Chapter 7: Comparative Guidance

In many countries, constitutional interpretation may be a judicial tool to overrule, strengthen, or weaken previous cases or established constitutional jurisprudence. *De Lamonthe* distinguishes between imposed comparative constitutionalism and spontaneous comparative constitutionalism. Imposed comparative constitutionalism comes from regional courts such as the European Court of Human Rights (ECHR). The *Conseil Constitutionnel* of France avoid differing with the ECHR and therefore follows the precedents of the ECHR. The motivation is that the ECHR has contributed to the emergence of new rights such as the right to privacy protected by Article 8 of the European Convention on Human Rights; freedom of marriage in Article 12 of the European Convention and the principle of the dignity of the human person.[426]A version of imposed comparative constitutionalism in France also emanates from the manner in which French conceptions of certain rights generally favours the reasoning of the ECHR. For instance, French conceptions of freedom of speech as 'one of mankind's most precious rights' is popular in France because it also existed in the French Declaration of 1789 during the French Revolution.[427][428]

A litany of constitutional, fundamental, or human rights and freedoms may also come into question if superior courts move to overrule, strengthen or weaken previous cases. Sometimes the decisions of superior courts are notoriously easy or difficult to predict, however one puts it. In the United States of America for example, it could be said with certainty that conservative-leaning courts are inclined to severely curtail or overturn decisions such as *Roe v Wade*,[456] which protects abortion rights in states hostile to the procedure.[429] Read differently, liberal-leaning judges may '*understand*' the need to protect certain rights that may be considered at variance with conservative judicial tradition in America. Judges lean on their doctrinal inclination or individual perspectives and apply them to the constitutional text. They will then demonstrate what constitutes

[426] De Lamonthe, Constitutional Court Judges' Roundtable,' 3 (4) *International Journal of Constitutional Law* (2005) 550-556, 551.
[427] De Lamonthe ibid, 551.
[428] U.S. 113 (1973).
[429] See, J. Glenza, Conservative US Supreme Court justices signal support for restricting abortion in pivotal case (The Guardian, I December 2021). See also J. Glenza, how dismantling *Roe v Wade* could imperil other

legitimate criteria for an adequate understanding of a constitutional text by providing reasons for their judgment. Because every constitutional or legal text calls for judicial interpretation, every form of judicial interpretation calls for an assessment of its legitimacy that includes the litigants' own perspectives, interpretative knowledge and developments from external legal sources.[430]For instance, petitions filed amicus under the auspices of the American Centre for Law and Justice (ACLJ) publicise the conservative-inclinations to overtake *Roe v Wade* and '*save countless unborn babies*.' The petitions by ACLJ are pro-life and are concerned with how different states in the USA like New York have been passing laws allowing abortions up to the moment of birth, while states like Mississippi passed laws banning abortions after 15 weeks.

The importance of constitutional interpretation in many countries proceeds from the realisation that citizens in any polity regard the Constitution, whether codified or uncodified; written or not; military or civilian; monarchical[431] or republican;[432] unitary[433] or federal;[434] 'core, basic human rights,' (The Guardian, 11 December 2021). The concern by Glenza is on how same-sex marriage and *in vitro* fertilization can be affected if justices overrule or weaken *Roe v Wade*.

The classifications are however difficult to distinguish clearly. We classify the Zimbabwean Constitution as *a la carte* or one which has many visions that enjoy the benefits of many worlds. We may say Zimbabwe's Constitution is theocratic because it refers to the Almighty God in the main preamble but

[430] This is reflected in section 46 of the Constitution of Zimbabwe which enjoins judges to refer to constitutional values listed in section 3 of the Constitution; international law or foreign law, as the case may demand. The choice of a method of interpretation is conditioned on the one hand by individual judicial inclinations and all factors that cast aspersions on the choice in which the method can be used on the other hand.

[431] Here the head of the State is a king or queen who inherits the State as is the case with UK, Belgium and Sweden where the king or queen reign but does not rule the State. This is different from Saudi Arabia and Eswatini where kings have substantial political and legal authority.

[432] Here the President is at the helm of governance and is either directly or indirectly elected. Section 92 of the Constitution of Zimbabwe provides that the President is directly elected jointly by the registered voters. Some mix-up of the features occurs in section 1 of the Constitution which provides that Zimbabwe is a unitary, democratic and sovereign Republic.

