CONSTITUTIONAL LAW

IDENTITY AND INTERPRETATION UNDER ZIMBABWE'S RIGHTS CONSTITUTIONALISM

Sharon Hofisi, Ntandokayise Ndlovu & Noah Maringe
With a Foreword from **Honourable Justice Zhou**

Constitutional Law, Identity, and Interpretation under Zimbabwe's Rights Constitutionalism

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Selected acronyms

ACHPR	-	African Charter on Human and People's Rights
ACRWC	-	African Charter on the rights and Welfare of the Child
CEDAW	-	Convention on the Elimination of all forms of Discrimination against Women
CPR	-	Civil and Political Rights
CRC	-	Convention on the Rights of the Child
ICC	-	International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ECOSOC	-	Economic, social, and cultural rights
ICJ	-	International Court of Justice
R2P	-	Responsibility to Protect
TWAIL	-	Third world approaches to international law
UN	-	United Nations

Acknowledgments

We would like to thank Honorable Justice Zhou, Judge of the High Court Harare, for the foreword in this book. If we may paraphrase his foreword, constitutional interpretation is like choreography about normative blueprints in a country. Constitutional interpretation and identity are captivating in a novel way. We thank the reviewers whose feedback enhanced the content of this book. We also appreciate various organizations and individuals whose works are available. While Chief Justices wear difficult hats, we also appreciate how different chief judges have shaped Zimbabwe's constitutional jurisprudence. As authors who value collaborative scholarship beyond academic silos, we realised that the sound of one hand clapping may sometimes be heard by an individual. Interdisciplinary scholarship shapes cross border constitutionalism in unique ways. For constitutional identity to flourish or even exist, a certain philosophical precondition is indispensable: constitutional interpretation that is clearly distinguished from ordinary statutory interpretation.

In constitutional litigation, as in life, the successful among us do not leave their constitutional futures to chance; they plan meticulously. It's about knowing where you're heading and setting up the right steps to get there. This isn't just about working hard as a constitutional lawyer— it is about working smart with a clear end in mind. Why plan? Planning gives you direction and purpose. Planning gives your daily efforts direction, turning routine tasks into stepping stones towards your larger goals. Without a plan, lawyers often react to client demands without progressing towards strategic litigation goals, leading to burnout and inefficiency. Through perusing different constitutional cases all litigants and the legal fraternity can start to plan effectively simply because if, "*You don't plan to fail, you fail to plan.*" We also thank all those who will engage with this book through book reviews and critiques.

Foreword

The Constitution of Zimbabwe which came into operation in May 2013 ushered in new dimensions in constitutional discourse. There can be no better way of unpacking these dimensions than through academic inquiry and interrogation of the diverse facets of the constitution from different perspectives. *Constitutional Law, Identity, and Interpretation Under Zimbabwe's Rights Constitutionalism* has thus come at an opportune moment in the constitutional history of Zimbabwe. It will greatly assist the judicial officers in Zimbabwe who have hitherto been vexed by attempting to transpose to the local context meanings ascribed to constitutional provisions in other jurisdictions.

Evidently, the text prioritises the judiciary as a special constituency in its thrust. This is clear from the numerous aspects of the work that are dedicated to judicial interpretation of and interface with the Constitution in particular, and constitutional law in general. This renders the text a necessary tool for every judge to have. That approach espoused in the text is not without justification when one considers the strategic position of the judiciary in a constitutional democracy such as one that Zimbabwe clearly aims to attain. The wise words of Rose E. Bird, American Jurist and Chief Justice of the Supreme Court of California, in *Los Angeles Times*, November 16, 1977, are apposite:

> "The courts hold a unique position among our democratic institutions. In a sense, they represent one of our last bastions of participatory democracy, in which disputants go directly before a judge or jury to resolve an issue. In no other governmental context could an individual take a problem to a decision-maker who represents the full force and power of that particular branch of government. This direct interchange between the individual and the state is at the heart of the democratic process . . . We must protect this unique heritage and strive to preserve the values it represents."

The work traverses a diversity of topics such as the interface between justice, politics and human rights and challenges and deconstructs traditional models of constitutional interpretation. Elsewhere, I hinted that the current Constitution of Zimbabwe demands a new thinking, a new mindset, and cannot be entrusted to those whose minds are sunken in the past way of reading a constitution. Like Paul at Damascus, the current constitution calls for a true conversion to a new way of "constitutional thinking", one that

"eschews the austerity of tabulated legalism" as was urged by LORD WILBERFORCE in the celebrated case of *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319(PC); [1979] 3 All ER21(PC). Without a judiciary with a changed mindset, the constitution becomes like a luxury bus entrusted in the hands of a driver of an illegal pirate taxi commonly known in Zimbabwe as "*Mushikashika*". In this respect, the title of Chapter 9 of the text is very piercing: "*Time to delink constitutional from ordinary statutory interpretation*". Alternative approaches to constitutional interpretation are postulated in the text.

The delicate subjects of fundamental rights and essential features of the constitution are unpacked with amazing profundity and clarity for the reader to readily understand them. The message is clear from the text, that protection of these fundamentals is by no means fodder for a faint-hearted judiciary or one that is predisposed to placating its political appointers. Yet the text also cautions against judicial overreach by unpacking the mechanisms inbuilt in the architecture of the Constitution to enable the judiciary to appreciate the parameters of its authority. In summary, the text is a ground-breaking work in the constitutional history of the country. Academics, students, judicial officers, lawyers in private practice and in government, legislators and other stakeholders will find it useful in understanding the constitutional issues that affect the day to day lives of every person, natural or juristic.

HONOURABLE JUSTICE H. ZHOU. JUDGE OF THE HIGH COURT (HARARE)

Preface

This book provides an explanation of rights constitutionalism, constitutional identity, and constitutional interpretation in Zimbabwe. Zimbabwe has a progressive Declaration or Bill of Rights (BOR) which makes a broad range of rights justiciable. Justiciability makes those rights judicially reviewable by courts with the competent jurisdiction to hear constitutional rights cases. The rights and freedoms that are called constitutional rights and are enforceable by the courts are part of what are called generations of human rights and freedoms. The generations are not used to show that one category of rights is superior to others. They are used as part of 'universal' human rights language. The triangle of statehood prioritised sovereignty, territorial integrity and independence, giving rise to the first generation of human rights, or include civil and political rights. Most of these rights were first contained in the soft law, the Universal Declaration of Human Rights (UDHR) and later in the International Covenant on Civil and Political Rights (ICCPR). When the ICCPR was ratified by states, Zimbabwe was still fighting for self-determination. After independence in 1980, the Government of Zimbabwe (GoZ), acceded to be bound by the ICCPR. They could not ratify ICCPR because they were not original negotiating parties to the ICCPR.

The second generation of human rights contains economic, social and cultural (ECOSOC) rights. These are rights that are largely contained in the International Covenant on Economic, Social and Cultural Rights (IESCR). Most of these rights are not justiciable in many constitutions since they are only included in the national directives, or the national objectives if we refer to Zimbabwe's constitution. Zimbabwe has a unique constitutional identity which has justiciable ECOSOC rights that include freedom from conscience, marriage rights, freedom from eviction, rights to education, healthcare, food and water and so forth. Judges are obligated to interpret such rights from the perspective of justiciability. The ECOSOC rights that are not included in the Bill of Rights such as right to social security or youth rights can be protected using various standards used by different courts to protect non-justiciable rights. Litigants and justices familiarize themselves with different standards of review of justiciable ECOSOC rights. States use deliberative democracy, reasonable standards of review, minimum core tests, margin of appreciation, availability of resources and proactive legislative measures to protect such

rights. Justiciable ECOSOC rights must be interpreted differently from those contained in the national objectives. This approach was, for example not adopted by the Supreme Court in *City of Harare v Mushoriwa*, SC 54/20. ECOSOC rights also benefit from the CESCR general comment is that details the standards of determining the government's commitment to make those rights reasonable. The City of Harare judgment can be compared with the following position taken in *Kwenda v Kwenda* SC 73/14 that:

> **Is there any basis upon which the above finding can be impugned?**
> I think not. As stated by GUBBAY CJ in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) 62 F – 63A:
> "It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing."
>
> Attention should also be drawn to the recent decision of this Court in *Pharaoh B. Muskwe v Douglas Nyajina and Two Others* SC 59/14.

Most of the standards on ECOSOC rights relate to availability, accessibility, quality and affordability of shelter, healthcare, education, or food and water. It is time Zimbabwean courts detail such tests in their decided ECOSOC cases. South Africa has detailed a lot of what has come to be called South Africa's reasonable standard of review test in ECOSOC rights. Zimbabwean courts can use South African cases to popularize a Zimbabwean approach on interpreting ECOSOC rights using cases such as *Soobramoney v Minister of Health* [1997] ZACC 17, 1998 (1) SA 765 (CC), *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C), *Government of South Africa v Grootboom and Others* (CC11/00) [2000] ZACC 19; 2001 (1) SA 46, 2000 (11), BCLR 1169; *Mahlangu and Anor v Minister of Labour & Others* (CCT 306/19 (2020) ZACC 24; 2021 (1) BCLR 1 (CC). The *Kwenda* case and cases above are important in making sure that courts always furnish reasons for their reasoning in dismissing or granting the relief sought in Mushoriwa ECOSOC cases. The case also showed how soft law must be used to achieve justice. Justices must not simply reject the UDHR on the basis that soft law is not binding. Constitutional interpretation of

ECOSOC rights is supposed to be consistent with international law. Soft laws such as the UDHR, general comments, committee reports, and so forth give detailed content on how to protect certain ECOSOC rights. They can also be used to interrogate when jus cogens (peremptory norms) become legal obligations (erga omnes) in international law.

The third generation of rights are collective or group rights. Zimbabwe's Bill of rights has third rights such as right to a clean environment or intergenerational environmental rights. These rights require judges to interrogate near binding soft environmental law such as the common articles in the Stockholm Declaration and Action Plan for the Human Environment, Agenda 21, and the Rio Declaration. These soft laws can be read together with the United Nations Framework Convention on Climate Change (UNFCC), and the Convention on Biological Diversity. Regional treaties such as the Single European Act, Treaty of Maastricht, Treaty of Amsterdam, Treaty of Lisbon can help courts to consider advanced constitutional jurisprudence in nuanced fashion, bearing in mind the interpretation guidelines in section 46 of the Constitution. There are peremptory principles of environmental rights such as precaution, prevention, polluter pays, good neighborliness, rectifying pollution at source, environmental sustainability governance (ESG), and environmental impact assessment. Specific treaties such as the Convention on International Trade in Endangered Species (CITES), can be analysed meticulously using the guidelines in sections 34, 46, 326, and 327 which deal with how international law must be applied in the Zimbabwean perspective.

Zimbabwe's constitution also protects fourth generation rights. Section 52 of the Constitution protects the right not to be subjected to medical or scientific experiments, or to the extraction or use of their bodily tissue, without their informed consent. A reading of section 52 shows that no one can be subjected to guinea pig experiments without their consent. Fourth generation rights are largely technological rights. They interlace with various aspects of the right to personal security such as freedom from all forms of violence from public and private sources. Test case litigation on honour-related violence that is widely publicised on various social platforms can be used to protect personal security as contemplated by the Constitution. With the different generations of rights

entrenched and made justiciable under the Bill of Rights, constitutional rights litigants, interveners, amici, and the courts must not simply focus on the fact that there are justiciable rights. They need to understand the general and procedural limitations to the substantive rights in the BOR that are contained in sections 86 and 87 of the Constitution. They also need to pay attention to technical issues or elements of determining justiciability of Rights in the BOR such as legal standing clause in section 85, competent jurisdiction clause in section 167, the nature of the persons claiming rights (whether natural or artificial), whether a right has been violated, the existence of a court with competent jurisdiction to protect the violated rights, whether the right is limited or absolute in its frame and content, whether it is for every citizen, every person, and so forth. Some rights are clear that no person may be deprived of such rights. They are crafted as non-negotiable or non-derogable justiciable rights. The usage of the term '*may*' does not necessarily mean directory language for such rights. The term '*may*' can be more peremptory than '*shall/must*'. Section 86 (3) of the constitution makes it clear that certain rights are not limited because:

(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—

- *(a) the right to life, except to the extent specified in section 48.*
- *(b) the right to human dignity.*
- *(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.*
- *(d) the right not to be placed in slavery or servitude.*
- *(e) the right to a fair trial.*
- *(f) the right to obtain an order of habeas corpus as provided in section 50(7)(a).*

The usage of 'may' can also be compared to peremptory norms (*jus cogens*) of general international law. When determining whether customary international law is consistent with the constitution or national law as contemplated in section 326 of the Constitution, it should be noted that a rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law. Peremptory norms of general international law create obligations that are owed to the international community, called,

obligations *erga omnes*, in which all states have interest. States therefore balance the triangle of sovereignty with elements of people's sovereignty when protecting obligations *erga omnes*. The non-negotiable rights in section 86 (3) have attained the status of such obligations even though Zimbabwe has not ratified the Convention against Torture (CAT). The significant thing is that the constitution makes the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment justiciable and properly entrenched.

When determining justiciability of constitutional rights, addressing technical aspects is important because preliminary arguments can be raised against shoddy or shoddily drafted constitutional cases. Zimbabwe has a Constitutional Court (CCZ) with rules that explain how litigants must operate. Litigants must know that the CCZ is the apex court in constitutional cases and has competent jurisdiction in matters relating to separation of powers between the judiciary, executive, and the legislature as contemplated in section 167. As such, litigants must familiarize themselves with the rules, cases, laws, and working practices or directions of this court. Critical issues include:

- the Constitutional Court of Zimbabwe Act
- The consolidated Constitutional Court Rules available at Veritaszim website.

The long title of the Constitutional Court of Zimbabwe Act shows that the enabling law is meant:

> To provide for the manner in which the Constitutional Court may exercise its jurisdiction; to confer additional jurisdiction upon the Constitutional Court; to provide for the powers, practice and procedure of the Constitutional Court; to provide for the making of rules and regulations in connection therewith; to make provision for appeals from decisions of inferior courts; and to provide for matters incidental to or connected with the foregoing.

The Act also reproduces section 167 of the Constitution which has been invoked countless times by the Constitutional Court and other courts regarding the Constitutional Court's competent, additional, statutory, and concurrent jurisdiction in constitutional matters. Section 176 of the Constitution also creates inherent jurisdiction for three superior courts, the

High, Supreme, and Constitutional Courts. The High Court is no longer the only court with inherent jurisdiction as expressly provided for in the constitution. What this means is that litigants who invoke the High Court's inherent jurisdiction and ignore the need to read it together with concurrent and competent jurisdiction of the other superior courts, do so at their own peril. For instance, section 167 must be prioritised together with other technical issues relating to locus standi. The section is framed thus:

167 Jurisdiction of Constitutional Court

(1) The Constitutional Court—

(a) is the highest court in all constitutional matters, and its decisions on those matters bind all other courts;

(b) decides only constitutional matters and issues connected with decisions on constitutional matters, in particular references and applications under section 131(8)(b) and paragraph 9(2) of the Fifth Schedule; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(2) Subject to this Constitution, only the Constitutional Court may—

(a) advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of this Constitution;

(b) hear and determine disputes relating to election to the office of President;

(c) hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President; or

(d) determine whether Parliament or the President has failed to fulfil a constitutional obligation.

(3) The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force.

(4) An Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court.

(5) Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court—

(a) to bring a constitutional matter directly to the Constitutional Court;

(b) to appeal directly to the Constitutional Court from any other court;

(a) (c) to appear as a friend of the court.".

What is clear from section 167 which all litigants in constitutional matters must follow is that the Constitutional Court has competent, statutory, concurrent, and exclusive jurisdiction in four broad situations which we may call the square of the Constitutional Court's competent jurisdiction:

- Disputes relating to the President

- The constitutionality of legislation
- Confirming orders of constitutional invalidity before they can take effect
- Assessing the fulfilment of obligations by the President or Parliament of Zimbabwe.

Litigants who ignore the above do so at their own peril. Litigants, whether they approach courts through strategic, public interest, impact, or general litigation, must disabuse themselves of the differences between section 167 and the legal standing provision in section 85 of the Constitution. Specifically, section 85 deals with matters litigated before the Constitutional Court or other courts through public interest litigation by individual or group litigants. They must allege that a fundamental right or freedom enshrined in the Bill of Rights or Chapter 4 of the Constitution, has been, is being, or is likely to be infringed, and the court they approach may grant appropriate relief, including a declaration of rights and an award of compensation.

Using the square of the Constitutional Court's competent jurisdiction, section 167 of the Constitution, in contradistinction with section 85, focuses on procedural steps relating to the Constitutional Court's jurisdiction in specific matters that cannot be litigated before certain courts, including the High Court. The case of *Ndewere v The President of the Republic of Zimbabwe and Ors*, SC 13 /23 is landmark in this regard. While section 85 (1) allows any person so described in that section to approach a court alleging a violation of a right, section 167 focuses on the procedural framework governing constitutional challenges of specific acts by the President and so forth. When approaching the Constitutional Court, section 167 should trigger in the litigant's mind issues such as:

- Jurisdiction that is exclusive or competent to the constitutional court or other courts
- Procedure to be followed when confirming orders or approaching the Constitutional Court directly or indirectly
- Justiciable rights which fall under the Constitutional Court's exclusive jurisdiction
- Timelines and technical issues laid down in the Constitutional Court's Rules.

It is important to remember that some rules of practice have now been codified. Litigants may however respectfully implore the courts to pay less attention to their timelines relating to oral arguments. While judges read papers, there is nothing amiss with presuming that they have misread the arguments in the papers. When allocated times are exceeded, litigants must avoid inviting unpalatable comments or legal banters from the judges such as '***counsel, can you stop***, ***why don't you admit your ignorance of the law relating to sections 85 and 167, I do not want you in my hands*** and so forth.'

What needs to be avoided include:

- Grandstanding especially in matters involving national security.
- Filibustering or speaking at inordinate length on matters already canvassed in your heads of argument.
- Beating around the bush or avoiding answering critical simple questions that amount to stalling or wasting the court's time.
- Circumlocution or using many words when fewer words will do. Courts normally call this deliberate attempt to be vague, evasive, or frivolous, and vexatious.
- Pounding the table referring to how lawyers without facts or the law try to appear to passionately make their point or express their opinion in a forceful manner.
- Padding the argument to refer to lawyers who fail to argue meticulously, stupendously, ingeniously, resiliently, astutely, and tenaciously.
- Barking the wrong tree, mistaken emphasis in a specific context, or pursuing wrong litigation routes or remedies.
- Putting the cart before the horse or how things are done contrary to trite positions or in wrong order especially relating to exhaustion of internal remedies.

In fact, the court as the case and court manager sometimes realises the litigant or their lawyer are playing to the gallery or intend to make people in the gallery to cast aspersions on individual judges or presiding officers. The court comes short of saying the litigant is waffling, rambling, verbose, or vending empty rhetoric. There are humorous lawyers however who seem like they are crying when talking about certain rights violations and you probably know them.

In all the above, court relations demand common courtesy between the judges, lawyers, and litigants. But most important of all is legal knowledge or lack of it. Sometimes you hear judges saying in angry tones, '***Counsel, why don't you admit your ignorance of the difference between sections 85 and 167 of the Constitution***!' Appropriate language is an integral part of the litigation process. This book provides some insights into the constitutional law, interpretation, and identity under Zimbabwe's human rights-based constitutionalism. Litigants must also prioritise how reading the consolidated Constitutional Court Rules as at 2022 provide for key issues which must be understood and observed by litigants, including those relating to time limits. Key issues relate to:

In terms of Zimbabwe's constitutional identity, it was shaped by the colonial constitutions of 1923, 1961, the Unilateral Declaration (UDI) Constitution, and the ceasefire charter, also called the Lancaster House Constitution in 1979/1980. The 1980 constitution was amended 19 times, with the Constitution of 2013 borrowing from the amendment hangover and being called, *Amendment 20*. While the 2013 constitution was simply supposed to be called, the Constitution of Zimbabwe, 2013, its '*Amendment 20*' label demonstrates how the

quest for *constitutional identity* in Zimbabwe was seen in the nineteen amendments that preceded the adoption of a homegrown constitution in 2013. In terms of political and constitutional identity, Zimbabwe is a constitutional democracy. This means that it has a supreme written constitution (*constitutional sovereign*) as the basis for its constitutional governance system. The supremacy of the constitution is captured in the supremacy clause and other constitutional provisions.

Constitutional identity describes the agreed or foundational principles that describe a constitutional system in a country. For Zimbabwe, the foundational principles are those listed in section 3 of the Constitution and in various provisions describing good governance, institutional operations, devolution, and public administration in Zimbabwe.

The constitutional system describes the whole body politic, or structure of the constitutional set up in a country as shown by the state-citizen interactions. The interactions can be through civic groups or the third sector or fourth estate (media). Zimbabwe's constitutional system is different, for example, from the United Kingdom which is a constitutional monarchy and has a monarch (*king and queen*) as its Head of State and Prime Minister as the Head of Government. Zimbabwe's political system enjoys what can be called, '*the best of many worlds of presidential systems*,' as the Head of State and Government is an executive president. He also commands the Zimbabwe Defence Forces and heads the National Security Council. This is different from other countries where the Head of State could be a titular president or monarch, and the Head of government could be a Prime Minister. Zimbabwe is also a presidential constitutional system because the Zimbabwean president has very enormous legislative powers although the people who directly elect him, jointly and severally, remain the repositories of governmental power. The President also enjoys more powers under the concepts of separation of powers and separation of functions than the other two arms of the state, that is, parliament and the judiciary. This distinguishes Zimbabwe from parliamentary systems like South Africa or the UK that grant parliament powers to control the executive.

Zimbabwe's parliament is '*sovereign*' in some sense. Parliament consists of two houses, the National Assembly and Senate. Together with the President, they

form the legislature or law-making arm of the state. Parliament and the President have different roles in the administration of the legislative functions in Zimbabwe. They meet through legislative agendas, state of the nation addresses (SONA), ministerial engagements and other events like the opening of Parliament. All the three arms of the legislature have true power. The executive kick-starts the law-making process through Cabinet. Cabinet consists of the President, as head of the Cabinet, the Vice Presidents and such Ministers as the President may appoint to the Cabinet. This position is enshrined in **section 105** of the Constitution as amended at 2023. Cabinet is chaired by the President, Vice President or minister designated by the President, failing which, the minister is appointed by Cabinet. The President is obligated to act on the advice of Cabinet in his or her discharge of executive duties, except for those functions carried out under section 110 (2) of the Constitution.

The National Assembly introduces, debates and drives the bills that will eventually become Acts of Parliament if they sail through the Senate and are signed by the President. Acts of Parliament can also be called *primary* statutes or legislation and can be distinguished from secondary or delegated legislation. Delegated legislation refers to laws that are made by bodies that are empowered by an Act of Parliament to make certain rules, ordinances, statutory instruments, regulations, administrative directions, circulars, and so forth. The National Assembly is made up of 280 elected members called Members of Parliament (MPs), divided into 210 MPs elected from constituencies, and quota system beneficiaries made up of 60 women and 10 youths. The Senate is made up of 80 members divided into 60 senators elected from ten six-member constituencies using proportional representation, 18 chiefs, and 2 persons with disabilities. Those who are elected from constituencies or specific geographical areas of Zimbabwe are elected either during a general election, harmonized elections, or at by-elections following recall of MPs, death, retirement, or conviction of an MP or senator.

Zimbabweans over the age of 18 can vote in an election, decided by winner-takes-it-all for elected parliamentarians and 50%+1 for the president. For the House of Assembly members, the winner-takes-it-all is also called *first-past-the-post* because the constituency elects one MP from different political parties

under Zimbabwe's multiparty democracy entrenched in section 3 of the Constitution. The candidates who obtain the most votes win the parliamentary seat even if they get the absolute vote or more than 50% of the vote. This system explains why, through legal reform, different political parties must benefit from proportional representation because the winner-takes-it-all approach usually leads to disproportionate representation when a country has dominant parties. Zimbabwe has been having at least two dominant parties after the year 2000, ZANU PF and one dominant opposition party (Movement for Democratic Change, MDC-T, MDC-Alliance, or Citizen Coalition for Change). Sadly, currently, Zimbabwean MPs do not have protection through a due diligence clause when they are to be recalled from Parliament. The Speaker of Parliament and courts of law have largely followed a narrow interpretation that mere receipt of a letter of recall from a political party will cause the MP to lose their seat. Although elected under indirect or representative democracy, MPs so recalled are left to challenge the recall in courts of law, and in most cases, face a narrow interpretation of their right to remain in Parliament.

To prevent the disproportionate votes in favour of one dominant political party, Zimbabwe has a concept of ten six-member constituencies because Zimbabwe is divided into ten provinces for electing senators. Zimbabwe does not distinguish between lower and upper houses of Parliament. It is constitutionally wrong to call the National Assembly lower house or the Senate upper house of Parliament. The constitution envisages two separate but equal houses, each doing its own allocated roles. The Speaker of Parliament even wields powerful roles when compared to the Senate President. At one time during a presidential void in Zimbabwe, when President Robert Mugabe resigned and in the absence of Vice President Mphoko from Zimbabwe, the Speaker of Parliament assumed the presidency. He assumed executive functions including inviting delegates to attend the inauguration of a new president. He remained so until the inauguration of President Emmerson Mnangagwa in 2017. We have shown that Zimbabwe is divided into ten areas or constituencies, each electing 6 senators and altogether electing 60. If a party wins 50-100 percent in the constituency, it gets 3-6 seats for the senators. If it gets about 33% of the votes, it gets two seats. The system is designed to ensure different political parties or independent candidates can win seats in each senatorial area in a manner that is different from MPs who win with the most seats in their constituency. The thresholds for calculating the seats to be won

depend on the number of people in the constituency and are designed to ensure fair senatorial representation.

The winner-takes-it-all system for MPs and proportional representation for senators explain why MPs and senators can produce more votes compared to a presidential candidate. The simple math should not be politicized or factionalized. A single constituency can indirectly influence votes from supporters of different political parties and those who prefer a particular senator. MPs are indirectly elected from a party list (different from proportional representation) to be the elected representatives who make decisions on behalf of the constituency members. Technically, while indirect democracy is common in parliamentary systems where votes for a party determine the number of seats it gets, Zimbabwe's system is that votes for a party candidate (including the party in the air for independent candidates) determines the votes a candidate wins or loses a seat. Zimbabwe's MP appointments also reflect characteristics of direct democracy because individual MPs are directly chosen by voters in a constituency. This makes Zimbabwe an *a la carte* electoral system where voters plate their food based on a different menu. Because MPs are indirectly or directly elected that ever way one prefers, voters in a constituency may vote for a candidate MP of one party together with a candidate councillor of another party, candidate senator for another party and candidate president for another party.

