Chapter 10: Legitimizing Rights Constitutionalism in Zimbabwe

To be fully legitimate, likely to last, and worthy of support, a constitution must embody certain principles, namely rule by consent, the rule of law, mechanisms limiting governmental power, and individual rights.[535] A Constitution needs not necessarily be liberal for it to promote constitutionalism.[536] This is premised on the fact that certain constitutions predated liberalism. Greek constitutions of Solon, Lycurgus and others as discussed by the philosopher Aristotle attest to the fact that constitutionalism may be promoted in any constitution.[537] When dealing with constitutional or any other matters brought before them, judges become both the case and court manager. Most importantly, they exercise what is called judicial review. In *Chief Constable v Evans, Lord Brightman*[538] aptly remarked thus:

> *'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.'*

When courts make decisions, especially relating to the constitution, their judgments may or may not be accepted by the diverse consumer population in the country. Essentially, their decisions will be considered illegitimate.

Rights Constitutionalism as Critical to End Experimental Constitutionalism

Constitutionalism is largely seen as a term of approbation because everyone is now considered a constitutionalist, See *Waldron, J, 'Constitutionalism: A Skeptical View', New York School of Law', 1, (2010).* In any state, questions may be asked to distinguish between legal and political constitutionalism. The response is captured in the view that a lecturer may frequently remind his own student it is meaningless, to ask whether the UK adheres to legal *or* political constitutionalism.[539] It is the idea, often associated with the political theories of John Locke and the

[535] Frohen, B. F, Is Constitutionalism Liberal? 33 *Campbell L. Rev.* 529 (2011).
[536] Ibid.
[537] Ibid, citing Aristotle's politics, Book II.
[538] 1982 [3] All. ER 141 @154.
[539] Elliot, M, 'Legal Constitutionalism, political constitutionalism and prisoner's right to vote', 2012, https://publiclawforeveryone.com/2012/12/05/legal-constitutionalism-political-constitutionalism-andprisoners-right-to-vote/, accessed 23 December 2018.

"founders" of the American republic, and equated with the concept of *regula iuris*, the "Rule of Law", that government can and should be legally limited in its powers, and that its authority depends on enforcing these limitations.[540] Linked to this is the *exerceatur constitution ruat coelum* concept which is rendered 'let the constitution be enforced though the heavens fall.'[541]

French thinker Montesquieu lacked any direct links to one of the most prominent features of modern constitutionalism, a special constitutional court with the power to act on behalf of rights[542] Significantly, comparisons have been made between various isms of constitutionalism. There are of course dangers in borrowing from other legal systems. The dangers of "borrowing" from one legal system to another are famous: the law of any polity is a construct embedded in a specific social and political culture and its transmutation to other polities is not easily achieved.[543] Similarly, it is dangerous to assume that intellectual conceptualisations travel with any less difficult.[544] The justifications from Weller and Trachtman on the dangers of borrowing are reproduced here and show that:

Law, like any other human institution, always has a history. This too has proven to be a trap for comparative analysis. First, there is a tendency to make our comparison at a given point in time, thereby overlooking some of the dynamic effects of the phenomena compared. Second, it is often hard to synchronise the different time scales of the comparison. Third, the law is a complex social phenomenon that confounds simple metrics of comparison and prescription. Finally, the intellectual prisms through which law is observed and conceptualised are also often quite different in disparate systems.[545]

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[540] Roland, J, 'Constitutionalism', (2002), http://www.constitution.org/constitutionalism.htm, accessed 23 December 2018.

[541] Ibid. *L* (2004).

[542] Id. To this extent, Zuckert id believes that 'Montesquieu is well known as the first to formulate the judicial power as a conceptually distinct power to be kept separate in a proper constitutional system, but he had no notion of the judiciary serving as a constitutional court. The honor of that innovation is generally held to belong to the Americans of the era between the American Revolution and the drafting of the new constitution in 1787'. One of the French terms that he uses is *droit naturel*, a phrase that can also be translated as natural right and never *droit natureles* for natural rights.

[543] Weiler, J.H.H, Trachtman, JP, European Constitutionalism and Its Discontents, 17 *Nw. J. Int'l L. & Bus.* 354 (1996-1997).

[544] Ibid.

[545] Ibid 355.

There is a justification for constitutional restraints and an independent judiciary to enforce them.[546] To the conservative, a governing popular "majority" carries the danger of being or becoming an irresponsible and excessively egalitarian, or "levelling," mechanism bent on the redistribution of social wealth, power and prestige.[547] In developed constitutional systems like America, such an approach is waning both in the courts and in the academy.[637] Unlike the liberal-legal paradigm, the new paradigm is overtly political- and overtly conservative in its orientation and aspiration.[548] In the American scenario, the observation of the new paradigm is that the paradigm shift, then, in its totality, is this: the liberal and critical legal discourses that dominated constitutional law in the sixties and seventies have been replaced by conservative and progressive discourses, respectively.[549] Not only the answers, but more importantly, the questions posed by our leading constitutional jurists and theorists have been radically transformed.[550] A fundamental question that may then be asked from the perspective of modern constitutional scholarship is: If the decisions of judges, no less than of legislators, are necessarily political - and hence necessarily grounded in some normative conception of the good - what politics should judges pursue, and on the basis of what conception of the good should they act?[551]

De-Americanising Rights Constitutionalism in Zimbabwe by Separating Constitutional Interpretation from Constitutional Construction in America

(I) Constitutional Interpretation Is About And Policy

Scholars may prefer to use theories,[552] It has been observed that sometimes, although rarely, the words of the Constitution appear to speak for themselves.[553] Article I, Section 3, Clause 1 of the Constitution, for example, states that "the Senate of the United States shall be composed of two Senators

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[546] West R, Progressive and conservative constitutionalism', 88 *Mich. L. Rev.* 645 (1990).

[635] Id 645.

[547] Ibid citing R. Epstein, Takings: Private Property and The Power of Eminent Domain (1985);

[548] Ibid.

[549] Ibid.