[433] Here all power resides in central government. Section 5 of the Constitution however speaks about tiers of government that include national government, metropolitan councils and local authorities. Further, there is reference to devolution of government in Chapter 14 of the Constitution. This may dilute the unitary nature of the Constitution in some way

[434] This Constitution allocates responsibilities and powers to the central and devolving governments such as states, regions, metropolitans and provinces.

again this is problematic because the identity of the Almighty is not defined. Various faiths such as indigenous Zimbabwean religion (a version of African traditional religion) whose adherents believe in the Almighty God (*Musikavanhu/Unkulunkulu*) may be considered secular religion by theocentric beliefs such as Christianity and Islam.[435]We can say that the Constitution is flexible when it comes to prescribed requirements for a simple majority in Parliament, in a manner akin to amending an ordinary law.[436]As such, the party that controlled the two-thirds majority in Parliament, ZANU PF, has already supervised two amendments to the infant Constitution. It is also flexible because it can easily be changed to suit current interests of the dominant political party of the day. But again, we may say it is a rigid Constitution because it requires some stringent conditions such as referendum or a prescribed high majority in Parliament when it comes to other issues such as amending the Bill of Rights. Its rigidity is also felt when it comes to lack of explicit due process models to prevent Parliamentarians from being recalled by their political parties through mere presentations of letters of recall to the Speaker of Parliament. This rigidity has been compounded by narrow approaches to constitutional interpretation which present the parliamentary recall provisions as unambiguous. This has insulated judges from reading the due process model into section 129 (1) (k) of the Constitution. In fact, rigid Constitutions can promote flexible changes in a society in instances where ruling parties control the legislature.[437]For Zimbabwe however, it has been a case of threats from the ruling party to amend the Constitution to stifle dissent mainly from the opposition politicians.[438] Countries, such as the United Kingdom (UK), can be said to have uncodified constitutions because their constitutions are partially written in many Acts of Parliament. The partially written constitutional provisions can then be used to develop arguments relating to a potential codification of the UK Constitution.

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[435] The main preamble to the Zimbabwean Constitution does not explain the way or religion from which the phrase 'Almighty God' is derived.

[436] These requirements are listed in section 328 of the Constitution. They were tested when two amendments to the Constitution were effected.

[437] For instance, the Brazilian Constitution which requires a high majority of three-fifths Parliamentarians in both houses was amended 92 times in 28 years while Zimbabwe's 1980 Constitution was amended 19 times before 2013.

[438] See for instance, Thandiwe Garusa, 'We Will Change The Constitution For Mnangagwa To Rule For Life: Chiwenga,' (19 November 2021, NewZimbabwe) https://www.newzimbabwe.com/we-will-change-theconstitution-for-mnangagwa-to-rule-for-life-chiwenga/ accessed 6 December 2022.

General Influence of Democracy on Constitutions

From a comparative analysis and for those familiar with the so-called waves of democracy, the '*wave*' metaphor has been used to suggest evidence of democratic diffusion from one country to another. For instance, during the Third Wave of Democracy largely popularized by Samuel Huntington,[439] it appeared like authoritarian regimes were behaving like falling dominoes simply on the basis that cross-border democratic developments produced ripple effects on other states.[440] While Huntington would condense issues about democratic breakdown in different countries, other scholars like Robert Dahl were focusing on the transformation of democracy from the Greco-classical version on direct involvement of citizens to the post-communism democracy that is based on representation, constitutionalism and liberalism.[477] Zimbabwe has mixed the two forms of Dahl's transformational approach since the president is directly elected by joint registered voters [441] while parliamentarians are elected under indirect or representational democracy. Zimbabwe also seems to incline to the approach by Francis Fukuyama where countries modify liberalism and occasionally use constitutions to establish strong states which rule by law and not the governance of the rule of law.[442] Fukuyama focused on democratic accountability where states and politicians of the day must commit to uphold the rights and needs of citizens they govern. To achieve this form of accountability, politicians must not practice institutional forbearance where they use state institutions to abuse, suppress and marginalise their political opponents. Accountability also enjoin the ruling elites to be answerable to their non-elite ordinary citizens by shunning state abuse (and state capture). States with authoritarian politicians who have read Fukuyama's works also use his thoughts to fragment opposition members into disorganized and disinterested or self-interested opponents so that they are kept out of political participation. The opponents who fight for political parties are considered anti-forces or regime change agents and are normally accused of causing the state or political forces to face total collapse. Fukuyama

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[439] Samuel P. Huntington, 'Democracy's Third Wave' 2 (2) *Journal of Democracy* (1991) 12-34.

