

## Chapter 9: Time to Delink Constitutional from Ordinary Statutory Interpretation

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### Introduction

Zimbabwe has passed the stage where citizens must utilise deliberative or dialogic democracy to debate about whether they need a justiciable bill of rights. While concern about government and Parliament's encroachment on rights and freedoms remain, Zimbabwe adopted a progressive Bill of Rights that entrenches various generations of human rights as alluded to in previous chapters. Courts have also pronounced landmark judgements on those rights in many unique ways that improved the rights jurisprudence in Zimbabwe as shown below

Civil and political rights	Case
Right to life	<i>Chawira &amp; Ors v Minister of Justice</i> where the court acknowledged inordinate delays but did not give remedy. The cases set pace for the abolition of the death penalty under the Death Penalty Abolition Act. The Act however leaves some room for imposition of the penalty in national security cases.
Right to personal liberty	<i>Kadungure v The State</i> HH 191/24
Right to freedom of expression	<i>The Prosecutor General of Zimbabwe v Beatrice Mtetwa &amp; Anor</i> HH18/16 and <i>Madanhire v AG</i> CCZ 2/14
Right to human dignity confirming High Court's order outlawing judicial corporal punishment	<i>S v Chokuramba</i> CCZ 10/2019
Right to freedom of assembly and association	<i>DARE v Saunyama</i> N.O CCZ 9/18
Political rights	<i>Mawarire v Mugabe</i>
Right to equality and non-discrimination	<i>Mawere v Registrar-General</i> CCZ 27/13

Collective or group rights	Cases
Communal land rights	<i>Livison Chikutu &amp; Ors v Minister of Lands</i> CCZ 3/23
Environmental rights	<i>Bonnyview Estate (Pvt) Ltd v Zimplats</i> CCZ 6/19
Environmental management rights	<i>Community Water Alliance v Environmental Management Agency</i> HH 258/19
Religious property rights	<i>Chiangwa v Apostolic Faith Mission in Zimbabwe</i> CCZ 6/23
Environmental rights	<i>ZELA v Anjin Investments (Pvt) Ltd</i> HH 523/15.

ECOSOC	Cases
Freedom from arbitrary eviction	Zimbabwe Homeless Peoples Federation v Minister of Local Government SC 78/21
Right to education	Mabutho v WUA
Right to healthcare	Zimbabwe Association of Doctors for Human Rights & Anor v Minister of Health & Ors 2015
Right to water and food	Mushoriwa v City of Harare
Cultural rights	...
Right to food	Hopnick Investments (Pty) Ltd v Minister of Agriculture HH 137/16

Special or elaborated rights	Cases
Women's rights	Mudzuru & Anor v Minister of Justice
Children's rights	<i>Mudzuru case.</i>
Rights of the elderly	
Rights of persons with disabilities or potentially crime-related disability	<i>Mapingure v Minister of Home Affairs and Others S 22/ 14</i>
Rights of veterans of the liberation struggle	<i>War Veterans Pressure Group &amp; Ors v Minister of Defence and War Veterans v Minister of War Vet HH 26/2020.</i>

Landmark case with amicus	Case
Law Society of Zimbabwe rep by Beatrice Mtetwa and Abameli Bamalungelo joined as amicus curiae	<i>Zibani v Judicial Service Commission HH 797/16, See also S v Chokuramba where the Justice for Children's Trust joined.</i>

### Important Cases on Currency Nominalism and Freedom to of Occupation, Profession, and Trade

Freedom of occupation	<i>Mlilo v Minister of Finance HH 605/19 and Kika's case.</i>
Currency nominalism	<i>Fleximail (Pvt) Ltd v Samanyau &amp; Others SC 21/14</i>
Principles relating to currency nominalism, legal tender, and once and for all damages principle and finality in litigation ( <i>interest reipublicae ut sit finis litium</i> )	<i>Makoni v The Cold Chain Private Ltd t/a Sea Harvest HH 197/15.</i>

Problems remain in areas relating to electoral cases (confusion between litigating before the High Court and Electoral Court), responsible government, prolonged detention and recall of MPs from Parliament. There is also problem

with the lack of procedural time limits relating to arrests by security institutions other than the Zimbabwe Republic Police. The promulgation of the National Security Council Act also compounds matters since it creates an impression that there is some National Security Act hanging in the air. This Act can be used against litigants. There is need for a clear rights-based regime where litigants can have bail and other proceedings in camera, can appear before special security courts and so forth, away from the media scrutiny of such institutions. There could be working model for Zimbabwe Human Rights Commission as a national human rights institution and other institutions such as the National Security Council and Complaints mechanism to determine how best to allow lawyers in government departments and ordinary lawyers to handle national security related cases.

**206 National security**

- (1) The national security objectives of Zimbabwe must reflect the resolve of Zimbabweans to live as equals in liberty, peace and harmony, free from fear, and in prosperity.
- (2) The national security of Zimbabwe must be secured in compliance with this Constitution and the law.
- (3) In particular, the protection of national security must be pursued with the utmost respect for—
  - (a) the fundamental rights and freedoms and the democratic values and principles enshrined in this Constitution; and
  - (b) the rule of law.

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**208 Conduct of members of security services**

- (1) Members of the security services must act in accordance with this Constitution and the law.
- (2) Neither the security services nor any of their members may, in the exercise of their functions—
  - (a) act in a partisan manner;
  - (b) further the interests of any political party or cause;
  - (c) prejudice the lawful interests of any political party or cause; or
  - (d) violate the fundamental rights or freedoms of any person.
- (3) Members of the security services must not be active members or office-bearers of any political party or organisation.
- (4) Serving members of the security services must not be employed or engaged in civilian institutions except in periods of public emergency

Zimbabwe has already decided on the rights and freedoms to be included in the Bill of Rights. Most of the rights were adopted from international and regional instruments. The African Charter on Human and Peoples' Rights for

instance imposes duties on states and citizens. This is also reflected in Zimbabwe's constitution. We contend that Zimbabwe now needs to amend the Statutory Interpretation Act to also reflect the position in the Bill of Rights. This will also empower lower courts to adopt the rights-based approach to interpretation. Other countries have developed methods of interpretation that are identifiable.

The United States of America has distinct methods of constitutional interpretation such as:

- Textualism
- Originalism
- Revisionism

To understand a constitutional text, we sometimes consider how the constitution is the higher law that cannot be unilaterally changed by an ordinary legislative Act.<sup>511</sup> The most general but important approach to understand the special status of a Constitution is from Elliot Bulmer<sup>512</sup> who focuses on fundamental legal-political rules that are:

- Binding on everyone in the State, including ordinary law-making institutions;
- Concern the structure and operation of the institutions of government, political principles and the rights of citizens;
- Based on widespread public legitimacy;
- Harder to change than ordinary laws (for instance two-thirds majority vote or a referendum is needed); and
- At a minimum, meet the internationally recognised criteria for a democratic system in terms of representation and human rights.

Judges can popularize the intrinsic model enshrined in section 46 of the Constitution and design a textualism approach from a Zimbabwean perspective. They can also design a constitutionality test or model. By constitutionality it is meant whether the provisions of a piece of legislation or law are in line with the Constitution. If they are not, the courts of law, usually

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<sup>511</sup> E. Bulmer, *what is a constitution? Principles and Concepts*. International Institute for Democracy and Electoral Assistance (2017) 5.

<sup>512</sup> *Ibid.*

the superior ones will declare it to be invalid.<sup>513</sup> The Constitution is *lex fundamentalis* and creates constitutional duties for judicial officers to treat the constitution as the *grund norm* and the frame of reference through which everything must function. In *Farai Mushoriwa v City of Harare*,<sup>514</sup> the Court was invited to interpret the content of section 77 right and the provisions of the Urban Councils Act as the enabling Act that gave the Harare City Council the power to unilaterally cut an individual's water supply before obtaining a court order. Justice Bhunu found the By-laws to be unconstitutional, but the City Council appealed against the decision. Both the High Court and Supreme Court didn't interrogate standards contained in General comment 15. The common methods of interpreting statutes that are not constitutional statutes include:

- Literal rule
- Golden rule
- Mischief rule
- Teleological theory
- Comparative approach

The literal interpretation considers the fact that meaning is not unjust, unfair absurd or unreasonable. The *locus classicus* is known as the *Kuvarega v Registrar General*<sup>515</sup> where the applicant was a member of the opposite party who was complaining that registrar-general had allowed members of the ruling party to turn up at the polling station wearing a t-shirt which had party slogans. The teleological or value laden or value-based approach to interpretation entails a value coherent construction- the objective and purpose of the provision must be ascertained against the constitutional values.<sup>516</sup> The mischief rule depends on the legislature's intention in curing certain defects in a statute or law. The leading case is *Heydon*<sup>517</sup> which is used by the Courts to determine the meaning of ambiguous words. Courts invoke the mischief rule to determine the many

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<sup>513</sup> In the South African case of *Matiso v Commanding Officer, Port Elizabeth Prison*, 1994 (4) SA 592 (SE) which is relevant in this book, Froneman J held that, the interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values and precepts of the Constitution.

