making a homegrown constitution was to enable Zimbabweans to follow up on promises made or undertakings made by the inclusive government between 2009 and 2013 and to incorporate the people's will into a justiciable blueprint. The constitution-making conversations enabled the politicians under the Government of National Unity (GNU) to process the people's will and consensus with a view to their general entrenchment into a justiciable constitution. The constitution-making process conveyed the mood in which sticky and common societal issues were made and the national or majoritarian attitudes from which national policy and laws are usually made. Since the 2013 constitution reflected the urgency to end the GNU constitutional moment, it also contained bad and good provisions. A complete analysis of the bad and good provisions would require another book. The reader should keep in mind that motivating and intervening variables differ from one society to another. When a state adopts a homegrown constitution, citizens usually become highly litigious. They approach the superior courts in a variety of ways, including through:

- intervening parties
- amicus curiae
- test case litigation
- strategic litigation
- public interest litigation.
- Participation of cross-border litigating lawyers especially from South Africa

Judges led by CJ Malaba also welcomed what they termed '*experimental constitutionalism*'. Legal reforms later introduced changes to the superior courts. The Constitutional Court Act for example has various rules that were developed to curb experimental constitutionalism.

INNOVATIVE CONSTITUTIONAL INTERPRETATION BEFORE THE 2013 CONSTITUTION

Between 1980 and 2009, the history of constitutional rights protection in Zimbabwe was tragic. We focus on situations that were not resolved through the courts. Zimbabwe witnessed ethnic violence and killings such as the two Entumbane uprisings, the Midlands and Matabeleland disturbances (popularly known as *Gukurahundi*), the blanket amnesties on dissidents and security agents; the lack of focus on war veterans' war challenges such as post-traumatic stress disorder (PTSD) affecting veterans of the liberation struggle (combatants, collaborators, restrictees, detainees). The PTSD vulnerability tool was also not extended to those who witnessed gruesome events during the liberation struggle, mass atrocities in the 1980s, the bloodbath in the 2008 presidential runoff, the shooting of six civilians in 2018 and so on. In the early 2000s, particularly after the Fast Track Land Reform Program and other events such as Operation Murambatsvina (Remove the Filth); Operation *Hakudzokwi* (You do not return) and the bloodbath leading up to the June Presidential Runoff in 2008, there was a bloodbath.[236] Rhoda Howard-Hassmann, for instance, notes in her seminal article that documents various human rights violations ranging from the murder of commercial farmers to forced removals and economic repression that:

> 'Euphemistic descriptions of Zimbabwe from 2000 to 2009 protected Mugabe and his regime from punishment for crimes against humanity. Meantime, millions of Zimbabweans either fled the country, or risked malnutrition and disease, from which they were protected only by the good offices of international agencies. Those who are ruled by criminals deserve better.'[237]

The significance of researching the history of constitutional interpretation stems from the significance of the Constitution itself. In reference to the American Constitution, it has been stated that:

> 'The Constitution is not buried in mists of time. We know a tremendous amount of the history of its genesis…we know who did what, when and many times why. One can talk intelligently about a founding generation.'[238]

The same observations can be made about Zimbabwe's Constitution. We may not cover all the cases interpreted by the courts based on the 1923

[236] See for instance Rhoda E. Howard-Hassmann, 'Mugabe's Zimbabwe, 2000–2009: Massive Human Rights Violations and the Failure to Protect,' 32 *Human Rights Quarterly* (2010) 898–920.

[237] Howard-Hassmann (n 183) 920.

[238] Edwin Meese, 'Construing the Constitution,' 19 U.C. *Davis Law Review* (1985-86) 23.

Constitution, 1961 Constitution and 1980 Lancaster House Constitution ('Old Constitution'). We bring up this history to demonstrate how judges have grappled with the meaning of constitutional provisions as reflected in the text. It has been said that the:

> 'Approach to constitutional interpretation begins with the text itself. The plain fact is that it exists. It is something that has been written...Indeed Judicial review has been grounded in the fact that the Constitution is a written as opposed to an unwritten document...the presumption of a written document is that it conveys meaning.'[239]

From the Zimbabwean perspective, the interpretation section 46 of the Constitution benefited from the need to protect constitutional rights in a progressive democratic manner.[240]The 1980 Constitution did not provide a method of constitutional interpretation or ways of constitutional construction. The course outlines in postgraduate research on new doctrines on constitutional (re) interpretation provide a good illustration of the increasing importance of constitutional interpretation under the 2013 Constitution.[241] There are also studies on the use of judicial review as a deterrent to constitutional litigation in Zimbabwe.[242] This section emphasises the importance of nuanced interpretive reflections on Zimbabwean constitutional developments prior to the adoption of the 2013 Constitution. In this section, we attempt to overcome the common criticism of today's superior courts' reliance on doctrinal views to avoid hearing constitutional cases.[243]In any case, it has been stated that constitutional interpretation is dependent on the judge's ability to balance reason and discretion.[244]Edwin Meese observes:

> 'Constitutional adjudication is obviously not a mechanical process. It requires an appeal to reason and discretion. The text and intention of the Constitution must be understood to constitute the banks within which constitutional interpretation must

[239] Meese (n 238) 24.

[240] See Sharon Hofisi, 'The Mosaic of our Democracy,' (11 April 2018, The Herald) ‹ https://www.herald.co.zw/the-mosaic-of-our-democracy/› accessed 23 November 2022.

[241] See for example course outlines in the Faculties of Law, Master's in Law Program and course outlines in the Governance and Public Management Department, Faculty of Social and Behavioural Sciences, University of Zimbabwe.

[242] See for instance, Hofisi (n 62).

[243] See Hofisi (n 62) above on how judges increasingly invoke foreign judicial doctrines such as the avoidance doctrine as a tool to avoid discussing the merits of constitutional cases. While judges may properly dismiss, strike down, or remove cases from the judicial roll because of technical or procedural mistakes by litigants and their lawyers, the doctrinaire quality of judgments comes where judges simply invoke some judicial doctrine without providing any nuanced analysis on how the doctrine is relevant to Zimbabwe. A good illustration of cases include:

[244] Meese (n 238) 26.