[440] H. Starr (1991) Democratic dominoes: diffusion approaches to the spread of democracy in the international system.' *Journal of Conflict Resolution* 35 (2) 356-81; see also Samuel P. Huntington, *The Third Wave. Democracy in the Last Twentieth Century* (1991, Norman and London: University of Oklahoma Press) 366.

[441] Section 92 of the Constitution.

[442] See Francis Fukuyama, *The End of History and the Last Man* (1992, Free Press); see also Francis Fukuyama, The Origins of Political Order: From Prehuman Times to the French Revolution (2011, New York: Farrar, Straus and Giroux, 2011, 2013, Cambridge University Press).

saw the opponents as important to counterbalance the authoritarian tendencies of the politicians the establishment of open institutions that fight political decay and abuse. Zimbabwean courts have largely been accused of either supporting the ruling or opposition parties in many ways. The politicians give legitimacy to the judgments of different judges in different ways. Superior courts have also been accused of being centres of judicial packing by the government of the day.

In all the above, judges must demonstrate that they are independent from political influences of the day. To do that, they must reflect in their judgments that they are guided by the need to democratize Zimbabwe as a constitutional democracy. From a theoretical level, constitutions and constitutional processes follow some theory of democratization. There are many theories of democratization to which Zimbabwe's constitution and constitutional developments benefit from. Five major approaches can be discerned, and these are listed by Teorell[443] to include:

a) The structural approach which states that countries that have undergone a more extensive process of societal modernization are more likely to be democratic.[444] This is because such countries focus on benefits of agglomeration brought by industrialization, urbanization, increasing levels of education, rising national income and developed communication technologies. Social other structural influences listed by scholars cited in Teorell[445] can also explain this theory and these include size of country,[446] religious composition,[447] societal fractionalization,[448] colonial heritage,[449] social capital,[450] and mass political structure.[451]

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[443] J. Teorell *Determinants of democratization: explaining regime change in the world, 1972-2006*. (2010, Cambridge University Press).

[444] S.M. Lipset (1959) 'Some social requisites of democracy: economic development and legitimacy.' *American Political Science Review* 53: 60-105; D. Lerner (1958) *The passing of traditional society*. Glencoe: The Free Press.

[445] Toerell (n 443) 18.

[446] R. Dahl & E. Tufte *Size and democracy* (1973, Stanford University Press).

[447] *S.M. Lipset (1994) 'The social requisites of* democracy revisited.' *American Sociological Review* 59 (1) 69105.

[448] Robert Dahl (1971) *Polyarchy*. New Haven: Yale University Press.

[449] M. Bernard, C. Reenock, & T. Nordstrom (2004) 'The legacy of western overseas colonialism on democratic survival.' *International Studies Quarterly* 48: 225-50.

[450] P. Paxton (2002) 'Social capital and democracy: an interdependent relationship.' *American Sociological Review* 67 (April): 254-77.

[451] R. Inglehart (1997) *Modernization and postmodernization: cultural, economic and political change in 43 societies*. Princeton University Press.

b) The strategic approach espoused by Dankwart Rustow as a response to Lipset;s arguments on structural influences on democratization. Rustow[452] argued that the structural school of thought neglected the 'genetic question of how democracy comes into being.' By criticising the mere focus on the influences of structural processes in a country, Rustow built a model that showed the democratic phases from the preparatory, decision and habituation states, through which countries strive to end authoritarian tendencies and shape their democracy. Rustow's model was then popularized by Guillermo O'Donnell and Philippe Schmitter as well scholars like Thomas Carothers[453] who focused on a transition paradigm where political elites (principals and agents) in a State make some strategic decisions on to democratize and consolidate the gains of democracy.[492] In simple terms, the 'preparatory' phase is called liberalization; the 'decision' phase is democratization; and the habituation phase is consolidation. Teorell monumentally argues that the installation of a democratic regime through the lens of strategic democratization approach follows a process of elite interaction between hardliners and soft-liners of the incumbent regime and the opposition forces.[454] This approach is linked to the *virtu*, *fortuna* and *necessitta* espoused by Nicolle Machiavelli to help show that democratic transitions are strategically elite driven even if such consolidation of power is meant to consolidate the incumbent regime's stay in power.