<sup>514</sup> HH 195/14.

<sup>515</sup> 1988 (1) ZLR 188 (H).

<sup>516</sup> See Botha, *Statutory interpretation: An Introduction for Students* 5 ed, 2017.

<sup>517</sup> *Heydon's Case* (1584) 76 ER 637.

meanings of the statutory provision. At a constitutional level, this position seems to have been poorly nuanced in the *Malaba* approach.<sup>518</sup> If the Constitution is treated as an extraordinary statute, the *Heydon* inquiry is four-pronged and enjoins a court to:

*First*, determine the nature of the common law that was in existence before a statute was promulgated. This position has not been properly nuanced in Zimbabwe since the courts simply consider the common law to be English common law which is wrong or narrow at the very least level of the inquiry.<sup>519</sup> In the *Nyamande* case, the Supreme Court did not even consider the pre-colonial and colonial settings in Zimbabwe to determine the common-sense approach to labour rights; the statutory approach, the English approach, the commonwealth approach, and a strictly Zimbabwean approach to employer-employee relations. No wonder the politicians responded by a wholly Zimbabwean approach of what labour rights and duties ought to be when they amended the Labour Act to reverse the *Nyamande* injustices that saw employees being dismissed *en masse*. The *second* inquiry in the *Heydon* approach relates to the mischief and defect to which the common law did not provide. This pillar is important and obligates judges to distinctly analyse the defect which the common law did not provide. While the Constitution of Zimbabwe protects the right to provide labour, it does not protect the right to work. The Supreme Court did not even grapple with this defect in the common law of England, or the other versions of the common law. *Thirdly*, the court must investigate the role of parliament in curing the disease of the Commonwealth. While the Supreme Court in the *Nyamande* case for instance made a finding that employers had the right to dismiss employees on merit, it did not even bother to look at the bargaining powers of the employers and employees. Employees were left without an umbrella at the expense of runaway employers. *Four*, the true reason for the remedy must be ventilated. The Supreme Court's finding in the *Nyamande* case simply rested on the proverbial goose-gander-equality and nothing more. There was no attempt to determine if the remedy provided to the employer would be administered exploitatively (which was immediately done much to the

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<sup>518</sup> See *Madzimore and Ors v Senate President and Ors* CCZ 8/ 2019.

<sup>519</sup> See *Don Nyamande v Zuva Petroleum* SC 43 of 2015.

chagrin of the many exposed workers who normally have no bargaining power).

There are other tools or aids of statutory interpretation *ejusdem generis* (similar meaning); *noscitur a sociis* (contemporaneity or surrounding meaning); *expressio unius est exclusio alterius* (mentioning other words to exclude others) and certain presumptions that are observed by our courts such as retrospectivity, constitutionality, and so forth.<sup>520</sup> Some aids of interpretation serve the same purpose with purposive or teleological interpretation. The *casus omissus* rule for instance which courts use to determine the omissions that help a court to find solutions to the problem before them. Similarly, the *non-obstant* clause operates like the mischief rule since courts grapple with the ambiguities or contradictions which the legislature wanted to address when it promulgated a certain statute. In the spirit of statutory interpretation, including interpretation of the Constitution, the trite position in Zimbabwe had been based on the golden rule that:

“To ascertain the intention of the legislature the words of a statute or legislation are to be given their ordinary or primary meaning unless that primary meaning of the words is obscure or leads to absurdity.<sup>521</sup> The Supreme Court however accepted that another way to interpret the Constitution is to treat it *sui generis* and requiring special guidelines of interpretation.<sup>522</sup> The requirements include treating the Constitution as:

- A Constitution must be interpreted as a living instrument which must be given;
- A generous and purposive meaning and;
- Must be construed holistically using;
- The spirit of the Constitution as reflected in the preamble and national objectives and directive principles of the state; and
- Ratified treaties should provide guidance on interpretation.<sup>523</sup>

Before and after a justiciable constitution in 2013:

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<sup>520</sup> See further Lovemore Madhuku, *Introduction to Zimbabwean Law*, (2010, Weaver Press).

<sup>521</sup> *Capital Radio (Pvt) Limited v Broadcasting Authority of Zimbabwe and 2 Others*, SC 128/02.

<sup>522</sup> *Capital radio* (n 55 above) page 11 and the precedents cited therein.

<sup>523</sup> See section 34 of the 2013 Constitution on the need for courts to ensure that treaties to which Zimbabwe is a state party are incorporated into Zimbabwean law.

1) Basic rights were understood through traditional folklores; idioms; or riddles.<sup>524</sup> Administrative common law principles and natural justice principles were used to describe principles that govern the exercise of powers and duties by public authorities.<sup>525</sup> It is particularly concerned with the control of public power by judicial review and in some countries, by non-judicial mechanisms such as individual and collective ministerial responsibility, the work of Parliamentary Ombudsman, Commissions for Local Administration and other Commissioners or Ombudsmen.<sup>526</sup> There is no demarcation of administrative law but conventionally it includes the exercise of power by central<sup>527</sup> and administrative government, planning, housing, social security, education, immigration, and tribunals and inquiries.<sup>528</sup> Administrative powers refer to the discretionary powers of an executive nature that are conferred by legislation on government ministers, public and local authorities, and other bodies or persons for the purposes of giving detailed effect to broadly defined policy.<sup>529</sup> The aggrieved party may approach an administrative tribunal<sup>530</sup> or may approach courts such as the Administrative Court and High Court<sup>605</sup> and so forth.

The Constitution empowers courts to apply relevant foreign law when resolving disputes relating to either the bill of rights or other areas of constitutional law.<sup>531</sup> Judges must develop their knowledge on sources and types of international treaties;<sup>532</sup> tests that are used in interpreting treaties and importance of general comments that are made in relation to certain human rights. Suffice to say that presiding officers must also be able to ascertain if

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<sup>524</sup> The common examples include those stories relating to the eponymous judge Jackal, known as Mutongi Gava Maenzanise; see S. Hofisi, 'The Conservative and Liberal Judge,' (30 May 2018, *The Herald*).

<sup>525</sup> see also J. Law and E.A Martin (ed), 'Oxford Dictionary of Law' (2009) 16, Oxford University Press. SEE also, *Mabutho v WUA* HH 698/15.

<sup>526</sup> *Ibid.*

<sup>527</sup> See how Mngangwa challenged his expulsion from Government when former President Mugabe summarily dismissed him.

<sup>528</sup> Law and Martin (n 525).

<sup>529</sup> *Id.* For the definition of administrative authorities who may exercise such powers in Zimbabwe, see section 2 of the Administrative Justice Act (AJA) (Chapter 10:28).

<sup>530</sup> This is a body established by or under Act of Parliament to decide claims and disputes in connection with the administration of legislative schemes, normally of a welfare and regulatory nature; see Law and Martin, pg. 17. The issues to focus on include employment, rent, evictions, licenses, water or education and so on.

<sup>531</sup> Section 46. See also, G. Linington (2004), 'The Role of International and Foreign Law in the Interpretation of a Bill of Rights: Some Lessons from South Africa.' *Zimbabwe Human Rights Bulletin*, no 10.

<sup>532</sup> See also article 38 of the Statute of the International Court of Justice

treaties must follow a dualist approach of incorporation as contemplated by the Constitution or not; a self-executing or not.<sup>533</sup>

In constitutional adjudication, adherence to precedents can contribute to the important notion that the law is an impersonal character, that the Court believes itself to be following 'a law which binds (it) and the litigants'.<sup>534</sup> Judges must interrogate four simplified human rights theories in Dembour (2010), What are human rights? Four schools of thought, *Human Rights Quarterly*, Vol 32 (1), pp1-20. The rights are given, fought for, talked about, and agreed upon depending on the natural law, protestant, deliberative, and discourse lens.