The numbers also influence who gets how many votes when it comes to senators. Senatorial elections in Zimbabwe do not follow a presidential system. A parliamentary system is used where senators are indirectly elected through proportional representation or strict party list system. The votes amassed by a political party are used to determine the number of seats it gets. This situation is confusing because voters cast their ballots for political parties rather than individual candidates as is the case with MPs. The total votes serve as a pre-determined system to enable political parties, and not voters, to directly choose which senator fills those seats. The appearance of senators on the ballot seems to make the actual process conveniently political. This differs from how individual MPs are elected by constituency voters. In contrast to MPs and senators, the Zimbabwean president is directly elected by joint registered voters. This means that each vote counts in assessing the final presidential

candidate without intervening steps requiring all registered voters to cast votes for a presidential candidate of their choice. The one with the most votes will win under what the constitution calls *direct appointment* of the President. The intervening steps for parliamentary candidates involve vote counting for National Assembly members and allocation of seats to senators based on a political party's performance. It should also be based on a political party's decision-making processes on which candidate will get those senatorial seats. To speed up the election, Zimbabwe allows names of senators to appear on ballot papers after pre-election inhouse decisions.

Mathematically, before one thinks about voter suppression, factionalism, voter apathy, and rigging, National Assembly members and senators can get more votes than the presidential candidate and vice versa. This is because individual MPs pool voters for themselves and individual senators pull votes for party allocation of senatorial seats. The votes are not pooled to directly select a president. For a direct presidential appointment, each vote, whether from the MP's party supporters or senator's political party, contributes directly to the final votes received by a president who must win a national mandate to lead Zimbabwe. The results follow the cause. Where voters dislike their political party president, they can vote for a councilor, MP, and senator of their choice from their political party and then team up with other voters to choose a president from another party whom they want to directly appoint or give the national mandate. This is different from systems like South Africa where the lower house of Parliament decides who becomes president from among its members, under the supervision of the chief justice. This system explains why parliament can easily remove presidents in South Africa although when one is elected President, they cease to be a member of the National Assembly. The Zimbabwean president also suffers from the 50% + 1 threshold required of him to win the national mandate. It is not 51% but 50%+ 1. This simply means that the presidential candidate must amass more than 50% of the total votes.

If the candidates fail to achieve the required presidential threshold, an impasse is declared, and a presidential runoff election is declared between the top two candidates. The parties must campaign again as required by electoral laws an election rerun or presidential runoff election. Historically and regrettably,

Zimbabwe had an electoral bloodbath and a very bad constitutional moment towards the June 2008 presidential runoff, frequently referred to as a *runover* because many people lost their lives due to politically motivated violence. This led to an interparty agreement, the Global or general Political Agreement that ushered in a government of national unity (GNU). There is no rationale for sticking to the 50%+1 in a country that already has direct democracy or direct appointment of the president. Technically, the 50%+1 is meant to ensure that the presidential candidate must demonstrate their national appeal or support. The national president must thus be different from an MP who can win with the most votes even if they are less than 50% of the votes in a single constituency. The president who must secure an absolute majority to get a national mandate, must be different from MPs who win in single districts or senators who benefit from their political party's nationwide support. Essentially, Zimbabwe's *a la carte* constitutional or political system shows that in single constituencies, political parties or individual candidates with the most local support will win in single constituencies and dominant parties or candidates will win the most seats in the National Assembly. In proportional areas, smaller parties or less dominant political parties can also win. To have a strong people's and national mandate to be the custodian of the constitution and constitutional government, a national president must garner 50%+1 or absolute majority of the votes cast.

To emboss Zimbabwe's constitutional identity, the main constitutional principles that build Zimbabwe's constitutional structure or society include democracy, constitutionalism, respect for the liberation struggle, human rights, separation of powers, rule of law, vested rights, free and fair elections, multiparty democracy, and constitutional devolution of power. Zimbabwe's constitutional system has a range of constitutional features relating to state sovereignty (*section 1*), constitutional sovereignty (*section 2*), people and individual sovereignty (*main preamble*, *Declaration of Rights, and devolution preamble*) and tier system of governance (*section 5*). The highest sovereign or Grundnorm, is the Constitution, whose supremacy clause affirms that any law, conduct, tradition or custom that is inconsistent with the Constitution is void to the extent of its inconsistency. The Grundnorm concept is employed here from Hans Kelsen who coined the term and used it to show how national

sovereignty also gets legitimacy from the people and international governance norms. People's sovereignty is captured under the '*We the people of Zimbabwe*' clause in the main preamble and all the provisions scattered in the constitution which show that the people of Zimbabwe are the repositories of state and government power.

Talking points on Zimbabwe's constitutional jurisprudence

University teaching curriculum should be broadened to expose students to various constitutional rights, systems, and nexus between the African, European, Inter-American and other systems. Critical literature on identity, legal systems, include

- Raes Koen, *Communicating legal identity: A note on the counter factuality of legal communication*
- Recommendations of the Council of Europe Commissioner for Human Rights on systematic work for implementing human rights at the national level, Strasbourg, 18 February 2009, CommDH.
- Hathaway Oona, do human rights treaties make a difference? 111 Yale Law Journal 2002, 1935-2042.
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- Hirschl Ran, The new constitutionalism and the judicialization of pure politics worldwide, 75 Fordham Law Review 2006, 721-754.
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- O' Flaherty Michael, Reform of the UN Human Rights Treaty Body System; Locating the Dublin Statement, Human Rights Law Review, 2010, 319-335.
- Odello Marco & Seatzu Francesco, The UN Committee on economic, social, cultural rights: the law, process and practice
- Human Rights and Gender Violence, translating international law into local justice, Chicago University Press, 2006.
- Bentham Jeremy, the limits of jurisprudence defined, 1945.
- Hohfield W. Newcomb, Fundamental legal conceptutions as applied in judicial reasoning, Westport 1978, 36-38.
- Ras Joseph, The concept of legal system, 1980.
- Dworkin Ronald, A matter of Principle, 1985.

State sovereignty in Zimbabwe is captured in the state sovereignty or triangle of statehood clause which shows that Zimbabwe is a sovereign, unitary, and

democratic Republic. State sovereignty is built around multiparty democracy and the participation of Zimbabwean people in the good governance of their polity. The principles of good governance are laid down in the founding values, chief among them being transparency, accountability, responsiveness and justice. Section 9 of the Constitution adds factors such as competence, efficiency, personal integrity and financial probity in administering state institutions, agencies of government and public institutions. There has been a party system of some kind since 1923 because the political party with the most parliamentary seats and a president elected by the people will form the government of the day. The political party in government chooses its members of the executive arm of state to implement the domestic and foreign policies of the state. The president of the ruling party issues presidential statements that are used to formulate Zimbabwe's official government policy cycles. Political party manifestos also become government policies. The president of the party in government also determines what is in the interests of national security as contemplated by section 109 of the Constitution which makes him the chairperson of the National Security Council.

Zimbabwe's voting system allows for independent or fly-by-night presidential candidates who are seldom elected. This is the beauty of multiparty politics envisaged by the constitution. The party which wins the presidency forms the Government, hence Zimbabwe has a presidential system of government. In parliamentary governmental systems such as the United Kingdom (UK), the party with most seats forms a government that is led by a Prime Minister. Zimbabwe does not have a constitutional recognition of a largest '*minority*' political party that is officially called the Opposition. This explains why the MDC Alliance and Citizen Coalition for Change (CCC) before its disintegration turned away the offer to be the official opposition after the disputed 2018 and 2023 elections respectively. In the UK, the recognition of the Government and Opposition is a matter of their parliamentary system and demonstrates that the Opposition recognises the majority party's right to run the country, while the majority party accept the minority party's right to criticise it. Without this agreement, the UK's parliamentary system would fall. This agreement is only made where both parties accept the legitimacy of the election. The MDC-Alliance and CCC's rejection of the offer of official recognition from the ruling ZANU PF was based on contested legitimacy or the disputed elections between ZANU PF as the winning party and MDC-

Alliance and CCC as losing parties who believed the elections were stolen. Parliamentary systems usually have some *living* coalition government of some sort between majority and minority parties. In contrast, presidential systems like Zimbabwe strive for one party's dominance in national government.

Political parties wield their power in parliament. Parties with 2/3 of the MPs control the introduction, debating and promulgation of laws in Parliament. They also influence the constitutional amendment processes as was done by ZANU PF in the first two amendments to the 2013 Constitution as at 2023. They also benefit from senators who can approve certain bills or their ruling party-cum-state president who can sign the bills into law. Bills with adverse reports from the people can also be brought back to a Parliament that is controlled by one party for promulgation into law under such arrangements. Besides MP majorities, ruling or winning parties also control administrative majorities such as:

- Speaker and deputy Speakers who is appointed by the dominant party in Parliament to lead Parliament and keep order in the House during debates.
- The government seat.
- The front benchers or Cabinet Ministers.
- The Clerk of Parliament.

The chief whips of the represented political parties sit without order of a separate shadow cabinet as is the case in other countries. The legislative powers of the president are constitutionally regulated and must be based on advice from Cabinet. A ruling party with many if not all ministers drawn from the party would mean the party can easily influence the government business in Parliament. The President has no direct role when it comes to Cabinet's ministry-based discussions. The only important decision the President can do is to dominate the outcome or Cabinet resolution. This is because Cabinet minutes and agendas are discussed sequentially. The current Cabinet structures leave a lot to be desired because firstly, the permanent secretaries who are chief civil servants are left out. A permanent secretary should be the voice between civil servants and the President who is the custodian of the Constitution. The permanent secretary is also an extraordinary civil servant who must be trusted by the executive. Secondly, there is no reason why

Zimbabwe should retain deputy ministers since they do not seat in Cabinet. Thirdly, following the formation of the National Security Council as a constitutional body, the Joint Operation Command (JOC), must be represented in Cabinet. This would enable JOC members from various security institutions to understand government business. This would help them understand good governance principles and when they make decisions, Cabinet can answer them.

Fourthly, Zimbabwe's Cabinet does not have room for permanent and non-permanent seats. Such seats can be used to accommodate other pillars of the state which promote accountable governance such as the media (*fourth estate*) and civil society (*fifth estate*). When dealing with the media or civil society, their representatives could come for sessions on a non-permanent basis. This would improve the quality of engagements between the national government and people-driven institutions. This would also non-permanent institutions such as JOC to respond to civil society and the media during those sessions. Effectively, the engagements will democratize Zimbabwe's constitutional identity, moments, structures and deliberations.

In terms of separation of functions between the three arms of government, the Acts of Government (AOG) in Zimbabwe are made in the name of the Government of Zimbabwe (GoZ), although the President as His Excellency (HE) appoints ministers and judges. Ruling and opposition MPs contribute to the acts of government because even where one party controls 2/3 majority, the other MPs participate in the adoption of laws. Occasionally, opposition MPs can be appointed ambassadors, thereby influencing Zimbabwe's foreign policy. In a government of national unity such as the one Zimbabwe had between 2009 and 2013, everything is done on the advice of the elected or compromise agreement. For Zimbabwe's GNU, the interparty agreement, Global or general Political Agreement (GPA) provided the framework of governmental operations albeit generally. The parties allocated each other seats under the auspices of the GPA although concerns were raised that ZANU PF got the most important ministerial posts.

While Acts of Parliament and Cabinet decisions drive national policy in Zimbabwe, local authorities, state agencies, and metropolitan provinces under

the tier system of decentralized government provide services that are critical to the implementation of national policies. Zimbabwe's government tier system is divided into metropolitan provinces or cities (*Harare and Bulawayo*) and local authorities (*rural and urban councils*). Each province has an urban and rural district council. Apart from state sovereignty, individual sovereignty is captured in the people sovereignty clause and under the Bill of Rights. This book will explore how rights constitutionalism has moved from experimental constitutionalism characterized by hurried and highly litigious interpretation of the constitution, to progressive constitutionalism, where litigants would draw from various jurisdictions and even challenge the inherent jurisdiction of courts such as the High Court. The latter shows how inherent jurisdiction for instance competes with competent jurisdiction in matters involving the three arms of government as was stated in the case of *Ndewere v The President of Zimbabwe and others*. When the 2013 Constitution was adopted, various litigants approached the courts to test their preparedness to implement the constitutional rights in Chapter 4 of the Declaration of Rights (DOR), also called the Bill of Rights in Zimbabwe. The superior courts were also prepared to uphold the constitution through the late Chief Justice Godfrey Chidyausiku's '***hands dripping with blood***' principle espoused in *Mawarire v The President of Zimbabwe and others*. The principle showed that litigants are not supposed to wait for their hands to drip with blood before they can approach courts of law to seek and enforce effective constitutional and legal remedies. Lower and superior courts were seized with important constitutional matters that shaped the constitutional jurisprudence of Zimbabwe, although the superior courts' usage and acceptance of the term '*constitutional matter*' is still polemic and debatable. The bill of the rights which forms the basis of constitutional interpretation, and the majority of constitutional matters is important because it contains:

- Justiciable and entrenched Chapter 4 rights whose form and content are constitutionally delineated. Justiciable rights are those which can be properly reviewed or adjudicated upon by the courts. The concept of justiciability deals with the question of whether legal issues can be adjudicated by a court based on legal disputes within a court's jurisdiction. The issues must not be presumptive, frivolous, hypothetical, assumptive, political or theoretical issues. The doctrine of entrenchment of constitutional principles or rights compels the courts of law to assess the

degree of legal protection contained in a constitutional provision. This could relate to whether the provision is hard or easy to amend, has special procedures like referendums or supermajority votes, and has content and form that applies to a special category of litigants. Both concepts preserve the stability of the constitution and are invoked simultaneously during the interpretation of the constitution.

- Broad duty bearer's clause in section 44 of the Constitution which has three positive duties to *protect*, *promote*, and *fulfil* constitutional or human rights and one negative duty to *respect* human rights. Together, the duty bearers must uphold human rights. The positive duties require active measures from duty bearers to ensure individual right bearers enjoy their constitutional rights and freedoms effectively. Protection prevents duty holders from violating rights and freedoms, promotion enjoins them to spread awareness and create conditions for the realisation of such rights and freedoms, and fulfilment demands direct action such as the provision of necessary services, actions like positive discrimination, quotas, or resources. Respect is a negative duty because it is two-way sledge requiring all duty bearers to refrain from violating or interfering with human rights and freedoms although no active intervention is needed. What is only required is the avoidance of the actions that violate human rights and freedoms.
- Clear provisions that the state (and its agencies) and persons (natural and legal) are classified as duty-bearers, something also contained regional instruments like the African Charter on Human and Peoples Rights (ACHPR).
- Clear guidelines in section 46 of the Constitution concerning the interpretation of human rights using the constitution's founding values, foreign law, international law, and presumption of the existence of other people's rights.
- Clear provisions on rights holders who could be anyone, every person, citizens and permanent residents, or everyone.
- Various generation of human rights from first generation or civil and political rights (CPR); second generation or economic, cultural and social (ECOSOC) rights; and third generation or collective/ group rights. We also have fourth generation rights or those related to scientific aspects.

- Directives or national objectives on some non-justiciable rights such as right to social security. This provides room for making such rights justiciable in the event of a constitutional amendment through a referendum.
- General, specifically and schedule-based limitations on human rights under the limitations clauses.
- *Locus standi* to enable litigants to approach the courts strategically or through public interest litigation. Those who utilise the liberalized legal standing provisions must also not casually approach the Constitutional Court using other provisions of the Constitution such as section 167 of the Constitution.
- Clear establishment of courts with competent jurisdiction in specific constitutional matters. The High Court's inherent jurisdiction for instance, cannot impugn the Constitutional Court's competent jurisdiction in matters involving the executive and legislative arms of Government.

Constitutional interpretation in Zimbabwe must be delinked from ordinary statutory interpretation. The constitution is an extraordinary statute with extraordinary methods of interpretation. The growth of jurisprudence on constitutional interpretation in Zimbabwe depends on the methods of interpretation that Zimbabwean judges typically employ. They must balance constitutional identity with Zimbabwe's constitutional democratic system so that fundamental values are procedurally evaluated in ways that promote effective functioning of governance structures as contemplated by the constitution. The constitutional litigant should never make the mistake of becoming familiar or casual with constitutional matters without understanding the nexus between interpretation, identity, and constitutional system as a whole. Courts in Zimbabwe must go beyond constitutional identity and emboss a *functional* approach that considers both the values in the constitution and procedures that promote effective functioning off government such as due process models when expelling parliamentarians directly or indirectly appointed by voters.

Because Zimbabwe's election model promotes tactical voting, a position that is also steeped in the political rights in section 67 of the constitution, a Member of Parliament who wins all votes for instance, is loosely said to be directly voted by voters. However, from a functional perspective, their votes are

influenced by several factors from their party and opposition supporters. Directly, party supporters vote for their candidate of choice, but indirectly, opposition supporters usually split their votes in favour of the so-called '*directly elected*' winner. The correct position should then be that the winner benefited from the weakening of the opposition party's votes. Tactical voting is rampant in Zimbabwe's elections where opposition parties vote for MPs belonging to dominant parties as a way of signposting future collaborations or advantages.

To promote balanced constitutional democratic system and constitutional identity using recalled MPs, it is noted that, undoubtedly, recalled MPs have suffered from narrow or literal interpretation of the recall provisions in the constitution which empower the Speaker of Parliament to declare a seat vacant once he receives a recall letter from the MP's political party. There is no due process clause in the constitution to empower the Speaker to verify if the person who writes the recall letter has authority to do so as alluded to above. As such, parliamentarians from the ruling and opposition parties have been unfairly recalled without due process procedures. After the 2023 elections that failed to produce a party with two-thirds majority in Parliament, CCC MPs were recalled by an official they allegedly regarded as a non-member who even forced the coalition President to resign from the '*captured* or *infiltrated*' party. Human rights holders have also been affected by judges who employ different constitutional interpretation methods ranging from:

- Conventional methods of constitutional interpretation such as the plain meaning rule and the purposive rule.
- Living tree constitutionalism.
- Borrowed canons of construction that promote judicial restraint in interpretation such as doctrines of ripeness and mootness.
- Use of the doctrine of the constitution's essential features.
- *Sui generis* methods such as Chief Justice Malaba's experimental constitutionalism concept.
- The use of constitutional, preliminary or technical, and political avoidance doctrines.
- The use of doctrines of deference and subsidiarity.

In terms of teaching constitutional law, interpretation, and identity, universities should broaden the teaching of interpretation of statutes to

include constitutional interpretation from undergraduate to postgraduate studies. Constitutional jurisprudence in Zimbabwe should be broadened to include third world approaches to international law (TWAIL), critical legal or race theory, decoloniality, international protection of human rights, and specialised human rights systems such as European, African and Inter-American human rights systems. The 10 major United Nations (UN) human rights thematic treaties relating to CPR, ECOSOC, women, children, persons with disabilities, enforced disappearance, torture, race and so forth must be prioritised in curriculum development, including exposing students to general comments and committee reports that interpret certain rights contained in specific treaties.

We have seen few if no instances when the courts resorted to *reading into the constitutional provisions* as a method of constitutional interpretation. For elaborated or special category rights from sections 80-84 of the Constitution, women and children have largely benefited from living tree and purposive methods of constitutional interpretation and the use of intrinsic method or Bill of Rights interpretation clause in section 46 of the Constitution. The same interpretive methods have not benefited veterans of the liberation struggle and persons with disabilities regrettably. Civil and political rights have also suffered from the use of judicial restraint in constitutional interpretation, and these include right to life, liberty, political rights, freedom to demonstrate and petition government and so forth. The courts either defer constitutional cases, instil litigation fatigue in litigants, postpone the operation of their orders against the executive without supervision frameworks, or give the executive the time to annul inconsistent laws without judicial supervision of executive steps. The executive has also acted with excesses in some cases and with less excesses in labour rights and right to life (abolition of the death penalty except for other extreme cases left open in the Death Penalty Abolition Act). The right to liberty suffers from the absence of clarity on compelling reasons to deny bail which has also led to over detention, prolonged detention and violation of the right to liberty of those allegedly arrested on grounds of crimes against the state or crimes bordering on national security on the part of the state or political persecution from the perspective of the victims. ECOSOC rights have largely benefited from the High Court's judicial activism. These include right to

education, freedom from arbitrary eviction, right to healthcare and right to food and water. Surprisingly the Supreme Court has sometimes reversed the gains on ECOSOC rights without furnishing reasons as was done in the *City of Harare v Mushoriwa* case.

While Zimbabwe has a Constitutional Court, we have not yet witnessed a clear and clean break from the period when the Supreme Court also served as the Constitutional Court. The dirty hands principle which was outlawed by section 85 (2) of the Constitution and bulwarked by the ***hands-dripping-with-blood*** doctrine in the *Mawarire* case has been replaced by various constitutional avoidance principles and judicial restraint rulings. Zimbabwean judges are still to stamp their authority on overturning or rewriting previous decisions. We are still to see judges adopting the two prominent positions on overturning or abiding by superior court decisions, known as the, '*we were wrong*' or '*we were right*' approaches, where courts justify their decisions to uphold or overrule previous decisions. We also do not witness strong dissenting decisions that were witnessed during the time of Justices Sandura and McNally. We however benefit from well-reasoned opinions in landmark cases such as Justice Hlatswayo's opinion in the *Loveness Mudzuru* case. Constitutional interpretation techniques are important under rights constitutionalism because it gauges how ready Zimbabwe's superior courts are to uphold and enforce the Constitution's generally progressive provisions.

We describe in this book the general trends in the teaching of Zimbabwean constitutional law. Since the deregulation of the teaching of law at three state universities in Zimbabwe (University of Zimbabwe, Midlands State University, Great Zimbabwe University), and two private universities, Africa University and Zimbabwe Ezekiel Guti University (ZEGU), several actors now develop Zimbabwe's teaching of, and jurisprudence in constitutional law. These include Council for Legal Education, law schools, universities and colleges offering law-related courses, government agencies, civil society organizations, and the heritage-based educators under the Ministry of Primary and Secondary Education who disburse constitutional knowledge from early childhood to secondary levels. The positive aspect of Zimbabwe's constitutional law is that the issue of judicial packing has been partially mitigated, despite the extant negative effects of judicial restraint. Judges from

various courts have always attempted to strike a balance between judicial activism and restraint. The discussion of how to maintain a society with judges who carry out their constitutional duties independently and without fear and favour will be successful in this book. To carry the torch for more rights-oriented constitutional (beyond political ideologies) in the future, we are especially interested in learning from the methods used by the higher courts.

We will also look at the instances when the courts have used judicial restraint to impede the growth of rights constitutionalism and constitutional jurisprudence. The plea for impact and public interest litigants to approach the courts properly is made with the intention reduce judicial restraint (*including judicial policymaking or construction*) and overrated activism. In turn, creative judicial scrutiny will be produced, through comparative and critical perspectives that are contemplated by the Constitution. In this effort, we also humbly request that judges of superior courts refrain from '***juridification***' of constitutional methods where they pluck doctrines of *judicial construction* (and not interpretation) from various jurisdictions. We have seen the wrong application of the constitutional avoidance and ripeness doctrines because judges either 'Americanise' or South Africanise such doctrines. We show that judges in Zimbabwe are appointed as the 'last line in the defense' of rights constitutionalism, and as such, they must avoid canons of constitutional construction.

We should also not forget that in an *a la carte* legal system, albeit frequently referred to as a common law nation, precedent is established by judges, and the doctrine of *stare decisis* is required by litigants. Constitutional law procedures and techniques of instructing aspiring and practicing attorneys should not be founded on falsely legalised ideas. We have included additional data based on our research interests in democratic experimentalism, dialogic constitutionalism and evolutionary constitutionalism through Sharon Hofisi's unpublished thesis on constitutional avoidance, public and impact litigation and Ntandokayise Ndlovu's thesis on ECOSOC rights in Zimbabwe. This emphasis is driven by current worries about the need for judges to resolve constitutional matters on their merits rather than on technicalities or rules of judicial construction.

In terms of structure, this book provides cursory references on the history of constitutional interpretation and evolution of rights constitutionalism in

Zimbabwe under the Lancaster House Constitution (Chief Justices Dumbutshena and Gubbay Courts). Under Chief Justice Chidyausiku and then Deputy Chief Justice Luke Malaba, concerns were raised about judicial packing and judicial capture. Part of the challenge was that the Chief Justice (CJ) and Deputy Chief Justice (DCJ) served as the heads of judicial benches and set the tone for the use of foreign theories or canons in constitutional adjudication. When CJ Malaba replaced CJ Chidyausiku, Zimbabwe went into periods of experimental constitutionalism. We began to see different types of judges: political, conservative, status quo, liberal, superhuman, and activist judges. We emphasise the influence that political and conservative judges have on Zimbabwe's constitutional interpretation system. Some judges realised how the Constitution is the highest law of the land but also serves as the nation's most important political guide. Pragmatic judges went beyond doctrinaire interpretations and issued conditional decisions that gave the executive the opportunity to repeal draconian laws such as the Public Order Security Act (POSA). We also acknowledge the role played by judges who have sharpened their interpretive ability through judicial training at colloquiums and through postgraduate studies. Legal scholars and litigants now comprehend the strong relationship between constitutional interpretation and the sort of judges in the Zimbabwean polity.

The quality of constitutional representations made by litigants and strategic litigation lawyers influences both the type of a judge (liberal, activist, political, super-human, conservative, constitutionalist) and their interest in specific methods of constitutional interpretation. This requires litigants in constitutional rights and constitutional cases to proffer nuanced legal arguments on why Zimbabwean courts must not casually invoke alien rules of judicial construction that take Zimbabwe towards the trajectory of judicial restraint and democratic backsliding. Equally important is the requirement for lawyers to understand the adversarial nature of Zimbabwe's legal and constitutional systems that requires them to carefully prepare their pleadings or determine the forum to protect constitutional rights. In Zimbabwe, judges serve as both the court and case manager. Because the purpose of a preface is also to acknowledge, I would like to thank Dr. Ntandokaise Ndlovu for the collaborative work we have done together. Ntando and I first met in 2019 during our doctoral research stay at Åbo Akademi University in Finland. We were beneficiaries of the Strengthening Human Rights Education in Africa

(SHUREA) Scholarship which I benefited from as a doctoral student at University of Pretoria. We also studied for an Advanced Diploma in Economic and Social Rights at Åbo Akademi University which was taught by experts from the European, inter-American and African human rights systems. The diploma exposed us to the following important aspects which can be used by litigants and Zimbabwean judges. Judges can also follow the works of the teachers on aspects including:

- Conceptual issues in the adjudication of ECOSOC rights taught by Shanelle van der Berg from University of Stellenbosch, South Africa.
- Remedies and ECOSOC rights by van der Berg.
- Amartya Sen's Capabilities theory and adjudication of ECOSOC rights by van der Berg.
- Social protection policies and enforcement of ECOSOC rights by Viljam Engström from Åbo Akademi University.
- The Committee on ECOSOC rights and general comments by Sandra Liebenberg from University of Stellenbosch, who was also a member of the UN Committee on Economic, Social and Cultural Rights (2017-2020).
- Regional human rights systems such as the African Human Rights (Danwood Chirwa from the University of Cape Town), European Court of Human Rights (Catarina Krause from Åbo Akademi University), Inter-American Commission and Court (Tara Melish from University of New York, USA), and country-specific jurisprudence such as the South African jurisprudence (Sandra Liebenberg).
- The concepts of minimum core, standards of review and margin of appreciation and progressive realisation of ECOSOC rights.
- Models of constitutional protection of ECOSOC rights in Africa by Danwood Chirwa.
- Direct and indirect approaches to ECOSOC rights enforcement by Tara Melish.
- Standards of review by Tara Melish.
- Business and ECOSOC rights frameworks and dilemmas by Claire Methven O'Brien from the Danish Institute of Human Rights and University of St. Andrews School of Management, United Kingdom.