[550] Ibid.

[551] Ibid.

[552] R.C Post, 'Theories of Constitutional Interpretation' (1990). *Faculty Scholarship Series.* Paper 209. R.R. Kelso, Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History, *Valpraiso University Law Revie*w

[553] Ibid, 14.

from each State."[554] If a third California Senator should one day present herself for accreditation in Washington, D .C., no court in the country would think twice before disapproving of the application.[555] From a phenomenological point of view, there would be no question of "interpreting" the constitutional language, for its meaning and application would appear clear and obvious. Post, however, cautions that, although he stresses the phenomenological character of this point, it is of course quite plausible to contend that all reading is necessarily active, and hence "interpretative."[556] But not all reading requires a reader self-consciously to inquire into the meaning of a text. From a phenomenological point of view, therefore, some reading does not require that the process of interpreting a text to be thematised.[557]

Judges are the last line of defence when it comes to interpreting the Constitution or the law in general. Relevant to this is the fact that courts of law or the judiciary are the pillar of the State which interprets the law. Judges accept the need to consider some form of interpretive analysis to make their decision legitimate. In legal (although not in philosophical or literary) parlance, judges require and must be able to articulate a "theory" of constitutional interpretation.[558] [559] The purpose why judges interpret the constitution was enunciated in *Marbury v Madison* a decision which established the concept of judicial review as emphatically the province and duty of the judicial department to say what the law is.[560]

In some instances, judges abandon the textual approach and decide that the meaning of the Constitution is better ascertained through strong evidence of the intent of the Framers than through fidelity to past precedents and doctrine.[561] The reason is apparently that the intent of the Framers best embodies those "principles" which the "people" desired to instantiate in their Constitution.[562] In the eyes of the majority, therefore, it is more important for the Constitution to be interpreted in a manner which accurately expresses

[554] Ibid.
[555] Ibid.
[556] See
[557] Ibid.
[558] Ibid.
[559] U.S. (1 Cranch) 137, 176 (1803).
[560] Ibid.
[561] Post 17, analyzing the majority decision in *Marsh v Chambers* 6,3 U.S. at 801
[562] Ibid.

these principles than that it be interpreted in a manner which remains faithful to the principle of stare decisis.[563] The Lockean social contract theory rests governmental legitimacy on common assent.[564] The people are important because it has even been asserted that ancient republics of Greece and Rome, incorporating as they did a variety of laws regarding voting on issues of public importance, could be deemed to exemplify a commitment to rule **by** consent; as Plato noted, democracies are ruled **by** opinion.[565] The diverse people in a polity make liberalism and its gains functional. The general liberal model is of a society of diverse and conflicting values seeking peace through tolerance, enforced **by** a constitutional state.[566] Questions such as: *what is a preamble to a constitution? What role does it play in constitutional adjudication and constitutional design? Why do states add a preamble to the constitution?* have been seldom asked or answered.[567] In many countries, the preamble has been used, increasingly, to constitutionalize un-enumerated rights.[568]

Sovereignty refers to the supreme authority in a State.[569] Constitutional supremacy underlines what is basically called the authority of the law. There is, first, the authority of the Constitution as law.[570]

The Constitution embeds non-negotiable tenets that support Zimbabwe's constitutional democracy. These relate to both rights' constitutionalism and good governance in general. In the South African case of *Coeztee v Government of the Republic of South Africa and the Matiso v officer Commanding Port Elizabeth* case

[563] Ibid.

[564] Frohen (n 535) 534.

[565] Ibid citing Plato, The Republic 488b (Benjamin Jowett trans.) (1960).

[566] Ibid 543, citing Kautz@ 438

[567] L. Orgad, 'Preamble in Constitutional Interpretation', *International Journal of Constitutional Law*, Volume 8, Issue 4, 1 October 2010, Pages 714–738, https://doi.org/10.1093/icon/mor010, accessed 23 December, 2018?.

[568] Ibid.

[569] J. Law and E.A Martin (n 525) 517. The two editors, state that in any State sovereignty is vested in the institution, person, or body having the ultimate authority to impose law on everyone else in the State and the power to alter any pre-existing law. For Zimbabwe and other countries with written constitutions such as the United States of America, constitution carefully balances the powers in a State. Countries such as the UK subscribe to parliamentary sovereignty and sovereignty is vested in the Parliament. The UK is on the verge of leaving the European Union and parliamentary sovereignty may be unchecked at regional level if the UK succeeds to do so. Under EU treaty, member States accede to the Treaty of Rome or any other EU treaty by signing accession agreements.

[570] Post 19, citing William W. Van Alstyne, "The Idea of the Constitution as Hard Law," *Journal of Legal Education* 37 (1987): 179. For a useful symposium on the subject, see Constitutional Commentary6 (1989): 19-113.

Sachs J explained the importance of founding values in constitutional interpretation. He held explained that:

The values that must suffuse the 'when' process, are derived from the concept of an open and democratic society-based dignity, equality, transparency, accountability, justice and freedoms. The notion of an open democratic society is thus not merely aspiration or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct....we should not engage in purely formal or academic analyses, nor simply restrict ourselves to ad hoc technicism, but rather focus on what has been called the synergetic relation and between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.[571]

Scholars disagree on whether the rule of law is fully a liberal or illiberal concept.[572] The Bill of rights has key aspects such as:

- Interpretation
- Presumption on the existence of other rights
- Non-exhaustive provisions
- Generations of rights
- Frame and content of rights
- Broad *locus standi* which does away with the clean hands' doctrine.[573]
- general and special limitations of rights

[571] See *Coeztee v Government of the Republic of South Africa and the Matiso v officer Commanding Port Elizabeth case 1995 (4) SA 631 (CC).*

[572] See Frohen (n 535) 536-537, citing Andrew W. Lintott, The Constitution of The Roman Republic Ch. Iv (Oxford Univ. Press 1999) where he argued that if the rule of law is inherent in constitutionalism, it seems apparent that it is not purely and solely liberal. Liberalism is not unique in valuing the rule of law, though it clearly values it quite highly. Indeed, any student of early Rome will note the role played by the rule of law in achieving (distinctly illiberal) constitutional development from the conflicts between patricians and plebeians in that republic-and their embodiment in distinctly illiberal laws regarding issues such as class divisions.