> flow. As James Madison said, if the sense in which the Constitution was accepted and ratified by the nation…be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers.'[245]

Judge Campbell echoed the same monumental remarks above, stating that protecting constitutionality entails developing a specific adjudication mechanism, spelled out in the constitution that must be entrusted to persons who are not involved in the drafting of the laws and must be generally applicable to duly enacted laws that are in full effect.[246] Campbell adds that constitutional adjudication is:

> 'Fundamental to the achievement of the constitutional rule of law, the allocation and balance of governmental authority, the distinction between the power reserved to the people and the powers relegated to the government, the vertical division of state's power, and respect for fundamental rights.'[247]

The Constitutional Court, for example, has exclusive jurisdiction to issue definitive interpretations. Campbell contends that constitutional courts must have the authority to resolve inherently contentious conflicts and to intervene in the precautionary oversight of laws through adjudication with certainty.[248] In addition, this broad conception of the Constitutional Courts' mandate allows them to perform the critical function of adapting the constitution and its supplementary texts to actual national circumstances.[249]Their powers are also political in the sense that they are called upon to defend a concrete and specific constitutional structure as outlined in the constitution.[250] They should keep in mind, however, that every political constitution must treat due process as the natural and rational means governing the legal resolution of conflicts arising from the performance of public functions or from acts or events that violate fundamental individual rights.[264]Furthermore, the Constitutional Court judges must recognise that due process is permanent and applies to any situation in which a court must resolve a conflict within the scope of its judicial competence.[251]This is linked to the need for judges to consider the

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[245] Meese (n 238) 26.

[246] Juan Colombo Campbell, Constitutional Court Judges' Roundtable,' 3 (4) *International Journal of Constitutional Law* (2005) 543-550, 547.

[247] Campbell ibid.

[248] Campbell ibid.

[249] Campbell ibid.

[250] Campbell ibid, 548. [264] Campbell ibid, 549.

[251] Campbell ibid, 550.

principles that guide the formulation of fair process in constitutional matters to achieve due and fair process.[252]

We show that, prior to 2013, Zimbabwe's constitutional development was heavily influenced by cross-border or rather cross-cultural developments from England, United States of America, Canada, and South Africa.[253] This position was also addressed in part in Chapter 3. As a result, cross-border constitutionalism provided useful insights into how and why judges in Zimbabwe sometimes dismiss constitutional matters based on poor pleadings from litigants or under-researched doctrines.

In our discussion, we borrow the concept of text interpretation from the doctrine of '*hermeneutics*,' which the ancient Greeks popularized to refer to how Hermes, the Gods' messenger, had to dutifully perform his task of explaining to humans the decisions and plans of their Gods.[254] In simple terms, hermeneutics served the purpose of dividing the realm of the text on the one hand and the people who wish to understand it on the other.[255] The hermeneutical analogy is required because, when applied to the work of the superior court judges as custodians of the Constitution, and in terms of constitutional ethos, it becomes clear that judges play a '*messenger's role*' as the custodians of the constitutional text which they interpret. They do so as appointed or unelected officials in a constitutional society who must uphold the majority's decisions in many ways. In deserving cases, they must distinguish between so-called counter-majoritarian concerns and other concepts such as tyranny of the majority. While some Zimbabwean judges are appointed by the President of the

[252] Campbell ibid.

[253] We have not focused much on the Rhodesia and Nyasaland Reports that were produced during the time of the Federation of the two Rhodesian countries, Northern Rhodesia (now Zambia), Southern Rhodesia (now Zimbabwe) and Nyasaland (now Malawi). The countries referred to above influence Zimbabwe's common law tradition from Great Britain. English cases and judges influenced constitutional cases during the colonial period. When Zimbabwe attained independence, the American model of a written constitution influenced constitutionalism in Zimbabwe. The Bill of Rights in Zimbabwe borrowed a lot from both the English and American constitutions. The Canadian and South African influenced are mainly shaping constitutionalism in Zimbabwe since Zimbabwean courts tend to follow developments in South Africa. Much of the constitutional jurisprudence also follows developments in Canada. By parity of reasoning, the Canadian influence is also heavily felt in Zimbabwe's constitutional jurisprudence.

[254] See W.G. Jeanrond *Theological hermeneutics: development and significance.* (1997, London: SCM Press) 1.

[255] Ibid.

country, judicial peers, and the Chief Justice, among others, the people Zimbabwe are the repositories of judicial authority. The old Constitution did not require judges to always have the capacity and desired attributes to understand the legal and constitutional texts before them.[256] In the event of complex cases, the individual judge's ability to interpret the Constitution was dependent on his or her access to comparative case law or research material.[257]Lawyers who cited court authorities have an unwritten duty to provide such legal material to the judge to avoid broad arguments.

THE IMPORTANCE OF PURPOSIVE AND GENEROUS CONSTITUTIONAL INTERPRETATION

In chapter 2, we discussed the issues raised by CJ Malaba's the strict, narrow and rigid approach especially provided in political cases. This strict approach is taken even when applicants' pleadings raise clear approaches that the judges must apply or, at the very least, ensure strict interpretation meets the test of 'textual clarity.' The *Mliswa-Mutasa* case is an example, in which the applicants' heads of argument were detailed in terms of the reasons to invite a purposive approach to section 129 (1) (k) of the Constitution, but the Court remained steadfast in its narrow sense (see, https://veritaszim.net/node/1236). The Constitutional Court adopted a narrow approach that was unrelated to due process in *Didymus Mutasa and Anor v The Speaker of the National Assembly and others*, CCZ 09/15. *Madzimure & Ors v Senate President & Ors*, CCZ 8 of 2019 followed.

The approach outlined in the case of in *re Chinamasa* case, showed the Supreme Court led by former Chief Justice Anthony Gubbay, was willing to associate with purposive constitutional interpretation when interpreting human rights that have a significant impact on the democratization of a society. The court linked its previous decisions on preferring a purposive interpretation as follows:

> 'This Court has held that the provision is to be given a benevolent and purposive interpretation. It has repeatedly declared the vital and fundamental importance of freedom of expression to the Zimbabwean democracy – one of the most recent judgments being that in *United Parties v Minister of Justice, Legal and Parliamentary Affairs*

[256] This is supposed to be so even if judges are of liberal, conservative, political, or any other type of a judge. This is also the reason why constitutions demand that judges should show some level of competence in interpreting the Constitution.

[257] See for instance *in re: Chinamasa* 2000 (12) BCLR 1294 (ZS).

& Others 1997 (2) ZLR 254 (S) at 268C–F,1998 (2) BCLR 224 (ZS) at 235I– 236C. What has been emphasised is that freedom of expression has four broad special objectives to serve. The most significant, in the present context, is the second, namely, "it assists in the discovery of the truth". The search for truth rationale has been articulated in terms of the famous "marketplace of ideas" concept. This holds that truth will emerge out of the competition of ideas. In his classic dissent in *Abrams v United States* 250 US 616 (1919) at 630, the redoubtable Justice Holmes said that: ". . . when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.'