The diploma gave us unique insights on aspects which we feel can be used by litigants in Zimbabwe which has justiciable ECOSOC rights. We both developed a strong interest in social and economic rights. We also co-authored and presented an article on social and economic rights in Zimbabwe. We were to meet again in 2022 at Åbo Akademi University as part of a book project on social innovation entrepreneurship under the Finland-Africa Platform for Innovation (SDG 9), (FAPI). The book is available in open access under the title, *Social Justice Innovation in Africa*. It is a critical resource in social security rights and perhaps campaigns to have social security included in the Bill of Rights. Currently social security is part of directive principles or national objectives in the constitution.

I also thank Dr Noah Maringe for partnering with us in this book project. He is an educator at ZEGU and practices law in Zimbabwe. We would like to emphasise that, while legal scholars may be quick to invoke the counter-majoritarian dilemma argument to criticise judges as captured, political, doctrinaire or counter-majoritarian, they must not do so to cover up for their shoddy drafting or to vent bald emotions hidden under intellectual anger. This book avoids emotive language simply because academics must separate emotions from legal arguments. They must assist judges in making judicial decisions that are considered legitimate in a constitutional society. We thank the Judicial Service Commission (JSC) and other organizations, including Veritas Zimbabwe, for promoting the electronic access to legal materials such as the affidavits, heads of argument, and litigants' submissions before the issuance of judicial judgments. Various institutions such as the Midlands State University (MSU) also compile law reports from various countries. Different lawyers from law-based organizations, foreign jurisdictions, the Attorney General's Office, the National Prosecuting Authority, different state legal departments, and individual law firms or de facto bar, have utilised impact litigation to uphold constitutional rights. Some judges of the High Court and Supreme Court have also pursued postgraduate education at local universities, including in advanced legal theory and comparative constitutionalism.

The entire legal fraternity, including judges, lawyers, legislators and political (policy) institutions that rely on judicial decisions, has a role to play in ensuring that judges of superior and specialised courts either adopt the *'we were*

wrong' approach that helps courts to properly overturn *their* wrong judicial precedents, or the '*we are now right*' approach that helps them celebrate cases that are or were properly interpreted. This way, we can together make informed decisions about whether to abandon or strengthen the doctrine of constitutional *stare decisis* through dialogic democracy, participatory, deliberative democracy or other forms of progressive constitutionalism. We can also shun rule by law or through lawfare and at the same time, constitutional matters that seek to trivialize the constitution. We are guided by the fact that judges of superior courts in Zimbabwe are not regulated by the Law Society of Zimbabwe by way of renewing their licenses yearly or regularly. Some judges however preside over the Law Society of Zimbabwe's Disciplinary Tribunal and help rein in errant lawyers in and out of court.

Most judges are not simply doctrinaire, conservative, political, or inclined to invoke judicial restraint, and as such, litigants and their lawyers and academics must avoid the same trap of pigeon-holing judges when criticising their decisions as legitimate or illegitimate. In the legal world, it is said that '*good lawyers know the law, but the best lawyers know the judge.*' Better lawyers prepare their pleadings well, including by pseudo-profiling the judge presiding over their cases. In some ways, litigants' knowledge bases and skill sets are direct and innovative tools that contribute to the quality of judgments written by judges. Judges occasionally show their indebtedness to helpful lawyers. In Chapter 1 for example, we purposefully used the case of *Denhere v Denhere and Another* CCZ 9/19 to demonstrate how Courts appreciate and engage with the arguments presented by litigants' lawyers to shape the tenor of their judgments on constitutional and non-constitutional issues.

Through the pleadings before them, judges attempt to '*understand*' the preparedness, shoddiness, frivolity, plausibility, strengths, and outcome of any case. This is why it has become a cliché that a party's fortunes are determined by their major pleadings or litigants rise or fall with their founding affidavits. We borrow from the jurisprudential parlance in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) 11721 that, '*...**you cannot put something on nothing and expect it to stay there. It will collapse***.' It is usually clear from a judge's ruling that he or she has either fully adopted or partially rejected one of the litigating parties' submissions. This is true whether the relevant judges express

their gratitude to the litigants' lawyers in their written judgments or reasons for judgment. Any good judge will usually demonstrate their gratitude to a specific lawyer who made insightful submissions during the hearing of the constitutional matter. As a result, beyond the text of the law or Constitution, there are numerous issues that litigants' lawyers must address to persuade judges to decide in their favour. Aside from the role of litigants, the quality of submissions is also determined by the legal material accessed by an individual judge's research assistants or through the individual judge's advanced or experiential training in constitutional interpretation. Litigants must be quick to seek adjournments and request such information from judges so that they can read them and criticise the legal sources used by the individual judge or their research assistants before a decision is made. They must also furnish courts with full legal materials they use to avoid cherry-picking arguments from jurisdictions that may belong to wholly civil or special common law systems. Key players in Zimbabwe's legal fraternity should thus strive to make a significant contribution to the quality of the constitutional rights judgments, even if it means asking for an adjournment or postponement of the case until the information relied on by the court has been evaluated. This is due to a variety of factors.

Most judges are now holders of postgraduate training in constitutional law from Zimbabwean and foreign universities. Others have for long served as part of the constitutional division of the Supreme Court or now serve as substantive judges of the Constitutional Court. We have research assistants trained from various jurisdictions. Some members of the courts' registry departments are also trained lawyers. The JSC has some lawyers with postgraduate training. We have impact litigants represented by lawyers from different jurisdictions. We have had lawyers who practice in South Africa such as Advocate Tererai Mafukidze working with law-based organizations such as the Zimbabwe Lawyers for Human Rights to institute cases strategically. Other law-based organizations like the Zimbabwe Human Rights NGO Forum, Zimbabwe Women Lawyers Association, and so forth have also contributed to constitutional litigation. Lawyers and the Law Society have acted as amicus curiae in important constitutional cases.

Furthermore, and admittedly, different courts have different rules and timelines for setting down or arguing constitutional matters. However, Zimbabwe's constitutional identity must create a constitutional culture or society that does not rely on canons of judicial construction that are casually borrowed from jurisdictions, such as the United States or South Africa. Such canons must only be used when the Constitution contains comparative provisions for their application or when there are gaps in established methods of constitutional interpretation. Zimbabwean courts must also not create an impression that they wait for South African or other courts to make pronouncements on constitutional provisions that are resemble Zimbabwe's provisions.

While proceedings in Zimbabwe are largely adversarial and certain courts are specialised, competent, or have exclusive jurisdiction in either constitutional, labour, or appellate matters, a judge is required to prioritise constitutional interpretation methods instead of rules of judicial canon. This is not to say that judges should claim to be experts in every method of constitutional interpretation which they employ. The point we are making here is that if rights constitutionalism is to be sustainably fostered in Zimbabwe, the important dimensions in a judge's way of interpreting constitutional cases should be based on both the merits and, in rare cases, the technical issues raised in the constitutional matters. Judges must also uphold their constitutional mandate to develop the customary and common law of Zimbabwe. Zimbabwean judges, as the ultimate interpreters of the constitution, must develop constitutional common law in Zimbabwe that explains constitutional doctrines and outline specialised common law rooted in the constitution. Guidance on constitutional common law can be sought from articles such as ***Henry Paul Morgan (1975), Constitutional common law, Faculty scholarship, Columbia Law School***. We do not condone shoddy drafting by lawyers who disregard rules of different courts. This book was written primarily for Zimbabwean students of advanced constitutional law, advanced legal researchers, lawyers involved in constitutional litigation, courts, and constitutional researchers. We cannot exclude anyone with an avid interest in constitutional law, interpretation, identity, and rights constitutionalism. Lawyers must also read the SA Case of *De Villiers vs Cape*

Division (1875) 5 Buch 50, which gives insights on the rights and duties of common law courts to renew and invalidate statutes. They could expand the argument to include invalidating unconstitutional provisions in the Constitution of the 'autocatons' (zvidzazvepo), to which Zimbabwe belongs.

Sharon Hofisi, February 2025,
Finland.

Introduction

In Zimbabwe's courts, constitutional litigants must always remember that superior courts have different constitutionally established procedures, jurisdiction, and jurisdictional limitations. In the High Court, it is important to institute constitutional cases based on public interest litigation provisions in section 85 of the Constitution. The High Court has competent, original, and inherent jurisdiction in most public interest cases. Direct access cases and matters under the exclusive jurisdiction of the Constitutional Court must be litigated in the Constitutional Court. Competent and exclusive jurisdiction are the key characteristics of correct constitutional procedure since three superior courts all have inherent jurisdiction. The litigants must always distinguish between section 85 of the Constitution cases and section 167 of the Constitution's adjudicative or jurisdictional guidelines. The language of public interest and jurisdictional guidelines can sound like someone is talking about antiques. First and foremost, there is legal standing given to anyone who wants to allege that their human rights or freedoms were violated. Secondly, there are standards that show who must be legally suited in the High Court or Constitutional Court. A technical litigant will probably object to the casual use of public interest provisions through section 167 of the Constitution and a legalist will object to the use of technicalities in resolving constitutional matters. Both sections 85 and 167 of the Constitution can be used to promote impact or strategic litigation if used properly.

While this book discusses the significance of constitutional interpretation and identity to the development of Zimbabwe's rights constitutionalism, litigants should strategically determine the type of cases superior courts such as the High, Supreme, and Constitutional Court will decide. If the court's jurisdiction happens to be limited by express constitutional provisions, then the concept of exclusive or competent jurisdiction will used to deny the litigant access to the constitutional remedy they seek. Although inherent jurisdiction is a phrase somewhat originally associated with the High Court, the Constitution introduced the concept of structured judicial hierarchy where the High Court in section 171 (c) may decide constitutional matters except those that only the Constitutional Court may decide, and the Supreme Court in section 169 (1) of the Constitution is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction. The concept of

structured judicial or superior court hierarchy has been shown in constitutional cases decided by the courts and what is gleaned from those courts include that:

- The Constitutional Court is the apex court with exclusive jurisdiction to make final rulings in constitutional matters and competent jurisdiction to determine matters involving the executive and legislative arms of the state.
- The High Court and Supreme can trigger referrals of constitutional cases to the Constitutional Court for confirmation of orders.
- Constitutional case litigants can appeal from the Supreme Court to the Constitutional Court.
- The High Court and Supreme Court act as gatekeepers of the superior court hierarchy of adjudicating constitutional cases
- The Constitutional Court acts as the ultimate arbiter of constitutional matters.

From the perspective of constitutional identity, judges of the superior must interpret or adjudicate cases based on the constitutional principles guiding the judiciary.

165 Principles guiding judiciary

(1) In exercising judicial authority, members of the judiciary must be guided by the following principles—

(a) justice must be done to all, irrespective of status;

(b) justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness;

(c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.

(2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence to maintain public confidence in the judicial system.

(3) When making a judicial decision, a member of the judiciary must make it freely and without interference or undue influence.

(4) Members of the judiciary must not—

(a) engage in any political activities;

(b) hold office in or be members of any political organisation;

(c) solicit funds for or contribute towards any political organisation; or

(d) attend political meetings.

(5) Members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.

(6) Members of the judiciary must give their judicial duties precedence over all other activities, and must not engage in any activities which interfere with or compromise their judicial duties.

(7) Members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law

When discussing constitutional identity and interpretation, the most important thing to note is that Zimbabwe has a progressive and justiciable constitution or Declaration of Rights or Bill of Rights. The concept of justiciability is not limited to the Bill of Rights. A justiciable constitution has provisions, principles, and structures which are outside the Bill of Rights but can be enforced by the courts such as those involving the performance of constitutional obligations or challenges to board appointments by ministers or other tiers of government. Zimbabwe's constitution also provides for good governance, accountable government, supremacy of the constitution, and constitutional separation of powers. A justiciable bill of rights protects human or constitutional rights and freedoms allowing rights holders to access courts to seek effective constitutional or other legal remedies. While Zimbabweans loosely refer to fundamental rights and freedoms, the European human rights system clearly distinguishes between human rights and fundamental rights. Human rights broadly refer to all individuals around the world because they are humans. Fundamental rights in the European system are those protected by the regional Charter of Fundamental Rights of the EU or country-specific constitutions, Terminologically, Zimbabwe's bill of rights has constitutional or fundamental rights and freedoms although they are not explicitly referred to as such.

This book examines whether Zimbabwe's superior courts are now prepared to embrace approaches to constitutional interpretation that improve the jurisprudence on constitutional identity and rights constitutionalism contemplated by the constitution as amended at 2023. The Bill of Rights' interpretation clause, also called *the entrenched method of constitutional interpretation*, is given special attention in this book because Zimbabwe has a justiciable constitution. We also examine the superior courts' approaches as revealed by judicial precedents, restraint, and activism. Our discussions stem from section 176 of the Constitution of Zimbabwe, 2013, as amended at 2023 (*'the Constitution'*). The section provides that judges have the constitutional responsibility or mandate to develop constitutional customary and common law. They should also regulate their processes by ensuring that courts with competent jurisdiction decide constitutional matters as envisaged by the constitution.

Constitutional doctrines are developed when judges properly outline processes, procedures and rules that provide a blueprint for resolving future

cases or legal disputes. The constitution envisages four major doctrines that can be utilised by superior courts in constitutional interpretation:

- The doctrine of judicial precedent (stare decisis) which allows common law judges to adhere to previous decisions to ensure the law and legal principles are certain, consistent, predictable, and fair in a reasonable society. In advanced constitutionalism, judges must distinguish between vertical stare decisis which is the idea that decisions of higher courts take precedence over those of lower courts and horizontal stare decisis which holds that prior decisions made by courts at a particular appellate level should serve as precedents for cases heard by courts of the same appellate level. Where the decision was not appealed to a higher court, judges must invoke the judicial comity principle to interrogate the doctrine of stare decisis. The doctrine is important when courts want to overrule decisions that are considered erroneous. There are two exceptions to the stare decisis rule. There is doctrine of ***per incuriam*** that relates to decisions made in ignorance of the law or any statute or binding authorities, and ***sub-silentio***, where points of law are not properly perceived by courts, were not present to the court's mind, or not consciously determined by the court, see for instance, *Arnit Das v State of Bihar AIR* 2000 SC 2264 para 21. In English common law, the court is bound by three exceptions, Firstly, when there are two conflicting decisions, the court is entitled and bound to decide which of its two conflicting decisions of its own it will follow. Zimbabwean courts are allowed and bound to regulate their own processes as a matter of constitutional responsibility enshrined in section 176 of the Constitution. Secondly, the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, on its opinion, stand with a decision of the House of Lords. This could be applied when a litigant approaches the High Court or Supreme Court in Zimbabwe. Thirdly, the court is not bound to follow a decision of its own if it is satisfied that the decision was given ***per incuriam***, for example, where a statute or rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.
- Doctrine of inherent jurisdiction in section 176 of the Constitution which allows superior courts to control their own procedures, fill legal gaps if the legislation is silent, and prevent litigants and presiding judges in lower courts from abusing court processes.

- Competent jurisdiction which empowers superior courts to develop constitutional customs and common law principles based on their constitutionally spelt competency. This requirement is part of the good governance principles enshrined in section 9 of the constitution.
- Doctrine of judicial comity which obligates judges of equal jurisdiction to operate under mutual respect. Individual judges must respectfully depart from their colleagues at the same level. They are not bound by decisions of judges of equal authority. An individual judge who departs from a colleague of equal authority's reasoning must invoke the comity principle to justify either agree with certain aspects or depart from the reasoning while maintaining judicial independence. When agreeing, they must, as a matter of courtesy, acknowledge the persuasive value of the earlier decision. They may also rely on similar principles applied by the previous judge of equal authority but reason differently or apply different constitutional methods. Their respectful departure can be based on facts of the case before them, legal interpretations, evolving societal needs, or circumstances that are unique to Zimbabwe's society. In this way, they balance judicial discretion with collaborative decision making. The extension of this principle applies to instances where courts make their decisions by deferring certain decisions, jurisdictions, or reliance on decisions of judges from different jurisdictions. The leading case in this regard is *Ndewere v The Republic of Zimbabwe and Ors*, **SC 13 /23.**

Linked to the above four doctrines are concepts of judicial independence and legitimacy of judicial decisions. The *Ndewere* case demonstrates how judicial independence can be protected as a legal doctrine. Judicial independence is the ability of the courts and judges to make decisions that are free from external pressures that decisions promote fairness, the rule of law and founding values protected by a constitutional society. Justice Ndewere's argument was that there was no institutional independence or separation from other governmental branches. There was also no personal independence relating to security of tenure and financial autonomy of judges. The case also demonstrates the need for decisional independence where judges are free to decide matters based on the law and facts without interference from superiors. These aspects are conjoined by the neutrality principle that protect the judge's role as a neutral arbiter in constitutional and legal disputes. The concept of legitimacy of judicial decisions directly flows from judicial independence. For

judges to be seen to be independent, they should deal with society's fears, including fears that courts may be judicially packed, captured, or infested with the executive's hired guns. The legitimacy of judicial decisions assists the nation and international community to accept court decisions as fair, just, and authoritative. This rests on:

- judicial independence
- impartial legal reasoning using established laws and precedent
- procedural fairness pillars such as due process and good governance principles laid out in sections 3 (2) (g) and 9 of the Constitution.
- Procedural limits that exist in the constitution as the supreme law and political map of Zimbabwe. To employ John Rawls' theory of justice argument, the law should protect constitutional or fundamental rights as part of basic liberties that should have priority over the pursuit of social goods like economic development and so forth. The basic rights must be so prioritised because they are entrenched and justiciable rights which are free from political controversies. This is also linked to Ronald Dworkin's argument in his book, *taking rights seriously*, that rights trump interests that do not amount to rights.
- Public confidence gleaned from the ordinary people's perceptions reported in key institutions such as mainstream media, civil society reports, independent commissions' reports, national security council reports and international community.

Zimbabwean judges have shown a proclivity to use the doctrine of constitutional avoidance, and its variant forms in their classical forms as developed in the USA and South Africa to resolve constitutional issues. In many cases, cases resolved based on reliance on classical doctrines did not attempt to provide nuanced discussions of changes to such doctrines like ripeness as a doctrine that is linked to exhaustion of remedies (see, the *Chawira & 13 Others v The President of the Republic of Zimbabwe and others*, CCZ 3/ 2017). This inclination to invoke classical forms of constitutional avoidance became pronounced under the leadership of the late CJ, Godfrey Chidyausiku and the current CJ, Luke Malaba. Chief Justices normally influence the way judges of their courts operate since they serve as head of the Judicial Services Commission (JSC) and head of the judiciary as an arm of state. A chief justice is an extraordinary judge who also wears two hats, a political and legal one.

We argue that the way the Chidyausiku and Malaba courts have been invoking political and constitutional avoidance doctrines is largely flawed under Zimbabwe's liberalized and progressive constitutionalism. This is because, in the absence of nuanced judgements presented from a Zimbabwean constitutional democratic perspective, perfunctory references to alien constitutional canons of construction or doctrines undermine the progressive nature of Zimbabwe's constitution which is rooted in constitutional democracy and justice. The courts rely on classical constitutional avoidance which is a doctrine where judges use non-constitutional grounds to delay the development of rights jurisprudence, weaken constitutional accountability, and allow legislative and executive powers to go unchecked. A judge's interpretive or judicial philosophy should develop or expand various philosophies about constitutional rights which include:

Philosopher	**Approach to justice and freedom**
John Rawls	Basic liberties must be given considerable respect because they are entrenched and should be protected from political abuse
Ronal Dworkin	Rights operate as trumps and if there is conflict, they must override interests which do not amount to rights
H.L.A Hart	In countries with limited amount of wealth, rights make citizens public-spirited citizens who prize political activity and service to others as a chief good of life and shuns status based on material goods and contentment
Joseph Raz	People are autonomous moral actors who make own decisions and use their freedom to advance social ends
John Finnis	Rights are seen as subjective self-good entitlements and rights holders use practical reasonableness (not simply objective assessment) to understand human conditions
J.S Mill	Certain limitations to rights are needed to prevent freedoms from being used to precipitate actual harm to other people
Jeremy Bentham	Each person is to count for one, and nobody is to count for more than one. Rights are utilitarian and help people to maximize pleasure and minimize pain. Value judgments should not be scientifically assessed but must proceed from metaphysical assumptions.

The set of beliefs above justify rights and freedoms and obligate judges to value freedom of will and capacity for self-directed action which define human beings. The non-constitutional doctrines invoked by the Chidyausiku and Malaba courts were also used to resolve controversies or political cases or evolved to fill in gaps that could not be filled by legal rules in the United States

of America (USA), where they originated. In invoking doctrines such as ripeness or constitutional avoidance, judges in Zimbabwe rarely distinguish or elaborate such doctrines as they are applied in political or legal terms in both the USA and South Africa and as applied in Zimbabwe. They therefore depart from the concept of *moral autonomy* which stipulates that people should be free from interference from others, including unelected judges. The avoidance doctrine and its variant forms are in the authors' view, largely incompatible with Zimbabwe's progressive and liberalized rights constitutionalism if invoked without nuanced judicial reasoning or without demonstrating how they are applicable to the Zimbabwean context. Zimbabwean courts should engage in substantial constitutional interpretation as spelt out in the constitution, especially when interpreting and upholding fundamental rights and freedoms. The Zimbabwean courts also use doctrinal avoidance. The *Ndewere* case is one case where the Supreme Court used established legal doctrines instead of constitutional principles. Effectively, the court ended up falling into the pitfall of using remedial avoidance that limited the scope of the court's remedies. While the Supreme Court relied on the distinction between competent and inherent jurisdiction, it also used prudential avoidance to decline to hear a politically sensitive case to maintain judicial legitimacy. We believe that the Supreme was however correct in finding that where inherent and competent jurisdiction compete, competent jurisdiction should prevail because it is the legal foundation of the court's authority to decide a case, while inherent jurisdiction is usually exercised only to support, not override, statutory or constitutional limits.

Apart from viewing judges through the moral autonomy concept, superior courts now have inherent jurisdiction to protect justiciable and entrenched rights and freedoms as a matter of constitutional responsibility. As a matter of constitutional mandate, judges must commit to uphold the constitutional duties contemplated by the constitutional identity Zimbabwe subscribes to. The mandate in section 176 is non-negotiable. Section 176 of the Constitution provides for the constitutional responsibility of superior court judges is the following manner:

'The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the

common law or the customary law, taking into *account the interests of justice and the provisions of this Constitution.*' (Underlining is intentionally made).

The preceding provision triggers the reasoning that litigants must choose the forum with competent jurisdiction when asserting the concept of inherent powers. The High Court used to have inherent jurisdiction as a matter of statutory law. Three superior courts, the High, Supreme, and Constitutional Courts, now have inherent powers as a matter of constitutional mandate. Judges are now empowered to ensure litigants utilise the inherent powers *viz.* competent jurisdiction of the three courts.

Talking Points
Radical liberals like Friedrick Hayek and Robert Nozick argue that the state has the responsibility to foster conditions in which freedoms must be protected. This proceeds from the basic thinking that a legal system has police services which prevent people from infringing other people's rights, including negative rights (freedom from harm), see Friedrik Hayek, *The Constitution of Liberty* (Routledge, 1960) at page 223 and Nozick, *State and Utopia*.

The extended notion of constitutional rights is that rights based on human autonomy are not only explained by freedom from interference. People also lack freedom if the range of their choices is constrained either by human interference or by shortage of resources or physical capacity. This takes us to the history of Zimbabwe's constitutional protection of various generations of rights, including ECOSOC rights. The history of Zimbabwe's constitutional crises demonstrates that the drafters of the Constitution, (and Zimbabweans and perhaps constitutional amenders) always chose to prioritise political doctrines than adherence to constitutional doctrines that protect rights of people as human beings. The 1923 Constitution's constitutional focus was on settler administration and stripping of property rights from the indigenous population. The Federation Constitution was mainly concerned with effective administration of Nyasaland, Northern and Southern Rhodesia. The 1961 Constitution was aimed at reshaping the politics in Southern Rhodesia following the dissolution of Federation. The UDI Constitution was aimed at undermining black nationalism and denying the ordinary people majority rule. During the UDI government, the NIBMAR principle (***No independence for Blacks without majority rule***) became a political tool to isolate the UDI even through imposition of British and United Nations (UN) sanctions.

Using Nozick's argument, black Rhodesians had their property and integrity attacked. According to Nozick, property rights have the same status as rights to personal integrity or human dignity, or freedom from slavery, torture, and attack. The state should also not impose forced labour on the tax payer. This is linked to how John Locke taught that people must come together to protect their property through what he called, fundamental obligations of the civil magistracy, see J. Locke, *Two treatises of Civil Government*, II, s.1.

Because of emphasis on ideologies such as NIBMAR and so forth, Zimbabwe's rights trajectory prioritised civil and political rights first. Political rights go beyond notions of individual autonomy and focus on enabling individuals to participate in political decisions. Political rights limited rights enjoyment because their goal is to balance state action and the legitimacy of coercive limits on civil liberties. As such, Zimbabwe's Lancaster House Constitution of 1979/80 was mainly focused on compromise political transition between the white minority and the new black government from 1980 to 1990. As such, the 1980 Constitution was mutinied a record 19 times. The amendments were used to protect political gains. Zimbabwe allowed parliamentarians to be voted for, but the same parliamentarians would legislate coercive limits which were usually accepted because they were promulgated by elected representatives. In a direct democracy, citizens will have a right to vote and initiate referendums and only many people would determine the extent to which coercion is to be allowed. The emphasis on political rights also saw other generations of rights being claimed through civil and political rights, the bulk of which are contained in the International Covenant on Civil and Political Rights (ICCPR).

Talking Points

If you read A. de Bourbon's article, Human rights litigation in Zimbabwe: past, present and future, 3 (2) *AHRLJ, 2003, 196-221*, you will be better off not second-guessing your knowledge about evolution of rights constitutionalism in Zimbabwe. Talking about rights jurisprudence, the article helps you to understand concepts such as liberal, political, superhuman, feminist, traditionalist, and doctrinaire judges. Would you manage in your own words to identify the constitutional issues and models of protection that were employed in each case presented in De Bourbon's nuanced analysis?