[573] Before the adoption of the 2013 Constitution, the clean and dirty hands doctrines were used to deny litigants of certain constitutional remedies, see ANZ case. The 2013 constitution explicitly shows that the fact that someone has contravened a law does not debar them from approaching a court to seek an effective remedy following a violation of constitutional rights. This progressive move is landmark in the protection of constitutional rights in Zimbabwe. The clean hands doctrine is a phrase from a maxim of equity: *'he who comes to equity must come with clean hands*. It means that a person who makes a claim in equity must be free from any taint of fraud with respect to that claim; see Law and Martin, p. 99. The application of the rule to the

The constitution explicitly shows that grammatical problems, possibly relating to the translation of the constitution into other languages are resolved by giving preference to the English text.[574] Montesquieu notes that judicial judgments must be based "on a precise text of the law.[575] That "text" must derive from the legislators.[576] There are natural, almost deductive principles for constructing the legislature of a free constitution. The very first such principle is that it too, like the judiciary, must be popular: "in a free state, every man who is reputed to have a free soul, should be governed by himself," and, therefore, "the people as a body should have legislative power.[577] Judges are allowed to use section 46 of the constitution with any necessary changes, to interpret the constitution apart from Chapter 4.[578] What this essentially means is that the section is not only limited to the bill of rights. The set criteria can be used to deal with any other provisions that may require judges to refer to the founding principles, foreign law or international law.[579]

In the process of judicial adjudication, judges must recognise that common law in its original English form was punctuated by constant law reform, with judges and lawmakers working together through inventive principles that prevented the powerful elite from abusing their powers without restraint.[580] It has been stated elsewhere that judges should not be seen to use functions that are essentially executive. Those who support judicial policymaking note that:
'Many, including judges, regard a strict division of judicial functions, completely divorced from other important public and policy making functions, as unnecessarily elected regimes of international law. It analyses the extent to which a centralised authority enables or restrains the production of international law. Finally, the pluralist school examines processes of constitutionalisation beyond the state and comprises several conceptions of transnational constitutionalism beyond fundamentalist adherence to the

[574] See section 345 of the constitution.
[575] See Zucker, citing Montesquieu
[576] Ibid.
[577] Ibid.
[578] See section 331 of the constitution.
[579] Deplano, R, *'Fragmentation and Constitutionalization of International Law: A Theoretical Inquiry'*, European Journal of Legal Studies, Volume 6, Issue 1, (2013) questions the validity of the use of constitutional concepts as a means for interpreting international law.
[580] M.D, Kirby, 'Lord Denning and Judicial Imperialism,' (26 July 1980, Open Lecture at University of Sydney, Australia.

notion of Montesquieu's injunction that liberty requires a separation of legislative, executive and judicial powers of government.'[581]

They also argue that the attempt to separate the functions of the three arms of government produces inconvenient results and also depart from the realisation countries that believe in the separation of powers doctrine such as Britain never practiced a complete separation of powers.[582] Judges can perform executive functions as personae designate and parliaments have even conducted trials in privilege cases such as Browne and Fitzpatrick.[583] In Britain, the highest judicial officer of England, the Lord Chancellor, and the other members of the highest court in Britain sit in Parliament in the House of Lords; and the Lord Chancellor is a member of executive government.[584] Judicial policymaking threatens the judges' fundamental legal commitment to faithfully interpret a constitution.[585] They must also realise that the boundaries of permissible constitutional interpretation are set by those who drafted and ratified the Constitution, including the general populace.[586] Contextually, Zimbabwe's Constitution provides for the values that must be used to interpret human rights that are guaranteed by the Constitution.[587] Linked to this is the need for judges to be flexible in dealing with the so-called binding principles. Lord Denning, a reformist judge argued that binding rules are '*false idols which disfigure the temple of the law*.'[588]In dealing with rigid policies, judges of superior courts in Zimbabwe must resort to their common law functions. It has been noted that common law preceded parliamentary lawmaking functions. It has been observed that:

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[581] Ibid, 2.
[582] Kirby (n580).
[583] (1955) 92 CLR 157.
[584] Compare this with the MPs, senators and judges in Zimbabwe.
[585] See K.E Whittington (1999), Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review, University Press of Kansas.
[586] T. Sandalow (1981), Constitutional Interpretation, University of Michigan Law School Scholarship Repository.
[587] Ibid. see also section 46 of the Constitution of Zimbabwe which obligates courts that interpret the Bill of Rights under Chapter 4 of the Constitution to use values that are in the Constitution, especially those in section 3 of the Constitution of Zimbabwe that include constitutionalism, rule of law and human rights amongst other values. Added to these values may be the values on public administration that are listed in sections 194 and 195 of the Constitution which include transparency, promoting merit-based appointments and the obligation for state or public entities to adhere to good corporate governance standards.
[588] Kirby (n 580) 5.

> 'The original genius of the common law was the capacity to adapt rules to meet different social conditions. The advent of the representative parliament has tended to make judges, including appeal judges, reticent about inventing new principles of law or overturning decisions that have stood the test of time.'[589]

In challenging the idea of the policy of judicial restraint, Lord Denning has cited Parliament's reluctance to change bad laws as justifying reformist agendas.

In exploring the use of public policy by our courts, it is important to show at the outset that public policy deals with what public officials do or do not do when they deal with problems that come before them.[590] They should influence the direction of public policy towards the embossment of the key features in a constitution. [591] Admittedly, policymaking is ultimately made by the government and may take the form of laws or regulation that deal with a specific problem in a polity.[592] The realisation that judges are policymakers, whether activist or not, is common in some jurisdictions such as the United States of America.[593]

Accountability of Judges in Using Public Policy

Judges may not necessarily be treated as accountable policymakers. [594] In jurisdictions such as England and Wales a judge or the judiciary as an institution must show various forms of accountability including external accountability to the public as it must be accountable to the judiciary (internal accountability), the executive and the legislature.[595] This paper explores how the formal court proceedings provide a form of accountability of the judges to the public and permits for scrutiny of the judges' work.[596] Crucial to the scrutiny of judicial decisions is that they must be reasoned, are subject to

[589] Ibid.