c) The social forces tradition focuses on the relationships among social classes in society and has its roots in the work of Barrington Moore[455] who criticised the landowners who subjugated the peasants. The end of the peasants' sufferings could only be brought by democracy that is driven by some middle class or bourgeoises. In some modified Marxian philosophy, democracy is forged from below through collective decision-making by multiple actors.[456]

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[452] (1970) 'Transitions to democracy: toward a dynamic model.' *Comparative Politics* 2: 337-63, at p. 340. [490] (1986) *Transitions from authoritarian rule: tentative conclusions about uncertain democracies*. Baltimore and London: The John Hopkins University Press.

[453] (2002) 'The end of the transition paradigm.' *Journal of Democracy* 13 (1): 5-21.

[454] Id, 20.

[455] (1966) *Social origins of dictatorship and democracy: lord and peasant in the making of the modern world*. Boston: Beacon Press.

[456] Teorell (n 443) 22.

d) The economic approach focuses on how economics shapes regime transitions and democratic stability in a three-pronged way. Firstly, political elites and non-elites focus on the economic preferences of the entire population to manage protest action and regime outcomes.[457] Secondly, the actors focus on structural preconditions and material resources, forcing the elites to calculate the risks of sustained mobilization by marginalised groups. Thirdly, economic modelling is done through deductive reasoning or focus on factors beyond transition paradigms, such as the actual factors that shape the political preferences of various actors who champion social change.[458] This theory is largely dependent on two critical factors. Firstly, if income inequality is more pronounced, the rich people are less likely to promote democracy for the poor.[459] Secondly, capital mobility or asset specificity means that the cost of democracy to the rich decreases as asset specificity decreases.[460] In simple terms, the less productive an asset is at home relative to abroad, the lower the tax rate will have to be to avoid capital flight.[461]

e) The eclectic approach which focuses on empirical investigations which contain both deductive and inductive elements to measure democracy and democratization, including the need to resort to quantitative or statistical estimation of indices.[462]

Cross Border Constitutionalism

Democracy is essentially 'a regime in which those who govern are selected through contested elections, where 'contested' means the presence of an opposition that has *some chance* of winning office.[463] Cross-border constitutionalism has given rise to progressive constitutionalism in Zimbabwe and as such Zimbabwean courts must not ignore this fact in their constitutional adjudication. This need is encapsulated in what Huntington called installing democracy by discovering '*that it can be done*' and learning '*how it*

2[457] Id, 4.
[458] id, 25.
[459] Teorell (ibid) 25.
[460] Id.
[461] Id.
[462] Id, 30.
[463] A. Przeworsiki, A. Michael, A.C. Jose & L. Fernando (2000) Democracy and development: political institutions and well-being in the world, 1950-1990. Cambridge: Cambridge University Press, 16.

can be done.'[464] When deciding to approach a constitutional court or court with the competence to decide constitutional cases, [465] Zimbabwe's hybrid constitutional history must help litigants to learn how to recognise, test, and explore opportunities for test or strategic cases or establish constitutional moments using comparative insights. We have seen that the constitutional developments in Zimbabwe have since the Mapungubwe and Great Zimbabwe times, been based on the concept of elite cohesion. The fall of the Great Zimbabwe was based on the acceptance by the ruling elites of the day that Nyatsimba Mutota could move to the north in search of material and natural resources and relinquish his position to the throne since he was the first child of Great Zimbabwe's king Chibatamatosi. [466] The Mutapa State's decline seemed to have been basely largely on the elite consensus that Changamire Dombo could establish his Rozvi kingdom since he had defeated the Portuguese.[467] The fall of the Rozvi State was also based on elite consensus that the Ndebele people under Mzilikazi and Lobengula possessed superior weapons and had effective war tactics. This is why even female Ndebele warriors like Nyamazana were celebrated in the history of the demise of the Rozvi State. While social classes also played a role in shaping the rules in the pre-colonial societies, the classes became very noticeable during the three caste classes in the Ndebele: the Zansi;[468] Enhla,[469] or Hole.[470]The White settler regime used constitutional developments from South Africa relating to referendums, land apportionment, suppression and exclusion of natives and so forth. The elites of today can also respect electoral participation, success or defeat based on the ethos that were respected in traditional Zimbabwe but still

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[464] S. Huntington (1991) *The Third Wave: Democratization in the late twentieth Century*. Norman and London: University of Oklahoma Press, p. 101.