Selected landmark human rights case before 2013 constitution	Method of constitutional adjudication
Retrofit (Pvt) Ltd v PTC 1995 2 ZLR 422 SC	The Supreme Court used the purposive liberal approach to liberalize trade rights or to create a free-market economy. The

	Supreme Court was also prepared to read the spirit of the times, Economic Structural Adjustment Programme (ESAP), to understand that Zimbabwe was in economic quagmire and PTC's monopoly could not be perpetuated. Zimbabwe was under ESAP but could not be declared a highly indebted poor country (HIPC country).
Capital Radio (Pvt) Ltd v Minister of Information (1) 2000 2 ZLR 243 (S)	The court utilised a purposive, holistic, rights-based approach based on the fact that the state broadcaster was enjoying freedom of expression to suppress the rights of private citizens. A state monopoly had to be treated equally with other non-state monopolies. The court engaged in the constitutional reading of freedom of expressions (*read in method*).
In re Munhumeso & Ors 1994 1 ZLR 254 (S)	The court adopted a purposive and generous or rights-enhancing approach that sought to attack security or public order laws that unduly limit the right to peaceful demonstrations.
Commercial Farmers Union v Minister of Lands 2000 2 ZLR 469 (SC)	The Supreme Court utilised a strict textualist or formalistic approach which proceeded from the argument that the government had not followed due process in its land appropriation laws. As such, the government had violated the rule of law in its legal sense. The court employed comparative textual method as developed from the USA that emphasises more of legality and clear legal procedures than just constitutional values.
Elliot v Commissioner of Police 1997 1 ZLR 315 (SC)	The court balanced purposive and rights-based activism to challenge mistreatment and arbitrary detention on the basis that they violated due process associated with the right to liberty.
Tsvangirayi & Ors v Registrar General of Elections SC 93/02	The court employed a purposive and systemic process that spoke to Zimbabwe's constitutional system and identity as a whole. For elections to be free and fair, the Court had to scrutinise the constitutional system to determine if it was possible to

	have free and fair elections based on participation of all eligible citizens. This is to be contrasted for instance with the case of *Mawarire v The President of Zimbabwe* in 2013 that created scepticism on whether the case was sponsored by government because the case was hurriedly done without considering the constitutional requirement of free, fair, genuine, and credible elections.
S v A Juvenile 1989 2 ZLR 611(SC)	The court adopted a human dignity approach that was enmeshed in the generous and purposive method to determine how corporal punishment violated the freedom from cruel, inhumane and degrading treatment.

In 2013, a homegrown or ***autochthonous*** constitution was still presented as an amendment. A human security or people-centred dimension was introduced. It also came after attempts by the political parties under the Government of National Unity (GNU) to introduce the Kariba Draft Constitution through political means.

Constitutional draft	The people's reactions
Constitutional Commission draft 2000	People rejected the draft through a referendum.
Law Society of Zimbabwe and National Constitutional Assembly Draft	The constitutions helped the people to broaden their thoughts and assess the political nature of the Government's Constitutional Commission draft.
Kariba Draft	People rejected the draft
2013 Constitution	The constitution was adopted following widespread consultations under COPAC. While few people voted for the adoption, the consultations have discuss points of consensus and sticky points. Sticky points related to issues including LGBTIAQs, and the non-discrimination provision in section 56 ended up leaving out sexual orientation as a ground for non-discrimination. The comparative provisions in the South African Constitution list sexual orientation as a ground.

While politics has largely shaped Zimbabwe's constitution-making process, it seems that the drafters of the 2013 Constitution were aware of the problem of unrestricted judicial powers. This awareness manifests itself in the constitutional requirement for judges to exercise their inherent judicial powers in the interests of justice and considering the provisions of the Constitution. Judicial authority is also vested in the people. For starters, Zimbabwe has faced many constitutional challenges and moments, including periods of political and legal instability before and after 2013. One notable instance was the constitutional crisis in the early 2000s when the government, led by the late and first executive President Robert Mugabe initiated controversial land reforms and constitutional amendments. These actions raised concerns about the existence of the rule of law and adherence to constitutional principles.

Some government officials publicly treated the rule of law as a *mere* tenet of democracy which could be overridden by political considerations. This created an impression that rule by law and lawfare were to be preferred in some instances. The early 2000s led to the emergence of two schools of constitutional interpretation under the courts of Chief Justices Gubbay, favouring broad conceptualisation of the rule of law as part of legal and democratic tradition, and later, the Chidyausiku court, merging rule of law with political doctrines of sovereignty. For example, CJ Gubbay declared the land reform unlawful because there was no land reform program. When he resigned and was replaced by CJ Chidyausiku, the government went back to the courts and presented a program that was not widely consulted with those who were going to be affected. The Chidyausiku Court found that the GoZ had complied with the need to craft a land reform program. Under the 2013 Constitution, the adoption of the constitutional provision that places constitutional responsibilities on judges seems to speak to some, if not all constitutional crises that have threatened Zimbabwe's constitutional democracy. In the face of such constitutional challenges, Zimbabwe's superior courts are called upon to utilise this inherent power to uphold constitutional values, protect individual rights, and ensure justice, despite political pressures.

Determining the Constitutional Responsibility of Judges

The constitutional mandates of judges of different courts are laid in the constitution. Judges of the superior courts have inherent powers to act as contemplated by section 176 of the Constitution. The High Court no longer enjoys inherent jurisdiction alone. The watering down of the High Court's inherent jurisdiction means that it has to be compared with other forms of jurisdiction such as competent and exclusive jurisdiction. Furthermore, different courts have Acts of Parliament and court rules that establish their authority and procedures. Other common methods that are used in countries with a constitutional society and constitutional identity include:

- examining legal precedent
- legislative intent
- interpreting constitutional texts.
- Utilising preliminary points
- Determining various forms of jurisdiction
- Reliance on the separation of powers and separation of functions doctrines.

Sadly, in situations where constitutional avoidance doctrine is invoked as a canon of judicial construction, and when it is used together with technical rules associated with it, judicial reliance is usually placed on mere rules of judicial construction that promote judicial restraint and work to the detriment of litigants. Courts lose their legitimacy and role as custodians of the Constitution if they use non-constitutional grounds to resolve constitutional matters. If judges invoke alien rules from the USA and South Africa loosely, it is essential for legal scholars, litigants and the judicial community to engage in constructive dialogue or deliberative democracy to clarify and ensure adherence to the country's legal and constitutional principles. Platforms such as the judicial colloquiums and mixed training of lawyers and judges can also serve as platforms for sharing notes on expectations from the consumers of judicial decisions. Legal and constitutional education and training programs or colloquiums play a huge role in allowing judges and legal scholars in Zimbabwe to exchange notes on best ways to improve Zimbabwe's constitutional jurisprudence.

Judges and lawyers must also be guided by section 326 of Zimbabwe's Constitution permits courts to apply customary international law when it is consistent with the Constitution or Acts of Parliament. Customary law has various principles such as *jus cogens*, *erga omnes* principles, doctrines of incorporation, and *grundnorm* principles which may be used from the perspective of international law. The Constitution also allows courts to utilise international treaty provisions as contemplated by section 327 of the Constitution. The minidictionary section in section 332 of the Constitution also provides useful guidelines on the types of law that may be challenged before the superior courts, such as:

- Statutory Instruments made by the President, a Vice-President, a Minister or any other person or authority under the Constitution or an Act of Parliament. The rules of the High Court and Constitutional Court were amended through statutory instruments. The section also applies to unwritten laws linked to the canons of construction which are frequently applied by the national courts.
- International treaties to which Zimbabwe is a state party are relevant in the context of specific constitutional rights that are brought before Zimbabwean courts under sections 34 and 327 of the Constitution. Section 34 obligates Zimbabwe to domesticate the provisions of treaties to which it is a state party.
- Under classical separation of powers doctrine, the court's authority to develop common law or customary law reflects a judicial function that, in a classical sense, would be separate from legislative functions which are under the auspices of the legislature. This aligns with the idea that judges have a role in interpreting and developing the law but not creating or making laws.
- Further, in comparing judicial and executive functions, the inherent power of the judiciary to protect and regulate their own processes reinforces judicial independence, ensuring that the judiciary has control over its internal affairs without interference from the executive branch. The judiciary must, however, avoid determining constitutional matters that are constitutionally supposed to be handled by specific courts of competent jurisdiction.

Even under the abandonment of the classical separation of powers doctrine and its contemporary evolution into separation of functions, judicial responsibility in constitutional protection and interpretation remains critical. Separation of functions envisages a situation where there are interconnected functions among the branches of government. Such overlapping functions, when seen in the constitutional provision on judicial responsibility, reflect a recognition that the judiciary, while primarily an interpreter of the law, also has a role in shaping legal principles and ensuring substantive and procedural fairness or justice. By empowering the judiciary to regulate and develop the law, the Constitution contributes to the system of checks and balances. It allows the judiciary to act as a check on potential abuses of power by the legislative or executive branches.

The Essential Features of the Constitution

The essential features doctrine as it relates to constitutional law, identity, and constitutional interpretation is the idea that certain fundamental characteristics or core principles of a constitution cannot be altered or amended. The essential features also relate to identifiable features that create a basic structure of the constitution. These essential features are considered foundational to the constitutional identity of a nation and some like the Bill of Rights, are often protected from modification through formal amendment procedures and require a referendum to change them. Such is the case with Zimbabwe's Bill of Rights. The declaration of rights in the Constitution is part of the immutable core principles or provisions that are deemed essential or unalterable. The same also relates to the structures of government, and other foundational elements listed in the founding provisions and the main and devolution preambles of the Constitution. Besides immutable core principles are issues that make up Zimbabwe's constitutional identity, the essential features doctrine posits that there are core features integral to a constitution's identity, and any attempt to change or amend these features might undermine the essence of the constitution itself. These issues include those issues listed in the interpretive sections of the Bill of Rights and the schedule of the Constitution.

We can add limits on constitutional amendments as another layer of essential features doctrine. While constitutional amendments are a common mechanism for updating a constitution, the essential features doctrine suggests that there are inherent constraints on the extent to which the constitution can be amended without jeopardizing its core identity. It seems Zimbabwe's two rushed amendments to the 2013 Constitution ignored this layer. The other layer is judicial review because courts often play a crucial role in applying the essential features doctrine. They do this by reviewing constitutional amendments and assessing whether proposed changes infringe upon the constitution's essential features. If a court determines that an amendment violates the core principles in a constitution, it may declare the amendment to be unconstitutional. This is the context in which litigation relating to the amendments to the 2013 Constitution could be located.

We will frequently refer to the main constitutional preamble (*'We the People of Zimbabwe'* clause); national objectives; the constitutional supremacy clause; the founding values; the schedules and the Bill of Rights in the Zimbabwean Constitution as part of essential constitutional features because they provide the normative or grundnorm framework for judicial adjudication of constitutional rights in Zimbabwe. Judges as interpreters of the Constitution are required to define the duties and responsibilities of the litigants as contemplated by the Constitution. Section 44 of the Constitution establishes four duties under the Bill of Rights which are to protect, promote, fulfil, and respect the constitutionally protected human rights and freedoms. Technically, there is a distinction between positive and negative duties. Positive duties on the one hand involve actions that governments and entities are required to actively take to ensure the realisation of human rights. These duties include protecting individuals from violations, promoting conditions that enable the enjoyment of rights, and taking affirmative steps to fulfil rights, especially justiciable rights. Negative duties, on the other hand, involve refraining from certain actions that might interfere with an individual's right. The duty to respect human rights implies not infringing upon or violating the rights and freedoms of individuals. It requires non-interference and abstaining from actions that could undermine the exercise of rights.

Cumulatively, the four duties bind the State (its three arms, including the judiciary); state institutions; government agencies, natural persons and juristic persons. Thus, both public and private individuals in Zimbabwe have both rights and responsibilities (as right holders and duty bearers). Section 44 of the Constitution's goal is to ensure that public and private individuals contribute to the constitutional culture that Zimbabwe envisages, in non-negotiable terms. Section 45 (1) of the Constitution provides that constitutional rights and freedoms bind the State and all executive, legislative and judicial institutions and agencies at all levels of government. Section 45 (1) provides that natural and juristic (artificial) persons are both entitled to the rights and freedoms outlined in the Bill of Rights to the extent that those rights and freedoms can be appropriately exercised. Using the four duties enshrined in section 44 of the Constitution, the duty to protect provides guidance to judges that judicial interpretation should seek to safeguard individuals from potential violations of their rights. Courts and interpreters should strive to give effect to

constitutional provisions that explicitly mandate the protection of rights against infringement by the state or other entities.

The duty to promote human rights provides guidance that constitutional interpretation should recognise the dynamic nature of human rights and freedoms and aim to foster sustainable conditions that enable the full realisation of rights, including promoting constitutional literacy as contemplated by section 7 of the Constitution. This also involves interpreting constitutional provisions in a manner that supports the creation of an environment conducive to the exercise of human rights and freedoms as spelt out in the Constitution, regional and supranational human rights documents. The duty to fulfil provides guidance that interpretation should consider constitutional provisions that address the affirmative duties of the state to actively work towards the realisation of certain rights, especially justiciable rights. The duty to respect provides safeguards' that though interpretation, the actions of the state or other entities seen as primary or secondary duty bearers do not violate or infringe upon the human rights and freedoms of individuals. Interpretative decisions should emphasise the boundaries set by the constitution and protect individuals from unwarranted interference.

Developing a Due Diligence Model in Constitutional Interpretation: Abandoning Narrow Methods of Constitutional Interpretation

We set out early in the introduction the need for a due diligence clause protecting MPs from narrow interpretation of their dismissal from political parties. The clause protects members of an important pillar of the state, the legislature. Judges have simply read the provisions of the recall provisions narrowly without regard for due diligence model of constitutional adjudication. When political parties for instance want to recall members of Parliament, (MPs) or are accused of destabilizing certain political parties, they simply write letters to the Speaker of Parliament or create proxies who can do so as seen in the recent Citizen Coalition for Change cases under the hand of one Tshabangu. If the MPs had remained, the hurried constitutional amendments would have been done holistically to allow ordinary citizens to address all aspects that affect them. In all the recall cases, the Speaker of Parliament has simply acted on such letters without exercising due diligence required under section 67 of the Constitution which protects political rights. From the perspective of representative and multi-party democracy envisaged in the Zimbabwean Constitution, a due diligence of constitutional interpretation is one that involves a thorough and careful consideration of legal principles, constitutional text, historical context, and societal values to ensure a comprehensive understanding of constitutional provisions. This approach must go beyond a strict or narrow interpretation that the mere letter would lead to an MP losing their parliamentary seat.

The need for due diligence includes upholding the constitutional society, protecting fundamental rights from those violations not explicitly anticipated in the constitutional text, preservation of constitutional values such as equality and human dignity, and adaptability to legal realism. Legal realism as espoused by legal philosophers like Roscoe Pound recognises that the law is not static, and judicial interpretation should be pragmatic and responsive to real-world constitutional complexities. From the perspective of rights constitutionalism, the injustices against MPs are the result of the activities of quasi-state officials such as the Speaker of Parliament, whose powers are *ipso facto* attributed to the

State and violate political rights. His powers are *ipso facto* attributed to the state because as a constitutional holder, the speaker exercises powers on behalf of and in accordance with the Constitution, reflecting the authority of the state. He is however expected to be impartial and neutral, representing the dignity and authority of the parliament rather than any political party or faction. This impartiality reinforces the connection between the Speaker's powers and the broader interests of the state. Linked to this is the need to preserve parliamentary independence. Attributing the Speaker's powers to the state help preserve the independence and integrity of the parliamentary institution. By acting on behalf of the state, the Speaker contributes to the separation of powers and maintains the autonomy of the legislative branch. In Zimbabwe's recall cases, the Speaker has largely leaned in favour of separation of function and separation of political parties than separation of powers envisaged by the constitution.

The Speaker of course has various powers including maintaining order during parliamentary proceedings, interpreting rules, and ensuring adherence to parliamentary procedures. These powers are not personal but are exercised in fulfilment of legal and procedural requirements established by the state. When they adopt narrow stances through statements like, '*they are not a court of law*,' they risk sounding disingenuous as they are enjoined to interpret the law. This is especially so because the Speaker is often regarded as the representative of the people within the parliamentary context. By attributing powers to the state, it underscores the idea that the Speaker's authority derives from the democratic will of the people as expressed through the constitution.

To uphold the duties imposed on the state institutions such as the Legislature, Zimbabwean courts should interpret political rights in a way that promotes due diligence or a standard of care when recalling parliamentarians. For example, the Courts have continued to apply a narrow interpretation of section 129 (1) (k), popularly called the '*Recall Provision*', *for* instance which provides that:

> 'The seat of a Member of Parliament becomes vacant…If the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it.'

In *Madzimure and others v The President of the Senate and others* CCZ 8 of 2019, Justice Malaba, then Deputy Chief Justice (DCJ), found in his judgment that the interpretation given to section 129 (1) (k) of the Constitution must be consistent with the spirit, purport and objects of the Constitution. Malaba DCJ (as he was then known) summarized his position as follows:

'Section 129(1)(k) of the Constitution relates to a legal process that has its beginning in the relationship between the Member of Parliament and the political party to which he or she belonged at the time he or she was elected to Parliament. The first fact to trigger the s 129 (1) (k) process is cessation of the status of belonging to the political party concerned by the Member of Parliament. Ceasing to be a member of the political party concerned is the main event. The legal effect on the creation of a vacancy in the seat of the Member of Parliament depends on the subsequent events that are procedural and communicative in nature.' Further, the court was of the view that:
The role the Speaker or the President of the Senate has to play in the process is to satisfy himself or herself that the document he or she has received is from a political party and that it contains a written notice declaring that the Member of Parliament who was a member of that political party when elected to Parliament has ceased to belong to the political party concerned. The Speaker or the President of the Senate has no power to prevent the occurrence of the creation of the vacancy in the seat of a Member of Parliament commanded by s 129(1) (k) of the Constitution as the consequence of the communication and receipt of the written notice.

Based on the foregoing, the then Malaba DCJ concluded that the section is a provision clearly intended to benefit a political party to protect it from members who abandon its cause. The provision is intended to prevent floor-crossings. The political party in question is ultimately accountable (although he preferred answerability) to the people. There was no attempt to strike a balance between the provision and the Constitution's political rights provisions. The significant issue that arises from this limited approach is how due diligence applies in the case. While Zimbabwe has a chapter on the interpretation of political rights, we note that the guidelines on international law, foreign law, and writings of prominent jurists may provide useful insights.

The court in *Madzimure* supra compared section 129 (1) (k) to foreign law in India relating to anti-defection.

However, with respect, we contend that the Malaba decision is too narrow and invalidates the Constitution's contemplations on rights constitutionalism. The Court is required to apply the doctrine of due diligence and to provide legal meaning for specific activities and risks arising from public and private conduct. Due diligence is a three-pillared standard of care. First, those in positions of power can fail to act with due diligence if they could. Due diligence is *an obligation* to make every effort to reduce the risk of harm caused by a violation of constitutional rights. If the courts give full effect to the political rights outlined in Section 67, any of the Zimbabwe's political parties would be able to reduce the risk of mass recalls by acting with care, courts will be required to recognise that bye-elections cause social and economic harm to the electorate. Courts must put all necessary measures at the disposal of political parties to avoid significant harm to the electorate. This could include consulting the electorate through commissioned surveys or holding a pseudo-referendum in the affected constituency. This viewpoint is consistent with the need for courts to weigh the opportunity of a political party to act or prevent harm against an MP.

The second pillar of due diligence is the *foreseeability of harm*. Courts are the arbiters, and they must consider the reasons why political parties and MPs may split before the end of an electoral cycle. In most cases, political parties are aware of or anticipate that the conduct of their administrators of the recalls will cause irreparable harm to an individual MP. This has happened in cases where non-office bearers in political parties used the Movement for Democratic Change to send letters of recall to the Speaker of Parliament. Courts can experiment by summoning former recalled MPs who did so on ideological grounds, such as Munyaradzi Gwisai, to explain why they lost when it appeared that the electorate was against his recall. This could also help the courts understand how political parties can campaign vigorously behind the scenes to oppose a recalled MP seeking re-election through a by-election. The Courts are required under due diligence test to request that political parties reduce the risk of unjustified recalls by investigating the provisions of a party's constitution. The Courts can take judicial notice of the fact that in most

cases, those who lose their seats may still be able to band together with voters to re-elect them. This has been the case for MPs from the Triple C political party and independent MPs such as Themba Mliswa. These can help the court understand why the electorate must be consulted before the Speaker of Parliament acts on the so-called recall letters. As a result, from the standpoint of due diligence, the concerned political parties that arbitrarily recall MPs are not doing anything that benefits the electorate.

Third, due diligence stems from the need for those who violate rights or commit legal violations to strike a balance between the *foreseeable harm and the preventive measures required.* The proportionality doctrine requires a Court to strike a balance between the legitimate interests of the individual MP who is being recalled and the so-called power of the political party to recall the MP. The constituency's voice must be heard to determine whether a political party has taken proportionate measures to prevent or minimize harm. The determination of proportionality is made in the interests of protecting the potentially harmed MP from partisan recalls. The harm that is likely to result from the recall is not only the loss of the seat, but also the harm to the people who elect the MP. This is where a political party's duty to recall an MP should invite judges to investigate the consultation with the constituency.

Between Democratic Backsliding and Judicial Restraint

Democratic backsliding refers to a situation where democratic norms and institutions are weakened. Constitutional interpretation is affected by democratic backsliding because authorities might attempt to reinterpret or undermine constitutional provisions to consolidate power, potentially eroding checks and balances. This concern arose when the 2013 Constitution was amended to enable the President of Zimbabwe to appoint the Chief Justice and judge President. While a Chief Justice and Judge President are extraordinary judges in matters of state or national security, direct appointments might still threaten rights constitutionalism through democratic backsliding. Democratic backsliding often involves challenges to the rule of law and human rights. Political appointees may be manipulated to weaken protections for individual rights and might be reluctant to deal with cases of judicial overreach. As democratic institutions weaken, judicial independence may be threatened with judges facing pressures to align their interpretations with the political interests of those in power. This compromises their ability to act as effective guardians of constitutional rights.

Judicial restraint is a cautious approach to interpreting the constitution, emphasising limited interventions in political matters. While this approach may promote political and constitutional stability, it usually leads to unjustifiable reluctance to actively protect rights, especially in the face of government actions that may infringe upon them. When taken to an extreme, judicial restraint my result in a failure to adequately safeguard constitutional rights. Courts may avoid challenging legislative or executive decisions, even when there are concerns about rights violations. Contributing to the erosion of rights. A restrained judiciary is also less likely to establish bold legal precedents that robustly protect rights. Over time, this leads to a narrowing of constitutional interpretations, limiting the scope of individual rights. This aspect has become a perennial cause of concern in the recall of parliamentarians by factional and proxy office bearers.

There are also instances when superior courts appear to engage in democratic backsliding by invoking doctrines that prohibit litigants from presenting constitutional cases to superior courts. The case of *Associated Newspapers of*

Zimbabwe (Pvt) Ltd. v Minister of State for Information and Publicity in the President's Office and Others SC 20 of 2003 established the dirty hands doctrine. That case was used to demonstrate that those who approach the Court bear the burden of demonstrating that they are entitled to effective relief. The Supreme Court stated that the burden of proving that a law is not reasonably justifiable in a democratic society is on the challenger, not the State, and that there is a presumption of constitutionality in that sense. The Court stated that in some cases, the legislature may be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society, particularly where oppressive restrictions are not prohibited by the Bill of Rights. We believe that the current judges who favour constitutional avoidance and other doctrines such as subsidiarity, deference, ripeness, mootness and *sine die* postponement of cases fail to distinguish between the dirty hands doctrine and the rule of law promoted by the section 85 of the Constitution's broad *locus standi* provisions.

When it comes to interpretation of constitutional rights, section 85 of the Constitution abolishes the dirty hands doctrine. Section 85 of the Constitution provides that:

85. Enforcement of fundamental human rights and freedoms

1. Any of the following persons, namely--
   (a) any person acting in their own interests.
   (b) any person acting on behalf of another person who cannot act for themselves.
   (c) any person acting as a member, or in the interests, of a group or class of persons.
   (d) any person acting in the public interest.
   (e) any association acting in the interests of its members.

   is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.
2. The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).
3. The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules

must ensure that-- (a) the right to approach the court under subsection (1) is fully facilitated.

(b) formalities relating to the proceedings, including their commencement, are kept to a minimum.

(c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and

(d) a person with expertise may, with the leave of the court, appear as a friend of the court.

4. The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court.

Section 85 (2) provides unequivocally that the fact that a person has broken the law does not preclude them from seeking relief in court. Because of the subsidiarity doctrine, constitutional issues such as those contemplated by section 85, have been rejected because of the use of the subsidiarity doctrine. In *Majome v BAZ* CCZ 14/2016, where the applicant accused Zimbabwe Broadcasting Corporation (ZBC) of bias in broadcasting political events, the court decided to disregard constitutional provisions in favour of ordinary statutory provisions. The court found that:

> 'The applicant was bound by the principle of subsidiarity in the choice of the law on which to found the cause of action. According to the principle of subsidiarity litigants who aver that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless they want to attack the constitutional validity or efficacy of the legislation itself. See AJ van der Walt: "*Constitutional Property Law*" 3 ed Juta p 66, *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474(CC) paras 39-40, *Chirwa v Transet Ltd* 2008(2) SA 24(CC) paras. 59, 69.'

In criticising the finding in *Majome* decision, we argue that the court relied on South African case when there was no gap in the Constitution to warrant such reliance. Even under the plain meaning doctrine of constitutional interpretation, the Constitution makes it clear that the Courts must not bar litigants who allege constitutional rights violations. The arguments from

Woolman and Bishop – "*Constitutional Law of South Africa*" 2 ed Juta Vol. 2 at pp 34-47-

34-48 on how a "*law of general application*" may justify the impairment of a fundamental right means that conduct – public or private – that limits a fundamental right but is not sourced in a law of general application cannot be justified, were inapplicable in this case. In the *Majome* case, the applicant presented documentary reports produced by an organization called Media Monitoring Project of Zimbabwe (MMPZ) as evidence of the ZBC's alleged bias in favour of ZANU-PF in the selection and presentation of political programs. The Court then disregarded the spirit of Section 85 (2) by censuring the applicant as follows:

> It must be said that the applicant's conduct of deliberately refusing to pay the licence fee for possessing a television set remains a criminal offence notwithstanding the attempt to justify the offence on account of the alleged biased programming by the public broadcaster in favour of ZANU-PF. Wrongful conduct on the part of the public broadcaster cannot justify her own criminal conduct. Two wrongs never make a right. Both conducts infringe the law. There is no doubt that a person who deliberately refuses to fulfil an obligation backed by criminal law the validity of which is not impugned commits a criminal offence irrespective of his or her reasons for doing so.

The preceding remarks provide insight into the Malaba Court and how it has used judicial restraint to reverse rights constitutionalism's gains in abandoning the dirty hands doctrine. The *Majome* case demonstrates how the CJ was unwilling to even consider the possibility of protecting the constitutional rights that had been violated, demonstrating the numerous ways in which judicial restraint reverses rights constitutionalism's gains. The Constitution provides unequivocally that the dirty hands doctrine must not obstruct effective relief in the event of constitutional violations. It also demonstrates how, in most cases, the CJ has failed to promote a better understanding of alternative ways to promote rights constitutionalism as envisaged by the Constitution. Exploring the CJ's beliefs about constitutional litigation is one way to look at his constitutional adjudication. We demonstrate how a judge's philosophy on judicial restraint can shape the tone of judicial reasoning in a

country, based on the CJ's belief that constitutional litigation has resulted in experimental constitutionalism. We hope that Zimbabwean judges must now abandon the so-called belief in experimental constitutionalism that is almost certainly used to promote judicial restraint in constitutional cases.