[590] T.A Birkland, (2011), *Introduction to the Policy Process*, New York.

[591] The key features in the Constitution of Zimbabwe, 2013, include popular sovereignty affirmed in the main preamble under the 'We the people of Zimbabwe' clause; national objectives; the founding values of constitutionalism, human rights, and the rule of law and supremacy of the constitution amongst others.

[592] Barkland (n 590).

[593] J.V Orth (2017), The Role of the Judiciary in Making Public Policy, https://nccppr.org/wpcontent/uploads/2017/02/The_Role_of_the_Judiciary_in_Making_Public_Policy.pdf, accessed 28 October 20?.

[594] Ibid.

[595] https;//www.judiciary.uk/wp-content/uploads.

[596] Ibid.

comment and can be subject to controls such as appeal to higher courts.[597] The use of reasoned public policy is seen here as one of the ways the judiciary can account to the people, the executive and the legislature. A judge must however deal with the dangers to judicial independence that come with accountability to the executive[598] For instance, during colonialism, it was found that Ian Smith's government was the only effective government on the basis of the doctrine of public policy.[599] Public policy was used to prevent the breakdown of order or cessation of the functions of the judiciary.[600] Effectively, the courts decided on the issue of whether or not they could use public policy to give effect to legislative and administrative functions of the Ian Smith regime as an 'effective' government in light of the 1961 Constitution.[601]

One may appear before a conservative, activist, political, liberal or superhuman judge. In analysing the *Madzimbamuto* case, Goldin J was described thus:

> *The Hon. Mr. Justice Goldin, son of an Eastern European immigrant shopkeeper, was born in 1918 in Cape Town, was educated at European South African schools and the University of Cape Town. After war service he settled in Rhodesia, having married the daughter of an early settler. The judge was not active in politics, although he took part in a campaign to create a favourable climate for the establishment of the Federation of Rhodesia and Nyasaland. He was an acting judge for some time before his appointment by the Rhodesian Front Government in July 1965. Although not socially a member of the Rhodesian "Establishment" the judge was acceptable to it.*[602]

The current Constitution has an interpretation provision which provides guidance on matters relating to the interpretation of the Declaration or the Bill of Rights.[603] Discourse on the use of public policy in Zimbabwe may call for comparisons between experiences in Zimbabwe and South Africa. Zimbabwe's

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[597] Ibid.

[598] Ibid.

[599] Per Goldin J in Madzimbamuto v. Lardner-Burke N.O. and Others and Baron v. Ayre N.O. and Others, Judgment Number GD/CIV/23/66, ('*Madzimbamuto*'), see also C. Palley, (1967) The Judiciary Process: UDI and the Southern Rhodesia Judiciary, https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468 2230.1967.tb02273.x, accessed 28 October 20?.

[600] Ibid.

[601] Ibid.

[602] Ibid at 266.

[603] Section 46 of the Constitution of Zimbabwe, 2013, under Chapter 4, or the Declaration of the Bill of Rights provides a useful starting point on how founding values in section 3 of the Constitution; foreign law; international law and provisions of the constitution can be used to interpret the various categories of rights that are listed from section 48 to 86 of the Constitution.

constitutional interpretation regime also depends on jurisprudences that influenced South Africa such as the Canadian jurisprudence.[604] Concern has been raised on the extent to which the South African state can override individual rights in pursuit of its own public policy.[605] Inevitably, the adoption of a cross-jurisdictional analysis of judicial reasoning in constitutional interpretation is important for Zimbabwe where three superior courts are given an inherent jurisdiction to regulate their own processes and must also develop the common law and customary law of the land.[606] Attention must however be given to the fact that comparative law views to constitutional interpretation may pre-supposes that states share constitutional text and judges in different countries share the same unarticulated sub-text as well.[607]

The use of public policy is in this book under the separation of powers concept. For Zimbabwe, separation of powers is part of the founding constitutional values or principles that bind Zimbabweans.[608] Essentially, the goal of vertical or horizontal application of the Constitution must also be spearheaded by courts and should aim at embossing good or good enough governance in a society.[609]

The Use of Rhodesia Public Policy

During Ian Smith's Unilateral Declaration of Independence, public policy was in the *Madzimbamuto* case to enable judge Goldin to pronounce himself on the legal effect of the UDI using political realities of the day.[610] In effect, the *Madzimbamuto* judgment sought to deal with the challenge to the extension of the detention of Madzimbamuto and Baron which were carried out without lawful authority since the Rhodesia parliament had no legal existence.[611] Further argument was that any executive functions performed by the Smith executive government were also illegal and therefore of no force and effect.[612]

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[604] See D.M Davis, Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience, OUP and NYU Law School, *ICON* Vol. 1, No.2, (2003) 187.

[605] D.I.C Binnie (1995), 'Constitutional Interpretation,' *Consultus*.

[606] See section 176 of the Constitution where the High Court, Supreme Court and Constitutional Court of Zimbabwe are clothed with inherent powers in this regard.

[607] Binnie supra note 14.

[608] See section 3 of the Constitution.

[609] Good governance is a founding principle that is listed in section 3 of the Constitution. For good enough governance, see MS Grindle (2011), The Concept of Good Enough Governance Revisited, *Development Policy Review*, Vol 29, Issue Supplement s1, The Policy Practice, https://thepolicypractice.com/library/good-enoughgovernance-revisited/, accessed 28 June 20?.