### **How to think anew about constitutional interpretation?**

This section is a call to every constitutional lover who has ever felt crinkled under the weight of a highlight constitutional interpretation judgment reel. It is for instance clear from the cases such as *Nyika v Minister of Home Affairs and Others* (2) ZLR 140 (CC) that the Constitutional Court is reluctant to confirm orders relating to constitutional invalidity of statutes. To the ones who have been *sold a constitutional dream but received a judicial restraint trap*, let's think treating constitutional from ordinary statutory interpretation now. We are living in a constitutional culture where judicial canons are curated, judicial review is institutionalised, and constitutional avoidance doctrine has become a tool of constitutional and decisional manipulation. In *Nyika v Minister of Home Affairs and Others* HH 181/16 for instance, Justice Tsanga's disposition was that:

In the result, it is accordingly ordered that:

- 1) Section 70 of the Police Act [Chapter 11:10], is hereby declared to be inconsistent with s 69 (2) and s 56 (1) of the Constitution of Zimbabwe.

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<sup>533</sup> Section 164 (2) (b) of the Constitution further places an obligation on the state to protect and assist the judiciary in carrying out its functions effectively, particularly to ensure that all court orders are obeyed. As a result, the courts in Zimbabwe, particularly the new Constitutional Court (ZCC) must recognise its primary role as that of deepening constitutional democracy, upholding the protection of human rights and entrenching the rule of law. The ZCC has a duty to ensure that it interprets all laws in line with the Constitution particularly the Bill of Rights. The Constitution provides for constitutional democracy mechanisms such as rule of law, constitutional supremacy and entrenched fundamental rights. However, the effectiveness of these mechanisms lies in their enforcement through an independent and impartial judiciary.

<sup>534</sup> Henry Paul Monaghan, "Stare Decisis and Constitutional Adjudication," 88 *Columbia Law Review* (1988) 752 (quoting Archibald Cox, *The Role the Supreme Court in American Government* New York, 1976], 50); Roscoe Pound, "What of Stare Decisis?" 10 *Fordham Law Review* (1941) 2.

- 2) This matter is referred to the Constitutional Court in terms of s 175 (1) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 for its confirmation or otherwise.
- 3) Pending the Constitutional Court's decision as in (2) above, the applicants' actions are hereby stayed.

Surprisingly, 9 judges of the Constitutional Court however took a long approach in *Nyika v Minister of Home Affairs and Others* 2020 (2) ZLR 140 (CC) that justified why the order of invalidity could not be confirmed because the judge had dealt with the issue which was not before her.

The same approach was adopted in *Mangwiro v Minister of Justice and Others* HH 172/17 where Justice Mushore declared provisions of the State Liabilities Act inconsistent with the Constitution in that:

“IT IS DECLARED THAT

1. Section 5 (2) of the State Liabilities Act [Chapter 8:14] be and is hereby declared to be inconsistent with the Constitution of the Republic of Zimbabwe; and is therefore invalid.
2. The matter is referred to the Constitutional Court in terms of section 175 (1) of the Constitution of Zimbabwe, for confirmation or otherwise.

The Constitutional Court however refused to confirm the order which it felt was improperly referred to it because the Registrar of the Court had not completed the correct form required to bring a case for confirmation. This approach was akin to the extended dirty hands where the litigant is blamed for the mistakes of the Judiciary itself through the Registrar. This brings to the fore how even the Constitutional Court Rules appear to reverse the gains of the powers of the Constitutional Court enshrined in section 167 of the Constitution. The approach in *Mangwiro* further demonstrate how judicial restraint weaponises court rules and burdensomely invokes the doctrine of ‘want for compliance with the Rules’ without considering the interests of justice.

While the approach by the Court must not have been adopted as it burdened the applicant unjustly, lawyers must now use the *Mangwiro* case to to implore High Court judges to properly refer matters to the Constitutional Court

bearing in mind that such referrals for confirmation are automatic and do not require a judge's direction. The Registrar of the Court, on their part, must ensure that the correct procedural forms and processes are followed when initiating the case for confirmation. In helping judges decide cases expediently, lawyers involved in the *Mangwiro* case should have carefully reviewed the procedural requirements and ensured compliance with the rules before proceeding to the hearing of the case. It is noted that Advocate Thabani Mpfu for the respondents rightly objected to the procedural irregularities relating to confirmation, but ideally, all parties should have worked to correct the defects before the matter was brought before the Constitutional Court, avoiding unnecessary delays and ensuring proper jurisdictional processes were followed.

As was the case in *Nyika v Minister of Home Affairs*, the Constitutional Court's refusal to confirm the matter on the basis that the High Court lacked jurisdiction to determine the substantive constitutional issue illustrates a deep tension in Zimbabwe's constitutional structure relating to judicial powers. Section 175(1) of the Constitution explicitly empowers lower courts to make orders of constitutional invalidity, subject to confirmation by the Constitutional Court. Instead of faulting the High Court judge, the Constitutional Court could have adopted a purposive approach or philosophy that is rooted in the constitutional supremacy clause in section 2 of the Constitution as its cause of action in the matter. This clause effectively allows judges to innovate on ways to ensure access to justice is promoted through the lens of the Constitution as the supreme law. If it had interpreted section 175 as creating a two-tier system where the High Court may determine constitutional questions at first instance and the Constitutional Court provides oversight through confirmation, the *Nyika* Constitutional Court as case and court manager would have avoided discouraging judicial officers from engaging with constitutional issues.

Through judicial innovation shown in cases such as *Combined Harare Residents Association (CHRA) v Minister of Local Government* CCZ 05/23 (judgment CCZ 03/23), the Constitutional Court could have embraced a pragmatic stance in the *Nyika* case that ensures substantive justice is not frustrated by procedural rigidity. The Constitutional Court in the *CHRA* case was even prepared to give a nuanced contextual distinction between *CHRA* case and the previous cases

such as *Prosecutor-General, Zimbabwe v Telecel Zimbabwe (Pvt) Ltd* 2015 (2) ZLR 422, (SC) where the Prosecutor-General approached the Constitutional Court directly to set aside a judgment of the Supreme Court that had directed him to issue a certificate Nolle Prosequi to Telecel Zimbabwe (Pvt) Ltd which had applied for such. In denying the Prosecutor-General audience, this Court held that the Prosecutor-General was improperly before the Court as he had not approached the Court in terms of s 85 (1) or any other constitutional provision that provides for direct access to the Court because the application by the Prosecutor-General had been brought directly to this Court purportedly in terms of sections 167 (1) and 176 of the Constitution. In CHRA, the Constitutional Court innovatively showed that the Constitutional Court went on further to hold that the application by the Prosecutor-General was neither an appeal against the Supreme Court judgment nor a referral from that court in terms of s 175 (4) of the Constitution.

Such a discussion of the contextual interpretation if consistently applied by the Constitutional Court would recognize that litigants in Zimbabwe often approach the High Court as the court of first instance and may lack the resources to directly petition the Constitutional Court. Upholding this pathway under section 175(1) promotes constitutionalism and ensures that constitutional rights are not diluted by unnecessary procedural barriers. This would protect innovative constitutional interpretation approaches established in Zimbabwean innovative jurisprudence in *Capital Radio v The Broadcasting Authority of Zimbabwe* S.C. 128\02 which introduced the living tree or generous approach concept of constitutional interpretation and the *Mawarire v Mugabe* CCZ 146/13 (Judgment 1/13) which protected litigants from the dirty hands doctrine. Litigants must keep their hands clean and must not wait, as was remarked by the late Chief Justice Chidyausiku, for their hands to drip with blood before they are protected by courts.

Consistently protecting innovative constitutional interpretation approaches resonates with comparative practices in countries like South Africa, where the Constitutional Court has consistently underscored the duty of lower courts to interpret and enforce the Constitution while leaving the final word on invalidity to the apex court. Zimbabwe needs a consistent approach where for instance, the *S v Makwanyane* CCT 3/94 case on death penalty continued to be

the landmark case that gives a glimpse into South Africa's constitutional law, innovative roles of the judiciary and how judges must not simply consider the literal aspects of the constitutional provisions or intentions of the draft. The *Makwanyane* case focuses on purposive interpretation and its consistent application by South African and international courts is important because it was the first case to be determined by the South African Constitutional Court. This consistency gives legitimacy to judicial decisions.