The doctrine of experimental constitutionalism which CJ Malaba was the proponent, largely explains in large part why the current CJ has encouraged doctrines of judicial restraint that have either frustrated litigants, caused litigation fatigue, or has prolonged the hearing of constitutional cases. If rights constitutionalism is to be promoted, the doctrines of judicial restraint must be abandoned. Rather than criticising the way constitutional cases have shaped Zimbabwean rights constitutionalism, the CJ bemoaned the Court's overburdened workload in his speech during the opening of the Legal Year in 2018, CJ Malaba where he noted that:

> The number of cases filed in the Constitutional Court has been steadily dropping in the last few years. In 2015, 101 cases were filed. They dropped to 76 in 2016 and further went down to 70 in 2017. That trend is normal and attests to experimental constitutionalism. In the formative years of every Constitution, citizens are keen to test its provisions, in the process fuelling litigation. This gives a false impression of the court's workload. That stampede to test the provisions slows down as the court interprets the provisions and makes definitive pronouncements on various constitutional issues. These give guidance to litigants and legal practitioners. In the earlier years, the court had no rules to regulate its procedure. The enactment of the Constitutional Court Rules, 2016 streamlined the procedures on the filing of cases, further regulating the influx of cases into the Court. Whilst the number of cases filed has been decreasing, the output by the Judges has been steadily increasing. For instance, the Court completed 78 cases in 2015, 97 in 2016 and 120 in 2017. That resulted in a corresponding decrease in the number of pending cases from 146 in 2015, 124 in 2016 and 74 in 2017. My major concern is that there is an apparent failure by some judicial officers of subordinate courts and legal practitioners to comply with the Constitutional Court Rules when referring matters to the court. This has resulted in many of the cases so referred being struck off the roll. I worry about the time and resources wasted.

The remarks above show that the CJ viewed the cases filed at the Constitutional Court as primarily test cases. He however must be commended for imploring litigants and subordinate courts to comply with rules of the Constitutional Court. His remarks also give the impression that whatever was done with those test cases was done to address what the CJ regards as the false impression of the Constitutional Court's workload.

Chapterisation

This book has 11 chapters which discuss the approach to constitutional interpretation and identity. It shows that rights constitutionalism is hindered by instances where courts continue to frustrate litigants with canons of judicial construction, modified versions of the dirty hands doctrine, and outright judicial restraint. The first chapter discusses general issues relating to constitutions, competent jurisdiction of superior courts, and constitutional law. The other sections consolidate the arguments on rights constitutionalism and constitutional interpretation.

Chapter 1: What Constitutes Zimbabwe's Constitutional Law?

Introduction

Zimbabwe's constitutional law is mainly Anglicized. The teaching of constitutional aspects of the pre-colonial states in Zimbabwe is rare. Customary law courts are also listed in the hierarchy of lower courts. While there is living customary law in Zimbabwe the Government of Zimbabwe (GoZ) and civil society organizations have not pushed the codification of customary law in Zimbabwe. Zimbabwe's constitutional law is now taught in primary and secondary schools as part of the heritage-based curriculum. Universities also teach Zimbabwe's constitutional law under various disciplines such as law, political and administrative studies, governance and public management, and so forth. Zimbabwe has a written constitution which envisages a constitutional democracy. Zimbabwe has more than 14million people. A constitution is the supreme law of a country that shows how the public and private institutions relate and how ordinary citizens demand accountability from state institutions and from each other. Ordinary citizens and other persons benefiting from the constitution are protected by various constitutional provisions affecting the state institutions, national and international agencies, and other juristic or artificial persons who bear duties to uphold constitutional rights. The constitution regulates how national laws and regulations or international laws and norms and administrative practices, customs, and conduct are scrutinised by national courts to determine their compatibility with Zimbabwe's law. The courts can also use the constitution to determine the constitutionality of national laws or the status of Zimbabwe's compliance with international laws and standards.

In terms of Zimbabwe as a sovereign state or populated geographical entity, the country is multilingual and has 16 official languages including English and sign language. The origin of Zimbabwean people is not certain. Different competing views exist. Linguistically, it seems incontestable that Zimbabwean languages are linked to the known history of Zimbabwe's pre-colonial states such as Karanga under Chibatamatosi, 11th Century Mapungubhwe, Buchwa (*Guru/Uswa*), Mutapa, Torwa, Rozvi, and Ndebele state. The Karanga state preceded all states. This created a common language called Karanga around the

Great Zimbabwe ruins, Dzimbabwe, from which Zimbabwe has its etymology. Dzimbabwe also refers to various ruins dotted around Zimbabwe. Tradition says the people known as Karanga were descendants of the chief (*ishe*) and his second wife (*mukaranga washe*). The 11th century Mapungubhwe ruins, now part of South Africa, are believed to have been under the control of the Karanga. Various customs (*tsika namagariro*) were used to govern the chieftaincy or precolonial states. The states developed from single hamlets, a homestead (*mana*), a village (*ruwa*), many villages (*dunhu*), chieftaincy (*ushe*), and kingdom (*umambo*). Each king had senators called *zigadzi*, who worked like the current *sadunhu* or headman in chieftaincies with defined hierarchies of village head, headmen, and chiefs.

Close to the Karanga state was a lesser-known state called the Guru/ Uswa/ Vuswa state in Buchwa. When the Karanga Nevanji or Prince Mutota migrated to what became the Torwa and Tavara areas, he carried people who were referred to as Gorekore or mixed peoples, later called Korekore. The Korekore area was to receive derogatory references as *Gandavaroyi* or area where those accused of wizardry and witchcraft were banished so that they could be devoured by marauding elephants that infested the areas. The Karanga in the northern southern parts of the country would identify other tribes from the highveld as people from uzuru (highveld) or Zezuru. They had subdialects in the Shawasha and Budya areas. They would also identify other people from the eastern mountains as Manyika, from the Karanga word nyika, meaning mountain. They Manyika people had their subdialects in the Ungwe areas of Rusape who were called VaWungwe. Meeting people who came Mozambique and greeted each other using, *Ndauwee* greeting, the Karanga called the people the Ndau people.

Revisionist theories seem to disassociate Karanga people from the other tribes, arguing that Karanga migration occurred in the later centuries. Some opine that the Great Zimbabwe walls were built by Phoenicians, King Solomon and Queen Sheba, or the Eland people from Mutoko. They deny the existence of Karanga kings like the Great Zimbabwe King Chibatamatosi and his migrant son, Nyatsimba Mutota, as mythical presentations. The etymology of the Karanga and other tribal peoples was also clouded by the usage of the derogatory term Shona to describe the five major dialects of Karanga, Zezuru,

Korekore, Ndau, and Manyika. The term Shona is used to describe how the Ndebele and other Nguni peoples vanquished the tribes above during the Mfecane or time of trouble under Shaka the Zulu. The people were referred as Shona because the Ndebele people mistakenly thought the people were mostly found in the western side of Bulawayo, known as *etshonalonga*. The Ndebele used the name Shona to refer to a people on their way down, bankrupt and of no further account. It was a contemptuous nickname. When raided, the Ndebele would also kill these people's cattle and force them to prepare the intestines in special ways as a sign of their vanquishment.

There were no written constitutional rules then but writings from the Portuguese show that the Karanga state preceded other states such as Munhu/Mwene/ NeMutapa States, Vuswa state, Torwa state, and Rozvi state. The Karanga, Mutapa, and Rozvi states would dominate under kings and vassal chiefs. There were various political rights relating to the trial of subjects such as that a servant had the right to be present during his trial (*muranda nyangonaka haatongerwi mhosva asipo*). Children had the right to be nurtured by the greater society (*mugoni wepwere ndousinayo*). Foreigners had the right to shelter (*mweni haapedzi dura*). Kings and chiefs also derived their power from the people (*ushe idurunhuru* or *ishe vanhu*). There was a form of separation of functions involving the king/ chief, his *dare* (council), warriors, and so forth. The kings or chiefs however could serve as judges and prosecutors, something reflected in ancient kings everywhere, including Rome's Caesar or Caesar's wife. Each kingdom and its vassal chiefs had some constitutional rules relating to politics or exercise of political power.

The state and empire had a duty to protect and promote economic, cultural and social rights through the *Zunde ramambo and gombo* concepts. The *zunde* concept was meant to promote food security and right to social welfare or social security. The *gombo* (virgin) was meant to allow young men of marriageable age to work for virgins and virgin lands. In cases where dominant raiders threatened the economic security of the people, the king warriors would engage in distributive raids that targeted rich people. The raids were known as *guramatanga* or reduce the sizes of rich people's cattle wealth. The cattle would

be used to pay tribute to the Ndebele people who usually carried out their *Dzviti* raids or light wars on the people who came to be called Shona. The etymology of the word Shona is contested and is sometimes linked to Sena people now mostly in Gokwe and San people (not to be confused with the people later identified as Khoisan). There were some collective rights relating to the environment such as the belief that the forest rewards hardworking people (*sango rinopa waneta*) or forests had invisible stewards called *mhondoro* (lions) and angelic beings called *makombwe*. Animal rights were observed through various totems. These beliefs existed many years before environmental rights, green transition or evolution of sustainability concepts. Zimbabwe was a huge mass of land before the advent of colonialism, (see https://www.worldhistory.org/uploads/images/10179.png?v=1726779610-0, accessed 18 February 2025)

TALKING POINT

Some people focus on tribalistic arguments of the origins of Zimbabwe. Most of those tribal arguments have involved Karanga and Zezuru people who had the opportunity of having presidents from Masvingo and Zvimba. Other challenges emanate from arguments raised by people who believed the Ndebele state was the last state and territories must be redrawn. Some people think that tribe must die as was done in Rwanda after the 1994 genocide. Some have even written books questioning if Zimbabweans exist. How useful do you think tribe and tribal differences are in Zimbabwe today? Visit this website, https://www.zim.gov.zw/index.php/en/my-government/provinces/mashonaland-east/9-uncategorised/461-history-of-zimbabwe-2?showall=1, and check what the GoZ thinks about the pre-colonial settings.

Special environmental, animal, territorial, property and indigenous people's rights were entrenched through naming of places. It could be the rush and bustle of river Nyangombe (river of the oxen) near Nyanga; Bindura (a place of trapping of animals); Chinhoyi (land of Zezuru headman Tshinoyi); Chivhu/Chemuvhu (based on acacia robusta plans that grew there and so forth. Harare was Zezuru king Neharare's hill; Runde near Gonarezhou was a river subjected to great floods; Kadoma was a name of a Tonga chief before the present town was named after him. Kariba was kariva or little trap, Karoyi was the property of a muroyi or witch who was drowned in river Karoi. Macheke was a term meaning a place of cultivated fields and gardens. Marondera was land of Marondera, a Zezuru chief. Masvingo originated from the walls of Dzimbabwe guru. Mazowe was the place of elephants, Matendere in Buhera meant enclosures, and Mount Darwin was called Pfura by the Korekore. Shamva was named after shavhi or tsamvi species of wild fig common in that area. Wedza means a place of wealth as it was called by the Mbire people, a section of the Karanga people who settled there and mined iron. They would hide most of the iron and tools in Makwe under Chief Svosve and Mutukwa and Mushwawo. Bembesi was named by Mzilikazi to mean something unpleasant. Bulawayo was founded by Lobengula in 1872 who called it kwaBulawayo, the place of the persecuted man. This angered some regimental forces within the Ndebele who wanted to forget Mfecane under Shaka. In 1816, Shaka the Zulu had named his first city, kwaBulawayo because he had been ill-used by his rivals, 'killed by his enemies,' as the Zulus would say. Dhlo Dhlo was Karanga for zhozho or a head ring, before the place was attacked and ransacked by Zwangendaba's warriors. Figtree was the equivalent of Mutiusinazita or a nameless tree. The belief was that there were gold deposits

under the trees. Gwanda was a name of the grassy shrub growing there. Gweru was the name of a river which flows intermittently, meaning 'dry'.

Ntabazikamambo was the hill of the king Chirisamhuru. Inyathi owes its name because Lobengula was garrisoned by the buffalo regiment to the north of Bulawayo. Lalapanzi is a marshy area where cattle sink to their bellies giving the impression of lying down (*lala panzi or rara pasi*). Limpopo is known by many names. It is called *Vhembe* by the Venda people meaning, 'the gatherer;' *Noka e Udi* by the Tswana, meaning a river of steep banks; *Mete* by the Shanganes of Mozambique, meaning, 'the swallower;' *Ngulukudela* by the Ndebele meaning, 'the river that floods or *iliMphopho* (the river of the waterfall). Matobo was corrupted from amaTobo or bald heads, given by king Mzilikazi who humorously remarked that the stones resembled an assembly of his elders. Ntabazinduna was the hill of the headmen. Nyamandlovu was flesh of the elephant. Zvishavane was derived from shava or red-brown iron oxides common there. Chikore was the place of the little cloud where chief Dondo performed rainmaking ceremonies under a tree where a little cloud would gather after the rituals. Chimanimani comes from Mawhenge mountains, meaning rocky place. Chipinge was king Tshipinga's area. Chirinda was a refugee area under Shangane chief Tshirinda, Honde Valley was Muhonde, or river of euphorbia trees and strange rocks called Masimiki or rocks that stand upright. Mutare was river of ore, Nyanga was the place of the celebrated medium Sanyanga, who held sway over the plateau summit of the mountain named after him. Rusape was a river sparing of its waters, Save was the name of a flower *adenium multiflorum*.

Tanganda means flooding river. Umvumvumvu means river of plenty. Vhumba was mubvumbi or the mountains of drizzle. Binga was the name of thick forests that existed before the Tonga people were relocated there during the construction of the Kariba Dam. Dete was reedy river or *rwizi rweshanga*. Hwange was Nambya king Hwange Rusumbani's place, with Nambya as a section of the Rozvi people. Kazungula was named after the tree of the species kigelia pinnata found there. Pandamatenga was a place where Mutenga of the Mlilima people created hunting camps between Botswana and Zimbabwe using groves of mpanda or rain trees (*lonchocarpus capassa*) near Matetsi river. Victoria Falls was Tonga for Mosi o a Tunya or smoke that thunders or rises.

When the Ndebele came, they called it *aManza Thunqayo* (water that rises like smoke). Zambezi was called by the Karanga and Tonga *Sambambezi* or *Shambambizi* river. The Mozambicans called it Kwamo or river of great floods. All these areas were considered sacred and had some 'constitutional' values.

This even paved way for the colonial government and other development practitioners to associate themselves with sacred places such as Concession, Beitbridge, Birchenough Bridge, Chegutu (biblical Ophir place), Nalatale (walls in Ndebele), Mbalambala (kudu area), Plumtree or marula area, West Nicholson, Kwekwe, Cyrene Mission, Mount Hampden (Musitwe mountain meaning the immovable), Mvuma, Norton, Providential Pass near Masvingo, Christmas Pass, Mermaids Pool, Morgenster Mission, Mount Darwin (Biblical Ophir place) and so forth.

Throughout Zimbabwe's history, religion has been closely connected with chiefs, kings, queens, and royal courts. Kings were believed to be representatives of the Supreme Being (Mwari/Mlimo). They were born into royalty. They ruled with spirit mediums called mhondoro and angelic indwelt beings called Makombwe. Early Christians and Muslims also visited Zimbabwe. Religion today is taught in four major religions: Christianity, Judaism, Islam, and Indigenous Religion. Family life in Karanga used to consist of both matriarchal and patriarchal aspects. The matriarchy, *tete vakuru/bambomukadzi*, became the *tateguru*. Later *tateguru* had a masculine description and children assumed patrilineal names and totems. The relationships within the family were mainly arranged under the extended family system. Siblings, Piblings, and niblings were one family. There was no strict emphasis between immediate family and extended relatives. Today, the family is more nuclear, and sibling rivalry abounds. Festivals that had the status of constitutional values included love festivals (*kupanana nduma*), rainy festivals (*mikwerera*), sacred resting days (*zvisi*).

With the language evolution theory which continued under modern Rhodesia that was formalized in 1890, the Shona and Ndebele languages became the dominant languages under the British South Africa Company, settler rule, and after independence. After independence, some revisionist historians began to craft theories that locate Guru/Uswa as some place in Tanzania under, '*we all*

came from Guruuswa or *tose takabva Guruuswa*' mantra. This theory seems to have been popularized by the late Aeneas Chigwedere who began as a school headmaster at Goromonzi and rose to be a brilliant educator and statesman.

Nobody, including revisionist historians and constitutional historians, cared to go beyond the parabola of ancient civilization that is well-documented, including how the Paleolithic era had Africa and other continents joined. Modern Tunisia and Italy were joined by a tongue of land passing through Malta. Europe and North Africa were once joined as one landmass. Somalia and races in the Berber and Alpine Mediterranean were joined. The bridge between Tunisia and Italy sank leaving Malta and the Nile River to assume their current states. People moved to different areas including the San, Sena or Shona. Karanga and Kalanga people were not separated until when the Ndebele brought classes such as *Zanzi (upper Khumalo class)*, *Enhla* 8middle incorporated Nguni-speaking and elite Rozvi) and *Holi/ abahole (lower class citizens)*. Some powerful Karanga people intermarried with the Nguni-speaking people. Venda and Shona shared the same phonemic and phonological attributes and so forth. Whatever the origin of Zimbabwean people, Zimbabwean languages were to be described under some Bantu/ *vanhu/ abantu* connection. The history of Zimbabwean languages, as written language, is relatively young, except for English.

Indigenous languages and the constitution	**Currently left out or removed from mother language**
Ndau	Was formerly part of the five branches of Shona language together with Karanga, Korekore, Zezuru, Manyika. Now Ndau is a standalone official language.
Sena and San	Not officially recognised
Karanga	Not recognised although it shares a lot with Ndau, Kalanga and Xhosa
Korekore	Not included
Zezuru	Not included
Manyika	Not included
Maungwe, Shawasha, Chitoko, ChiGovera etc	Not included

The movement of Cecil John Rhodes to Durban in 1870 had a huge impact in shaping Southern African states into modern countries. Rhodes was the fifth

son of an Anglican clergyman who lived in Stortford, England. Rhodes developed tuberculosis and emigrated to South Africa to recuperate at the farm of his brother Herbert in Natal. He later abandoned the farm and joined the gold rush in Griqualand West. In 1880, Rhodes formed the De Beers Mining Company in South Africa. He bought his competitor, Barney Barnato out in 1888, with a cheque of £5 338 650. He also founded the Gold Fields of South Africa Company in 1887. He began to expand his gold exploration to Zimbabwe using the Rudd Concession and Moffat Treaties. Zimbabwe was now exposed to modern sources of hard international law.

In 1890, Zimbabwe was subjugated and named Rhodesia. In 1890, Rhodes was the Prime Minister of the Cape Colony. By 1893, Rhodes' British South Africa Company (BSAC)was a major force in the economy of Rhodesia despite the outbreak of the *Umvukela* War with the Ndebele people. He attempted to overthrow President Kruger by supporting the Jameson Raid from Zimbabwe into the Transvaal. The Jameson Raid was defeated and Rhodes resigned as the Cape Premier in 1896. His resignation was met with the outbreak of the First Chimurenga or Shona Uprising in Rhodesia. The Shona and Ndebele people were to be vanquished.

Zimbabwe's Modern Constitutional Law

Modern Zimbabwean constitutional law is a branch of public law concerned with the relationship between the State and its citizens. It is also the branch of law that deals with governance of a state and its people. Under Zimbabwe's constitutional democracy, constitutional law theories are built around the supremacy of the constitution. The written constitution is contrasted with other forms of constitutions (written/unwritten, rigid/flexible, military/civilian, unitary/ parliamentary, Republican/ mixed and so on). Zimbabwe's 2013 constitution was autochthonous or homegrown by native Zimbabweans. Zimbabwe's constitutional identity, stability and structure owe a lot to local legal factors. This position is enshrined in the constitutional provisions that obligate international laws to be consistent with Zimbabwe's constitution and laws.

The study of constitutional law follows the country's constitutional identity model. Zimbabwe's 2013 2013 replaced the Lancaster House Conference/

ceasefire Constitution as was shown above.[1] Constitutional law deals with how the country's constitutional development follows legal and political principles espoused in the constitution. It is critical that constitutional issues be kept separate from political decisions, and that this be done in accordance with a country's constitutional model.[2] Courts can declare political and legal traditions that are inconsistent with the constitution to be invalid or unconstitutional.

Political issues or controversies may be prevalent in a constitution that envisions an '*elective dictatorship*' in which power is concentrated in one arm of the state. This position can be found in unwritten constitutions such as the United Kingdom, where the Prime Minister wields political power.[3] In Zimbabwe the executive President wields monstrous political power as head of State, government, commander–in-chief of the Zimbabwe Defence Forces and so forth.[3] He also chairs the National Security Council under the National Security Council Act. The exist of the council also presumes the existence of a secured National Security Council Act. This adds to the executive excesses. Most constitutions also lack accountability mechanisms for monitoring ministerial performance or human rights violations by state officials. As a result, ministers who also serve as part of the executive branch of government base their evaluations on legislative hyperactivity rather than effective results.[4] The executive branch of Zimbabwe combines political (President, Vice President and Cabinet Ministers) and legal institutions (the Attorney General and important institutions that fall under the A.G.). This executive model reflects what is called the executive power excesses. While the constitution envisages the existence of an independent oversight mechanism to make security institutions accountable, the composition of those appointed by the President also leaves a lot to be desired.

Zimbabwe has a constitutional presidential model in which political actors outside of Parliament can wield political and legal power. The Cabinet, for

[1] See Sharon Hofisi and Eldered Masunungure, Rule of Law or Rule by Law, Journal of *Good Governance in Africa*, 2020.

[2] See Sir John Baker QC, 'The Unwritten Constitution of the United Kingdom,' (2013) 15 *Ecc LJ* 4–27, 6. [3] Baker (n 2) 6.

[3] See section 89 of the Constitution of Zimbabwe where the president has many offices; section 116-117 where he also serves as part of the Legislature and issues relating to his appointment of judges and commissioners of independent institutions.

[4] Baker (n 2) 8.

instance, initiates the legislative agenda long before Parliament decides to begin the law-making processes. Ministers discuss and advice the President on isues that are turned from policy to law. The policy cycle is all about who owns the policy and legal processes as shown below.

A SIMPLIFIED VIEW OF THE POLICY PROCESS

Constitutionally, the Zimbabwean Cabinet has evolved into a legal-political institution. This is because when included in constitutional provisions or involved in law reform discussions, a cabinet transforms into a legal-political institution. It gains formal recognition and authority within the constitutional framework, shaping the executive branch's role in legislative governance. This evolution signifies a structured and constitutionally sanctioned mechanism of decision-making, policy formulation, and law implementation within the government. To this extent, political issues may thus have no legal solutions unless the written constitution contains provisions limiting political powers,

such as founding values on good governance;[5] civil and political rights; or generally an expansive Bill of rights.

A written constitution serves as a model for governance by providing a foundational document or blueprint that outlines the structure of government, delineates powers, and guarantees justiciable fundamental rights. It has obvious advantages when compared to partially written or unwritten constitutions in that there is clarity of structure which helps in preventing the abuse of power by fostering a stable political environment. It also serves as a legal foundation for the state, providing the basis for all regulations and laws. It protects human rights and freedoms against potential government overreach.

A written constitution also entrenches rights based on the idea of entrenchment of rights that refers to the process of making certain provisions, especially fundamental rights, more difficult to amend. This prevents their arbitrary amendment. It also enhances the justiciability of rights by providing a clear legal basis for citizens to challenge violations of their rights in courts of law. Judges can refer to constitutional provisions to adjudicate cases involving alleged infringements on fundamental rights. This ultimately establishes the rule of law, ensuring that all individuals, including government officials, are subject to and accountable under the law. This fosters a constitutional society based on legal principles rather than arbitrary decisions or what Thomas Hobbes called the violent human nature.

The doctrines of entrenchment and justiciability that empower judges to review instances where constitutional rights and freedoms are violated, explain how such rights and freedoms are guaranteed. Factors to be considered in determining the justiciability of rights include the existence of an ordinary statute to give content to the constitutional right, the frame and content of the right, the forum where remedies can be obtained, and the academic or hypothetical nature or otherwise of the relief. The logical conclusion is that non-justiciable rights are not constitutional rights but can be protected using directive principles in the constitution. It has been stated that the Zimbabwean Constitution contains a supremacy clause that places a high

[5] See for instance the principles such as responsiveness, accountability, transparency and justice in section 3 (2) (g) of the Constitution of Zimbabwe 2013 ('the constitution); principles of public administration in section 194ff of the Constitution or the Bill of Rights in Chapter 4 of the constitution from sections 44ff.

value on the relationship between state institutions and between individuals and the State.[6] Any law, custom, practice or conduct that contradicts the Constitution is unconstitutional to the extent of its inconsistency.[7]

The relationship between constitutional law and politics is rooted in the concept of the rule of law that is principle of institutional morality characterized by two central characteristics: legal certainty and procedural fairness.[8] The definition of the rule of law as legal certainty is broad, and it includes how individuals can seek individual redress and how public officials and private individuals must be held accountable to one another through clear rules.[9] This is linked to the need for the virtues of rules to include legality, certainty, congruence to purpose, and accountability (vertical, diagonal and horizontal).[10] This also speaks to the need to limit discretion to achieve the interests of justice.[11] For instance, any form of discretion can be checked in a three-pronged fashion:

> First is the '*confining*' of discretion through rules, akin to legalisation and wherever possible discretion should be shaved down to the minimum compatible with the task to be performed. Discretion can also be controlled through '*structuring*' through open procedures such as rule-making procedures which administrative agencies must comply with before issuing their regulations. Third, there is '*checking*' of discretion by means of a second look internally and not necessarily through the courts.[12]

The first pillar of confining discretion obligates rule-makers to act objectively so that rules are predictable and are applied consistently. Structuring discretion obligates rule makers to act transparently and to promote participatory democratic governance. This could be achieved through consultative forums, oversight institutions and other accountability mechanisms contemplated by the constitution. Checking discretion involves

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[6] See section 2 of the Constitution.

[7] Section 2 of the Constitution.

[8] Jeffrey Jowell, 'The Rule of Law Today,' in Jeffrey Jowell & Dawn Oliver, *The Changing Constitution* (2000, Oxford University Press) 3.

[9] Jowell (n 8) 8.

[10] Jowell (n 8) 9.

[11] Ibid.