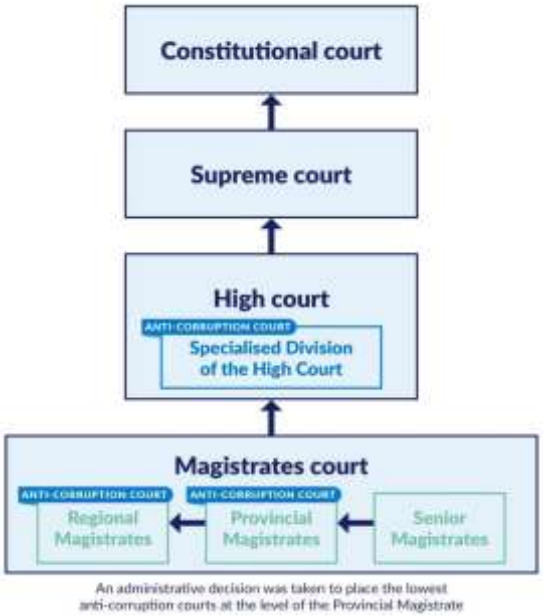
[610] J.M Eekelaar (1967), Splitting the Grundnorm, https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.14682230.1967.tb01144.x, accessed 29 October 2019.

[611] Ibid at 160.

[612] Ibid.

Quintessentially, the judges in Rhodesia had to apply the law that is, not the law that was, as long as the usurper was in power.[613] Judges of superior courts in Zimbabwe must motivate the polity to lean towards constitutionalized politics and should play a huge role in fostering a sustainable culture of lawyering and judgeship which makes the normative framework in the constitution to be the starting point in general governance and rights constitutionalism in Zimbabwe.[614]

Basically, new developments in Zimbabwe allow litigants to approach the Constitutional court in relation to constitutional rights enforcement as provided in the hierarchy below.



Preliminary objections are requested by one of the parties to the litigation regarding either fatal mistakes, mootness, ripeness, deference, subsidiarity, constitutional avoidance, forum shopping or defects with the relief being sort.

[613] (1970), R.S Welsh, The Function of a Judiciary in a Coup De'tat, 87 *South African Law Journal*. Welsh's assertion was based on the views of Professor Hahlo on the fact that the UDI was a gentle revolution and the usurper's word was law which judges could also follow.

[614] While judges do not hold or renew practising certificate with the Law Society of Zimbabwe, they remain lawyers. They occupy judicial office after satisfying the requirements of being a lawyer who is trained as required by the Constitution.

Courts may uphold the technical objections and refuse to hear the party in error. The courts will not formally decide the case on the merits. When the court rejects the technical arguments, it then decides the case before it on the merits. Litigants are therefore compelled to understand the procedure before the courts relating to admissibility of their case. This relates to the rules of the Court, the forms and identification of parties and issues relating to the relief being sort. Admissibility helps the courts to determine if there is a genuine dispute between the parties. When the case is admitted, the hearing procedure (both written and oral) begins. The oral procedure is critical because parties have to present their main arguments. The Court can also invite interveners or amicus representatives to address specific interests. Experts may also apply to be involved in the proceedings if they commit to remaining impartial. The oral procedure provides the opportunity to lawyers to present their arguments, respond to them and answer legal questions. Beyond restating their positions, lawyers must also pay attention to practices on time allotment in the superior courts. The judges may deliberate and give *ex tempore* judgments in simple cases, or they may reserve their judgment in complex cases.

The need for these human rights legal systems is to make the human rights treaties effective in the lives of everyday people.[615] It has been observed that the poor implementation of such treaties is caused by lack of access to treaty procedures, ignorance of the treaty provisions and processes, failure to create national vehicles for implementation, failure to produce state reports, failure to remove impermissible reservations and so on.[616]It has also been observe that if rights are not followed with remedies, and standards for protection have little to do with reality, then the rule of law is at risk.[617] The idea of human rights violation presupposes a concern with violence that in turn is linked to state and public policy orientations of protecting citizens from violations.[618]

The Court in *Chawira and Others v Minister of Justice*[619]the Constitutional Court made serious errors. Firstly, interpreting the avoidance doctrines and ripeness

[615] Anne F. Bayefsky, The UN Human Rights Treaty System: Universality at Crossroads (2001, Kluwer Law International) xv.
[616] Ibid, 6.
[617] Ibid, 8. [724] Ibid, 6.
[618] Upendra Baxi, The Future of Human Rights (2002, Oxford University Press) vii. Section 48 of the Constitution.
[619] CCZ 3 of 2017.

doctrines wrongly.[620] The reasons include that presidential Pardon was interpreted as a matter of procedure rather than a matter of rights as envisaged by the Constitution.[621] In this case, ripeness was not even given the contemporary considerations and its surprising how the judges unanimously arrived at the same conclusion that avoidance doctrine was applicable.[622]The court ignored foreign cases that focused on creative interpretation of the Constitution and international law such as *S v Makwanyane*.[623] Zimbabwe does not have a right to work.[624] Right to provide labour in exchange of remuneration is provided in the Constitution.[625]While the Labour Act cross-refers to other Acts such as Disabled Persons Act,[626] there is need to broaden the cross-referencing in light with the broad non-discriminatory clause in the Constitution.[627] There are many concerns that are still to be decided by the courts including defences to discrimination,[628] long parental leave,[629]right to paternity leave (not included), and lack of special rules or policies on sexual harassment.[738] Sexual harassment has received attention in the courts of law in the case of *Mbatha v Zizhou*[630] where the High Court categorized it as an actionable wrong and a species of non patrimonial loss. The policy of dragnet arrest of commercial sex workers was not decided based on a written judgment.[631] Parents who want to assert their rights to shelter must claim it through their children as emphasised in section 81 of the Constitution. Arbitrary state policies on development or disaster-linked evictions and internal displacements in Chiadzwa, Manzou, Chingwizi and Tokwe-Mukosi have not benefited from nuanced court judgments. The right to education has

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[620] Sharon Hofisi, 'Chawira Judgment: Some Reflections,' (26 April 2017, The Herald) ‹ https://www.herald.co.zw/the-chawira-judgment-some-reflections/ › accessed 9 January 202?.