For Zimbabwean lawyers and judges of lower courts, it is noted that the *Nyika* and *Mangwiro* cases referred to above are cautionary cases on the quality of cases and how lawyers must have pre-hearing memorandums. Legal practitioners must carefully frame pleadings to establish standing and anchor constitutional questions within the High Court's jurisdiction under section 171 of the Constitution. Judges, meanwhile, should not shy away from addressing constitutional matters but must craft their orders with clarity that they are subject to confirmation as contemplated by the rules. Going forward, both lawyers and judges must anticipate the Constitutional Court's reluctance to confirm invalidity orders and respond with rigour, bearing in mind that costs may be visited upon them if they unnecessarily argue for the sake of it. Lawyers by ensuring proper constitutional foundations are laid in pleadings, and judges by grounding their decisions in section 175 while signaling the broader constitutional duty to protect rights. This strategic awareness fosters a culture where constitutional issues are not side-lined but fully ventilated at all judicial levels.

**Here's what we have witnessed, and we say this with full imploration:**

We have seen landmark cases on women, children, and other constitutional matters. More judges have started taking the Constitution and their constitutional responsibility to develop the common law and regulate their work than anyone's talking about. Amici has also started to intervene in critical cases as was done by the Zimbabwe Lawyers for Human Rights and Justice for Children's Trust in *S v Willard Chokuramba* CC 10/19. The court held monumentally that:

The elimination of judicial corporal punishment from the penal system is an immediate and unqualified obligation on the State. Judicial corporal punishment constitutes a serious violation of the inherent

dignity of a male juvenile offender subjected to its administration. It is an antithesis of compliance with the values recognised in section 53 of the Constitution. To emphasise human dignity is to engage with our conception of what it is to be human. It is also a point of closure: it is definitive and universal. It is not a value that tolerates either derogation or dissent. We recognise this in all sorts of areas, including constitutional law.

We have also seen many instances of judgments written in error such as and those where judges of the lower courts are criticised by judges of the higher courts such as the *Mangwiro* and *Nyika* cases. There are cases that are still correct even if they were appealed against such as *Zibani v Judicial Service Commission* HH 797/16 and its use of the deference principle. The appeal is in *JSC v Zibani* SC 763/16 (Judgment SC 68/17). Judges who make such judgments like Justice Hungwe would also be promoted to the Supreme Court. Lawyers and academics do not have control on judicial careers or aspirations although it is felt that some promoted judges ought to have remained in lower courts shaping constitutional jurisprudence remarkably. There are cases where judgments have been written in error such as *Frances Mary Bowers v Minister of Lands* CCZ 16/25, with no judgment number. There are cases where lawyers' insistence on justice through recusal of conflicted judges like *Kika v Minister of Justice* HC 2128/21, and the confusion that was created by the *Marx Mupungu v Minister of Justice* CCZ 13/21 (Judgment CCZ 07/21).

The experiences from *Mangwiro*, *Nyika*, *Zibani*, *Bowers*, *Kika*, and *Mupungu* cases show that Zimbabwe's constitutional jurisprudence is still maturing, and both lawyers and judges carry a joint responsibility to strengthen it. This is linked to what Chief Justice Malaba remarked many years ago about constitutional experimentalism and the need to avoid litigious litigation that leads to dismissed cases or use of technicalities in resolving matters. For lawyers, the imploration is to cultivate attitude, skill, and knowledge (ASK) that go beyond technical pleading. They must approach every constitutional case with the conviction that the Constitution is a living document which has three legs stated in section 332 or the dictionary section of the Constitution. They must deploy comparative and purposive arguments with precision, and insist on remedies that enhance constitutional supremacy. For judges, the imploration is

to exercise restraint in criticism of lower courts, while still guiding them constructively, and to appreciate that their judgments do not only resolve disputes but also lay down constitutional pathways.

This requires humility in acknowledging past errors, courage in correcting them, and consistency in interpreting the Constitution as the supreme law rather than as an appendage to statute. Justice Makarau for instance adopted this approach by referring to the doctrine of fairness without casting aspersions or vitriol on lower courts in the case of *Jayesh Shah v Charles Nherera* CCZ 51/24 (Judgment CCZ 9/25). The Supreme Court in the *Jayesh Shah* case had made three findings. Firstly, that the appeal judgment made findings were binding on the trial court during the continuation of the trial. Secondly, that previous findings of both the High Court and Supreme Courts that the applicant had indeed paid a bribe to the respondent were irrelevant in legal proceedings. Thirdly, that despite the respondent failing to lead any evidence in support of the damages claimed, the trial court had the power to assess the quantum of such damages. Justice Makarau indicated in the *Jayesh Shah* case relating to the first pillar that it is not the correct position of the law because the appeal against the order of absolution was interlocutory. As such, remarks made during an interlocutory hearing are not binding on the trial court which is still responsible and has jurisdiction to determine the matter before it as was held in *Robin Vela v Auditor General and Another* CCZ 10/24.

Justice Makarau's finding in *Jayesh Shah v Charles Nherera* CCZ 51/24 (Judgment CCZ 9/25) is important because it distinguishes between remarks made in an interlocutory order of absolution and findings in a final judgment. Where absolution is merely interlocutory, comments made by an appellate court do not bind the trial court, since the trial court retains jurisdiction to determine the matter fully once evidence is led. However, if absolution is later confirmed as a final order, those findings acquire binding authority as *res judicata*. Makarau's approach ensures that trial courts are not unduly constrained by provisional appellate remarks, thereby protecting their constitutional mandate to adjudicate matters before them independently. This clarification avoids conflating the binding force of a final appellate ruling with the non-binding character of interlocutory observations.

In addition, the remarks in the case show that besides adhering to *stare decisis* doctrine loosely, other doctrines can be used by superior courts to clarify their findings in the future. Rather than saying lawyers and judges are presumed to know the correct legal position, Justice Makarau uses the doctrine of *res judicata* as one that ensures that only final determinations of a competent court bind parties in subsequent proceedings, not provisional observations. The *Jayesh* case also can be read into to show how the doctrine of *functus officio* reinforces that a court's interlocutory remarks cannot be treated as determinative once it has not conclusively disposed of a matter. Equally, in reference to previous cases in the High and Supreme Court, Justice Makarau's remarks in the *Jayesh* case help show how the principle of judicial comity requires courts at different levels to respect each other's roles while recognizing that interlocutory findings cannot usurp the trial court's duty to assess evidence afresh. These doctrines, when read together with section 165 of the Constitution on the principles of judicial independence or principles guiding the judiciary, buttress Justice Makarau's reasoning and prevent the erosion of trial courts' jurisdiction through premature appellate overreach.

The *Jayesh* judgment is also important in how it models a respectful corrective dialogue between superior courts. By invoking the *Robin Vela v Auditor General CCZ 10/24* precedent, Justice Makarau framed her disagreement with the Supreme Court in measured terms, showing that the correct approach is not to declare a lower ruling "wrong" in isolation, but to situate it within evolving jurisprudence. Her careful phraseology, pointing to the interlocutory nature of the order, functions as a judicial acknowledgment that the Supreme Court's earlier position could have been seen differently had the *Vela* case been fully adverted to. This is a gentle but firm way of saying or telling the Supreme Court to adopt the approach, "we were wrong" or "we ought to have seen" the correct precedent, thereby preserving institutional dignity while correcting doctrinal missteps.

In future, courts or authors of judicial decisions should adopt this tone, doctrine, or philosophy of respectful correction when stating the correct position of the law. They should acknowledge the reasoning of prior courts, explain why a different interpretation better aligns with constitutional values, and cite binding or persuasive precedents that resolve the tension. Instead of

castigating or undermining fellow judges, courts should use language of refinement and clarification through phrases such as “*upon closer examination*,” “*with the benefit of subsequent authority*,” or “*as clarified by later jurisprudence*.” This approach, as exemplified by Justice Makarau, reinforces judicial humility, preserves collegiality across the hierarchy, and strengthens public confidence in the judiciary’s ability to evolve without acrimony. Lawyers could also be encouraged to engage with judges without fear or favour since judges themselves would be showing collegiality among themselves.

Effectively, what comes out from the above concerns is that both lawyers and judges must remain committed to the three requirements of constitutional adjudication contemplated in section 332 of the Constitution, that is, *interpretation*, *protection*, and *enforcement*. Interpretation demands more than literalism because it requires purposive, value-driven reasoning consistent with section 3’s founding values. Protection obliges both the bar and the bench to guard against executive or legislative overreach, while enforcement ensures that constitutional rights and principles are not paper guarantees but are made effective in lived reality. The imploration, therefore, is for lawyers to litigate boldly and intelligently, and for judges to adjudicate with vision and fidelity to constitutionalism. Together, this cultivates a culture where errors are minimized, jurisprudence is enriched, and the Constitution functions as the true safeguard of democracy.