The approach described above was significant in three ways. First, the Supreme Court was willing to associate with its previously settled decisions that freedom of expression must be protected by using the benevolent and purposive interpretation method. The use of a trite position provided legal certainty and procedural fairness in assessing violations of the right to free expression. Second, the right to free expression was interpreted purposively and generously because it is critical to the development of Zimbabwe's democracy. Three, CJ Gubbay was willing to learn from respectable judges' dissenting opinions about how to protect constitutional rights and values. This is especially important for Zimbabwean judges especially under the current 2013 Constitution that enjoins them to possess knowledge of the Constitution or constitutional law and the developments in international law. For instance, in the *Mudzuru & Another v the Minister of Justice, Legal and Parliamentary Affairs and Others*, the apex court held that,

— "the scheme of fundamental human rights and freedoms enshrined in the Bill of Rights is based on the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights and freedoms to ensure that they are enjoyed in practice."

There is no doubt some remnants of purposive interpretation can be inferred from *Mudzuru* judgment and the tenets of transformative constitutionalism where judges are not aloof to the needs of society but interpret rights in a purposive and generous way. Le Roux for instance, stipulates that–– "transformative constitutionalism entails social change (transformation) through law (constitutional rights). It promises that fundamental social

change can come about through legal reforms, backed by popular mobilization and strategic litigation. Accordingly, constitutionalism promises that people can change their lives and society by arresting their rights.[258]

Purposive interpretation in constitutional interpretation has been lauded for its ability to make sure that:

> 'All legal interpretation must start by establishing a range of semantic meanings for a given text, from which the legal meaning is then drawn. In purposive interpretation, the text's "purpose" is the criterion for establishing which of the semantic meanings yields the legal meaning. Establishing the ultimate purpose--and thus the legal meaning--depends on the relationship between the subjective and objective purposes; that is, between the original intent of the text's author and the intent of a reasonable author and of the legal system at the time of interpretation. This is easy to establish when the subjective and objective purposes coincide. But when they don't, the relative weight given to each purpose depends on the nature of the text. For example, subjective purpose is given substantial weight in interpreting a will; objective purpose, in interpreting a constitution.'[259]

In *In re Chinamasa*, CJ Gubbay went into detail to distinguish between different types of contempt of court, suggest the type of court that was semantically applicable in the case, and then decide whether Patrick Chinamasa was officially protected in his capacity as a state functionary. The case also raised significant concerns about the appropriateness of using third party intervention at the Court's request. In that case, the High Court had asked amicus curiae to determine whether Chinamasa had committed contempt of court. CJ Gubbay was prepared to add the benefits of comparative constitutionalism to the applicability of purposive interpretation in Zimbabwe by citing and distinguishing various cases from Canada, New Zealand, and other jurisdictions.

THE ANALOGOUS CONSTITUTIONAL INTERPRETATION

Judges could occasionally go beyond literal interpretation or textualism and purposive interpretation to adopt an analogous method of interpretation.[260]We cannot say that the judge in the *Chaduka* case abandoned textualism, because the court was interpreting the same constitutional text in novel ways. In that

[258] Le Roux "Advancing Domestic Workers Rights in a Context of Transformative Constitutionalism" in du Toit (ed) *Exploited, Undervalued and Essential: Domestic Workers and the Realization of their Rights* (2013) 31.
[259] Aharon Barak (Translated by Sari Bashi), *Purposive Interpretation in Law* (2005, Princeton University Press).
[260] *Mandizvidza v Chaduka NO & Ors* 1999 (2) ZLR 375 (H).

case, the applicant was a female trainee teacher at a church-run college. She signed a contract stating that if she became pregnant, she would lose her candidacy. She became pregnant after marrying customarily that caused the college to request that she withdraw her candidacy until after giving birth. The female student was protected by the Court on the grounds that the college had enough characteristics to qualify as a public institution. The Court was willing to overturn the college's clearly discriminatory practice and allow the female student to take her examinations. Five discoveries were critical.[261] The High Court reached the following conclusions:

First, it held that the college possessed sufficient "*public*" features to qualify it as a public office of public authority. Other features included the fact that education is a public concern in which government has a controlling and regulatory role; that the Ministry of Higher and Tertiary Education regulated the academic affairs of the college; that lecturers were paid by the state; and that students enrolled at the college were sponsored by the state. This finding was significant because, analogously, the Ministry of Higher Education was used to empower the Court to use its discretion to reverse the college's discriminatory practice based on the reasons of public interest or concern. The analogous approach also empowered the Court to strike a balance between the female student's lived realities and the college's patent discriminatory practice. This became clear when the Court held that the conduct of the college's actions was clearly discriminatory. It was not saved by the requirement that a male student who caused the female student to fall pregnant could also withdraw from the college. If a married male student's wife became pregnant, he would not be affected, whereas a married female student who became pregnant would have to withdraw from the college. In addition, it was mostly, if not entirely, pregnant female students who were subjected to the penalty.

In support of the analogous approach, the Court also held that the lack of childcare facilities could not be used to justify requiring pregnant students to withdraw; rather, the lack of facilities was a form of discrimination in and of itself. It also held that the principle of fairness outweighed the principle of freedom of contract. In any case, students did not in reality contract freely.

[261] See also‹ https://tbitilaw.com/mandizvidza-v-chaduka-no-ors-1999-2-zlr-375-h/› accessed 23 November 2023.

They had no choice but to accept the contract's terms. The contract did not prohibit students from engaging in sexual activities, and pregnancy could occur even with the most stringent contraceptive methods used. It was unjust to punish the result of sexual activity rather than the conduct that leads to it. Furthermore, the pregnancy clause made no distinction between married and unmarried women that was unfair and discriminatory even by religious standards. Thus, the Court concluded that the enforcing the discriminatory clause would be contrary to public policy in a case where concerted efforts have been and continue to be made to eliminate discrimination based on sex or gender. Pregnancy would not interfere with the college's primary goal of training teachers.