[621] Section 48.

[622] See Hofisi (n 620).

[623] *S v Makwanyane* 1995 6 BCLR 665 (CC).

[624] Sharon Hofisi, Workers' rights and the Constitution (2 May 2018, The Herald)‹ https://www.herald.co.zw/workers-rights-and-the-constitution/ › accessed 9 January 202?.

[625] Section 65 of the Constitution.

[626] Section 5 (1) of the Labour Act (Chapter 28: 01).

[627] Section 56.

[628] Section 5 (7) of the Labor Act.

[629] Currently the Act limits the leave to periods of compassion such as death of a child. [738] See section 8 (g) of the Labour Act.

[630] HH 675 of 2021.

[631] Blessing Zulu, Zimbabweans Welcome ConCourt Ruling on Prostitution Arrests (27 May 2015, Voice of America) ‹https://www.voazimbabwe.com/a/zimbabweans-welcome-concourt-ruling-onprostitution/2792758.html › accessed 9 January 2022.

[741] Section 81 of the Constitution protects children's right to shelter.

been protected from arbitrary public policies such as degree classes of students, as was in Danai Mabutho v WUA HH698/15 religion and freedom of contract,[632] refusal to release results and many others. In *Makani* case, the court remarked that:

> Adv. de Bourbon accepts that public policy enables the scrutiny of private contracts to ensure their constitutionality. Nevertheless, it is possible to contractually waive one's religious precepts to achieve a specific social or material purpose, as the applicants have done by signing the contentious form of admission. I am inclined to agree. As I have indicated earlier, I do not perceive the right to freedom of religion as being absolute or non-derogable.

This judgment and the representation miss the whole point that children do not lose their rights by virtue of passing through the school's gates.[633] Right to healthcare is confusing. Zimbabwe does not have a right to health. And the provision of healthcare has also impacted on many rights related to health such as dignity.[745]

Right to food and water is enshrined in section 77 of the Constitution. Zimbabwe's 1980 Constitution did not contain this right. This right has been limited by the Supreme Court in *City of Harare v Mushoriwa*.[634] Rather than focusing on the interpretation section, the Court chose to follow foreign methods of interpretation that did not bear on protecting the right to water as a justiciable right. The Supreme Court focused on four aspects of interpretation of administrative instruments in the following:

> 'There are four clear rules of interpretation that emerge from this celebrated passage. Firstly, because of the representative nature of municipal bodies and the delegated authority that they administer, by-laws enacted by such bodies ought to be benevolently construed and supported if possible. Secondly, it is to be presumed that such by-laws will be reasonably administered by the authority responsible for administering them. Thirdly, courts of law should exercise great caution in questioning the validity of by-laws and should be slow to strike them down as being invalid on the ground of unreasonableness. And, fourthly, where the criterion of

[632] *Amos Makani v Arundel* CCZ 7/ 2016.

[633] UN Children's Rights Committee, 'General Comment on the Aims of Education,' (2001)‹ https://www.unicef.org.uk/rights-respecting-schools/the-rrsa/introducing-the-crc/ › accessed 9 January 202?. See *Mapingure v Minister of Home Affairs and Others* SC 22/ 14.

[634] SC 54 of 2018.

> reasonableness is to be applied to any by-law, it should only be condemned if it is objectively found to be grossly unreasonable.'[635]

Relying on a common law decision at the expense of the Bill of Rights method is a reversal of the gains of rights constitutionalism. The Supreme Court was obligated to make a finding that administrative cases or ordinary administrative law is part of constitutional common law that can be used to decide constitutional rights cases.[636]

Before the 2013 Constitution, CJ Dumbutshena refused to obey the choice of law dilemma in the interests of women's rights in *Lopez v Nxumalo* SC-H 115 85. A white man who sought to avoid tried for seduction damages at a community court was denied relief by the Supreme Court on the basis that he was familiar with traditional law and could not seek solace in general law. We also referred to *Madzvidza v Chaduka*[637] where the policy of withdrawing the candidature on the grounds that a woman should not fall pregnant while enrolled at a college was analogously considered discriminatory. Justice Gwaunza (as she was then called), the practice was both discriminatory and unreasonable.[638] The court rejected public policy arguments (the college offered public services although it was a private college) that discriminate female students who could combine motherly and other societal roles while fathers are unencumbered.[639] The observation of the court in the *Mandizvidza* decision encouraged government to promote equality in law and practice.[640]This is one such case that shaped the constitution's emphasis on gender equality promotion at all levels of governance in Zimbabwe.[641]Women also now have equal rights with their male counterparts.[642] It remains to be seen if the courts will make judicial pronouncements that correct cases that denied women relief based on the fact that customary law was not included in the Lancaster Constitution's non-discrimination provision.[643]The Court in *Magaya* decision also refused to

[635] *Kruse v Johnson* [1898] 2 QB 91.

[636] See in detail Gillian E. Metzger, 'Ordinary Administrative Law as Constitutional Common Law,' 9 *Columbia Public Law Research Paper* (2009).

[637] 1999 (2) ZLR 735 (H).

[638] *Mandizvidza* judgment, at 10.

[639] Ibid.

[640] Ibid, 14.

[641] See section 17 of the Constitution.

[642] Section 81 of the Constitution.

[643] *Magaya v Magaya* 1999 (1) ZLR 100 (SC).

modify customary law and rejected human and women rights arguments in the following manner: 'Great care must be taken when African customary law is under consideration. In the first instance, it must be recognised that customary law has long directed the way African people conducted their lives...in the circumstances, it will not be readily abandoned, especially by those such as senior males who stand to lose their positions of privilege.'[644]

Venia Magaya was denied constitutional protection for her inheritance rights because the court was of the belief that the listed grounds in the Constitution excluded sex. Now that the non-discriminatory clauses include sex, we wait to see a judgment that will correct the *Magaya* injustice. Sadly though, examples were the courts juxtaposed legal arguments and policy to deny female litigants legal protection include women's rights, right to sexual and reproductive health, and right to privacy. In *Mapingure v Minister of Home Affairs*[645]the appellant was raped by robbers at her home, and she immediately lodged a report with the police. She did not access pregnancy preventive medicine within the seventy-two-hour period because the doctor insisted on the need to administer such medication in the presence of a police officer. She went to the police and the police officer who had attended to her was not available. Through bureaucratic problems, the Court placed duty on the applicant to prevent the unwanted pregnancy. The applicant's state after being raped was not given due attention with the court even suggesting that she could have approached the magistrate on *ex parte* basis for relief to terminate the pregnancy. The court did not even consider the litigant's trauma and focused on the choice of dilemma.