[465] Section 85 of the Constitution provides that litigants in constitutional cases can approach competent courts seeking remedies for violation of constitutional rights and such remedies may include compensation and declaration of rights.

[466] There are views which believe the Great Zimbabwe is not the first pre-colonial state, but we are not going to discuss those in this book. We are here just laying the basis on the understanding of public law during the precolonial period.

[467] The Mutapa kings had been weakened by the Portuguese through installation of puppets chiefs and support of rebel chiefs. Changamire Dombo, who was a military general in the Mutapa State, then managed to defeat the Portuguese and establish his Rozvi kingdom, derived from *murozvi* or destroyer of the Portuguese influence.

[468] These were the privileged Khumalo people who belonged to Mzilikazi's royal family.

[469] These were sub-elites who were mainly members of Nguni-speaking people who joined Mzilikazi and the Ndebele from South Africa during the Mfecane or time of the great trouble under Tshaka the Zulu.

[470] These included the sub-elites from areas such as Venda in Limpopo or Vhembe Province and non-elites such as the Shona.

uphold vestiges of colonial laws. The 2013 Constitution borrowed a lot from constitutions of Kenya, United States, South Africa and Canadia.

Comparing Internationalised Constitutional Moments Before and after Independence

The famous constitutional case before independence was *Madzimbamuto v Ladnerburke* ('*Madzimbamuto* decision') which dealt with the right to arbitrary detention of Mr. Madzimbamuto. This case was decided by Rhodesian superior courts and the Privy Council in Britain. Mr. Madzimbamuto's wife constitutionally sensed that her husband's constitutional rights were being violated by the Ian Smith UDI regime which she felt was illegitimate. In challenging the detention in the Rhodesian superior courts and the British Privy Council, this case offered a lot of insights on how the courts also examined doctrines such as governmental necessity as they relate to constitutional or human rights and fundamental freedoms. The *Madzimbamuto* decision helps show how constitutions free ordinary citizens from the 'invisible hand' that seems to dominate repressive regimes.[471] Rhodesia was placed under United Nations-approved sanctions and was obligated to respect the NIBMAR (No independence without black majority rule) principle adverted to earlier on. The popular resistance by black nationalists and the ordinary masses in Southern Rhodesia were given impetus by constitutional cases such as the *Madzimbamuto* decision. This culminated in the rejection of the political arrangements such as Zimbabwe-Rhodesia and the adoption of the Lancaster House Constitution (LHC) in 1979. While the LHC was largely a ceasefire charter, it showed how constitutional moments also depend on the interpretation of constitutional rights by domestic and international courts.

The *Madzimbamuto* decision and the constitutional moments it produced culminated in Zimbabwe's independence depended largely on elite cohesion even though the participation of ordinary citizens or private citizens was also crucial. The settler regime arrangements had to be replaced by some federalism. The end of Rhodesian Federation had to pave way for the 1961 Constitution. The 1961 Constitution entrenched a Declaration of Rights which guaranteed basic human rights and freedoms such as observance of proper legal procedure

[471] See H.H Marshall (1968). The Legal Effects of U.D.I (Based on *Madzimbamuto v Lardner-Burke*) 1022. *The International and Comparative Law Quarterly*, Vol. 17 (4) 1022-1034.

and protection from discrimination by laws or administrative action.[472] It also provided for the appeal to the Privy Council.[473][474] The advantage of this Constitution was that it could be interpreted using laws such as the Colonial Laws Validity which prohibited colonial legislatures the right to alter a constitution except in the manner stipulated in that Constitution.[475] The Smith regime had introduced a constitution which introduced fundamental changes to the 1961 Constitution which included giving the Rhodesian legislature all powers to make laws. In heralding and underlining the constitutional moments provided by the *Madzimbamuto* case, Hopton notes seminally that:

> 'What the courts had to adjudicate was the validity of the new regime and its Constitution, and thus, ultimately, the success of the revolution. This occurred in a series of cases which questioned the legitimacy of the new regime, the most being *Madzimbamuto v Lardner-Burke N.O; Baron v. Ayre N.O*,[476] which for obvious reasons, became known as the 'Constitutional Case.'