It is clear from the above that with analogous constitutional interpretation, what changes is the judge's perspective or way of seeing the text. It is not enough to rely solely on activist adjudication. Analogous interpretation is similar to the living constitutionalism that is a way of protecting rights that are not expressly mentioned in the Constitution.[262] Because litigants actively participate in recreating the constitutional text in question, living constitutionalism or an analogous method is also dependent on citizens' ability to approach courts strategically or well-prepared.[263]Litigants who draw the court's attention to analogous interpretations may even assist the courts in revisiting some constitutional courts or imploring the courts to depart from the reasoning of previous courts. In this context, we can discuss the two realms in which the courts either say '*We were wrong*,' in deciding constitutional case X, or '*we stand by our decision*' in case X. This stems from the notion that it is the province and duty of the judges to declare what the law is.[264] Courts are given such authority because they are not elected like the legislatures and the executive. We caution here that they are appointed by a functionary who is directly elected, and, by extension, must account directly to the people. Furthermore, legislatures may not make a mockery of the Constitution by

[262] See for instance *Griswold v Connecticut* 381 U.S. 479, 483 (1963) where the US Supreme Court used many constitutional amendments to protect the right to privacy.

[263] The *Mandizvidza* case was filed by Tendai Biti who remains one of the constitutional lawyers who have for long been utilizing strategic and public interest litigation to protect the rights of the vulnerable sections of the Zimbabwean society.

[264] See *Marbury v Madison*, I Cranch 137, 177 (1803).

annulling court judgments or destroying the rights acquired because of those judgments.[265] The interpretation of the old constitution shows that judges in common law legal systems do not act as mere umpires in some adversarial game of wits under common law legal systems. Those who read constitutional decisions are always the ones who apply their perspective on how a court comes to its decision. A lawyer like Thabani Mpofu could come here and argue that the common law relating to the employers' rights to terminate employment without notice has been modified and both employees and employers have common law rights to claim when terminating employment.[266]The argument was simple, what is good for the goose must be good for the gander. Madhuku would say there is need for an inner eye[267]and so on. We can also say that, unlike Hermes, the Greek God's sole messenger, no individual judge has unlimited perspective unless he or she is Caesar or his wife. As a result, judges frequently rely on the doctrine of judicial comity or innovation to show why decisions of their colleagues may not be binding on them. They can independently depart from the reasoning of their colleagues, especially if they are judges of the same court such as the High Court or Supreme Court.

THE HOLISTIC, LIVING CONSTITUTION OR *SUI GENERIS* APPROACH

The Zimbabwean superior courts used the holistic method of interpreting the Constitution in addition to the purposive and analogous methods. This was followed in the case of *Capital Radio (Private) Limited v Broadcasting Authority of Zimbabwe and Others*.[268] The Attorney General of Zimbabwe intervened in that case, but Tony Mendel's brief provides detailed insights on the comparable aspects that the court could use from foreign and regional courts around the world.[269]CJ Chidyausiku held that the approach is based on comparative jurisprudence and required that:

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[265] See *United States V Peters*, 5 Cranch 115, 136 (1809).

[266] *Don Nyamande and Anor v Zuva Petroleum (Private) Limited* SC Judgment No. 43/2015.

[267] Thabani Mpofu, ' Full Text: Thabani Mpofu responds to Madhuku analysis of Mohadi resignation,' (8 March 2021 Nehanda Radio) https://nehandaradio.com/2021/03/08/full-text-thabani-mpofu-responds-to-madhukuanalysis-of-mohadi-resignation/ Accessed 23 November 20222.

[268] SC 162/2001.

[269] Tony Mendel, 'Written Comments Submitted by Article 19, Global Campaign for Freedom of Expression, ‹https://www.article19.org/data/files/pdfs/cases/zimbabwe-capital-radio-v.-broadcasting-authori.pdf‹, accessed 23 November 2022.

'The Constitution be interpreted as a living instrument;[270] the Constitution be given a purposive and generous interpretation;[271] the Constitution must be construed as a whole;[272] the spirit of the Constitution as reflected in the preamble and national objective and directive principles of state policy is to guide interpretation by the court;[273] and ratified treaties should provide a legitimate guide in interpreting constitutional provisions.[274]

As a result, the Court declared that certain provisions of the Broadcasting Services Act were unconstitutional.[275]

CONSTITUTIONAL INTERPRETATION UNDER THE 2013 CONSTITUTION

The 2013 Constitution as has been indicated in other sections above has an interpretation chapter.[276] It also contains a broad justiciable Bill of Rights.[277] The Constitutional Court wavers from early decisions such as *Mawarire v Mugabe and Ors* Judgment No. CCZ1/13, in which the court departed from the narrow approach to interpretation and restrictive approach to legal standing. CJ Chidyausiku made a monumental remark when criticising the restrictive approach to legal standing that:

> 'Even under the pre-2009 requirements, it appears to me that the applicant is entitled to approach this Court for relief. Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.'

At the level of the citizen, constitutional interpretation under the 2013 Constitution requires that judges must not be justified solely by the fact that a society may have different types of judges: conservative, doctrinaire, liberal,

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[270] The court cited *Minister of Home Affairs v Fisher* [1980] AC 329 at 329; *Dow v Attorney-General* 1992 LRC (Const) 623-3; *Muhozya v Attorney-Gene*ral (DSM) Civil Case No 206/93 (Tanzanian High Court decision, unreported).

[271] Citing *S v Zuma & Ors* 1995 (4) BCLR 401; *Sakal Papers v Union of India* AIR 1962 SC 305.

[272] Citing *Rattigan v Chief Immigration Officer and Ors* 1994 (2) ZLR 54 (S).

[273] *New Patriotic Party v The Inspector General of Police Judgment of the Supreme Court of Ghana* 4/93 (unreported).

[274] *Dow v Attorney-General (supra); Derbyshire County Council v Times Newspapers* 2 WLR 449 8 1995 (2) ZLR 199 (S).

[275] *Capital Radio case* (n 268) 123-124.

[276] Section 46.

[277] The Bill of Rights protects CP rights, ESC rights and collective rights.

political, super-human, humorous, and the people's judge.[278] A judge may find it difficult to respond by saying, '*I am a political judge or some other judge*.' The Constitution envisages a situation in which the interpretation of the Bill of Rights differs from ordinary statutory interpretation and does not rely on the individual judge's perceptions or emotions about how a specific case should be interpreted. Even in the etymological sense of hermeneutics as the science of textual interpretation, the theory of interpretation is argued to be more than a theory of understanding.[279]It may be difficult to assert categorically that judges always interpret constitutional or legal texts without regard for the potential implications, dimensions and methods of their interpretation. Judges in Zimbabwe may one day perhaps wake up and ask litigants to bring cases with problems from customary law or common law to court so that they can be resolved. While we do not expect judges to instruct lawyers *per se*, they can now engage in innovative instruction of lawyers in their judgments, at judicial symposiums, and during various judicial engagements with lawyers such as the beginning of legal years and so on.[280]

The interpretation provisions also show how litigants can challenge the conduct of judges who issue practice directions that litigants are required to read carefully or follow when filing cases as some form of judicial instructions to guide how the constitutional case should be filed in a court of law. Judges may issue practice directions to clarify procedures or to keep litigants away from simply being litigious.[281] They may do so to clarify seemingly ambiguous provisions or to direct litigants to a critical court judgment that is usually ignored. The hope is that judges who adopt any form of constitutional interpretation will be guided by the constitutional text or some legal methods of interpreting it. Doctrinaire approaches can be problematic because they are typically regarded as non-legal or merely judicial methods of bolstering the concept of judicial restraint. For Zimbabwe, such restraint is primarily focused on the interpretation of complex cases involving the Bill of Rights. The superior courts usually spend lengthy discussions on technicalities and very

[278] Superior court judges for instance have the constitutional responsibility to develop the common law and customary law and to regulate their internal processes.