Children's right to participation and to be heard was heavily affected in Amos Makoni which forced the children to follow the agreements entered between the school and the children's parents. The school authorities stand in *loco parentis* and cannot be above the High Court which is the upper guardian of minors. To then allow the school authorities to violate the children's right to participation is akin to reversing the gains of rights constitutionalism in the Constitution.[646]Children's rights however received landmark considerations in

[644] ibid, .
[645] SC 22/ 14.
[646] Section 81.

Mudzuru case and juvenile caning.[647]The Chokuramba case was landmark in that it is a creative approach that is based on reading rights together to abandon discriminatory state policy. In this case, the court used the right to dignity provisions in section 51 to protect the rights of juvenile male offenders. The court remarked thus:

> 'Judicial corporal punishment by nature involves the use of physical and mental violence against the person being punished. (…) In the case of a punishment for crime, the infliction of the pain and suffering is intended to be severe to achieve the purposes of the punishment. The infliction of the punishment in the circumstances would inevitably involve one human being assaulting another human being under the authority and protection of the law. Forcibly subjecting one person to the total control of another for the purposes of beating him or her is inherently degrading to the victim's human dignity.'

Reading provisions into constitutional provisions is an innovative example of taking the Constitution as a living organism. The Constitutional Court and the High Court (Muremba J) decisions can be used to torch-bear on living originalism as it applies to Zimbabwe. This approach had not been deeply pursued although courts frequently refer to many provisions when interpreting rights.[648]This approach of treating the Constitution as a living organism realises that progressives (under progressive constitutions) tend to view the Constitution as a kind of living organism that grows and develops and should be adjusted or altered by courts in response to unfolding circumstances.[649] Time and norms change as do constitutional clauses that are not in line with the times.

Zimbabwe amended the Constitution to give the President monstrous powers to control the way judges are appointed. This is inimical to the concept of direct democracy that is used to appoint the Zimbabwean President.[650]Under direct democracy, officials such as the President must be controlled directly by the people who elect them based on the idea that the people under such democracy have the right to initiate referenda on important political issues or the exercise of political power.[651]Judges who are appointed by a President who

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[647] *The State v. Willard Chokuramba*, CCZ 10/19, Constitutional Application No. CCZ 29/15.

[648] See *Mapingure* decision, *Makani* decision, and so on.

[649] See Peter Berkowitz, Reading into the Constitution (1 June 2012, Hoover Institution), https://www.hoover.org/research/reading-constitution› accessed 9 December 202?.

[650] See section 92 of the Constitution.

[651] See in detail David Feldman, *Civil Liberties and Human Rights in England and Wales* (1993, Clarenda Press) 18.

is directly elected conform to the rule beyond minimalist democracy and elite democracy.

To constrain judges' powers under associational democracy, judges must weigh the gains of asserting of constitutional rights by citizens considering the methods of protecting such rights. They must also determine if the assertion of rights and the methods of protecting them are incompatible with other important constitutional ideals.[652]This is important because constitutions and constitutional practices, based on the idea of the nation-state, must exercise social control that is ascribed to them under the social contract theory.[653]Furthermore, Constitutions are designed to frame states, and to frame the law within the state.[654]Judges must be quick to understand that the intellectual tools of constitutional law doctrine and related political (and legal or constitutional) theories are dictated by the normative frame of the Constitution.[655]When judges are being moved by litigants to act, they must be concerned with the behavior of constitutionally designed actors who are presumed, by definition, to determine the use (and, ultimately, the constraint) of state power.[656]

Judges must balance between state-centred constitutionalism and transnational (global) governance, especially all the national and international tools that protect good governance.[657] Judges must understand that blocs such as Africa Union may interpret human rights situations in Zimbabwe through a peer review approach whereas the EU and western countries use the dual legitimacy approach where, through rationality and democracy test, governance and governmental elements are intertwined.[658]Judges or litigants who criticise the EU and western approach must also do so in nuanced ways such as the fact that the duality could be unconstitutional if it denies the possibility of a deliberative-based justification of supranational bureaucratic

[652] Feldman (n 651) 1.
[653] See Andräs Sajo, Book review: A New World Order 3 (4) Journal of International Constitutional Law (2005) 697-705, 697.
[654] Ibid.
[655] Ibid.
[656] Ibid.
[657] Sharon Hofisi, 'Navigating the Legal Framework for Sustainable Politics, Governance and Public Management in Zimbabwe,' in Gideon Zhou, Lawrence Mhandara and Charles Moyo, *Zimbabwe in Transition towards Transformative and Sustainable Public Governance and Management* (2022, University of Zimbabwe Publications) 28ff.
[658] See Sajo (n653).

governance.[659]Litigants and judges who support the nation-state need to also take cognizance of the fact that deliberative democracy is only promoted in instances where individual authority is increased.[660] As a result, rights constitutionalism becomes the only test to determine if the executive and parliamentarians are sensitive to the constitutional and global governance norms from a Zimbabwean perspective.