[12] See K.C. Davis, *Discretionary Justice* (1969) cited in Jowell (n 8) 9.

strong oversight mechanisms such as internal audits of skills and practices, supervisory evaluations, and internal checklists. For Zimbabwe, the rule of law as procedural fairness includes procedural protection that is also known as due process or natural justice. Natural justice is codified in administrative law under the Administrative Justice Act (Chapter 10: 28) and has been made justiciable in sections 68 and 69 of the Constitution. The right to be heard for instance has many facets under section 69 of the Constitution. These include the prohibition on condemning someone without giving them the opportunity to be heard or influence the outcome of the decision against him.[13] According to Jeffrey Jowell, such safeguards allow those affected to argue their case and, where a reasoned decision is required, to give formal and institutional expression to the influence of reasoned argument in human affairs through the process of justification.[14]

Albert Venn Dicey defined the rule of law as the rule or supremacy of the law.[15]Albert V. Dicey defined the rule of law in three ways. First, it implies that individuals should not be subjected to wide discretionary powers. As a result, Dicey claims:

> 'No one is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraints.'[17]

This interpretation of the rule of law has been interpreted as meaning that broad official powers are arbitrary powers which no one should be forced to submit.[16] As a result, 'Whenever there is a discretion there is room for arbitrariness,' and 'discretionary powers should be excluded from regular law.'[17] This approach is critical in constitutional interpretation, particularly when judges take judicial notice of certain issues during court proceedings or create arbitrary practice directives, notes and so forth. For example, some instructions concerning the setting down of election and constitutional cases are simply onerous and endanger democratic litigation in Zimbabwe. Litigants

[13] See also Jowell (n 8) 13.

[14] Ibid basing on Lon Fuller's understanding that the publication of decisions provides people with the opportunity to criticize arbitrary decisions and goes a long way in achieving accountability (and the rule of law).

[15] Albert V. Dicey, *The Law of the Constitution*, (1885, ed. by E.C.S Wade 1959), 189.

[16] Jowell (n 8) 5.

[17] Dicey (n 15) 188, cited in Jowell ibid.

should beg the courts of law to avoid arbitrary reliance on judicial discretion, particularly when judges refuse to consider the merits of constitutional matters by relying on technical issues or doctrines such as constitutional avoidance.[18]

Second, the rule of law entails the equal submission of all classes to a single law administered by the ordinary courts. Third, Dicey defined the rule of law as the absence of a separate written constitutional code and the creation of constitutional law as the result of the judicial decisions determining the rights of private persons in specific cases brought before the courts.[19] The third meaning is specifically used to distinguish the rule of law as it applies to Britain that has a partially written or unwritten Constitution, and this has largely contributed to Dicey's conceptualisation of the rule of law being heavily criticised.[20] W.A. Robson contended that Dicey misinterpreted French law because the droit administrative was not intended to exempt public officials from the rigors of private law, as Dicey claimed, but rather to allow public administration experts to determine the extent of official liability.[21] We have purposefully chosen to explain the rule of law because Zimbabwe's constitutionalism has largely been built largely on the contestability of this notion of procedural fairness, particularly from the early 2000s to date.[22] Furthermore, the teaching of constitutional law in Zimbabwe has largely relied on the concepts of Dicey's version of the rule of law without questioning its applicability to Zimbabwe's constitutional democracy.

The Constitution has clauses that make the people of Zimbabwe the repositories of state and governmental authority.[23] The Constitution's main preamble is enmeshed in the rule of law that limits the powers required in a

[18] Zimbabwean judges have often been crafting practice directives that are arbitrary especially when it comes to directives that bear on election matters. Often when judges raise the issue of 'taking judicial notice of something, they descend into the arena of the litigants and abandon the role of the court and case manager even in instances that depart from a consideration of the rule of law as reason, consent or constitutionalism. Sometimes they use the aspect of judicial notice to harass litigants' lawyers or justify why judicial restraint is to be applied in the case.

[19] Dicey (n 15) 195.

[20] See for instance W.A Robson, *Justice and Administrative Law* (1928, 2nd edition 1947) 343, cited in Jowell (n 9) 5.

[21] Ibid.

[22] For more issues see cases such as *Commercial Farmers Union and Ors v The Minister of Lands and Rural Resettlement and Ors* Judgment No. SC 31/10.

[23] See the main preamble under the '*We the People of Zimbabwe*' clause.

constitutional democracy. It is a type of normative consent based on the idea that the rule of law envisaged a situation in which the governance of a polity is contingent on the consent of the governed.[24] The Constitution also establishes three branches of government: the executive, legislature and judiciary. The concepts of separation of powers, separation of functions and separation of parties connect these branches. Politicians elected to the legislature for example, support their political party's legal interests even though they are technically considered independent. In parliament, political parties have chief whips and leaders. Some judges are also perceived to be appointed primarily based on their political party affiliations, resulting in a '*judge for the system*' analogy. While separation of powers is a constitutional doctrine in Zimbabwe, the executive's excess powers give the impression that there is separation of functions rather than powers. The other arms or branches are determined by how executive power is exercised. In some cases, the conflation of political parties, security institutions and government institutions complicate matters further. Such conflation refers to the intertwining or improper blending of these distinct entities, often leading to challenges in maintaining a healthy separation of powers and preserving democratic principles. This gives the impression that the branches' separate functions are nothing more than a division of political parties or political party interests. Further, there is partisan influence on security and government, politicization of institutions, abuse of state power, erosion of checks and balances, undermining of the rule of law, and presence of corruption risks.

When considering conflation of state institutions, careful considerations of constitutional and political issues is required. The assumption is that judges and lawyers who represent litigants must assist the Zimbabwean society in devising methods to separate constitutional and political questions. We should note right away that constitutional law is broad. It may address issues such as:

- the amendment process.
- the relationship between central government and devolved provinces.
- scope of central and devolved powers.
- public administration, national institutions and others.

[24] See T.R.S Allan, 'The Rule of Law as the Rule of Reason, Consent and Constitutionalism' (1999) 115 *LQR* 221.

- Independent constitutional commissions and other national institutions. Because the book focuses on judicial functions related to constitutional interpretation, it is also informed by the concept of judicial review.

Judicial review is important in constitutional interpretation because it is a constitutional doctrine that empowers courts (particularly superior courts) to declare unconstitutional executive and legislative acts as such.[25] The term superior is ambiguous because magistrates' courts review cases from traditional courts and so on. The judicial review doctrine is important for litigants who approach courts of law in written constitutional systems. In the absence of a written constitution, judges must rely on common law, soft laws or constitutional conventions.[26] The doctrine of judicial review is important in determining how committed a country's judges are to the constitutional frameworks that govern judicial independence and accountability. Judges must strive to be impartial arbiters in dealing with all litigants who approach them because they serve both as court managers and case managers. It has been observed that judicial impartiality means:

> 'To do right, that is to decide cases impartially, and in accordance with the law, judges must be independent to all litigants and also of all who might directly or indirectly seek to influence the outcome of a legal action, including their fellow judges who are not sitting on the particular case.'[27]

The preceding seminal remarks demonstrate that judges must be prepared to demonstrate direct and indirect impediments to the exercise of their judicial functions. In a country like Zimbabwe, where there has been concern about judicial packing by the executive, judges must work to assuage litigants' fears by dealing with constitutional issues on the merits. They must also not solely rely on constitutional avoidance doctrines in politically sensitive matters while favoring judicial activism in others. Furthermore, Lord Hodges' remarks elsewhere necessitate the application of the principle of judicial comity as

[25] The leading case in this regard is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[26] See A. Le Sueur, 'Parliamentary accountability and the Judicial System,' in N Bamforth & P Leylands (Eds) *Accountability in the Contemporary Constitution* (Oxford University Press, 2013).

[27] Lord Hodge, 'Upholding the Rule of Law: How we preserve Judicial Independence in the United Kingdom? (*Lincoln's Inn Denning Society*, 2016).

contemplated by the Constitution, particularly in relation to how judges are permitted to regulate their processes.[28]

Using Hodge's criteria, judicial independence should include inter alia:

> 'Clear constitutional commitments to the independence of the judiciary and the rule of law; exclusion or at the very least, minimization of political considerations as an influence on the appointment and promotion of judges; adequate finance; personal immunity from suit from acts and omissions related to the exercise of judicial functions; security of tenure; separation of powers; accountability; role recognition by judges; performance and moral authority; (and) maintaining political and public understanding and support.'

The logical corollary to this is that litigants' lawyers must also point out instances where they believe any of the pillars of constitutional law are not upheld.[29]These principles must be read in conjunction with the Constitution's principles on judicial independence (including personal, institutional, administrative, interpretive, managerial, leadership and financial independence). As a result, judicial independence is not limited to a single country but can and has occurred in a variety of constitutional systems. Judicial independence can be defined by internal or institutional laws in a specific jurisdiction or can be derived from principles from mature or developed constitutional systems and institutions that seek to promote the independence of judges.

The Essential Features of the Constitution of Zimbabwe

We have seen that Zimbabwe has essential features alluded to above. We may spend some discussion on founding values as they focus on the country's constitutional democracy, whose tenets are listed in the Founding values provisions.

The Founding Values of Democracy

The rule of law, constitutional supremacy; vested rights; good governance principles; separation of powers and other values are enshrined in the Constitution.[30] In some sections above, we discussed the concept of the rule of

[28] See section 176 of the Constitution.

[29] Further guidance can also be obtained from the International Association of Judicial Independence and World Peace, *Mount Scopus International Standards of Judicial Independence* (19 March 2008).

[30] Section 3 of the Constitution.

law in section 1 above. Perhaps a distinction should be made between the rule of law rule-book conception and rights conception of the rule of law. This is important in assessing judicial commitment to rights constitutionalism in Zimbabwe. Ronald Dworkin presents these two pillars as opposing ideals. The rule-book conceptualisation of the rule of law, for example, is based on the premise that:

> 'The power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all.'[31]

Using Dworkin's definition of the rule of law, judges are obligated to follow the rule-book conceptualisation of the rule of law by imposing such a rule in ordinary adjudication.[32] The judges can do so by interpreting what rules' makers intended, also known as legislative intent.[33]This differs from Dicey's approach to limiting or constraining judicial discretion if it is found to be arbitrary.[34] Many Zimbabwean cases under the Lancaster House Constitution emphasised this strand of the rule of law. The teaching of the rule of law in undergraduate legal studies also emphasised this strand because students were taught constitutional law as an introductory course or module. The use of this approach resulted in judges taking a haphazard approach to determining the constitutionality of statutes pertaining to contentious programs such as the land reform.[35]It also resulted in disputes over the legitimacy of judgments from regional courts such as the now defunct Southern Africa Development Community (SADC) Tribunal. Following judgments that denied litigants who had succeeded in challenging Zimbabwe's arbitrary land reform laws, the Zimbabwean judges refuse to give litigants the opportunity to enforce the judgments, citing policy considerations.

Ronald Dworkin's rights-based approach to the rule of law has not been widely adopted in Zimbabwe but took shape under democratic experimentalism after the promulgation of the 2013 Constitution. Dworkin's approach to rights constitutionalism is because Dworkin also influenced Britain's Bill of Rights

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[31] Ronald M. Dworkin, *A Matter of Principle* (1985, Oxford University Press 5) 11.

[32] See Brian Jansen, 'Dworkin's Rights Conception of the Rule of Law in Criminal Law: Should Criminal Law be Extensively Interpreted to Protect Victims' Rights? *Netherlands Journal of Legal Philosophy*, 2, (2017):160-176.

[33] Ibid.

[34] See Dicey (n 15) above.

[35] See the *CFU* case (n 22) and cases cited in that case.

jurisprudence. The rights conceptualisation compares with Dicey's procedural fairness and legal certainty.[36]It is a step above the rule-book approach that risks being dismissed in some situations as a mere democratic tenet whose pillars may not be applicable to written constitutions.[37]This approach simply assumes that:

> 'Citizens have moral rights and duties with respect to one another, and political rights against the state. It insists that these moral and political rights be recognised in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable.'[38]

This compares with the Bill of Rights in Zimbabwe that now imposes duties on state functionaries, state institutions and agencies, and natural and juristic persons,[39] and imposes obligations on right holders.[40] For Zimbabwe, the concepts of rights have moved beyond moral obligations. These duties have been codified in ordinary statutes and made legally enforceable or justiciable by the Constitution. For example, codified rules of natural justice relating to the right to be heard experienced a seismic shift in *U-Tow Trailers V City of Harare and Anor* 2009 (2) ZLR 259 (H) 267 F-G; 268 A-B where it was held that:

> "That the promulgation of the Act brings in an era in administrative law in this jurisdiction cannot be disputed. It can no longer be business as usual for all administrative authorities, as there has been a seismic shift in this branch of the law. The shift that has occurred is, in my view, profound as it brings under the judicial microscope all decisions of administrative authorities save where the provisions of s 3 (3) of the Act, apply. Because of the foregoing, I find that the decision by the first respondent summarily to terminate the lease agreement between itself and the applicant was an administrative action carried out by an administrative authority, empowered to do so by the lease agreement between the parties. The Act applies to that decision. The Act provides that an administrative authority which has the responsibility or power to take any administrative action which may adversely affect a right, interest or legitimate expectation of any person shall, inter alia, act reasonably and in a fair manner. The Act proceeds to define what a fair manner, for the purposes of the Act, entails and this includes adequate notice of the nature and

[36] See Dicey (n 15) above.

[37] See in detail the case of *in re Chinamasa* 2000 (12) BCLR 1294 (ZS) which dealt with vicious criticism of a High Court decision relating to the conviction and sentence of United States nationals for weapon possession.

[38] Dworkin (n 31) 11.

[39] Section 44 of the Constitution.

[40] Section 47 of the Constitution for instance provides for a presumption on the existence of other people's rights when interpreting the Bill of Rights. See also section 59 of the Constitution which obligates those exercising their freedom to petition and demonstrate to do so peacefully.

> purpose of the proposed action and a reasonable opportunity to make adequate representations, in my view, an embodiment of the *audi alteram partem rule*."[41]

Following the passage of the Administrative Justice Act,[42] natural justice principles were transformed from a matter of administrative discretion to a matter of legal requirement. They are now enshrined and justiciable as constitutional rights to administrative justice.[43]Using the rule of law or other values listed in section 3 or section 194ff of the Constitution, judges are obligated to ensure that their approach to constitutional interpretation in relation to the Bill of Rights is guided by the founding values of the constitution and other values contained in other constitutional provisions.[44] The core national values that are used to democratize a country are typically referred to as founding values. These principles and values are linked to the type of democracy practiced by a particular country. Zimbabwe practices constitutional democracy, with many modifications.[45] Zimbabwe has had various forms of democracy since it became a colony of Britain in 1896. It also benefits from borrowed or cross-border constitutionalism from common law jurisdictions with written constitutions, such as the USA, whose Constitution declares the people to be the source of sovereign power in the country. Zimbabwe's constitution also borrows from Canada, Kenya, and South Africa's constitutions in many ways.

National Objectives

The Constitution includes objectives that serve as a priority list for Zimbabweans to follow. Some critical issues, such as social security, are listed in the national objectives but must be made justiciable or legally binding under the Bill of Rights. The rights to social security and development must be included in the Bill of Rights for courts of law can properly protect, promote, respect and fulfil them as justiciable rights. The national objectives are

[41] See also *Danai Mabutho v Women University in Africa and Anor* HH 698-15 where this view was reiterated.

[42] Chapter 10: 28.

[43] See section 68 and 69 of the Constitution.

[44] Section 46 of the Constitution.

[45] See Sharon Hofisi, 'The Mosaic of our Democracy,' (11 April 2018, The Herald) ‹ https://www.herald.co.zw/the-mosaic-of-our-democracy/› accessed 18 November 2022; see also Sharon Hofisi, 'A Relational Approach to Supporting Democracy in Zimbabwe,' (21 March 2018, The Herald)‹ https://www.herald.co.zw/a-relational-approach-to-supporting-democracy-in-zim/› accessed 18 November 2022.

analogous to directive principles if they are used as tools for constitutional interpretation. As such, they are employed to comprehend the constitutional dimensions of state policy and to serve as normative starting points for such policy. National objectives, when used to protect constitutional rights, serve as supplemental information for the content of justiciable rights. This is particularly the situation in social, economic and cultural rights which require judges to develop standards of review for such rights considering state policy, laws and other measures. They are also critical in determining the government's commitment to democratic ideals and to the democratization of the state.

They also assist the international community in determining whether a country is following international human rights instruments, standards, and norms. Rights included in the national objectives, such as social security, are not justiciable and rely on the state's willingness to amend the Bill of Rights through a referendum to be made justiciable. The right to social security is no longer a question of social welfare but a matter of development. This is due to Zimbabwe's adoption of a developmental social pillar in all aspects of work, including the transformation of institutions like social welfare into social development. This highlights the importance of Zimbabwe making the right to social security and legal aid justiciable. Alternatively, the African human rights system can be used to translate the principles of social security into a justiciable right linked to the right to development protected in Article 22 of the African Charter on the Human and Peoples' Rights that focuses on the need to improve the well-being of humans and peoples of Africa. Article 22 of the ACHR provides that:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development

The primary goal of the right to development is to improve the well-being; one can never properly develop if a right is not asserted in a way that constitutionally obligates a duty holder to respect, protect, promote, fulfil or

uphold the right. Many of the critical issues identified in the national objectives should have been included in the Bill of Rights. Furthermore, when Zimbabwe amended its Constitution, a referendum should have been held to determine many aspects of the Bill of Rights that need to be amended to protect many categories of rights. This is because Zimbabwe went a long way to include other categories of rights in the Bill of Rights, besides civil and political rights.

The Bill of Rights

A justiciable Bill or Declaration of Rights contains a list of constitutional rights that are enforceable under a written or unwritten Constitution. Countries that lack fully written Constitutions, such as the United Kingdom have Bills of Rights derived from various statutes including the Human Rights Act. Regional systems and courts may have an impact on how constitutional rights are defined terminologically. For example, when discussing the protection of rights European citizens under the European Convention on Human Rights (ECHR), the ECHR, refers to the rights as fundamental rights. The term '*human rights*' is used by the European Court of Human Rights to refer to the rights of people living outside Europe or who are non-Europeans. The terms '*human and peoples*' rights' are used in the African human rights system to create duties and rights to be upheld by states and their citizens. The African human rights system is thus unique in because the State and its citizens are duty holders. Historically, the French Revolution inspired the Declaration of the Rights of Man (gender-inclusive). Zimbabwe's Constitution refers to rights and freedoms.

The Bill of Rights addresses both substantive and procedural issues concerning justiciability of constitutional rights. In many ways, the Zimbabwe's Declaration of Rights in Zimbabwe is expansive and progressive. The Bill of rights has four duties listed in section 44 of the constitution which are to protect, promote, fulfil and respect human rights.

44 Duty to respect fundamental human rights and freedoms

The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter

The duties to uphold human rights and freedoms apply to both the state and private persons (natural and artificial or legal persons).

45 Application of Chapter 4
(1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
(2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
(3) Juristic persons and natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them

Parliament has the primary responsibility for protecting through positively legislating for new rights and negatively refraining from legislating against existing rights. Zimbabweans must not be complacent about the extent of their fundamental rights and freedoms. They should use the presumption in favour of human rights to assess bills which parliament introduces. Responsible Portfolio Committees must monitor and report on the impact of bills on rights, including monitoring delegated legislation for infringements of rights under the constitution and regional or international human rights instruments. Political parties in Zimbabwe can also improve the culture of interaction and fight polarization so that cross-party cooperation can be enhanced. Courts and litigants should move towards creating protection agencies within state institutions. Currently the individual complaints mechanism can be utilised in this regard.

Rights holders should also respect the presumption not to preclude other people's rights which demonstrates that the Constitution assumes the existence of other people's rights.[46]

47 Chapter 4 does not preclude existence of other rights
This Chapter does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution.

Thus, the enjoyment of human rights is contingent on this presumption. This presumption makes justiciable all the other constitutionally protected presumptions. Lawyers were introduced to some presumptions in statutory

[46] Section 47 of the Constitution.

interpretation. The presumption of retroactivity shows that constitutional amendments must not apply retroactively unless explicitly indicate so that there is stability in legal rights and duties. The presumption of constitutionality shows that the legislature's laws are presumed constitutional unless proven otherwise. The victim has reverse onus to justify otherwise. In India, the case of *Keshavananda Bharati v State of Kerala* (1973) Supp. (1) S.C.R 1 upheld this position but went further to develop the basic structure doctrine of protecting fundamental rights following a constitutional amendment. The presumption against implied repeal protects constitutional continuity because the provisions of the constitution are presumed not to be repealed by later legislation unless expressly stated, see *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (UK) on the position that laws do not automatically override earlier ones unless explicitly stated. The presumption in favour of the exclusiveness of fundamental rights shows that multiple interpretations must be cured by upholding fundamental rights to foster a sustainable culture of human rights, see *Maneka Gandhi v Union of India* AIR (1978) SC 597 (India). The presumption against the restriction of common law rights shows that interpretation should not restrict common law rights unless clearly intended by the laws so that common law traditions are protected within constitutional frameworks, see *R v Secretary of State for the Home Department, ex parte Simms* 1999] UKHL 33 (UK) which held that fundamental rights must not be curtailed by ambiguous statutory wording because unqualified meaning may have passed unnoticed in the democratic process. The presumption of legislative intent to comply with international law shows that constitutions are interpreted in harmony with international law. International law is considered to be real law and states should comply with global norms they are a party to, see *Minister of Home Affairs v Fisher* [1979] 3 ALL ER 21 [1979] 2 WLR 889 which took an interpretation favouring international treaties using the doctrine of construction of the constitution.

The presumption against excessive delegation or the non-delegation doctrine assumes that the legislature does not delegate excessive power to the executive so that checks and balances under the separation of powers doctrine are maintained, *Whitman v American Trucking Associations* 531 U.S 457 (2001). The case showed that while Congress could give agencies some discretion in setting regulations, they may not consider financial effects when making

environmental regulations. Most presumptions are framed from the constitutional values in section 3 of the Constitution. There is a presumption for instance, that legislation is not intended to interfere with vested property rights and in administrative law, that it is not intended to oust the jurisdiction of the courts, see, *Anisminic Ltd v Foreign Compensation Commission* [1984]1 NZLR 116 at 121. Courts and litigants who shun presumptions must emphasise on the argument that presumptions themselves are not common law rights but only give limited protection to people's legitimate expectations. They however protect common law rights through presumptions of political communication jurisprudence, see *Australian Capital Television Pty Ltd v The Commonwealth* (1992) HCA 45.

Presumption	**Case**	**Main issues**
Presumption against retroactivity	*Mawarire v Mugabe & Ors*	The order sought by the applicant to compel President Mugabe to proclaim election dates sought to take effect before the end of Parliament's term. Implicitly, the Constitutional Court upheld the presumption against retroactive application of election-related laws by making an order that compelled the President to follow constitutional timelines.
Presumption of constitutionality	*Mpofu v ZESA 2020*	The Court presumed the constitutionality of some statutory provisions and shifted the burden of proof to the applicant to demonstrate that the said provisions had been violated
Presumption against implied repeal	*Tsvangirai v Mugabe CCZ 2017, CCZ 71/13*	The President's authority to proclaim election dates was challenged implying that newer constitutional provisions repealed older ones. The court found that this was not so unless explicitly stated, maintaining legal continuity.

Presumption in favour of fundamental rights	*Mawere v Registrar General and Ors 2013*	A Zimbabwean with foreign citizenship sought recognition of his Zimbabwean citizenship under the 2013 Constitution. Applicant's right was upheld because the court reinforced the relevant presumption.
Presumption against the restriction of common law rights	*Don Nyamande v Zuva Petroleum and Chawira v Minister of Justice*	In the Nyamande case, the employer was given the common law right to terminate the employment contract on notice to the employee, a right wwhich for long was not exercised. In the Chawira case, the court upheld the common law rights challenging death row placement as amounting to inhumane treatment. Although it did not outlaw the death penalty, the Court had utilised the presumption.
Presumption of legislative intent to comply with international law	*Government of Zimbabwe & Ors v Fick & Ors* 2013 (5) SA 325 (CC)	The case relating to the enforcement of SADC Judgment against Zimbabwe following land expropriation without compensation showed that international tribunal decisions are enforceable under crossborder constitutionalism, showing that domestic legislation intends to comply with international obligations. Zimbabwe had to respond by moving to disband the SADC Tribunal.
Presumption against excessive delegation	*CHRA v Minister of Local Government, Public Works and National Housing CCZ 3/24.*	Section 314 of the Urban Councils Act (Chapter 29:15) was challenged on the basis that the responsible minister is given monstrous powers that can override decisions of elected councillors.

It also includes three positive duties to protect, promote and fulfil human rights and freedoms, and a negative duty to respect human rights and freedoms on the part of state, state institutions and juristic bodies.[47]It also includes guiding principles for applying founding and other principles, foreign law, international law, and constitutional provisions to the interpretation Bill of Rights.[48]

46 Interpretation of Chapter 4

(1) When interpreting this Chapter, a court, tribunal, forum or body—

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

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

(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;

(d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and

(e) may consider relevant foreign law in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

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

The Bill of Rights also contains general limitations[49] and special limitations[50] on the enjoyment of human rights and freedoms in the Constitution.

86 Limitation of rights and freedoms

(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or freedom concerned;

(b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;

[47] See section 44 of the Constitution.
[48] Section 46 of the Constitution.
[49] Section 86 of the Constitution.
[50] Section 87.

(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
(e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
(f) whether there are any less restrictive means of achieving the purpose of the limitation.
(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
(a) the right to life, except to the extent specified in section 48;
(b) the right to human dignity;
(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
(d) the right not to be placed in slavery or servitude;
(e) the right to a fair trial;
(f) the right to obtain an order of habeas corpus as provided in section 50(7)(a).

87 Limitations during public emergency
(1) In addition to the limitations permitted by section 86, the fundamental rights and freedoms set out in this Chapter may be further limited by a written law providing for measures to deal with situations arising during a period of public emergency, but only to the extent permitted by this section and the Second Schedule.
(2) A written law referred to in subsection (1) and any legislative measures taken under that law, must be published in the Gazette.
(3) Any limitation which a written law referred to in subsection (1) imposes on a fundamental right or freedom set out in this Chapter must not be greater than is strictly required by the emergency.
(4) No law that provides for a declaration of a state of emergency, and no legislative or other measure taken in consequence of such a declaration, may—
(a) indemnify, or permit or authorise an indemnity for, the State or any institution or agency of the government at any level, or any other person, in respect of any unlawful act; or
(b) limit any of the rights referred to in section 86(3), or authorise or permit any of those rights to be violated.

It also includes the four generations of human rights and freedoms, with civil and political rights (first generation); economic, social, and cultural rights (second generation), and group/ collective rights or group rights (environmental rights) (third generation) taking precedence. The generations are not intended to prioritise a specific category of rights. Civil and political rights followed theorists like Hegel, Kant, Bentham, Rousseau and Locke who saw '*true*' freedom as one that proceeds from one's desire to be subjected to the common good, to rationality and through the ballot box. These rights were

included in the ICCPR. Some European countries are part of the European Convention on the Protection of Human Rights and Fundamental Freedoms while African countries are part to the African Charter on Human and People's Rights. Second generation rights are contained in the International Covenant on Economic, social and cultural rights (IESCR). International human rights norms combine positive rights and natural rights. ECOSOC rights are part of positive international law, and their scope and implications are constitutionally described in sections 74-77 of the Constitution.