[279] Jeanrond (n 254) 2.

[280] Cf *In re Chinamasa* supra where the applicant challenged whether the High Court could on its own invite an amicus curiae to determine if the offence of contempt of court had been committed.

[281] For instance, relating to the need for litigants to hold pre-trial conferences in complex cases.

little time on what should happen on the merits. While the goal of constitutional interpretation is not to replace legal rules for deciding cases, such as on technicalities or merits, it should eventually help improve the constitutional jurisprudence in a country.

THE INTERPRETATION PROVISION IN THE CONSTITUTION (INTRINSIC MODEL)

Section 46 of the Constitution identifies as the interpretation provisions:

46. Interpretation of Chapter 4

1. When interpreting this Chapter, a court, tribunal, forum or body--

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

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

(c) must consider international law and all treaties and conventions to which Zimbabwe is a party.

(d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and (e) may consider relevant foreign law.

in addition to considering all other relevant factors that are to be considered in the interpretation of a constitution.

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

(a) **Giving full effect to the rights and freedoms enshrined in this Chapter**

The interpretation chapter provides guidance to courts, tribunals and bodies that interpret rights the Bill of Rights. To give full effect to the rights and freedoms in the Bill of Rights, includes doing so for all the generations of civil and political (CP), economic, social and cultural rights (ESCR), collective, and information rights that are so protected. Analysing cases where constitutional avoidance doctrines have been used[282]reveals that most important constitutional cases in Zimbabwe that have been

[282] See Hofisi (n 62).

resolved on technical matters or so-called constitutional avoidance doctrine deny future litigants the access to constitutional justice. It has been noted, for example, that the legal protection of constitutional provisions must be done through due process to promote constitutional justice and constitutional legitimacy, because due process:

> 'Constitutes the mechanism that re-establishes the legitimacy of the provisions of the Constitution if they are violated. The judgment that resolves the conflict is the only means by which to restore full effect to the constitutional norm whose violation gave rise to the conflict. It is here, then, that the concept of the constitutional court as guardian of the constitution emerges-the masterful creation envisioned by Kelsen that is intended to ensure constitutional supremacy through due process...all constitutional declarations are futile without legal procedure to guarantee their efficacy.'[283]

Zimbabwean courts have tended to apply a narrow interpretation of 'giving full effect to the provisions' especially in cases requiring adherence to the observation of the due process model of constitutional interpretation.[284] The need to promote due process is part of the process of developing a constitutional order that defines and limits the state's ability to deprive a person of their constitutional rights and freedoms.[285]Due process's first pillar iis the requirement to deprive rights and freedoms in a legal manner. The sole issue on judicial review under this approach would be whether the law authorizing the deprivation was duly enacted by the appropriate legislature or executive body.[286] The second pillar is procedural, and it limits the deprivation of rights and freedoms based on procedural fairness before impartial and independent tribunals.[287]The third pillar is procedural privacy that places procedural and substantive constraints on the state's ability to infringe on individual privacy or autonomy (substantive due process). The fourth type is procedural-substantive due process that focuses on the offender's or the wrongdoer's moral culpability. Zimbabwean courts' usage of the avoidance

[283] Campbell (n 246) 546.

[284] See *Madzimure* case, CCZ 8 of 2019

[285] Victor V. Ramraj, Four Models of Due Process,' 2 (3) *International Journal of Constitutional Law* (2005) 492-524, 492.

[286] Ramraj (n 285) 493.

[287] Ibid. This idea has been lacking in many political-related trials in Zimbabwe which are simply referred to as high profile cases, something not found in the criminal laws of Zimbabwe. The lack of due process is also found in the practice of recalling parliamentarians who are elected as representatives. They are removed without recourse to due process.

doctrine, for instance, is rooted in the dirty hands doctrine that is prohibited by the Constitution.[288] Giving full effect to the rights and freedoms in the Constitution also requires judges to demonstrate that constitutional rights adjudication differs from ordinary judicial practice. Mattias Kumm[289] has advanced a three-pronged argument, demonstrating that:

> 'Firstly, constitutional rights provisions tend to be comparatively indeterminate. Constitutional textual references are likely to include general invocations of liberty, equality, due process, freedom of speech and the like. This leaves them more open to judicial interpretation than most statutes, administrative regulations and ordinances. Second, constitutional provisions generally occupy the highest position in the hierarchy of norms within a domestic legal system. Institutionally, this means that courts in the position of the final arbiter of constitutional claims cannot be overruled by the ordinary legislative process. Only a constitutional amendment or its own subsequent decision can overrule the decision made by a constitutional court. Third, a constitutional rights claim often raise issues that are politically highly controversial.'

The above remarks show that superior courts must adopt generous and purposive interpretation that promote due process and other constitutional norms. The Malaba court's plain meaning, especially in relation to recalling parliamentarians[290]or invoking versions of the constitutional avoidance such as the subsidiarity doctrine, is antithetical to the due process model.[291]

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

The distinction between constitutional principles and constitutional rules must be properly made. The distinction is presented thus:

> 'Principles are norms which require that something be realised to the greatest extent possible given their legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but what is legally possible. The scope of the legally possible is determined by opposing principles and rules. By contrast rules are norms that are always either

[288] The fact that someone has contravened a law does not bar them from approaching a court to seek their constitutional right to be protected. This constitutional position was disregarded without cogent reasons in *Majome v BAZ*, CCZ 14/16.

[289] Mattias Kumm, Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice,' 2 (4) *International Journal of Constitutional Law* (2004) 574-596, 574.

[290] *Madzimure* case.

[291] See *Majome* case.