We may illustrate the issues through the *Kika* and *Mupungu* cases that smack of judicial respect for two linked principles, separation of powers and functions. The *Mupungu* case came after *Musa Kika* had, in addition to the Chief Justice, cited as respondents all the judges of the Supreme Court and some judges of the High Court. At the time of the filing of the application, the five judges of the Constitutional Court, other than the Chief Justice and the Deputy Chief Justice, were Supreme Court judges, acting as Supreme Court judges and were cited as such. The applicant in the *Mupungu* case utilise direct standing or sufficient interest sufficient interest within the contemplation of s 175(3) of the Constitution seeking legal certainty because he felt that firstly, the President acted constitutionally in

approving Justice Malaba’s election to continue in office as Chief Justice for an additional 5 years and that he is in office in accordance with the Constitution following the President’s approval. Secondly, all persons who were judges of the Supreme Court and those acting as judges of the Constitutional Court as at 7 May 2021 are entitled to elect to retire at the age of 75 years in accordance with s 186(4) of the Constitution and that the High Court cannot contradict that position without also declaring s 186(4) of the Constitution to be constitutionally invalid. Lastly, the applicant argued that the Registrar of the High Court had not acted in terms of r 31(1) of the Constitutional Court Rules 2016, to place the record of proceedings in that court before this Court for confirmation.

The *Mupungu* case effectively operated as **SLAPP-style litigation** because it was strategically framed not to vindicate genuine constitutional rights but to neutralize the earlier *Musa Kika* judgment that had questioned the legality of Chief Justice Malaba’s continued tenure. By invoking section 175(3) on direct access and standing, the applicant styled himself as seeking “*legal certainty*,” yet the substance of the application was to shield the executive decision and judicial beneficiaries from constitutional scrutiny. The sheer scale of cited respondents, judges of both the Supreme Court and High Court, demonstrated that the application was less about protecting rights than about overwhelming and delegitimizing opposition to the extension of tenure. In this way, it mirrored the hallmarks of SLAPP litigation as a defensive and resource-heavy tactic designed to deter and reverse accountability.

Moreover, the *Mupungu* reasoning approach reversed the thrust of *Kika* by re-legitimizing Justice Malaba’s continuation in office and insulating section 186 (4) from critical interpretation. Where *Kika* had underscored the role of the High Court in testing constitutional limits on judicial tenure and reinforced constitutional checks on presidential powers under the separation of powers doctrine, *Mupungu* repositioned the Constitutional Court as the ultimate validator of executive preferences through the doctrine of separation of functions. This reversal undermined the authority of lower courts under section 175 and narrowed the space for constitutional contestation. The case thus

marked a jurisprudential retreat because it shifted the discourse on constitutionalism through the courts from safeguarding constitutionalism to entrenching incumbency of extraordinary judges in the mould of the Chief Justice, illustrating how procedural tools like direct standing can be weaponized to undo progressive rulings.

Under the doctrine of separation of powers enshrined as an essential feature of the founding provisions of Zimbabwe's constitutional democracy, the *Kika* case was centrally about separation of powers as entrenched in the Constitution, as it questioned whether the President could unilaterally extend the Chief Justice's tenure without undermining the constitutional role of the judiciary and Parliament in safeguarding judicial independence. This highlighted the dangers of executive overreach into the composition and leadership of the courts under partial and strict separation of powers doctrines. In contradistinction, *Mupungu* shifted the lens to separation of functions, narrowing the inquiry to whether the High Court, as opposed to the Constitutional Court, had the competence to determine the validity of constitutional amendments and tenure provisions. In doing so, *Mupungu* reframed the debate from the substantive check on executive authority adopted in *Kika* case to the procedural allocation of judicial roles, effectively sidelining broader constitutional principles in favour of institutional demarcations.

Constitutionally, academically and using advanced constitutionalism doctrines, both options are correct because Zimbabwe's Constitution explicitly entrenches separation of powers in section 3(2)(e) as one of the founding values, yet does not expressly entrench separation of functions. The doctrine of separation of powers speaks broadly to the distribution of legislative, executive, and judicial authority to prevent concentration of power. However, in practice, constitutional systems often implement this principle through functional allocations of what each branch or organ may or may not do. Thus, while the Constitution does not name "separation of functions" as a founding value, it implicitly recognises it through provisions like section 175 relating to confirmations of invalidity, and section 186 on judicial tenure), which distinguish the competences of different courts and institutions. Both readings are therefore valid because *Kika* emphasized the broader philosophical commitment to divided powers, while *Mupungu* accentuated the operational

dimension of functional separation within the judiciary. The approach becomes a matter of art of constitutional litigation.

The approach in both cases reflects Montesquieu's original misconception about separation of powers which misconception however continues to be taught in the academy and invoked by courts. In *De l'Esprit des Lois*, Montesquieu described the need to prevent tyranny by dividing government authority, but his formulation was ambiguous between *lato sensu* or a broad, principled distribution of power among branches and *stricto sensu*, a rigid, mechanical insulation of each branch. Montesquieu misconceived the British system because, observing it from France, he believed Britain practised a strict separation of powers, **when in reality it was a separation of functions within a framework of checks and balances.** In 18th-century Britain, the King, Parliament, and the courts were not institutionally insulated. For example, the King-in-Parliament was the sovereign lawmaker, ministers sat in Parliament while exercising executive powers, and judges derived authority from the Crown yet acted independently in adjudication. What existed was functional differentiation relating to legislating, executing, and adjudicating of matters which were carried out by different actors with deliberate overlaps to prevent paralysis.

Montesquieu, misreading this as pure separation of powers, transformed a pragmatic British balance of functions into a rigid theoretical model that later influenced constitutional design worldwide. Modern constitutionalism, including Zimbabwe's, adopts the *lato sensu* understanding where powers are separated in principle, but practical governance requires interdependence and checks, not watertight divisions. The entrenchment of separation of powers as a value in section 3 ensures that even without a textual guarantee of "*separation of functions*," functional distinctions can be drawn and enforced where necessary to give meaning to the principle. In this way, Zimbabwe's courts are entitled to recognise separation of functions as an operational extension of the entrenched value. The need to invoke separation of functions is a matter of constitutional responsibility enshrined in section 176 of the Constitution where courts must develop the common law in Zimbabwe. This constitutional responsibility includes correcting what was not common law in England or what was simply common sense of judges or common emotions of scholars and judges who wrongly interpreted the British law.

The **Chief Justice** in Zimbabwe, as is in most jurisdictions, embodies this dynamic because he or she is not just a judge, but an **extraordinary judge** who symbolises and manages the interface between the different branches and levels of the judiciary. As head of both the Constitutional Court and the Supreme Court, the Chief Justice exercises powers that extend beyond adjudication to administration aspects like judicial appointments, court management, ceremonial roles in state functions and to symbolic functions as the guardian of judicial independence. The latter is important whether facultative or institutional. This extraordinary status makes disputes like *Kika* and *Mupungu* particularly sensitive in advanced constitutional litigation. They are not merely about an individual's tenure, but about how far the executive may influence the extraordinary figure who embodies the institutional balance of the judiciary within the broader doctrine of separation of powers and functions. At the end of the day, constitutional development at any stage depends on the quality of the Chief Justice of the day.

What emerges from the foregoing is that constitutional lawyers must innovate on their art of interpreting constitutional matters, including as was done in *Kika* and *Mupungu*. Forward or back-ward thinking in constitutional litigation depends on various doctrines and philosophies. It is not because judges are not good enough or that lawyers are not widely read. But because they are now *convinced* that if the constitutional provisions are ignored, *they will be seen as the problem in the interpretation work*. This is because judges act as the court and case managers. In terms of section 332 of the Constitution, they must ensure they decide constitutional matters by *interpreting, protecting and enforcing* the provisions of the Constitution through constitutional matters. This means constitutional interpretation must be linked to the protection and enforcement of constitutional provisions including in ways that promote separation of powers and functions as effective doctrines. Judges must treat the law to mean provisions of the Constitution, Acts of Parliament, statutory instruments and unwritten law, including customary law. Most judges are, unfortunately, on the judicial restraint hamster wheel. They spend the majority of their time focusing on technicalities, spend time on issues that do not bring matters to finality, and then they have to keep dealing with matters struck down or removed from the roll. We know it is exhausting and frustrating to litigants, because it is how constitutional identity and rights constitutionalism are ignored or made stunted for many years.