The Bill of Rights also specifies the nature and content of human rights and freedoms. It is the content of a human right or freedom that makes it justiciable or non-justiciable. It is also the form or content that encourages judges to exercise judicial restraint when invoking non-constitutional doctrines such as the avoidance doctrine or subsidiarity. It also provides for the distinction between relative[51] and absolute rights.[52] In protecting human rights in the constitution, the first step is to encapsulate the right in an authoritative rule, a statutory or international legal norm that is binding so that the right does not merely become at best an expectation and at worst an aspiration. The other step will be to decide the appropriate method of applying the norm, including establishing the person to be bound and how. International law and diplomacy may be used as other steps where the victim lacks legal standing to enforce a right conferred by international law. Domestic or municipal laws might provide remedies such as declarations of rights, specific performance and so forth. Constitutionally protected rights may be enforced through judicial review of constitutionality of legislation. Judges who feel that this approach may substantively reduce the legislative power, orders suspending the operation of the remedy may be imposed to prevent conflict between state arms.

The Schedule of the Constitution

The Constitution's schedule contains vital information on the delegation of powers to state bodies, functionaries, and institutions. It amplifies what the substantive constitutional provisions say. The resolution of constitutional

[51] For instance, freedom to demonstrate and petition government in section 59 of the Constitution is relative upon being exercised peacefully.

[52] See the rights such as right to life and freedom from torture which are non-derogable as contemplated by section 86 (3) of the Constitution.

disputes is dependent on the schedule's exemptions or clarifications on how certain provisions; offices; positions or functions must be interpreted. This is directly linked to the importance of the constitution as a supreme law of the land and the country's political or policy roadmap. The discussion of the five features is not exhaustive. When the late President Mugabe fired his Vice President, Emmerson Mnangagwa, in 2017, the schedule became an issue. The question became whether a Vice President is subject to the President of the Republic. Other issues concerning the schedule are related to the type of democracy that explains the nature of the Zimbabwean presidency or legislature. A President (and Vice President) is clearly elected directly by jointly registered voters, whereas parliamentarians are indirectly elected through representational democracy.

Because the running mate clause (now removed through an amendment) had not implemented for the first two election terms, Vice Presidents were at the mercy of the President. The election of a VP based on the running mate clause means that Zimbabwe will not face a constitutional crisis if a President is deposed, resigns, or dies in office beginning in 2023. He or she is automatically succeeded by his running mate. Following Mugabe's resignation, Zimbabwe was ruled by five Presidents in quick succession. Mugabe became the country's second President in 1987, succeeding Canaan Banana, albeit as executive president. When Mugabe resigned or was forced to resign that ever way is correct, Vice President Mphoko 'took over' as President by virtue of the Constitution. He was unavailable and eventually became incapacitated. The Speaker of Parliament became the *de facto* President, signing letters of invitation to Head of States and Governments before the transition of power to the fifth President, Emmerson Mnangagwa, took office on November 24, 2017. The schedule and other significant features demonstrate that constitutions, in whatever form they are framed, can have a variety of significant features, depending on whether they are prescriptive or procedural.[53]

Some Key Aspects from Constitutional Law

Constitutional law also provides insights on the traditional sources, theories, processes, structures and instruments that are involved in making, interpreting

[53] See more detail IDEA, 'What Is a constitution? Principles and Concepts (August 2014) ‹ https://constitutionnet.org/sites/default/files/what_is_a_constitution_0.pdf › accessed 22 November 2022.

and applying ordinary laws and the Constitution.[54] To this extent, constitutional interpretation becomes:
'a special case of legislative interpretation – special because constitutions have peculiar characteristics, yet still a case of legislative interpretation because they are written laws enacted by a supreme political authority.[55]

Essentially, every lawyer is *presumed to know or be knowledgeable about the law*, particularly the critical relationship between constitutional law and other branches of the law. This presumption is critical for understanding one's own legal system and other legal systems. The constitutional lawyer should also know the sources of constitutional law such as:

- The constitution
- National laws
- Precedents or previously decided cases
- Administrative constitutional law
- Legal writings
- Codified laws
- Foreign laws
- International law

Constitutional law and interpretation help lawyers and judges in a country to have a better understanding of their own legal system's rules and institutions from a new perspective and in a better way.[56] Zimbabwean lawyers are required to work *de lege ferenda*, because the case law of judges create precedents which can be considered trite law. Lawyers can also work *de lege lata* in cases where foreign and international laws are used to fill gaps in domestic law. Judges and lawyers who value various areas of comparative law as they relate to constitutional interpretation can benefit from the best of both the *de lege feranda* and *de le lege lata* worlds.

The Zimbabwean constitution also requires lawyers to understand the country's legal system. As a result, the constitutional lawyer who is dealing

[54] For general appreciation of Zimbabwean law, see Lovemore Madhuku, *An Introduction to Zimbabwean Law*, (African Books Collective, 2010).
[55] Gonçalo de Almeida Ribeiro, 'What Is Constitutional Interpretation?' *New York Colloquium*, ‹What is Constitutional Interpretation.pdf (nyu.edu)›accessed 13 November 2022.
[56] Michael Bogdan, *Comparative Law* (1st Edition, Kluwer, 1994) 28.

with cases that are before political, extraordinary or doctrinaire judges must also demonstrate how the Constitution serves as the foundation of the State's legal order and as a power-map tracing the normative relationships between government and citizen.[57] This position was considered in common law jurisdictions such as Great Britain where the constitutional lawyer and the political scientist are forever undivided.[58] This observation is significant, particularly in Zimbabwe, where constitutional law is primarily taught in law schools without due guidance of authoritative texts that can be properly critiqued by legal scholars and judges.[59] Most lawyers in legal practice before the introduction of master's degrees in law at the UZ and MSU got an appreciation of constitutional law (and mostly ordinary statutory interpretation) at undergraduate level. They were taught mainly using principles of foreign theorists, jurists and philosophers because of the absence of literature that provide a Zimbabwean constitutional perspective.

The teaching of constitutional law did not put any emphasis on constitutional interpretation and comparative constitutional law as part of the course outlines.[60] Most lawyers in Zimbabwe who attended law school in Zimbabwe during the University of Zimbabwe's monopoly on legal education were introduced to constitutional law by Professors Welshman Ncube and Lovemore Madhuku. Other emerging law schools have different constitutional lecturers, some of which were taught during their undergraduate studies by Professor Madhuku or had postgraduate studies in foreign jurisdictions. Law schools in Zimbabwe however took long to introduce students to constitutional interpretation or advanced legal training. Even the proliferation of law schools and lecturers simply meant that lawyers were now taught constitutional law and human rights in a variety of ways, depending on the lecturer's training or schools attended. Professor Madhuku took an Anglicized approach because of his training in the United Kingdom. Other lecturers who were educated in South Africa conducted comparative studies, particularly in

[57] See Ivo Duchacek, *Power-Maps: Comparative Politics of Constitutions* (Santa Barbara: ABC-Clio, 1973).

[58] See S.A. de Smith, The Lawyers and the Constitution, Inaugural Lecture delivered at the London School of Economics (10 May 1960) 6.

[59] The five law schools in Zimbabwe, University of Zimbabwe (UZ); Midlands State University (MSU); Great Zimbabwe University (GZU); Zimbabwe Ezekiel Guti University (ZEGU) and Africa University (AU) teach constitutional law at undergraduate level. The differences in teaching are noticeable at master's levels for MSU and UZ.

[60] See also Madhuku (n 54) ibid.

areas of judicial selection and economic, social and cultural rights. Those lawyers who had been educated in the United States such as the late E. Zvobgo were outspoken supporters of the separation of powers, castigating parliamentarians who did not assert their independence as *'Parliament's foolish lot or partly wise.'* Zvobgo was also instrumental in turning Zimbabwe's presidency into an executive presidency, leading to the abolition of the Prime Minister's position in 1987.

Some lawyers are now benefiting from attending law schools which offer advanced modules linked to constitutional law such as human rights law, international law and international humanitarian law. We hope that law schools will teach advanced constitutional or comparative constitutional law, international or regional protection of human rights, and various human rights systems to enable lawyers to properly defend constitutional rights.

The expansion of legal education to include degrees such as the LLBS and Honours in Substantive law has introduced law to students from a variety of disciplines, including media, history, political science, development studies, and administration. If those students are appointed to the judicial bench or practice law, Zimbabwe's constitutional interpretation will take on new dimensions. Lawyers who remain in silo projects of '*legal puritans*' are likely to be left behind. As a result, legal educators must expand their curricula to include legal and political theory. They can no longer afford to focus on the doctrinal approach to law which attempts to separate legal arguments from political and policy debates. Law after all is a product of policy and political institutions and should be taught from a functional approach.

As a result, judges rely more on literature from legal scholars, case law, judge's researchers, and judicial colloquiums to gain an understanding of how to interpret the Zimbabwean Constitution. Historically, the Lancaster House Constitution, 1980, [61] did not include a broad interpretation provision governing how Zimbabwean courts of law must interpret the Constitution.[64] The need for lawyers to understand how Zimbabwe differs from other jurisdictions in terms of how it uses legal doctrines, methods of constitutional interpretation, or approaches to the adoption of foreign law is linked to the

[61] This was repealed and replaced with the Constitution of Zimbabwe, 2013 ('Constitution).

arguments raised above on the teaching and practice of constitutional law. In Zimbabwe, judges are still invoking foreign doctrines that are long abandoned in their country of origin or would have been modified from the classical sense.[62]

Evolution of the Formalised Constitutional Structure of Zimbabwe

Britain's colonialism greatly influenced Zimbabwe's constitutional structure when it turned into a modern state in 1890. While Zimbabwe had constitutions in 1923 and 1961 under British rule, there was no judicial demonstration of inner logic and coherence in constitutional interpretation until the case of *Madzimbamuto v Lardner Burke* [1969] 1 AC 645. In many ways, this case introduced a seismic shift in constitutional interpretation, demonstrating how judges can go a long way toward exposing the relationship between constitutional law and politics on one hand, and constitutional rights and freedoms on the other. The judges' task was to balance legal and political doctrines such as *de facto* and *de jure* recognition and the doctrine of necessity. This difficult task demonstrated how a codified constitution must serve as a foundation for analysing and interpreting constitutional provisions. Another important aspect in this case was that the interpretations from the judges of the Rhodesian High Court, Supreme Court and Privy Council differed concerning the *de facto* or *de jure* status of the Unilateral Declaration of Independence (UDI) government under Ian Smith. The was landmark because it showed that:

- Southern Rhodesia had become a self-governing British colony in 1923
- The Westminster Parliament passed the Southern Rhodesia Act 1965 which declared that Southern Rhodesia remained a colony and provided for the Queen to exercise her legislative powers by Order in Council.
- the Southern Rhodesia (Constitution) Order 1965 was made; s.2(1) declared the new 1965 Constitution void, whilst s.3(1) temporarily suspended the power of the Legislative Assembly

[62] See for instance, Sharon Hofisi, *The doctrine of constitutional avoidance as a nemesis to public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis* (University of Zimbabwe, 2018), ‹The doctrine of constitutional avoidance as a nemesis to public interest and strategic impact litigation in Zimbabwe: Thesis, antithesis and synthesis | Semantic Scholar›accessed 13 November 2022.

- The acts, orders and legislation made by an illegal regime are considered invalid and cannot override the right of the United Kingdom Parliament, as the lawful sovereign, to make laws.
- The convention that the United Kingdom Parliament does not legislate on matters within the competence of the Legislative Assembly without the agreement of the Government of Southern Rhodesia is not legally enforceable.

After independence, Zimbabwean judges such as Justices Gubbay, Muchechetere, Sandura, McNally, Dumbutshena, Chidyausiku and others shaped the constitutional structure in different ways under the 1980 Constitution, particularly in terms of the protection of the rule of law or in curbing rule by law or lawfare in the protection of civil and political rights. Problems relating to human rights, including ECOSOC adjudication, were mainly resolved from the perspective of civil and political rights (CPRs) which were justiciable in the constitution. Economic, social and cultural rights (ESCRs/ECOSOC) were claimed through CPRs since ESCRs were not entrenched in the constitution and as such, were not consistently considered as justiciable fundamental rights.[63] Progressive changes occurred with the introduction of a home-grown constitution in 2013. It changed the way judge-made customary and common laws are considered and how judges should develop such laws. This was because informative legal scholarship on ESCR greatly increased and became accessible to Judges although they did not mention such legal work in their judgments.[64] Landmark cases were also made and pronounced such as *Danai Mabutho v WUA and Anor*, HH 698/15 and *Amos Makani v Arundel* CCZ 7/2016 (right to education), *Mapingure v Minister of Home Affairs* SC 22/14 (right to healthcare), *Mushoriwa v City of Harare* HH 195-14, *City of Harare v Mushoriwa and Anor* SC 228/14, and *TK Hove v City of Harare* HH 205/16 (right to water), *Chitungwiza Residence Trust v Chitungwiza Municipality* HH 52-15

[63] See in general Ntandokayise Ndlovu, *Protection of socio-economic rights in Zimbabwe. A critical assessment of the domestic framework under the 2013 Constitution of Zimbabwe* (Achor Academic Publishing 2016); Howard Chitimira, 'An Analysis of Socio-Economic and Cultural Rights Protection under the Zimbabwe Constitution of 2013,' 61 (2) *Journal of African Law* (2017) 171-196, 174.

[64] See for instance, Justice Mavedzenge & Douglas Coltart, *A Constitutional Law Guide towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights* (Zimbabwe Human Rights Association); Prosper Chitambara, *A Compendium on Social-Economic Rights in Zimbabwe* (Labour and Economic Development Research Institute of Zimbabwe, 2017). Noah Maringe, *Freedom of association for private sector employees in Zimbabwe: a comparative analysis*.

and *Chitungwiza Residents Trust v Minister of Local Government and Public Works and Anor* HH 599-22, and the recent Chitungwiza Residents Trust case that was confirmed by the Constitutional Court (freedom from arbitrary eviction).

In terms of the nexus between constitutional structure and judicial interpretation, lawyers with advanced legal training in Zimbabwe have begun to scrutinise the work of superior courts in many ways such as the Constitutional Court's role in the protection of human rights[65]and the use of constitutional avoidance to discourage strategic and public interest litigation;[66] judicial selection strategies[67] and so forth. This makes legal scholars in Zimbabwe as contributors to the source of law in Zimbabwe both on a *de jure* and *de facto* basis. Constitutionally, judges of superior courts in Zimbabwe are obligated to either develop customary and common law of Zimbabwe and to regulate their own processes. This is despite the surprising omission of case law on what is considered to be law under the definition sections in the constitution.[68] What this means is that judges must interpret the laws (including the Constitution), to help the lawmaker (The Legislature) to reform the law in line with the Constitution (and international law) and litigants to benefit from certain of the law when they resolve their disputes through courts of law.

While constitutional interpretation is a result of judicial discretion, lawyers who appear before courts of law must strive to improve the quality of interpretation by filing well researched pleadings.[69] Robert Park notes

[65] See in detail, J Mavedzenge 'The Zimbabwean Constitutional Court as a key site of struggle for human rights protection: A critical assessment of its human rights jurisprudence during its first six years' (2020) 20 *African Human Rights Law Journal* 181-205.

[66] Hofisi (n 62).

[67] Gift Manyatera, 'A Critique of the Superior Courts Judicial Selection Mechanisms in Africa: The Case of Mozambique, South Africa and Zimbabwe,' (University of Pretoria PhD Thesis, 2015); see also Tabeth L. Masengu, 'what Lies beneath: The Complex Nature of Appointing Women Judges in Zambia and South Africa,' (University of Cape Town, PhD Thesis, 2020). See also Owen Murozvi, a critical analysis of the mandate of the National Peace and Reconciliation Commission (NPRC) in achieving transitional justice in Zimbabwe.

[68] Section 332.

[69] See Mark Fischler, 'An Integrated Approach to Constitutional Interpretation,' *Journal of Integral Theory and Practice*; see also Robert E. Park, 'How Lawyers Read the Constitution: An Introductory Bibliography,' 26 (1) *American Studies International* (April 1988), pp. 2-34.

monumentally in respect to the role of judges in enforcing the American Constitution that:

'The power to enforce the rights and powers afforded by this most important document in the nation's political life-the very instrumentality of securing liberty, political representation and limits to governance-lies largely in the hands of a judiciary and a profession that are politically unaccountable. So, if I shall argue, the Constitution is not itself an objective source of rights, this professional class enjoys unique and often invisible controls over the recognition, expression, and protection of constitutional rights and powers.[70]

Judges must however link constitutional interpretation to the constitutional history that obligates judges to exercise judicial review because of their sworn duty to uphold the Constitution.[71]The remarks by Robert Park and those of Chief Justice Marshall in the *Madison* case show at least four important issues that explain the nexus between constitutional interpretation and the duty of judges to uphold the Constitution.

Firstly, nuanced common law traditions to which Zimbabwe's constitutional law owe a lot of comparisons aid the development of democracy and democratization in a country if judges commit to the traditions that legitimate constitutional democracy. At the same time, however, country-specific judges can provide constitutional resources which serve as resources which litigants in a specific constitutional structure or society could utilise to further the independence of judges from peer, litigant or political threats. Second, constitutional common law in mature democracies affected the constitutional democracies of the countries that borrowed constitutional doctrines. Not only was Zimbabwe's progressive constitutional democracy affected by its contact with American, South African, Canadian and Kenyan influences. It has been a major contributor to what is called the modification of constitutional traditions since Zimbabwe has an *a la carte* constitutional identity that enjoys the best of many worlds. Zimbabwe now has a mixed tradition that has legal doctrines enmeshed in the Constitution and non- constitutional traditions that are borrowed and invoked by judges as part of judicial restraint in Zimbabwe.[72] This has given rise to new forms of constitutional doctrines or constructions

[70] Park (n 69) 2.
[71] See *Madison* case (n 25).
[72] See Hofisi (n 62).

such as avoidance, prolonged reservations of judgments, deference, moot, ripeness and other doctrines.[73]

Third, borrowed doctrines applied by judges in Zimbabwe have immensely affected the litigants and outcomes of constitutional matters in a way that threatens the supremacy of the Constitution. For example, the Constitutional Court, the apex Court in constitutional matters has been the leader of judicial restraint in constitutional matters that bear on the interpretation of human rights and freedoms.[74]Surprisingly, the High Court has been innovative in its use of judicial activism to protect the constitutional rights and freedoms which are usually threatened by the invocation of various forms of judicial restraint by either the Supreme Court or Constitutional Court.[75]

Fourth, constitutional interpretation has been threatened by the Constitutional Court's reliance on constitutional construction as a canon of judicial creation that relies more on avoidance or judicial restraint to avoid the determination of courts on the merits. Amongst worrisome cases are those that deal with arbitrary confiscation of property by security institutions; the right to life; freedom of association; and many others.[76]The concern in this book is that judges of superior courts must not rigidly lean on judicial restraint or constitutional avoidance as they seek to canonize rather than constitutionalize the interpretative regime in Zimbabwe. If the canons of judicial constructions and creation are invoked, they must be applied in their modern form. Zimbabwe's judges have been criticised for invoking classical doctrines of constitutional avoidance which have been abandoned or modified in jurisdictions they originate such as the USA and South Africa.[77]

As we will show in this book, there has been lack of nuanced court judgments or dissenting opinions on why constitutional interpretation in Zimbabwe

[73] ibid.
[74] Ibid.
[75] Ibid.
[76] See in detail the discussion Sharon Hofisi, 'The ConCourt and the Avoidance Doctrine,' (11 October 2017, The Herald) ‹ https://www.herald.co.zw/the-concourt-and-the-avoidancedoctrine/› accessed 18 November 2022.
[77] See Hofisi (n 62). See also Tawanda Rest Zvekare, 'The applicability of the doctrine of constitutional avoidance to constitutional adjudication in Zimbabwe,' ‹https://www.semanticscholar.org/paper/Theapplicability-of-the-doctrine-of-constitutional-Zvekare/c098b327ef20ec227a872c046ac94d2b27a2e7ccA› accessed 18 November 2022.

must not be threatened by unanimous or frequent use of contemporary doctrines of judicial restraint that largely apply in jurisdictions where judges are professionally independent such as the USA. Zimbabwe's model of judicial selection often receives a backlash that is expressed in political or patronized terms. It is the duty of judges to allay the general populace of the fears that they resist constitutional doctrines and rely on canons of construction to frustrate litigants who bring constitutional matters that upset the political establishment of the day. Although the use of canons of judicial canons is justified in situations where lawyers flagrantly disregard the rules of the courts or the presumption to know the law, the frequent reliance on lengthy reasons on why such doctrines must be used to create backlogs in constitutional matters has made judicial restraint to dominate the constitutional order in Zimbabwe.

In many ways constitutional avoidance and its variant forms seem to threaten judicial independence. Unelected judges who should serve as court and case managers in critical cases override and exclude constitutional ethos unanimously simply to delay the finalization of constitutional matters. This approach clearly creates minority majority on the part of judges, something antithetical to the counter-majoritarian dilemma. This does not necessarily mean that canons of judicial creation undermine constitutionalism, but it at least explains why judges who are politically appointed may threaten the constitutional structure in a society. However, many of the issues discussed in this book point to the need for litigants through their lawyers to also innovate on ways to implore the courts to be.

Comparative Constitutional Interpretation

Comparative constitutional interpretation depends on the quality of constitutional documents that are submitted before a judge; the type of the judge and the ability of the judicial bench and litigants (especially legal representatives) to appreciate comparative aspects of constitutional interpretation as they apply to Zimbabwe. To do so, the judges must also understand the concept of comparative in general. Comparative law is a term of art which does not really focus on how separates the parts of legal systems

are.[78] Three illustrations have been made to show how the 'comparative' in comparative law or other aspects of the law can be interpreted to mean:

'(*Firstly*, the comparing of different legal systems with the purpose of ascertaining their similarities and differences. *Secondly*, working with similarities and differences that have been ascertained, for instance explaining their origin, evaluating of the solutions utilised in the different legal systems, grouping of legal systems into families of law, or searching for the common core of the legal systems. *Third*, the treatment of the methodological problems connected to the study of foreign law (*italicised words added for clarity*).'[79] While the term comparative law is normally used in course outlines or studies of foreign law, it must be made clear that studies of foreign law in and of themselves alone do not fall within the framework of comparative law.[80]

What this entail is that judges are at large to interpret the constitution based on their knowledge that is obtained because of advanced studies in law; doctrine of judicial comity; constitutional requirements; or judicial doctrines that are normally invoked in a legal system. This point however means that the judge must appreciate the similarities and differences correctly and not merely in an incidental fashion.[81] What is gleaned from the above is that some expert knowledge on what is compared is needed on the part of the judge, judges' researchers and the litigants' lawyers. As such, a point worth reproducing from Michael Bogdan's discussion of comparative law as a legal method or science is that comparative law must not be used casually and in piecemeal fashion. Bogdan thus notes:

'Not long ago, comparative law was regarded as being a playhouse for escapist theoreticians having rather peculiar interests. Comparative jurists used to be for example facetiously defined by their colleagues as jurists who when in their own country pretended to be experts on foreign law, while abroad representing themselves as experts on the law of their home country. Today however, it is generally recognised that comparative studies can greatly contribute to legal education and research.'[85] There are two corollaries to the above quotation when it comes to interpretation of the constitution or

[78] See for instance Gutteridge, *Comparative Law* (2nd edition, Cambridge, 1949).
[79] See Michael Bogdan, *Comparative Law* (1st Edition, Kluwer, 1994) 18.
[80] Bogdan (n 82) 19.
[81] See Walter J. Kamba, 'Comparative Law: A Theoretical Framework,' 23 *ICLQ* 489 (1974). [85] Bogdan (n 82) 25.

ordinary law in general. First, judges who have acquired some advanced studies in law can use comparative constitutional law and interpretation methods to increase a society's knowledge of the legal system as a social phenomenon.[82] This is because lawyers, lecturers and students can see, hear and think about rules and institutions differently without consciously or instinctively being bound by certain legal solutions suggested by lawyers who do not knowledge of comparative legal systems.[83]

In terms of the Constitution of Zimbabwe, judges are obligated to know some comparative aspects of the law beyond Zimbabwe especially when interpreting constitutional rights in the Declaration of Rights.[84] They are obligated to use international law and foreign law when interpreting the constitution. This means lawyers and judges must also strive to apply the relevant rules and aids of constitutional interpretation which are needed for the protection, promotion, respect and fulfilment of human rights and freedoms in the Constitution. This guideline, provided by the interpretation part of the Constitution,[85] is not without problems and depend on how judges and lawyers appreciate various aspects of comparative constitutional law. The comparative approach is also enriched by a system which allows broadened legal standing for interveners, amicus curiae, and other claimants to participate and perhaps provide nuanced heads of argument on constitutional interpretation methods. Comparative interpretation also shows that some rights like right to vote or participate in politics cannot be claimed by juristic persons.

Constitutional Matters

A set of aids, theories, or rules used by judges to interpret ordinary statutes or constitutions as extraordinary statutes distinguishes modern constitutional systems. These interpretive tools are sometimes institutionalized in form of

[82] While Faculties of Law such as the University of Zimbabwe and Midlands State University have LLM or master's Degrees in Constitutional Law, undergraduate students are normally exposed to ordinary methods of statutory interpretation. Methods of constitutional interpretation are also not taught as substantive aspects of courses such as Human Rights Law. As such, students of advanced legal studies in Zimbabwe must all be forced to do modules on comparative constitutional interpretation to help them use the constitution as a starting point in their various fields of specialization.

[83] Bogdan (n 79) 28.

[84] Section 46 of the Constitution.

[85] Ibid.

theories and canons of interpretation. This is closely related to the history, type, and model of a country's Constitution. In the case of written constitutions, the judiciary in the USA has played a role in developing methods of interpreting the US Constitution. In many societies, constitutional interpretation remains the litmus test for judicial impartiality in deciding constitutional matters. In relation to constitutional matters, for example, litigants must ensure that when approaching the Constitutional Court directly, they do so only when their matter is truly constitutional. The Zimbabwean Constitution allows litigants, in the interests of justice and with or without leave, to approach a Court directly to decide a constitutional matter. [86] This principle has been interpreted by litigants' lawyers to be applicable to the context of the Constitution as a whole, and the role and place of the Court in a constitutional framework.[87]

The Constitutional Court, on the other hand, held that once a person alleges a violation of a constitutional right, all the other provisions governing access to the Court are not suspended.[88] This means that the mere allegation of a violation of a fundamental right must be weighed against other principles governing direct access to the Court.[89] The rationale for the Constitutional Court's position in the *Denhere* case was that other courts, such as the Supreme Court, have exclusive jurisdiction over non-constitutional matters. As a result, applicants cannot simply seek protection under the Bill of Rights in situations where the non-constitutional matter does not constitute an infringement of the constitutional rights that in the *Denhere* case, was the right to equal protection from the law provided under section 56 (1) of the Constitution.

Legitimacy of Judicial Decisions

The legitimacy of judicial decisions, like any other issue involving the courts' adjudicative discretion, is central to constitutional interpretation. For example, the question has been raised: can decided case x be a legitimate

[86] Section 167 (5) (a) of the Constitution.

[87] See Lovemore Madhuku's remarks as reiterated by the Court in *Denhere v Denhere and Another* Judgment No. CCZ 9/19.

