Chapter 8: Some Thoughts on Embossing Historical Constitutional Interpretation in Zimbabwe

Introduction

The area of storytelling in constitutional education is still to be utilised or popularized in Zimbabwe. It can be useful in understanding customary law of Zimbabwe or the customs that were used to defend human rights in traditional Zimbabwe. To keep this history of constitutional interpretation from being a boring exercise, we have selected aspects we consider to be useful in the realm of constitutional interpretation. Constitutional history that is based on modern constitutions seems to begin with three issues:[499]

- The consideration of the type of history (i.e. intention or meaning and texts or backdrops)
    - The pattern of usage (whether pluralist or dispositive or interpretation or rhetoric); and
    - The type of constitutional provision (i.e. form of government, procedural technicalities, and historical compromises such as treaties).

Some studies on constitutionalism in Africa have focused on Africa's constitutional moments or constitutional revival without really going into the history of African constitutionalism before colonial period.[500] There are studies that focus on South Africa's traditional justice but they do not go deeper into constitutional systems in such society.[501]An attempt to show the contributions of African jurisprudence to constitutional rights to education is referred to the Constitution of West Africa drafted in 1871 to unite the Fante Confederation (18681873). The Fante Constitution has been considered a unique Constitution which represents a unique early African attempt to construct a modern nation-state based on a written constitution.[502] The lack of detailed analysis of Zimbabwean traditional law is that just like in Southern Africa, the bulk of

[499] J. Greene & Y. Tew, 'Comparative approaches to constitutional history.' *Columbia Law School Comparative Judicial Review* (2018) 381-3.

[500] H.P. Prempeh (2007) 'Africa's' constitutionalism revival': false start or new dawn? *International Journal of Constitutional Law* 5 (3): 469-506.

[501] K. Freddie & M. Koketso (2013) 'Law and traditional justice systems in South Africa: a hybrid of historical and constitutional discourse.' *Journal of Global Peace and Conflict* 1 (1) 49-65.

[502] C. Adick (2021) 'An African contribution to the constitutional right to modern schooling 150 years ago.' *International Review of Education* 67: 385-402.

teaching on African customary law has tended to focus on captured and formalized versions that are recorded in the law reports and interpreted through Anglo-Saxon or Roman Dutch law procedural and substantive law filter.[503] The challenge of teaching customary constitutional law has become a matter of the content of what is to be taught and the sources from which that content can be drawn.[504] The problem has been compounded by the fact that national constitutions, legal systems and the mode and extent of the recognition of customary law create their own considerations of how customary law should and can be addressed as a system of law.[505] To this we argue that a significant rule based approach to egalitarian constitutionalism can be noticed from Zimbabwe's oral history.

There is need to focus on how traditional courts ranked the rules of interpretation under the concept of *hunhu/unhu/Ubuntu*. Near-egalitarianism was noticeable in 11th century pre-colonial States such as Mapungubwe, Great Zimbabwe, Mutapa, and Rozvi. Mapungubwe is believed to be the first State in Zimbabwe as a symbolic State to show how constitutionalism prevailed. This State means '*Hill of Jackals*' and epitomizes the wisdom of justices who preserved the civilization that was taking place in the area, the opportunities, rule of law and bureaucracy that was visible in the area.[506] Justice Jackal is often presented in traditional folklore as the people's judge or the eponymous judge who could interpret the rules of society from the perspective of the ordinary citizens. For instance, in the story of the Hunter and King Lion, a man went hunting and caught a rabbit. As fate would have it, the man slept in the forest. When he woke up, he saw King Lion seated next to him. Lion then greeted the man and urged him not to run away. He told the man how good he was as a king. Lion respected the right to be heard and the rules of natural justice well. As such, he commanded the man to give the rabbit to his dog and then to eat his dog. This would enable Lion to eat the man without showing cruelty. The man had to die a dignified death. Jackal suddenly came and instructed the man to follow Lion's instructions. '***Do as Lion said and then I will eat the lion***,' Jackal retorted. Lion is infuriated but Jackal then told the man that he should prepare to take a tree called Go Forever or *Muyendachose*

[503] J. Stewart (1997) Why I can't teach customary law? The Zimbabwe Law Review 14: 18-28.
[504] Id, 19.
[505] Ibid.
[506] SAHO (2011) Kingdoms of Southern Africa: Mapungubwe, available at https://www.sahistory.org.za/article/ kingdoms-southern-africa-mapungubwe, accessed 12/12/2021.

when Justice Jackal would finish eating Lion. Lion then chases Jackal, and the man is saved from the jaws of death. In this folklore, the right to be heard is based on restraints that society can impose on rules or the executive arms of the State. We may risk argue that the Hill of Jackals can even serve as a comparison for present day Constitutional Courts such as Constitutional Hill in South Africa or Mashonganyika Building in Harare Zimbabwe.

Another approach would be to survey the constitutional developments during the colonial period. We can use language rights as the starting point for test case litigation. Before the Constitution of 2013 was adopted, the Ndau people were also considered to be part of the Shona people.[507]Situational analysis could be made with Ndau people to determine if they want to litigate to be incorporated as an ethnic group within the Shona language.

The Period 1890- 1923

Although the rule of law can be said to have been first seen in the 1923 Constitution, history can be used to understand legislative developments between 1890 and 1923. Southern Rhodesia was then annexed by Britain through the Southern Rhodesia (SR) (Annexation) Order in Council 1923 which made SR part of Britain's Dominions but known as the Colony of Southern Rhodesia.[508]It established a legislature consisting of a legislative council and legislative assembly.[509] There was also referendum by the white settlers to decide whether Southern Rhodesia should become a British colony or to form an amalgamation with South Africa. Historically, the 1923 constitution influenced the drafting of legislation such as the Dog Racing and Sports Pool Prohibition Act, 1950 when it was feared that the wave of immigrants from Britain would bring to this country some of the less desirable customs of that socialist State.[510] However, there was legislation that violated the rights to human dignity on the basis of military constriction. The Civil Disabilities Act was introduced in 1950 to enable the High Court to impose disabilities on persons who refused to undertake military service or who deserted or were discharged with ignominy from the Forces. Such disabilities included disenfranchisement, prohibition on the holding of any public office or

[507] Section 6 of the Constitution of Zimbabwe 2014 lists Ndau as a distinct language.
[508] Ibid, 1.
[509] Article 1 of the Constitutional Letters Patent.
[510] . C. Loades, '*Legislative Oddities*', Heritage, Publication No. 5, 1985, Harare.

business licence or holding or managing any mining claim and carrying the firearms. Later in the 1960s, Britain's decision to delay the granting of independence to SR is known in historical circles as the NIBMAR (no independence before majority rule) principle. It is basically understood together with the conditions which included:

1) *Improvement of the political status of the Native or Blacks*
2) *Non-retrogressive principle*
3) *Eradication of racial discrimination*
4) *Holistic proposal on independence*
5) *Lack of oppression either by majority or minority*.

The NIBMAR principle impliedly pointed to the oppressive nature of colonialism. This historical analysis can then be used by lawyers to deal with instances of state repression, land redistribution, land audit, voting rights, and so forth.