We however need to see them giving nuanced analysis on ordinary statutory interpretation, starting with the conventional rules or methods such as the literal, mischief, golden and teleological rules. The four legs of the mischief rule must be properly nuanced: *what was the common law before the Act; what mischief or defect did the common law address; what remedy did Parliament provide; and what was the true reason for the remedy?* In responding to what the common is, Zimbabwean judges must not be carried away by the loose description of Zimbabwe law as a common law country. They must define the common law as it evolved in England. It was nothing more than the common sense of ‘judges’ in the Crown courts. The ‘judges’ common sense was reduced to writing or interpretation as the emotions of the judge well before formal legal rules were established. Such common sense and emotions later became precedents representing the customs of English people. Common law is thus no different from customary law. While for Zimbabwe common law under the colonial government referred to Anglicised Roman-Dutch law, Zimbabwe before colonisation had its common law which we call customary law. The drafters’ intention in section 176 of the Constitution must be properly distinguished.

Judges must also distinguish between intrinsic (short and long title, preamble and definitions sections in Acts of Parliament) and extrinsic aids of statutory interpretation (preparatory documents, COPAC reports, historical contexts, analogous issues, judicial precedent or Article 38 of the International Court of Justice Statute on sources of international law. They must also be familiar with different presumptions that are used in interpreting statutes. Guidance must be sought from the Interpretation Act. Today, talking about innovative constitutional interpretation has become a trend, a tactic to hook litigants into believing in judicial legitimacy. And somewhere along the way, constitutionally aligned interpretation has in some instances stopped being about a judge’s duty and started being used as an interpretive funnel.

**This is how the constitutional rights system stays intact:**

- Judges committing to the principles of independence in section 165 of the Constitution instead of restraining and frustrating litigants.
- Judges focusing on the intrinsic aids of constitutional interpretation such as the main and devolution preamble; the supremacy clause; individual sovereignty in the main preamble; the Bill of Rights clauses; the founding principles; the schedule.

- Judges must also commit to the interpretation clause in section 46 of the Bill of Rights. The reference to international law must be clearly guided by sections 12, 34, 326 and 327 of the Constitution. Section 12 protects the principles of foreign policy which include peaceful coexistence, respect for international organisations, respect for international law; and peaceful settlement of disputes. Section 34 must guide courts on the usage of the doctrine of incorporation and domestication of treaty provisions. Section 326 must be interpreted from monist where customary international law is automatically part of Zimbabwean law or is consistent with the Constitution. Peremptory norms or *jus cogens* and legal obligations (*erga omnes*) must be properly canvassed in judgments. Section 327 must be interpreted using the dual theory where parliamentary approval is needed before treaties are binding. Monism in treaty provisions can be drawn from aspects relating to loans that can bind Zimbabwe. Foreign law must persuasively guide judges if there is a lacuna or confusion in Zimbabwean laws or case law.

So here's what we are asking judges now, lawyers to lawyers, soul to soul:

- Before you adjudicate, ask questions. In bail cases, defence lawyers must in terms of section 50 simply make a request for their clients to be released unconditionally and not apply for bail. Judges must guide lawyers who believe they are under instructions from clients to apply for bail yet the Constitution imposes the duty on the state to show the court that there are compelling reasons warranting the denial of bail.
- Before you compare or invoke international, remember the context or circumstances around domestication and incorporation of international law. Lawyers must read the *Magodora v Care International Zimbabwe* case on the effect of citing treaties to which Zimbabwe is not a state party. Justice Patel noted that:

I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not

internally cognisable where it is inconsistent with an Act of Parliament. See s III B of the former Constitution and ss 326 and 327 of the current Constitution.

- Before you label lawyers a failure or ignorant of the law, *check who defined certainty and clarity of adjudication in the first place*. Most judges unnecessarily descend into the arena, are excited about dominating cases or questioning litigants without endorsing their questions on the record, or use the doctrine of judicial comity irresponsibly. Others are also writing judgments wrongly whether *ex tempore* or reserved.
- If judges are upholding appeals from lower courts without giving reasons, it is not judicial review, it is exploitation of litigants; see *City of Harare v Mushoriwa*.
- If a correctly decided case like *Romeo Zibani v JSC* is wrongly reversed by the superior courts, let us stop relying on *stare decisis* or the doctrine of superior jurisdiction of higher courts. Let us call it what it is: *a wrongful interpretation loop disguised as adjudicative hierarchy*. Justice Hungwe for instance, correctly used the doctrine of deference to resolve the matter and the Supreme Court should have upheld his findings.

### So what's the alternative?

The first aspect relates to how judges can use deference or balance judicial vigilance and restraint to protect the Constitution. Real constitutional interpretation rooted in constitutional provisions as contemplated by section 46 of the Constitution is needed. Unshakeable by '*we are always right*' ideology because it is *constitutionally proper*. Unbothered by political optics. Uninterested in prolonging litigation without sharing the full reality. And most of all let us be *committed to rebuilding trust among Zimbabweans*. Because we cannot build rights constitutionalism if we keep selling the wrong one with better filters. In *Zibani v Judicial Service Commission*, HH 797/16, Justice Hungwe correctly applied the **doctrine of judicial deference** by recognising that certain disputes, particularly those involving institutional arrangements of the judiciary and the appointment of senior judges, require courts to respect the constitutional roles of other branches unless there is a clear violation of the Constitution. Faced with a challenge to the constitutionality of the processes around the Judicial Service Commission (JSC) and the appointment of the Chief Justice, Hungwe J acknowledged that while the courts are the ultimate guardians of the

Constitution, they must exercise restraint in matters that are textually committed to another arm of government.

By invoking deference, Justice Hungwe emphasised that the High Court could not substitute its own preferences for those of the Constitution or the JSC where the law granted discretion, unless there was demonstrable illegality or irrationality. His reasoning was that judicial review should not collapse into judicial supremacy; instead, courts must strike a balance between vigilance in enforcing constitutional values and respect for the legitimate functions of other state institutions. This careful application of deference, upholding the limits of the judiciary while not abdicating its constitutional duty, meant the judgment was principled, even though it was later appealed. It exemplified how Zimbabwean judges can protect constitutionalism without encroaching unduly on the functions of coordinate branches. Again, the Judge had in his mind separation of functions, which we believe was correctly applied.

Justice Hungwe's reasoning in *Zibani v JSC* shows that judicial deference was used correctly because he recognised the constitutional role of the **policy-makers and the executive** in initiating amendments to the law, while at the same time exercising the court's constitutional duty to prevent a potential infringement of rights enshrined in the Bill of Rights. By noting that internal Cabinet memos and draft bills do not constitute law, Hungwe J affirmed that the judiciary cannot interfere with unfinished policy processes. This was deference to the constitutional mandate of the executive and legislature under section 180. At the same time, however, he acknowledged that once such intentions are placed before the court, they cannot be ignored, since they shape the constitutional context in which rights claims are litigated. This approach speaks to deliberative, dialogic, and democratic experimentalism differently. Justice Hungwe's approach in *Zibani v JSC* resonates with dialogic and deliberative democracy **and even** democratic experimentalism.

This is because he treated the courtroom as a site of constitutional dialogue among citizens, institutions, and policy-makers, rather than imposing a rigid judicial veto. By acknowledging the executive's draft intentions without treating them as law, he fostered deliberation between branches while still protecting the applicant's rights, exemplifying *institutional* independence (the judiciary exercising its own mandate without usurping others) and *facultative*

independence (a judge's ability to act impartially despite political sensitivities). In doing so, Hungwe J positioned the judiciary not as an authoritarian interpreter but as a facilitator of constitutional conversation, ensuring that different arms of state and citizens could experiment, contest, and refine constitutional meaning within a framework of mutual respect and checks

The deference was correct because Hungwe J did not overstep into policy-making or attempt to rewrite section 180 of the Constitution. Instead, he balanced judicial vigilance with judicial restraint to protect the Constitution. He accepted the JSC's constitutional mandate but held it accountable to the principle of fairness and the need to prevent avoidable constitutional conflicts between the judiciary and policy-makers. His order to temporarily stay the interviews was grounded not in the annexed drafts, which he explicitly discounted as non-law, but in the applicant's prima facie right and the absence of opposition from the policy-making arm itself. This demonstrates judicial deference properly applied because the court respected the constitutional functions of other branches, but still exercised its supervisory role to ensure that the process did not prejudice rights or create unnecessary constitutional crises. The same crisis could have happened after the *Kika* case where the JSC did not prosecute its appeal and the lawyers in subsequent proceedings had continued to refuse to participate or had not withdrawn their challenge. Without difference, the *Mupungu* case was subsequently filed, albeit in ways that smack of SLAPP litigation.