When Baron and Madzimbamuto challenged their detention based on the illegitimacy of the Smith Regime, the High Court ultimately found that the detention orders were consistent with maintaining order without detriment to the fundamental rights of the 1961 Constitution since UDI was a *de facto* regime as contemplated under international law.[477] Even the appeals judges carried out extensive surveys of cases from other legal systems including mature constitutional democracies like the United States of America. There was also extensive examination of various constitutional jurisprudential positions by Chief Justice Beadle who resorted to Kelsen's Pure Theory on the Grundnorm or fundamental norm which balances between the utilitarian 'ought' statements and the realpolitik. The Grundnorm concept was used to describe the Smith regime as a *de facto* government. Fieldsend A.J.A also weighed in by rejecting the Grundnorm concept as a '*halfway house*' solution to the recognition of the Smith regime which he felt had not even assumed the status of a de facto

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[472] T.C. Hopton (1978) Grundnorm and Constitution: The Legitimacy of Politics. *McGill Law Journal* (Vol 24, pp 72-91, at 73.
[473] Id.
[474] 29 Vict, c63 (U.K).
[475] Id, 74.
[476] [1968] 2 S.A. 284, 307 (App.Div.).
[477] Id, 74.

government because it did not control the judiciary. Fieldsend A.J.A thus felt that courts still owed their allegiance to the 1961 Constitution and the independence of the courts created by the 1961 Constitution had to be solely governed by this Constitution. Upon appeal to the Privy Council, the Privy Council rejected Beadle CJ's compromise solution and held that the de facto/ de jure is blurred since the de facto recognition is inapplicable in internal situation or on grounds independent of the constitutional position. [478] Effectively, the Privy Council even rejected the doctrine of necessity on the basis that the British government still retained sovereignty.

After independence, constitutional moments under the 2013 Constitution showed how the constitution could be interpreted by one judge writing a brief for a few judges[479] while in some about nine judges grapple with the resolution of a constitutional matter placed before them.[480] If a matter before the courts is essentially a 'constitutional matter'[481], then the Constitutional Court judges are expected to be seized with the matter so that all the other courts within the hierarchy of the court system in the country can benefit from the reasoning of the apex court in constitutional matters. The Constitutional Court is given unfettered powers to make binding pronouncements on constitutional matters. [482] All the judges of the Constitutional Court are constitutionally obligated to hear constitutional matters relating to Chapter 4 rights and freedoms or concerning the election of a President or Vice President. [483] As such, the judges of the Constitutional Court are expected to constitutionalize their interpretations unanimously or through dissenting judgements. In a way,

[478] Hopton (n 472) 79.

[479] This is usually the case at the High Court, Labor Court, and Administrative Court where an individual judge can adjudicate on a matter in various forms, such as urgent chamber applications or normal court applications and actions.

[480] This is usually the case at the Constitutional Court where a full bench sits to decide on a matter as contemplated by the rules of the court; see for instance the *Chawira & 13 Others v Minister, Justice Legal & Parliamentary Affairs & Others* (CCZ 3/2017 Const. Application No. CCZ 47/15. That case dealt with the constitutionality of the death penalty. The Constitutional Court judges unanimously dismissed the case based on express constitutional avoidance, reference to the ripeness doctrine and the exhaustion of internal remedies. For a critique of the judgement, see also S. Hofisi, 'The Chawira Judgment: Some Reflections,' (The Herald Zimbabwe, 26 April 2017).

[481] See section 332 of the Constitution. Section 332 is the dictionary or definitions section of the Constitution. It defines a constitutional matter as "a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution."

[482] See section 167 (1) (a) of the Constitution.

[483] See section 166 (3) (a) of the Constitution.

the judges account to the people, who are the repositories of judicial power.[484] Thus, it is the people who ultimately legitimize or delegitimize the decisions of judges.

Constitutional Dimensions of Politics in Zimbabwe

We have seen that Zimbabwe's Constitution has key features which venerate specific founding principles and fundamental values,[485] prioritises a tier system on State institutions,[486] and embeds national objectives as part of Zimbabwe's priority list.[487] Further, the Constitution also allows for the complementary interpretation of sources of municipal law with those of international law.[488] Lying athwart any normative approach to constitutionalism is the notion that the Constitution serves as the soul that animates the existence of a polity.