> fulfiled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain fixed points in the field of the factually and legally possible. This means that the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule of principle.'[292]

Using the approach described above, we contend that the broad provision in section 46 (1) (b) is supported by many pillars. Judges need to adopt contextual interpretation which is steeped in Zimbabwe's democratic values. We thought it would be best to use an example from administrative law because most Constitutional Court decisions that rely on judicial restraint or constitutional avoidance are based on administrative or public law. This is due to the Supreme Court and Constitutional Court's failure to adopt or decide on administrative law cases involving constitutional rights such as water of freedom of expression using contextual review. Contextual interpretation may also include the need for judges to adopt contextual review, particularly in public law cases. Contextual review is a judicial method in administrative law that rejects doctrinal or categorical methods of guiding judicial supervision of administrative action.[293] Dean Knight defines contextual review as follows:

> 'Judicial method that rejects doctrinal or categorical methods to guide judicial supervision of administrative action. Judges are invited to assess the circumstances of a claim in the round without any doctrinal scaffolding to control the depth of scrutiny; in other words, intervention turns on an instinctive judicial impulse or overall evaluative judgment.'[307]

The traditional judicial eye in administrative law cases focuses on aspects such as scope, grounds or intensity of review, whereas contextual review stresses the importance of normative or constitution-based argumentation.[294] Traditionally, scope is concerned with whether judicial intervention is permissible; grounds of review are concerned with a simplified and generalized set of grounds for intervention; and intensity of review is concerned with the need to balance constitutional, institutional and functional factors.[295] In contradistinction, contextual review is novel in that it focuses on four aspects. The first is how

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[292] Robert Alexy, *A Theory of Constitutional Rights* (2002, Oxford University Press) 44.

[293] For a detailed discussion of contextual review see Dean R Knight, 'Contextual Review: The Instinctive Impulse and Unstructured Normativism in Judicial Review,' 40 (1) *Legal Studies* (2020) 1-21, 1. [307] Knight ibid.

[294] Dean R Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (2011, Cambridge University Press).

[295] See *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 982.

'something has gone wrong' grounds or simply wrongness which of a nature and degree that requires a Court's intervention.[296]The second focus is on broad-based unreasonableness that allows for different levels of scrutiny and empowers judicial judgment. Dean Knight contends that this approach departs from the traditional reliance on standards of review. However Canadian Courts, for instance, have now merged two distinct standards of unreasonableness (patent unreasonableness and reasonableness simpliciter) into a single, more general contextual formulation of unreasonableness that goes beyond the Wednesbury standard of manifest unreasonableness.[297]

The third type of ground is open-textured grounds that focus on balancing substantive fairness and abuse of power. Dean Knight argues that substantive fairness serves as a ground of review because it allows judges to consider the adequacy of the administrative consideration given to a matter and of the administrative reasoning, and providing a measure of flexibility allowing redress for abuses of administrative authority which might otherwise go unchecked.[298]Abuse of power will be used as a ground of review because it is the primary evaluative calculus for substantive legitimate expectation grounds. The Court considers whether it is unlawful to frustrate a substantive legitimate expectation when the abuse of power is 'so unfair that to take a new and different course will amount to an abuse of power.'[299]The fourth type of ground is non-doctrinal deference, in which courts have refused to give doctrinal deference when evaluating the proportionality of limitations of rights.[300] Knight observes that courts are increasingly rejecting the deference devices such as:

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[296] *R (Guinness PLC) v Panel on Takeovers and Mergers* [1990] 1 QB 146.

[297] See *Dunsmuir v New Brunswick* [2008] 1 SCR 190 and *Associated Provincial Picture Ltd v Wednesbury Corporation*, [1948] 1 KB 223.

[298] See *Waitakere City Council v Lovelock* [1997] NZLR 747 (H).

[299] *R (Coughlan) v North and East Devon HA* [2001] QB 213 (CA) at 57. Cf. *City of Harare v Mushoriwa* SC 54/20 where the Supreme Court simply indicated that it was going to arrive at a different view from the High Court in *Mushoriwa v City of Harare and Anor* HH 195-14 on the right to water without even weighing into the concepts of abuse of power and substantive fairness. This is a proper case which we feel the applicant ought to have taken to the Constitutional Court for further assessment of the judicial reasoning that was adopted in this case. While the Supreme Court gave a partial remedy, this was a proper case where the Court should have invoked. The High Court in *Mabutho v Women's University in Africa and Anor* HH 698-15 on the right to education was prepared to adopt the concepts and to protect the applicant whose substantive legitimate expectation had been violated. The High Court also adopted the test in *TK Hove v City of Harare* HH 205-16 bon the right to water since the applicant was not religiously paying his water consumption debts.

[300] Dean Knight (n 294) 8. Cf. *Majome case*.

'Due deference,' 'discretionary areas of judgment,' 'margin of appreciation,' 'democratic accountability,' 'relative institutional competence,' and so on.[301]It is preferable to take a nondoctrinal approach that focuses on:

> 'The giving of weight to factors...is the performance of the ordinary judicial task of weighing up the competing considerations on each side and accord appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.'[302]

When deferring cases or invoking doctrines such as subsidiarity, mootness and ripeness, postponements *sine die*, and so on, the Zimbabwean Constitutional Court has even gone so far as to simply blame on applicants using the doctrine of dirty hands which the Constitution forbids.[303]

However, contextual review or interpretation has been accused of having seductive harm because formulaic rules are rejected in favour of judicial instinct and the forensic exercise becomes inherently discretionary on which values the judge is focusing on.[304]It has been argued that adjudication plays a critical role in safeguarding the rule of law and the supremacy of the Constitution through due process.[305] In this way, the democratic values espoused in a constitution make it a *decisoria litis* norm, to be applied directly by the judge in resolving any constitutional dispute.[306]This is important for promoting both constitutional justice and constitutional legitimacy. A Court such as the Constitutional Court protects values because it is the constitutionally established judicial body that ensures their implementation and compliance with its rules, with a due process for their enforcement.[307] We argue that Zimbabwean superior courts should reconsider precedent on due process, for instance, in accordance with constitutional justice and legitimacy.[308] Juan Campbell argues that judges must recognise that adjudication and due process are intricately linked concepts, because

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[301] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

[302] *Huang*, at 16.

[303] See *Majome* case; *Madzimure & Ors v Senate President & Ors and Holland & Ors v Senate President & Ors* CCZ 8 of 2019; See also cases cited in Hofisi (n 62) such as *Mujuru* bond notes case and others.