The second alternative is for judges to commit to principles guiding the judiciary enshrined in section 165 of the Constitution. They must also show in nuanced decisions how sufficient interest or direct interest standing in the Constitution is different from legal standing in section 85 of the Constitution. In some aspects that are evolving during interviews of judges, judges who identify themselves with certain political parties during their interviews must renounce such identification when they are subsequently appointed in line with section 165 of the Constitution. Judicial independence in Zimbabwe can be both facultative and institutional even when judges renounce political affiliations because the renunciation addresses only the appearance of bias, not the structural or functional capacity of the judiciary. Institutional independence is guaranteed by the Constitution through section 165, which ensures courts are free from executive or legislative interference in their

operations and decisions. Facultative independence remains intact because individual judges retain the discretion, expertise, and ethical duty to adjudicate impartially, guided solely by law and conscience, regardless of prior political identification. Renunciation merely removes external perceptions of partisanship, allowing the judge to exercise both personal discretion and institutional authority without undue influence.

This principle parallels provisions prohibiting partisan alignment in security institutions, reflecting the broader constitutional and international norm that bodies tasked with upholding the law must operate free from political capture to maintain legitimacy. International principles, such as the Bangalore Principles of Judicial Conduct, the UN Basic Principles on the Independence of the Judiciary, and the European Charter on the Statute for Judges, reinforce these dual aspects by emphasizing impartiality, integrity, and accountability. These norms underline that judicial independence is not only structural but also ethical and functional because judges must act without fear, favour, or prejudice, and institutions must be safeguarded from political encroachment, creating a judiciary that is both symbolically and operationally autonomous.

The renunciation of political affiliations and adherence to section 165 illustrate the interplay between **de jure and de facto judicial independence**. *De jure independence* is guaranteed by constitutional and legal provisions relating to securing tenure, remuneration, and protection from external interference, while *de facto independence* reflects the practical ability of judges to exercise impartiality and discretion in daily decision-making, free from actual or perceived pressures after appointment. This duality also reinforces the broader **separation of powers and functions**. Structurally, courts remain distinct from the executive and legislature (institutional independence), and functionally, individual judges exercise judgment autonomously (facultative independence). Together, these forms of independence ensure that both the office of the judiciary and the personal conduct of judges uphold the rule of law, maintain public confidence, and allow the courts to serve as a meaningful check on the other arms of government.

Thirdly, evolving areas of the law such as child trafficking, refugee entrepreneurship and others must currently inform predictive models on judicial interpretation in Zimbabwe. Judges must familiarize themselves with

international laws such as the Palermo Principle. They must also deal with the mercantilist or economic theories of child, adult, or human trafficking. Innovative linkages between smuggling and child or adult trafficking must tap from South African approaches. Cases on **refugee entrepreneurship** and **child trafficking** are particularly important in Zimbabwe because they intersect with multiple dimensions of constitutional and statutory protection. Under the **Refugees Act**, refugees are guaranteed the right to work and participate economically, yet barriers often exist in practice for those refugees who do not have certain financial means. Litigation in this area ensures that refugee rights are treated as **justiciable**, moving them beyond theoretical guarantees to enforceable entitlements. Similarly, rising and distressing child trafficking cases engage core constitutional protections for children, particularly the principles of **child agency and autonomy**, safeguarding their right to protection, development, and participation in matters affecting them. These cases reinforce the judiciary's role in giving concrete effect to rights enshrined in law, as has been demonstrated in South Africa, ensuring that vulnerable populations are not excluded from the benefits of legal protection.

From the importance of **justiciable rights** concept in Zimbabwe, refugee entrepreneurship, courts may need to adjudicate disputes where economic participation is restricted or exploited, ensuring that refugees can exercise agency and autonomy within the constraints of national regulation. For child trafficking, justiciability ensures that victims' rights are actionable, compelling the state to prevent exploitation, prosecute offenders, and provide reparations. Looking forward, similar distressing issues may arise that will require judicial attention both domestically and internationally. These include **child labor**, **online sexual exploitation**, **migrant smuggling**, and **statelessness**, all of which involve vulnerable populations and implicate cross-border responsibilities. Additionally, rapidly emerging issues of **climate-induced displacement**, **urban informal settlements**, and **access to education or healthcare for marginalized groups** could similarly demand enforcement of justiciable rights. Zimbabwean courts, like their counterparts internationally, will increasingly face the challenge of protecting the rights of those who are doubly vulnerable by age, migration status, or socio-economic marginalization, ensuring that constitutional and statutory guarantees are not merely aspirational but practically enforceable.

Fourthly, lawyers must also improve their 'ASK' approach in terms of attitude, skills and knowledge. We have passed the stage of professional identity where lawyers simply possess legal qualifications or serve as generalist or specialist lawyers, we are now in the era of competence identity where lawyers must move into T-lawyering or portfolio skillsets. The ASK approach is seen in how section 167 must be properly understood in terms of the doctrine of finality in appeals and applications before the Constitutional Court. The same applies to how Justice Makarau took a clear position in *Jayesh Shah* case by impliedly appealing to the *res judicata* and other doctrines to create the doctrine of fairness that showed that the Constitutional Court is the final court of appeal in constitutional matters under the principle of fair adjudication.

When engaging in strategic, impact, anti-SLAPPs or constitutional case selection strategies, lawyers must ask themselves five important aspects

- Client choice- is the client credible and how does the public perceive her? The public gives legitimacy to the client selection and judicial decision.
- Factual matrix- Can the case be won on the facts even if the law is against you? Facts are stubborn, they anger giants. Facts must be presented with precision, brevity and coherence. Judges must pick factual issues easily and they can only do so when they are chronologically well put.
- Legal advantage- can the case be won on the facts? This speaks to how law must not be pleaded in the facts, how issues, relevant rules, cases, and laws are applied to the case conclusively (IRAC).
- Effective remedies- litigants must consider whether they will obtain effective remedies looking at the precedents or manner of adjudication of a particular judge. Good lawyers know the law but the best lawyers know the judge.
- Risk of losing- these could be based on many issues such as jurisdiction, legal standing, strict timelines, statute of limitations, forum shopping, technicalities, costs of suit, and ignorance of the law. Lawyer are presumed to know the law.

### The bottom line

- Zimbabwe does not need many lawyers and judges to build something meaningful and constitutional. It needs leverage from superhuman, liberal and activist judges. We all know the eponymous Justice Jackal and the way he rescued a man about to be devoured by a lion.
- Constitutional lawyers should find the few good things that multiply their efforts in defining constitutional identity, culture and interpretation in Zimbabwe. They must pull those levers hard and shine a light on how the Constitution must be followed. These include understanding updated or current rules such as the Constitutional Court Rules 2025. Where such Rules reverse the gains in the Constitution or Constitutional Court Act or bring issues that delay judges, litigation or law reform approaches could be adopted.
- The legal fraternity rewards efficiency, clarity, and simplicity, not perfection, legalese, playing to the gallery, vain arrogance, approbating and reprobating, and frivolity. Constitutional lawyers must start with judges who explicitly commit to constitutional responsibilities enshrined in section 176 of the Constitution such as Justice Chirawu-Mugomba and Chitapi and implore others to do the same until it works for all judges. Then compound ruthlessly.

That is how Zimbabwe builds a blueprint for constitutional interpretation that serves rights constitutionalism instead of consuming it. At the moment, the **Constitutional Court Rules** in Zimbabwe could be challenged as **burdensome and ultra vires** the Constitutional Court Act and the Constitution where they impose procedural requirements that frustrate access to justice or conflict with constitutional provisions. Requirements concerning strict forms, rigid reckoning of time, and prescriptive modes of service largely operate to deny litigants meaningful participation in constitutional litigation, particularly where constitutional rights are at stake. For example, rules governing electronic filing, service, and the set-down of cases are obviously impractical or inaccessible for ordinary citizens or public interest litigants. The rules create procedural hurdles that effectively prevent a case from being heard and this could be challenged as being inconsistent with the Constitution's overarching mandate that the judiciary must protect, interpret, and enforce constitutional provisions.