Towards Prioritising Hybrid Constitutional Law in Zimbabwe

Constitutional law, like administrative law, is a branch of public law which deals with the hierarchical relationship of national laws and the political roadmap of a country. On the one hand, it deals with the principle of separation of powers which speaks to the distribution of powers of State governance among the three institutions such as the executive, judiciary and the legislature.[529] On the other, it also deals with the concepts of individual sovereignty and individual freedoms that directly bear on political governance such as freedom to demonstrate and petition government[489] and political rights[490]. As such, constitutional law greatly influences the politics of a nation.

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[484] See section 162 of the Constitution which provides that judicial authority is derived from the people and is vested in the courts.

[485] Section 3 of the Constitution lists many principles including rule of law, supremacy of the Constitution and human rights.

[486] Section 5 of the Constitution.

[487] See Part 2 of the Constitution. While the national objectives are not justiciable, they can provide useful insights on how the judges can interpret the Constitution in ways that protect, promote, respect and fulfil human rights and freedoms in the Constitution.

[488] See sections 326 and 327 of the Constitution. See also sections 46 and 34 of the Constitution.

[489] This right is enshrined in section 59 of the Constitution and should be exercised in a peaceful manner. Opposition political parties such as Movement for Democratic Change- Tsvangirai and Transform Zimbabwe once petition the Zimbabwe African National Union- Patriotic Front (ZANU-PF) that was led by former President, Mr. Robert Mugabe. They wanted ZANU PF to fulfill its 2013 election promise to provide 2 million jobs and to account for the missing US$15 billion in diamond revenue.

[490] This right is enshrined in section 67 of the Constitution. The right holders have the right to form, join, or participate in the cause of a political party of their choice. There is no law that regulates the registration of political parties in Zimbabwe. However, the Political Parties (Finance) Act regulates the funding of parties. Those who can access State funding have to satisfy a minimum winning threshold. The right holder must

Constitutional law provides the consummate checklist on the exercise of governmental power in a State. It is an easy branch of domestic law with several principles[491] and rules on public engagement. Often when the general populace comes to the deep end, they may simply resort to the Constitution to seek redress for a constitutional violation.[534] Constitutional law becomes important because it provides the doctrines and principles which judges can use when interpreting the Constitution.[492] Constitutional law also provides the doctrines which help in determining if judges are inclined to judicial restraint or judicial activism.[493] Caution may be made here. It would be stretching the truth to state that constitutional litigation is easy. Judges who properly dismiss or remove cases from the roll of cases may be unfairly accused of exercising judicial restraint. Litigants should therefore properly consult and instruct their lawyers and lawyers, or unrepresented litigants should satisfy various legal requirements as expected by the rules of courts of law if their cases are to be properly dealt with based on the merits. Sometimes a case may be litigated strategically or through strategic impact litigation,[494] or be instituted on the grounds of public interest.

Hybrid constitutional law helps also helps litigants to criticise the doctrines that are usually invoked by certain judges if they trump legal doctrines. The technical arguments that are raised by the litigants and relied upon by judges should also be part of the constitutional laws in a country. Before litigants can

[491] Important principles are found in section 3 of the Constitution, and they are listed as the 'founding principles and values.' The other equally important principles are found in Chapter 9 of the Constitution. They are listed as the 'Basic Principles and Values governing Public Administration'. For long, public Administration was studied as a discipline of either political science or public law (constitutional law and administrative law). Most universities used to offer Political and Administration degree. The trend the world over is to offer separate degrees such as Honors in Political Science and Honors in Administrative Studies. Others offer dual degrees in Law and Politics or Administration. The University of Zimbabwe currently has a separate Faculty of Law which offers a 4-year Honors degree in Law and a Faculty of Social Sciences and a Department of Political and Administrative Studies which offer separate degrees in Political Science and Administrative Studies. It is hoped that the two Faculties will in future offer interdisciplinary degrees in tune with the times. This will increase specialization for both the lawyer and the Political Scientist. In many instances, lawyers usually pursue their postgrad studies in International Relations in the Faculty of Social and Behavioural Studies. [534] See the provision on constitutional redress in section 85 of the Constitution.

[492] R.F. Nagel (1983) 'Interpretation and importance in constitutional law: a re-assessment of judicial restraint.' *Nomos* 25: 181-207.