[304] See PA Joseph 'Exploratory Questions in Administrative Law,' 25 *NZULR* (2012) 75.

[305] See Campbell, (n 246) 545.

[306] Campbell ibid, 545.

[307] Campbell ibid 546.

[308] See the *Majome* case and the cases cited in the same foot note.

adjudication without process is not a judicial process which can be said to have *res judicata* effect.[309]

(c) **consider international law and all treaties and conventions to which Zimbabwe is a party**

International law is the body of law that governs the interactions between or among states. In terms of international law sources, Article 38 of the International Court of Justice Statute which provides the following sources of public international law:

(I) international conventions, whether general or, establishing rules expressly recognised by the contesting states.

(II) international custom, as evidence of a general practice accepted as law.

(III) the general principles of law recognised by civilized nations; and

(IV) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The reference to international law is generalized in Zimbabwe's Constitution. It also clarifies the application of international law relating to treaties in Zimbabwe[310] and customary international law.[311] Zimbabwe can apply various branches of international law depending on the interpretation clause in section 46. The branches include international human rights law,[312] criminal law,[313] administrative law, humanitarian law, investment and trade law and so forth, depending on the applicable treaty or customary international law. Unless it is inconsistent with the Constitution or an Act of Parliament, customary international law (CIL) is part of the Zimbabwean law.[314] When CIL is consistent with the Constitution and Acts of Parliament, this is described as simple monist test where CIL automatically applies in municipal or domestic law. Monism allows states to accept CIL to be part of domestic law. Courts in Zimbabwe are urged to consider and prefer ways of interpreting CIL that is

[309] Campbell (193) 546.

[310] Section 327 of the Constitution.

[311] Section 326.

[312] Litigants must present to the courts the treaties that Zimbabwe has ratified and the human rights approaches by various bodies under the UN and African Union.

[313] While Zimbabwe has not ratified the Rome Statute of the International Criminal Court (ICC), this branch of law may be applicable if successor governments decide to refer situations to the ICC. [328] Zimbabwe has a law relating to genocide and IHL can apply in this regard.

[314] Section 326 (1).

consistent with the Constitution and national law.[315]This provision emphasises the need for courts to use inverted or modified monism where CIL that is or is likely inconsistent is modified to suit the Constitution and national law especially in situations where the elements of *opinio juris* or state practice (usus) are present. The other aspect is when *jus cogens* (peremptory norms) transform into obligations *erga omnes* or binding obligations.

APPLICATION OF TREATY LAW IN ZIMBABWE

Zimbabwe has an *a la carte* or choice-based version of applying treaty law.[316] Firstly, international treaties signed by the President or under his authority do not bind Zimbabwe until they are approved by Parliament.[332]This demonstrates Zimbabwe's parliamentary primacy over treaty law. While the President is a member of the Legislature, he or she is required to fully involve Parliament, both the National Assembly and the Senate (Zimbabwe no longer has a lower and upper house under the Constitution). Secondly, treaty law that has not been approved by Parliament does not become part of Zimbabwean law unless it is incorporated by through an Act of Parliament. Under the circumstances, the doctrine of incorporation makes Zimbabwe a full dualist country. Treaty law and domestic law are regarded as distinct spheres that must be reconciled if treaty provisions are to be applied domestically. The same Parliamentary approval is required for agreements executed by the President that are not treaties but impose financial obligations on Zimbabwe.[317]This may explain why the executive uses several memorandums of understanding (MOUs) rather than memorandums of agreements (MOAs). Courts and litigants may then be required to determine the legal nature of MOUs for them to avoid Parliamentary scrutiny.

Ancillary guidelines on the interpretation of treaties must be sought from the Vienna Convention on the Law of Treaties, especially in relation to the interpretation of treaties in good faith in accordance with the plain meaning given to the treaty's terms.[318] The Vienna Convention's interpretation provision contains four interpretation principles that domestic courts in Zimbabwe may

[315] Section 326 (2).

[316] See Sharon Hofisi, Zimbabwe and International Law,' (*20 September 2017, the Herald*). [332] Section 327 (2) (a).

[317] Section 327 (3).

[318] Article 32 of the Convention, 23 May 1969, Vienna, UNTS No 18232.

follow. The literal or textual interpretation is based in the fact that the ordinary meaning of words reflects the parties' intention.[319]The other is the contextual principle which emphasises the importance of taking into account the framework or context of the terms to be interpreted as derived from the preamble and annexes or instruments attached to the treaty.[320]The other is the teleological or effective interpretation that focuses on the treaty's object and purpose.[321] There is a distinction to be made between the provision's forward-looking (goals) and backward-looking aspects (history) of the provision.[322]The fourth principle is the good faith principle that requires interpreters to avoid absurd or unreasonable interpretations.[323]

According to Mikaela Heikkilä, the Vienna Convention also provides supplementary means of interpretation based on the treaty's preparatory work (*travaux préparatoires*) and the circumstances of its conclusion.[324]Supplementary material is used to confirm the meaning resulting from the application of the main principles of interpretation or to determine the meaning when the interpretation based on the main interpretation principles is ambiguous, obscure or leads to manifestly absurd or unreasonable.[325]

(d) Pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter.

Many issues must be addressed through this pillar of internal constitutional interpretation. Zimbabwe has recently seen litigation over the implementation of provisions governing the vice presidency.[326]Zimbabwe has yet to put the Constitution's provisions for the establishment of an independent police oversight mechanism into action. There is now a general body relating to security institutions in section 210 of the Constitution. This might not win the confidence of citizens who might feel they are being forced to deal with all

[319] See Anthony Aust, *Modern Treaty Law and Practice* (2000, Cambridge University Press) 188.
[320] Mikaela Heikkilä, International Criminal Tribunals and Victims of Crimes (Institute of Human Rights 2004) 8.
[321] Heikkilä ibid.
[322] Heikkilä ibid.
[323] Aust (319) 187.
[324] Heikkilä (n 320) 8.
[325] Article 32 of the Vienna Convention.
[326] The VP are obligated to be regulated by a code of conduct and recently NGO Forum approached the Court in *Nyasha Chiramba v Minister of Justice* HH 584/22.

security institutions. The composition of the constitutional body is also something that has been criticised.

> **210 Independent complaints mechanism**
> An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct.