Specific rules, such as **Rule 10(5)** requiring a certificate of service within two days and **Rule 10(6)** deeming matters abandoned for non-compliance, are especially vulnerable to challenge. The rigid timelines can lead to unintended dismissals, particularly where parties rely on postal or electronic service, or where logistical delays occur. Moreover, ambiguity around whether the **Registrar is required to notify parties** compounds the potential for unfairness. If notification is not mandated, litigants may lose rights without an opportunity to be heard, undermining procedural fairness and the Constitution's guarantees of access to justice. These procedural provisions may be considered ultra vires insofar as they contradict constitutional norms or statutory intent in the Constitutional Court Act.

The rules governing **joinder, misjoinder, and non-joinder**, as well as provisions that restrict set-down and electronic communication at the Constitutional Court level, highlight the need to **delink statutory from constitutional interpretation**. Constitutional litigation often involves matters of broad public interest or multiple affected parties, which may not fit neatly into statutory procedural molds. Courts must interpret procedural rules in a manner that preserves the **primacy of constitutional rights**, rather than mechanically enforcing statutory requirements that impede litigation. When rules prevent joinder of necessary parties, or treat minor procedural defects as fatal, they risk subordinating constitutional principles to procedural technicalities, which would contravene the spirit of section 175 of the Constitution. Ultimately, any challenge to these rules would emphasize that while the Registrar and the Constitutional Court must maintain orderly procedures, they cannot do so at the expense of constitutional justice. The **delinking of statutory from constitutional interpretation** allows courts to treat procedural rules as facilitative rather than determinative, ensuring that cases are decided on the merits of constitutional questions rather than dismissed on technical grounds. Statutory instruments which establish rules are law as contemplated in section 332 of the Constitution and must be challenged accordingly if it is felt they are unconstitutional.

Registrars of superior courts should be seen as procedural facilitators who ensure compliance without automatically invoking abandonment; notification to parties should be considered essential to uphold fairness. The *Mangwiro* case also showed how superior courts can burden litigants as a result of the

Registrar's mistakes. This reinforces the principle that procedural rules exist to serve constitutional enforcement, not to obstruct it, preserving the integrity and accessibility of Zimbabwe's apex constitutional forum. Constitutional lawyers and litigants must also respect the Court rules. For instance, Rule 18 of the Constitutional Court Rules must be complied with as it provides the general requirements for all applications, notices of opposition and answering affidavits. The mandatory requirements relating to written applications stated in R18 (2), 18 (3) and R 18 (4) must be observed saliently. A distinction between court and chamber applications must be made as required by Rule 21 for court applications and Rule 25 for chamber applications. While the Constitution is the starting point in constitutional matters, Rule 18 is the starting point in the actual matters.

Still on the same issue, Rule 26 guides matters where leave of the Court is required. Leave is not required for disputes regarding election to the office of the President; qualification as Vice-President; referral from lower courts; and determination on whether Parliament or the President has failed to fulfil constitutional obligations and so forth. There is need to also ensure that draft orders in substantive direct application cases are attached to the application. Rule 36 must be properly adhered to when it comes to applications for confirmation of declaration of invalidity including filing of the record from court of origin by the registrar within 30 days. Such record must contain the reasons for the judgment and court order for confirmation in form CCZ 5 and these should be filed with the Constitutional Court Registrar. Rule 36 (5) is instructive on initiating confirmation against a person or state entity within 15 days of the order and serving the registrar or clerk as the case may be. Rule 39 guides the filing of heads of argument on all parties involved as directed by the Chief Justice after filing the application. The same applies to written arguments supporting or opposing the confirmation. Rule 36 (3) deals with appeals by the state or any person on notice of appeal filed with the registrar within 15 days of the order. A copy must be served with the Clerk or registrar of the court that made the order.

The procedural provisions outlined in Rules 18, 26, 36, and 39 of the Constitutional Court Rules are critical for equipping lawyers and judges to delink ordinary statutory interpretation from constitutional interpretation because they emphasize that constitutional litigation has its own procedural

logic, distinct from ordinary civil or statutory matters. For instance, Rule 18 establishes the starting point in actual constitutional matters, signalling to practitioners that constitutional applications in the Constitutional Court cannot simply follow the framework of ordinary court processes. By foregrounding the Constitution as the substantive law and the Rules as the procedural guide, lawyers are encouraged to frame arguments in terms of **constitutional values and principles**, rather than limiting themselves to the literal or technical interpretation of statutory provisions. Judges, in turn, are reminded that their interpretive task in constitutional matters is broader, purposive, and rights-oriented.

Rule 26, which governs matters where **leave of the Court is required**, further clarifies the procedural distinctions between constitutional and statutory disputes. By explicitly including exemption clauses through exempting cases such as presidential or vice-presidential elections, lower court referrals, or failures by Parliament or the President to fulfil constitutional obligations, the rule underscores that certain matters are inherently **constitutional** and demand immediate attention without procedural gatekeeping. Section 176 of the Constitution can then be used to show that certain matters are inherently constitutional because it empowers the **Constitutional Court to determine any matter that raises a question as to the interpretation, protection, or enforcement of the Constitution**. This provision aligns with Rule 26's exemptions from leave requirements by identifying disputes such as presidential elections, vice-presidential qualifications, or alleged failures by Parliament or the President to fulfil constitutional obligations, as intrinsically constitutional. Section 176 thereby provides the **textual foundation** for treating these cases as outside ordinary procedural gatekeeping, emphasizing that their significance and potential impact on constitutional order justify direct access to the apex court or clothes the Constitutional Court with inherent jurisdiction, reinforcing the principle that some disputes are of such constitutional importance that they cannot be delayed or hindered by preliminary procedural formalities.

For lawyers, this distinction allows them to focus on the **constitutional substance** or substantive constitutional law rather than procedural hurdles, framing arguments in terms of rights, obligations, and constitutional checks. Judges similarly benefit by appreciating that certain disputes are of such public

importance that rigid statutory formalities should not impede access to constitutional adjudication. Rule 36, particularly concerning the **confirmation of declarations of invalidity**, reinforces the importance of structuring constitutional cases with precision and completeness. The requirement for filing the record from the court of origin within 30 days, including reasons for the judgment in form CCZ 5, ensures that the Constitutional Court has a full factual and legal context. For lawyers, this procedural requirement teaches the necessity of connecting **factual matrices to constitutional questions**, rather than relying on statutory technicalities alone. For judges, adherence to Rule 36 signals that constitutional interpretation is not an abstract exercise but is grounded in real-world disputes and must be reasoned transparently, thereby cultivating a culture where the Constitution is interpreted independently from ordinary statutory logic.

Finally, Rule 39's guidance on **heads of argument and written submissions** demonstrates the collaborative and deliberative dimension of constitutional litigation. By requiring comprehensive arguments from all parties, the rule equips lawyers to present detailed, principle-based reasoning that prioritizes constitutional norms over statutory text. Judges, on their part, are trained to evaluate submissions holistically, distinguishing between statutory obligations and constitutional imperatives. Collectively, these procedural rules reinforce the understanding that constitutional interpretation demands a **rights-centred, purposive, and principled approach**, helping both lawyers and judges to avoid the automatic transposition of ordinary statutory interpretation methods into the constitutional sphere, and thereby strengthening the enforcement and protection of fundamental rights.

The procedural and substantive guidance from the **Constitutional Court Rules and the Constitution** equips lawyers to make strategic decisions in constitutional case selection. First, lawyers must consider **client credibility and public perception**, since cases like presidential elections, children's rights, or refugee entitlements attract scrutiny and require a plaintiff whose standing and motives are unimpeachable. Second, lawyers assess whether the **case can be won on the facts**, which involves ensuring that evidence is properly documented, as emphasized by Rules 36 and 39 on filing of records and heads of argument. Third, they evaluate whether the **case can be won on the law**, using section 176 and the exemptions in Rule 26 to argue that the matter raises

inherently constitutional issues rather than merely statutory questions, which strengthens arguments for direct access and purposive interpretation.

Fourth, lawyers must ensure that **effective remedies** are available, understanding that the Court's relief, including interdicts, declarations of invalidity, or confirmation of lower court orders, must be achievable within procedural frameworks like Rules 36 and 39. Fifth, they assess the **risk of losing**, which may arise from procedural non-compliance for example, strict deadlines in Rule 10, judicial philosophy, or directions from the Chief Justice on case management. These considerations ensure that lawyers choose matters where constitutional questions can be clearly articulated, procedurally supported, and ultimately adjudicated without undermining the credibility of the client, the judiciary, or the constitutional system itself. This strategic framework transforms case selection from *ad hoc* litigation into a disciplined approach that aligns facts, law, remedies, and risk with the demands of constitutional enforcement.