In constraining their powers, political (and other types) of judges must use the judiciary's theory of institutional dialogue to show the legitimacy of judicial review. They do so by showing the courts' readiness to dialogue with the legislature to achieve the proper balance between constitutional principles and public policies.[661]This dialogue is based on the need to present judicial review as democratically legitimate. The proponent of this approach seems to be Justice Rita Makarau who usually suspends the operation of declarations of constitutional invalidity such as those on the Public Order Security Act. When she did so, the legislature and executive capitulated and replaced POSA with the Maintenance of Peace and Order Act. The dialogue is ongoing because the judiciary does not necessarily have the last word with respect to constitutional matters and policies.[662]The exercise of judicial functions in this way also waters down the counter-majoritarian fears because the judiciary like this is aware that the executive and legislatures will always have powers to reverse, modify, or void a judicial decision nullifying legislation or which threatens social or economic policy ends.[663]

Human rights are correctly perceived as an instrument for the defence of the vulnerable except for property rights which are conceived as an instrument to protect the powerful.[664] International human rights instruments and case law however shows that property rights can be protected through human rights restrictions, proportionality principles and margin of appreciation.[665] Some protection also comes from the content of the positive obligations of ESC

[659] Ibid.
[660] Ibid.
[661] Luc B. Tremblay, 'the Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures,' 3 (4) International Journal of Constitutional Law (2005) 617-648, 617.
[662] Ibid.
[663] For instance, the *Don Nyamande* Case which threaten the job security of already vulnerable employees resulted in the amendment to the Labour Act to show the illegitimacy of the court decision.
[664] Theo R.G. van Banning, The Human Right to Property (2002, Intersentia) 7.
[665] Ibid.

rights as they relate to property rights.[666] The best form of protection of property rights is the degree of justiciability in the Constitution which enables courts to appropriately resolve the dispute by balancing the rights given to the holder and the duties carried by the bearer. An integrated approach is because property rights entail civil and social rights characteristics in many ways.[667]

Judicial Techniques that Can be Employed Under the Human Rights Constraint Model

The starting point in positivist legal philosophy is that human rights are those rights that are recognised in domestic constitutions, international treaties and other legal sources.[668] Positivism however sometimes leaves out minority rights which are not explicitly recognised in law. This permits for a functional approach to human rights which is two-pronged in nature. First, human rights should simply be seen as claims based on particular values or principles and second, they are legal rights that entail entitlements and freedoms.[669] The Court will therefore examine the substantive (based on the values or content of the right in legal and moral sources), formal (constructive, pragmatic, discursive democracy) and philosophical (varied from the form of democracy as liberal, social and so forth).[670] African societies developed their own intricate principles and rules that governed rules and principles such as *Unhu/Ubuntu*/humaneness.[671] Such ideals can be compared to the developments in the French and American Declarations in a nuanced way particularly the abstract nature of some rights. Africa's version of rights must also be understood as one where some rights are complemented by duties that do not allow the use of violence, neglect of the family or destabililisation of developmental agendas.

While comparative adjudication has not been done in Zimbabwe, each judge has the capacity to make a landmark pronouncement on constitutional rights and constitutional identity in Zimbabwe. Comparative adjudication is central

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[666] Ibid.
[667] Ibid.
[668] Ilias Bantekas & Lutz Oette, International Human Rights Law and Practice (2013, Cambridge University Press) 9.
[669] Ibid.
[670] Ibid,
[671] See M Mutua, Human Rights: A Political and Cultural Critique (2002, University of Pennsylvania Press) 72.

to the development of constitutional theory. For most jurisdictions, strategic litigation is the way to test judicial theory and philosophy, but on constitutional interpretation comparison is the principal method. Putting it all together, the judges give lawyers or litigants a chance to practice the art of writing judgments for the judges by way of heads of arguments. The judge then listens to the model discussion through the papers and through oral arguments in court. When the lawyers are addressing the court, the procedure is normally that:

- The court as case manager opens the hearing meeting through the registrar's representative
- The applicant takes the floor to introduce a point or the other party interrupts and disagree totally when they have preliminary points to raise.
- The court may or may not ask for a compromise. It may hear the preliminary points and arguments on the merits.
- The court can make suggestions during a party's address and the party can accept, reject the suggestion.
- A party may ask the court to rephrase the suggestion and then accept the suggestion.

Important actors in the case include the registrar who arrange the court roll and ensure that the parties comply with procedures laid out in the integrated electronic case management systems where necessary. The court recorder is also important in making sure the proceedings are properly captured. The court remains the time allocator. Litigants should use the elevator approach to drive their legal arguments home and to keep the order. This helps the court to try and reach an informed decision. The court then decides as indicated in the Constitutional Court Act and Rules or laws of other courts. Just like in effective participation in meetings, effective litigation in constitutional cases seem to demand a keen eye, an attentive ear, a smooth and respectful tongue, and an awareness of one's body language. The effective way which varies of course includes:

- Introducing a point and talking about it a little by giving a solid opinion and drawing the court to specific paragraphs in your papers.
- Express strong agreement or disagreement with standpoints adopted by the other party.

- Express reservation with a judge's suggestion and respectfully show why you adopt that stance,
- Pay attention to tricky questions and ask tricky questions by using positive hesitation
- Avoid questions and then give a neutral suggestion
- Accept and reject some suggestions
- Always remember to use the IRAC approach of legal analysis where you raise the issue, rule, application and conclude with a standpoint.

Occasionally observe landmark rulings by Judges of the Constitutional Court or other judges of the other superior courts. Some judges of the Constitutional Court for instance have had the following:

Judge	Landmark Case	Remarks
Chief Justice Malaba	Loveness Mudzuru v Minister of Justice and Chamisa v Mnangagwa	
JCC Paddington Garwe		
JCC Rita Makarau	Mupungu v Minister of Justice CCZ 7/21	
JCC Bharat Patel	City of Harare v Mushoriwa Madanhire v AG	No timely reasons for the dismissal of the Mushoriwa appeal serve that he would have reached a different viewpoint. Reversed the gains on water rights in Zimbabwe but reasoned judgment on freedom of expression in Madanhire case.
JCC Anne-Mary Gowora	Nyamande v Zuva Petroleum	
JCC Chinembiri Bhunu	Mushoriwa v City of Harare	
JCC Ben Hlatswayo	Hilton Chironga v Minister of Justice	