It remains to be whether test case litigation can persuade the Courts to liberally interpret the provisions governing police oversight. Constitutional rights and freedoms can only be given due regard if the superior courts consider the human rights indicators for assessing State compliance with international human rights. Beyond citing provisions of treaties, the courts must consider what human rights committees, Universal Periodic Reports (UPR), human rights council, special rapporteurs, national human rights institutions, and other human rights experts have to say about the country's situation. Treaty bodies and the Committees on Economic, social and cultural rights (ECSR) and Rights of the Child invite states to develop indicators to track their compliance with human rights treaties in the treaty body reporting process. [327] The national objectives or national directives must also be considered because they include structural indicators of the state's intention to comply with international human rights law. They also establish non-judicial institutions for human rights implementation. They can then in turn be used to explain the process indicators that measure the efforts undertaken by states to implement international human rights. Zimbabwe's nonjusticiable national objectives and general disregard for many indicators have resulted in low scores on many human rights indices. This is because such indices are part of outcome indicators that assess a state's human rights performance.[328]

(e) May consider relevant foreign law

Foreign legal materials appear to be used discretionally across jurisdictions. The term 'may' in section 46 (1) (e) does not imply that the court had

[327] General Comment 8, the Right to Work (art 6) under the Committee on ESCR 2005, E/C.12/GC/18; General Comment No 15 on the right to water (art. 11-12) Committee on ESCR 2002, E/C,12/2002/11, para 54; and so forth. The General Comment No 15 was not considered in the two important cases of *Farai Mushoriwa v City of Harare* HH 195-14 and *City of Harare v Mushoriwa* SC 54 OF 2018).

[328] See for instance Human Rights Watch, Zimbabwe; Events of 2021, ‹https://www.hrw.org/worldreport/2022/country-chapters/zimbabwe› accessed 5 December 2022.

discretion to apply foreign law. In deciding Zimbabwean constitutional rights cases, the court should consider whether it is desirable or appropriate to rely on judicial decisions or other interpretive materials from other countries. This is a matter of constitutional responsibility, not merely legal philosophy. In some countries, judges have abandoned the need to resolve cases judicial comity or hierarchy. American judges Antonin Scalia and Stephen Breyer spoke about the importance of applying foreign law in American courts. While the American Constitution is silent on the subject, Zimbabwe's Constitution expressly allows courts to apply foreign law, albeit without a clear checklist to guide them. In pitching a debate between Justices Scalia and Breyer, for instance, the following questions were considered:

> 'When we talk about the use of foreign court decisions in U.S. constitutional cases, what body of foreign law are we talking about? Are we limiting this to foreign constitutional law? What about statutes and, where it exists, common law? What about cases involving international law, such as the interpretation of treaties, including treaties to which the U.S. is a party? When we talk about the use of foreign court decisions in U.S. law, do we mean them to be authority or persuasive, or merely rhetorical? If, for example, foreign court decisions are not understood to be precedent in U.S. constitutional cases, they nevertheless strengthen the sense that the U.S. assumes a common moral and legal framework with the rest of the world. If this is so, is that to strengthen the legitimacy of a decision within the U.S. or strengthen a decision's legitimacy in the rest of the world. Or for some other reason?'[329]

Answering some of the questions, for example, issues relating to international treaties in Zimbabwe are guided constitutionally.[330]If Zimbabwe is to adopt a common law decision, the court is obligated to be clear on the nature of common law it is adopting whether it is commonsense common law prior to the adoption of statutes in England; common law simply referring to very old English cases; American, Canadian or South African common law modifying anglicized versions; or common law of a specific country without any anglicized aspects. Justice Scalia stated that he does not use foreign law in interpreting the US Constitution but rather in interpreting treaties. He contended that foreign law should not be used to determine the content of American constitutional law to ensure that Americans are on the right track and share the same moral and legal framework as the rest of the world.[331]Justice

[329] Norman Dorsen, A Conversation between U.S. Supreme Court Justices,' 3 (4) *International Journal of Constitutional Law* (2005) 519-542, 520.
[330] See section 46 (1) (c).
[331] See Scalia in Dorsen (n 329) 521.

Breyer argues that foreign law should be used simply because law emerges not from above, not from the Supreme Court, but from a complex interactive democratic process.[332]

Justices are part of the democratic process and work with what they are made to understand by lawyers, law professors, students and ordinary citizens teach them.[333]The process of applying foreign law evolves into a dialogue between judges, professors, members of the bar, those who decide cases, and those who analyse and put together series of decisions, and those with practical experience at the bar.[350]In a constitutional sense, judges are obligated to converse with legal scholars and demonstrate their understanding of how the legitimacy of their decisions is contested in a democracy.[334] Regardless, we believe that judges must speak in their decisions as members of professional groups that appreciate legal developments across various disciplines. The importance of comparative constitutionalism also necessitates the use of foreign law. Justice Juan Colombo Campbell of Chile's Constitutional Court contends that he relies on foreign case law and jurisprudential sources to confirm the universality of the principles that underpin constitutional justice.[335] He argued that it is critical to use foreign case law to resolve common issues such as constitutional conflicts and methods of resolving them; constitutional adjudication; constitutional fairness and due process; judicial protection of constitutional supremacy; and interpretation and adaptation of the texts and values contained in constitutions, as expressed in well-founded constitutional court rulings.[336] Constitutional justice according to Justice Campbell is:

> 'Strengthened by the effective protection mechanisms provided by constitutional procedural law. The texts of modern constitutions establish the foundations of the normative legal system that is then given effect by the incorporation of a judicial mechanism to protect its provisions. It is by means of fundamental charters that civilized nations guarantee the rights of individuals, regulate relations between individuals and the state, distribute power among the branches of government, and

[332] See Breyer in Dorsen ibid, 522.
[333] Ibid. [350] Ibid.
[334] We could not find the citation for the case involving National Electoral Reform Agenda that later led to the repeal of the Public Order and Security Act (POSA) in Zimbabwe. That case generated interest including emergence of some citizen groups such as Coalition against Violence and Anarchy that also wanted to counter the use of protests to assert human rights and freedoms.
[335] Campbell (n 1246) 544.
[336] Campbell ibid 544.

establish an integrated judicial system to protect and guarantee the legitimacy of the constitution's provisions and values.'[337]

The above remarks are consistent with those of Oliver Dutheillet de Lamonthe who contends that comparative constitutional law is important as a practice even for bodies such as the *Conseil Constitutionnel* in France which is not required by law to follow it but still considers it important to constitutional litigation.[338] Later in this book, comparative constitutionalism as a method of applying various laws law will be discussed.

[337] Campbell ibid 545.

[338] See Olivier Dutheillet de Lamonthe, 'Constitutional Court Judges' Roundtable,' *International Journal of Constitutional Law* (2005) 550-556, 550.