[493] Id.

[494] Strategic litigation has proven to be one of the tools that lawyers utilise to change draconian and unjust laws with a legal system. Jurisprudence from the Constitutional Court

complain that judges are frustrating them by upholding technical arguments, they should know the legal sources that are accepted in their country. No wonder it has been said that modern social science is characterized by a broad development of studies into politics and political relations.[495]

The Constitution must Remain a Supreme Source Of Law

Before the 2013 Constitution was adopted, courts interpreted other generations of rights by linking them to the first generation of rights.[496] The reason was to make it clear to litigants to respond to the Constitution's purpose. The fertilization of a rights constitutionalism since the year 2000 saw rights and political activists risking their lives and sacrificing their various energies to demand an end to rule by law in favour of the restoration of the rule of law, protection of human rights, and respect for other non-negotiable, and nonderogable tenets of democracy.[497] If a Constitution can affect the whole of a society, then its entrenched and justiciable features must be applied vertically to State functionaries and horizontally to all citizens, and all the more if members of a polity place it in high regard, it becomes the roadmap, the compass, or beacon to tell outsiders and insiders on the governance trajectory in a State.[498] Hence it is vital that constitutional interpretation is not mechanical and formalistic but a comprehensive analysis of the text in context.

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[495] See G.K.H. Shashnazaroy *Contemporary Political Science in the USA and the West*. Progress Publishers, Moscow (1982) 7.

[496] Economic, social and cultural (ECOSOC) rights were interpreted in this regard since they were not justiciable in the bill of rights. ECOSOC rights are contained in the International Covenant of Economic, social and cultural Rights (IESCR), 1966. They are regarded as second generation of right because they enable an individual to enjoy his CP rights effectively and in a more informed way. They include the right to healthcare; right to education; right to food and water; and freedom from arbitrary eviction.

[497] Various issues such as the Land reform in early 2000, *Operation Murambatsvina* in 2005; electoral violence in the 2008 presidential runoff; the Government of National Unity and the constitution-making process between 2009 and 2013 enabled different sections of the Zimbabwean society to decide on issues to be included in the constitution. A constitutional selection committee, COPAC, led the process. Zimbabwe also benefited from the work of the drafters of the constitution and from input from constitutions such as South Africa and Kenya. In the end, a largely progressive constitution was produced which has progressive features that protect citizens; advance the national interests of Zimbabwe and provide guidance on the governance milieu which Zimbabweans envision and strive to practice.

[498] Section 3 (2) of the constitution lists various principles of good governance that can be used to ensure that there is transparency, accountability, responsiveness in a way justice is dispensed. Other principles such as separation of powers speak to the pillars of the State such as the executive, legislature and the judiciary. The three institutions must adhere to this concept in many ways and courts sometimes invoke different versions of the avoidance doctrine of interpretation to observe this principle. Principles relating to the rule of law, supremacy of the constitution and human rights tend to bind both the State and citizens to observe certain duties and to respect, protect, promote and fulfill certain human rights enshrined in the constitution.

Conclusion

The foregoing analysis has shown that democratic theory and constitutional interpretation depend on the compromises of the political elites and the social forces that address the needs of the ordinary citizens. Basically, Zimbabwe's constitutional law' constitutions; and constitutional interpretation was inspired by developments in the pre-colonial, colonial and post-colonial periods. The colonial period introduced the concept of constitutional cases. Judges demonstrated the need to develop and innovate on constitutional doctrines and other house solutions. While some doctrines such as *de facto* recognition and doctrine of necessity were wrongly applied, the colonial courts introduced the concept of 'constitutional cases' which are still considered today as constitutional cases. Further, it was shown in this chapter that pre-colonial societies did not have formalized systems, but they did observe concepts such as separation of powers, individual sovereignty, religious freedoms, freedom of expression and so forth. Oral tradition and old-world indigenous language literature show that pre-colonial States in Zimbabwe had unwritten doctrines, rules or laws which bear significantly on relations between the State and its citizens in the modern era, relations between members of the ruling elite, sub-elites and so forth. Essentially, while the term Constitution was not used then, there are various rules that show the pre-colonial states were constitutional societies. The non-usage of the term stems from the fact that the term was

Anglicized and came to be associated with written Constitutions from 1923 and 1961 Constitutions.