[88] Per CJ Malaba justifying the position on the basis that the Constitutional Court is specialized court that deals with constitutional matters only.

[89] Malaba (n 88).

decision in a just system?[90] The legitimacy war is based on the fact that, on the one hand, a constitution does not contain substantive values that it embodies, and on the one hand, where conscientious moral choices of judges are legitimated, constitutional interpretation may provide substantive justice better than any other theory.[91]According to Philip Bobbitt, as cited in the Harvard Law Review, a constitution is written law that must be construed using the current methods of legal construction. As a result, judicial review becomes the forum through which people (in Bobbitt's case, Americans) discuss their Constitution. Courts typically rely on judicial precedents to help them interpret cases.[92]

Judicial precedents generally provide the standards, rules, and principles that should be applied in similar cases.[93] While judicial precedents are important, constitutional interpretation requires that judges must not limit their decisions by relying solely on past decisions.[94] To ensure the legitimacy of judicial decisions, Philip Bobbitt, for example, contends that judicial precedents can only be relied on if the principles they establish are part of a well-reasoned written opinion.[95] This is significant in making the application of the law predictable, consistent, and stable for many players in the legal fraternity, including lawyers, judges, legislators, and state institutions that rely on the decisions rendered.[96]

Furthermore, while superior courts can take the, '*we were wrong*' approach and overturn incorrectly decided cases, the legitimacy of constitutional interpretation is dependent on the Court overturning the decision to demonstrate that the previous case was misguided in a way that vitiates the application of the doctrine and exceptions of *stare decisis*. As a result, the courts will be able to take the '*we are now right*' approach to constitutional

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[90] Harvard Law Review, 'Note: Legitimacy and Justice in Constitutional Interpretation,' 106 (5) *Harvard Law Review* (Mar. 1993), pp. 1218-1223, 1218.
[91] Harvard Law Review (n 90)
[92] See Michael J. Gerhardt, *The Power of Precedent* (2011 Oxford University Press) 147-48.
[93] See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982, Oxford University Press) 7.
[94] See Michael J. Gerhardt, 'The Role of Precedent in Constitutional Decision-making and Theory, 60 *Geo. Wash. L. Rev.* (1991) 68, 76.
[95] See Bobbitt (n 93) 42.
[96] Gerhadt (n 94) 85ff.

interpretation. As a result, judicial review must use constitutional interpretation as a tool to demonstrate that courts are the guardians of constitutional principles in terms of how they are developed and preserved.[97] Constitutional interpretation falls into this category because it is important in promoting the values that are clearly enshrined in a country's Constitution. This is because constitutional values shape a nations' constitutional identity and provide normative principles that ensure everyone's comfort.[98]

Conclusion

This chapter addressed the critical aspects of Zimbabwe's constitutional law in general.

These features highlight how distinct Zimbabwe's constitutional system is from others. It demonstrates that Zimbabwe has the best of both worlds. The concept of experimental constitutionalism has put it in jeopardy. The following chapter provides a scoping analysis of approaches to constitutional interpretation in Zimbabwe based on previous court decisions. It is intended to show how different judges can be classified into schools of judicial interpreters. It is hoped that Zimbabwean will take a leaf from the book and devise their own system of interpreting the country's relatively new Constitution.

[97] Bobbitt (n 93) 4.

[98] See for instance in relation to South Africa<http://www.dac.gov.za/content/11-why-are-constitutionalvalues-important> accessed 19 November 2019.

Chapter 2: A Sketch of Zimbabwe's Constitutional Interpretation Concerns

This chapter is guided by the following questions: *What prompted Zimbabwe's superior courts to adopt non-constitutional doctrines under the leadership of the late Chief Justice (CJ) Godfrey Chidyausiku and current CJ Luke Malaba? Why do so many constitutional matters fail for technical reasons rather than substantive ones? What does the shift from ordinary statutory interpretation to constitutional interpretation mean Zimbabwean constitutional law practice and study?* In responding to the questions, we note how the constitutional developments that shape Zimbabwe's constitutionalism largely motivate the judges of the day in their interpretative style.

We also applaud the efforts of many organizations that make law more accessible to the public by providing databases. VeritasZim, for example, makes court pleadings available to legal scholars and litigants on their website. The Judicial Services Commission (JSC), Law Society of Zimbabwe (LSZ), various law firms with strong online presence, Musasa Project, WILSA, Legal Resources Foundation, Centre for Advanced Legal Research, ZIMLII, SAFLII, Sabinet, and various library sources provide easy access to legal materials for lawyers. In all of this, if methods of constitutional interpretation or constitutional construction motivate the tenor of a country's legal practice as much as professional experiences do, then the tenor and development of constitutional jurisprudence becomes rich.

Scholars are free to choose the method of assessment for Zimbabwean judges' approaches to constitutional interpretation. One method is to divide the courts into the eras of several Chief Justices (CJ) such as Dumbutshena, Anthony Gubbay, Godfrey Chidyausiku and Luke Malaba. We have yet to benefit from quantitative legal analysis of their contributions to Zimbabwean constitutional jurisprudence. CJs Gubbay's and Dumbutshena contributed to the jurisprudence on the Lancaster House Constitution. CJ Chidyausiku took office at the helm of the contentious land reform program, and as such, he was largely conservative, and a political judge inclined more to judicial restraint

than activism. He however ushered in a seismic shift towards the hands dripping with blood doctrine in Mawarire case which formed the basis of strategic and public interest litigation under the 2013 Constitution. The same description is given to CJ Malaba, who has largely presided over a bench that employs doctrines that are foreign to Zimbabwe. The hope was that he would emulate the progressive ruling he had set in *Mudzuru and Anor v Minister of Justice* CCZ 12/14 when he was still Deputy Chief Justice. Malaba's tenure was also extended following a protracted legal battle to have him leave office on retirement grounds starting with the case of *Kika v Minister of Justice and Ors* HH 264-21. Constitutional avoidance is largely part of the American system of tools for resolving political controversies rather than legal problems.

Some judges of the Constitutional Court lean towards legal realism. They could also write impressive constitutional affirmations using legal realism as espoused by realists like Roscoe Pound. For instance, in the *Mudzuru* case, Justice Hlatswayo wrote the following:

> **HLATSHWAYO JCC:** - I respectfully agree with the Honourable Deputy Chief Justice's reasoning and conclusion that on a proper construction, the Constitution by necessary implication sets the minimum age of consent to marriage at eighteen years. I do so also for the additional reasons pertaining to the structure and scheme of the section, and to the legislative history of the provision which in my view one can fairly take judicial notice of.
>
> The predecessor provisions to s 78 of the Constitution can be found in the Draft Constitutional Proposals 1 of the Parliamentary Select Committee (COPAC) of 26 January 2012 (hereinafter termed 'Proposal 1'), the Draft Constitutional Proposals of 18 July 2012 ('the 18 July 2012 Draft') and the 2000 Draft Constitution of Zimbabwe.
>
> Section 78 of the **Constitution states:**
> **"78 Marriage rights**
> 1 Every person who has attained the age of eighteen years has the right to found a family
> 2 No person may be compelled to enter into marriage against their will
> 3 Persons of the same sex are prohibited from marrying each other."
>
> An equivalent provision in the earlier COPAC Draft, Proposal 1, stated as follows:
>
> **"4.25 Marriage**
> 1 Everyone who has attained the age of eighteen years has the right to marry and found a family and no such person may be prevented from entering into marriage
> 2 No one may be compelled to enter into marriage against their will." [emphasis added]

What is critical to note here is that the COPAC Proposal 1 formulation clearly linked the right to marry with the right to found a family and stipulated the minimum age of eighteen as a requirement for the enjoyment of the right to marry and/or found a family. The next COPAC Draft, the 18 July 2012 Draft, juxtaposes the minimum age of eighteen years with the concept of "marriageable age" in a most confusing manner, thus:

"4.35 Marriage rights

1 Every person who has attained the age of eighteen years has the right to marry a person of the opposite sex who is of marriageable age, and no such person may be prevented from entering into such a marriage

2 Every person who has attained the age of eighteen years has the right to found a family

3 No person may be compelled to enter into marriage against their will."

It is not clear in this draft how the entitlement to marry upon attaining eighteen years can be attenuated by the concept of marriageable age. However, the Draft provisions show that when the drafters formulated the final provision in s78, they were fully cognisant of the term "marriageable age" which may be deployed to leave the fixing of the age of marriage to separate legislation other than the Constitution itself. They chose not to do so and by necessary implication set the minimum age of eighteen in the Constitution. By contrast the equivalent provision in the 2000 Draft Constitution specifically relegates the fixing of the marriage age to separate legislation, thus:

"27 Marriage

The State must take appropriate measures to ensure that –

(a) Men and women of marriageable age are free to marry each other and found a family." [emphasis added]

Section 78 is headed 'Marriage rights', yet the main provision (subsection (1)) does not contain the word "marriage". The other subsections are all about marriage. It is thus necessary, and just and equitable, to construe subsection (1) of section 78 as if it read:

1) "Every person who has attained the age of eighteen years has the right to marry and found a family."

The legislative history of the provision, the general scheme of the section itself and a reading of the section in conjunction with the other provisions of the Constitution – all support the view that, by necessary implication, s78 of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe.

Finally, while this judgment may have addressed the issue of child marriages, this is akin to the mending of the roof during the storm in the sense that a myriad of legislative and State resource mobilization measures have become urgent and imperative consequent upon this decision. One can but point out just a few imperatives:

The age of sexual consent which currently stands at sixteen years is now seriously misaligned with the new minimum age of marriage of eighteen years. This means that, absent legislative intervention and other measures, the scourge of early sexual activity, child pregnancies and related devastating health complications are likely to continue and even increase. The upside is that the new age of marriage might have the positive effect of delaying sexual activity or child bearing until spouses are nearer the age of eighteen. The downside is that children between sixteen and eighteen years may be preyed upon by the sexually irresponsible

without such people being called upon to take responsibility and immediately marry them. Thus, there is an urgent need, while respecting children's sexual rights especially as between age mates as opposed to inter-generational sexual relationships, to extend to the under-eighteens the kind of protection currently existing for under-sixteens with the necessary adjustments and exceptions.

And when children beget children, the health, social and economic burdens on the children themselves, their babies and their parents or guardians becomes overwhelming. The provision of the Constitution relating especially to the protection of the family must be urgently activated to meet this challenge. Section 25 of the Constitution under the National Objectives states as follows:

"25. **Protection of the family**

The State and all institutions and agencies of the government at every level must protect and foster the institution of the family and in particular must endeavour, within the limits of resources available to them, to adopt measures for –

(a) the provision of care and assistance to mothers, fathers and other family members who have charge of children; and

(b) the prevention of domestic violence." [emphasis added]

It is also hoped that international and non-governmental organisations – some of which commendably motivated this application – will show the same or even more enthusiasm in the raising of the huge resources noted above and in contributing to the refinement of the local laws both civil and criminal consequent upon this decision as they showed in advocating the abolition of child marriages in Zimbabwe.

Accordingly, I am of the view that the order outlined in the main judgment by the Honourable Deputy Chief Justice is, with respect, the appropriate order in the circumstances.

Surprisingly, the Malaba and Chidyausiku courts applied alien doctrines without justifying why controversy canons of judicial construction designed in America or elsewhere are applied to legal problems which require constitutional cases to be decided on the merits. Their courts have also abandoned the concept of full or partial dissenting judgments from Judges of appeal or specific superior courts. This has resulted in the selection of cases in which they will innovatively exercise their discretion to hear and determine cases technical arguments as was seen in cases such as *Mujuru v President of Zimbabwe* CCZ 8/18, *Sister Berry & Another v The Chief Immigration Officer & Another*, CCZ 4/16, and others. The courts could sometimes innovatively hear important cases on the merits of the case based on some '*doctrine of importance*' as was the case in the *Chamisa v Mnangagwa and others*, CCZ 42/18. Such approach enables the greater society to commend the court's very practical approach. Alternatively, they could be inventive and make liberal pronouncements such

as that litigants '*must wait to come to court with hands dripping blood*' such as the *Mawarire v Mugabe* case, Judgment No. CCZ1/13. Their courts, on the other hand, have issued four important judgments that received widespread public support and protect important constitutional rights such as right to bail (*S v Fanuel Kamurendo and others*, CCZ 84/2015); freedom of expression (*Madanhire and Anor v A.G.* Judgment No CCZ 2/14); and women/ children's rights (*Loveness Mudzuru and Anor v Minister of Justice and Ors*, CCZ 12 of 2015. Surprisingly, before his appointment as CJ, DCJ Malaba (as he was then known) had occasion to admire judges like the late Mr. Justice Wilson Sandura, who relied on dissenting judgements to protect judicial independence and to resolve complex legal problems in Zimbabwe (https://www.herald.co.zw/justice-sandura-hailed/).

As a result of the influence of chief justices or judges who give reasoned dissents, it is noted that the '*interpretation model*' of the Bill of Rights serves as a starting point for encouraging judges to write dissenting opinions.[99] This interpretation model provides the various aspects that comprise the various interpretative tools that an individual judge or respective litigants can draw the attention of the judge to. Borrowed constitutional doctrines such as avoidance doctrines must be applied only if they can be transformed into the constitutional tradition espoused by the Constitution. Constitutional reforms and the forces driving those reforms create a constitutional tradition. It assists members of a polity in avoiding reliance on artificial versions of constitutionalism that are incompatible with the Constitution.[100] Constitutional traditions extend beyond the need to identify constitutional moments on human rights in court decisions, such as 1789 in France or 1948 following the adoption of the Universal Declaration of Human Rights. When making any comparative aspect, it is necessary to distinguish that improve the jurisprudence on constitutionalism. Cesare Pinelli, for example, observes monumentally:

[99] Section 46 of the Constitution.

[100] Cesare Pinelli, The Formation of a Constitutional Tradition in Continental Europe since World War II, 22(2) European Public Law (2016) 257-268, 258.

> 'It is worth noting that, while the Preamble of the 1789 Declaration of Human and Civic Rights assumes 'ignorance, forgetfulness or contempt of the rights of man to be the only causes of public misfortunes and the corruption of Governments', the Preamble of the 1948 Universal Declaration (of Human Rights/UDHR), first asserts that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'[101]

The distinction made above aids in capturing the normative continuities in constitutional systems at the national and international levels, but only in a cosmetic way. The above evolutionary model introduces the spirit of the times introduced by the Declarations of 1789 and 1948 and provides an account of how different societies in different eras had to approach the problems associated with the disregard of human and fundamental freedoms. While the French Revolution was heavily influenced by philosophers and philosophy, the UDHR was influenced by democratic waves seeking to protect various generations of human rights and freedoms that had been threatened by the two World Wars. Cesare Pinelli goes on to say about the differences:

> 'Rather than adjourning the 1789 Declaration, the Universal Declaration changed the premises on which human rights were grounded. In the former, 'ignorance, forgetfulness or contempt of the rights of the man' are evils condemned in abstract terms, resting upon the Enlightenment's premise that self-evident truths are potentially available to everybody.

The Universal Declaration casts a dark shadow on that certainty, referring to 'barbarous acts which have outraged the conscience of mankind': contempt for human rights is condemned in the light of historical circumstances, after which nothing could be taken for granted in the conduct of human affairs. Hence the reference to 'the inherent dignity…of all members of the human family', hitherto not mentioned in the Declarations or in constitutional documents.'[102] The need to adopt the human interest or human factor content in real terms expands the scope and pace of normative focus in the two Declarations. The UDHR is a soft law document that was drafted in a more globalized and universal world. Since 1948, the world has witnessed the adoption of numerous human rights

[101] Pinelli (n 100) 260.
[102] Pinelli (n 100) 261.

instruments at both the United Nations (UN) and regional levels. The Zimbabwean Constitution contains constitutional rights and freedoms that can be interpreted in terms of the UN's nine thematic human rights instruments.[103] These include the racial discrimination instrument;[104] civil and political rights; economic, social and cultural rights; women's rights; children's rights; and others. The existence of books such as Roseline Hanzi's book, *Zimbabwe's status of compliance with human rights instruments* (2011, Zimbabwe Lawyers for Human Rights) has motivated us to also show Zimbabwe's human rights commitment that is shown below.

International Convention on the Elimination of All Forms of Racial Discrimination :1753	Signature: Ratification/Accession: 1991	NA,	
International Covenant on Civil and Political Rights :1753	Signature: Ratification/Accession: 1991	NA,	✓
Optional Protocol to the International Covenant on Civil and Political Rights :1753	Signature: Ratification/Accession: NA	NA,	
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty :1753	Signature: Ratification/Accession: NA	NA,	
International Covenant on Economic, Social and Cultural Rights :1753	Signature: Ratification/Accession: 1991	NA,	
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights :1753	Signature: Ratification/Accession: NA	NA,	
Convention on the Elimination of All Forms of Discrimination against Women :1753	Signature: Ratification/Accession: 1991	NA,	
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women :1753	Signature: Ratification/Accession: NA	NA,	

[103] The UN is an intergovernmental organization to which Zimbabwe is a member. The Courts in Zimbabwe are obligated to interpret treaties to which Zimbabwe is a party using the approaches adopted by the committees that monitor the implementation of these thematic treaties.

[104] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 by UN General Assembly resolution 2106 (XX).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment :1753	Signature: Ratification/Accession: NA	NA,	
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment :1753	Signature: Ratification/Accession: NA	NA,	
Convention on the Rights of the Child :1753	Signature: Ratification/Accession: 1990	1990,	
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict :1753	Signature: Ratification/Accession: 2013	NA,	✓
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography :1753	Signature: Ratification/Accession: 2012	NA,	
Optional Protocol to the Convention on the Rights of the Child on a communications procedure :1753	Signature: Ratification/Accession: NA	NA,	
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families :1753	Signature: Ratification/Accession: NA	NA,	
International Convention for the Protection of all Persons from Enforced Disappearance :1753	Signature: Ratification/Accession: NA	NA,	
Convention on the Rights of Persons with Disabilities :1753	Signature: Ratification/Accession: 2013	NA,	
Optional Protocol to the Convention on the Rights of Persons with Disabilities :1753	Signature: Ratification/Accession: 2013	NA,	

United Nations Human Rights Office of the High Commissioner (2022).

From the preceding commitment chart, the Zimbabwean human rights system can also benefit from the instruments under the African Union that governs the rights of humans and peoples in Africa;[105] such as women[106] and children.[107]We

[105] Date of Adoption: June 01, 1981, and Zimbabwe ratified this treaty on 30 May 1986, see ‹https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf› accessed 22 November 2022.

[106] See the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted in Mozambique on 11 July 2003. Zimbabwe ratified the protocol, see https://maputoprotocol.com/thecountries-that-have-ratified-it accessed 22 November 2022.

[107] African Charter on the Rights and Welfare of the Child, Date of Adoption: July 01, 1990. Zimbabwe ratified this treaty on 19 January 1995.

note that in some cases, Zimbabwean courts have been praised for progressively interpreting women's and children's human rights in accordance with the Bill of Rights interpretation model. The *Mudzuru* case provides a conspectus on methods of constitutional interpretation for women and children.[113]In that case, DCJ Malaba followed the guidelines on legal standing of the applicants under section 85 of the Constitution; compared the provisions of section 78 of the Constitution relating to marriage rights[108] and marriageable age with those laid out in section 22 (1) of the Marriages Act[115] and the Customary Marriages Act. [109] The decision is significant in distinguishing children's constitutional rights from other rights. The court specifically found that the duty-based provisions in section 44 of the Constitution guarantee the protection of children's rights in the Constitution.[110] Section 44 imposes duties on the State and every individual, including juristic persons; state institutions and government agencies at all levels to respect, protect, promote and fulfil the rights enshrined in the Constitution.

Three major themes emerge from the *Mudzuru* case. First, since the adoption of a homegrown Constitution in 2013, Zimbabwe has become a unitary state that does not treat men and women's enjoyment of human rights differently. Simply put, Zimbabwe is not a differentiated society in terms of men's and women's human rights in the binary sense.[111]Second, the elaborated rights of specific groups that were formerly marginalised and are still vulnerable can benefit greatly from purposeful interpretation of the Constitution.[112]Third, there has been a shift from a patrilineal and ordinary legislative interpretation tradition of 'what the ordinary law is to the specific-group rights regime that is distinguished by considering what the Constitution contemplates for each

[108] The court embossed the provision that 'no person, male or female in Zimbabwe may enter into any marriage including an unregistered customary law union or any other union including one arising out of religion or a religious rite, before attaining the age of eighteen (18),' see page 1 of the *Mudzuru* judgment. [115] Chapter 5:11.

[109] Chapter 5: 07.

[110] *Mudzuru* case, p 2 of the judgment.

[111] It may be a differentiated society in situations of sexual orientation since it deliberately leaves out sexual orientation as a ground of discrimination in section 56 of the Constitution.

[112] These rights include women (80); children (81); elderly (82); persons with disabilities (83) and veterans of the liberation struggle (84).

specific holder of constitutional rights and freedoms.[113] This is gleaned from the Court's willingness to adopt the purposive interpretation advanced by the applicants' lawyers to make a judicial finding that section 78 (1) on marriage rights, as read with s 81 on children's rights, showed that the age of 18 years has become the minimum age of marriage in Zimbabwe.[114]By doing so, the Court demonstrated its willingness to reject a strict, narrow and literal interpretation based on the international human rights inspiration that influenced the framing of marriage rights in the Constitution.[115]

Zimbabwe's Bill of Rights interpretation model is hybrid in that it aims to be aspirational, protective, and promotional of justiciable constitutional rights and freedoms. Because it is provided for by the Constitution, we can call this hybrid model the internal constitutional model. As a result, judges and litigants must interpret the Bill of Rights and Freedoms as contemplated or anticipated by the Constitution. Prior to the deliberate inclusion of interpretation provisions in the Constitution, and prior to the adoption of broad, generous and purposeful interpretation such as *Mudzuru* approach, Zimbabwean Courts demonstrated a willingness to interpret the Constitution as an extraordinary statute. *Capital Radio (Private) Limited v The Broadcasting Authority of Zimbabwe and 2 Ors* is the leading case in this endeavor.[116]This case provides useful starting point for understanding how the Zimbabwean Supreme Court that served as a Constitutional Court in special circumstances sought at the time, to achieve a framework of analysis on how the Constitution's supremacy must be understood in a constitutional democracy. In two ways, this case was significant. First, as an intervener, the Attorney General of Zimbabwe (AG), Zimbabwe government's leading lawyer or law firm, utilised the third-party intervention method. The AG used this case to influence the provisions of the Administrative Act in 2004 that allowed the AG to intervene in administrative proceedings as a matter of choice and law.

[113] For instance, the constitutionality of the Marriages Act as an ordinary statute could not be used to justify government's lame excuse that girls mature faster when compared to their male counterparts and as such the minimum marriage provisions were not at variance with section 78 of the Constitution which envisages that anyone below 18 years of age is a child.

[114] See *Mudzuru* judgment, p 3.

[115] Ibid.

[116] SC 162/2001.

Secondly, it follows that a superior courts in Zimbabwe must seek a way to interpret the Constitution in a comprehensive and holistic manner. The key criteria in this endeavor thus include, but are not limited to, Zimbabwe's historical and current tenor of constitutionalism. More importantly, treating the Constitution as a living document identifies what is worthy of being built into Zimbabwe's constitutional identity. In other words, the identities or important features provided by the Constitution must be regarded as significant, particularly if those provisions distinguish Zimbabwe from other constitutional identities around the world.

Constitutional interpretation is thus considered to be a subset of legislative interpretation based on the idea that the Constitution, despite being a written law enacted in the country, has unique characteristics.[117] It has been noted that:

> "Mainstream accounts of constitutional interpretation take it to be a special case of legislative interpretation. It is a special case because Constitutions, unlike statutes and regulations, are characteristically single, basic, rigid, vague, and enduring laws. Nevertheless, it is still legislative interpretation because constitutions properly so called are supposedly written laws enacted by a supreme authority. Their content is for the most part determined by the political choices of the constitutional lawmaker, notwithstanding the fact that the object of those choices is to some extent determined by the very nature of the task-namely, to establish a government, not the legal regime...it follows that the problems of constitutional interpretation are continuous with those of statutory interpretation.'[118]

Another source of authority is the canons of constitutional interpretation found in the realm of the concept of constitutionality or non-posited basic norms.[119] The modes of constitutional interpretation, or 'ways of determining a specific meaning of a provision within the Constitution,'[120]are linked to a court's judicial review authority. This was clarified in *Marbury v Madison*[121] in which the US Supreme Court explained its powers to review the constitutionality of federal governmental action.[122] The US courts have also gone a long way toward distinguishing between constitutional interpretation

[117] G.A. Ribeiro (2020) 'What is constitutional interpretation.' New York University Colloquium.

[118] Ibid, 1-2.

[119] Ibid.

[120] B.J. Murrill (2018) '*Modes of constitutional interpretation*.' Congressional Research Service Report.

[121] n (25), 5 U.S. (I Cranch) 137 (1803).

[122] Id, p. 1.

that is based on determining the meaning of the Constitution through constitutional interpretation methods, and constitutional construction that is based on constructing the text of the Constitution itself.

Litigants should be wary of a judge's use of methods of constitutional interpretation or proclivity to rely on constitutional construction. It should be noted that constitutional interpretation relies on traditional legal tools to determine meaning, such as the text and structure to ascertain meaning.[123] Constitutional construction, on the other hand, supplements the meaning derived from such traditional interpretative methods with materials outside the text, such as moral or pragmatic considerations.[124] Such constructions should be used sparingly when the text is so broad or undefined that faithful but exhaustive reduction of legal rules is impossible.[125]

We can also conclude from the classification of Zimbabwe's mixed legal system classification that litigants should be familiar with both common law and civil law constitutional interpretation. Zimbabwe is frequently referred to as a common law legal system. This classification is based on Anglicized origins and the influence of Roman-Dutch law. There is scarcity of literature explaining why Zimbabwe is classified as a common law country. There is no literature that attempts to distinguish between the common law and civil law features in Zimbabwean law. We can say that many aspects of Zimbabwe's legal system lean toward the common law tradition. As a result, we can examine how codified laws are limited to the Criminal Law (Codification and Reform) Act rather than the entirety of Zimbabwe's laws. To summarize, the common law interpretation method requires interpreters to go beyond the text and elaborate the body of law that has developed primarily through case law or judicial precedent when interpreting the Constitution.[126] This requirement stems from the realisation that there are constitutional law principles that are difficult to reconcile with the language of the Constitution, and many other

[123] K. Whittington, *Constitutional construction: divided powers and constitutional meaning* (1999, Cambridge University Press).
[124] Id.
[125] Id.
[126] D.A. Strauss (1996) 'Common law constitutional interpretation.' *The University of Chicago Law Review* 63 (3) 877-935, at p. 877.

settled principles that may be inconsistent with judicial precedent or original interpretations of such rules.[127]

The need for judges to reconcile the text with evolving understandings of what the Constitution requires can be gleaned from constitutional interpretation in any form. David Strauss,[128]for example, emphasises five major points that demonstrate how constitutional law and constitutional interpretation benefit society, including the need to:

> 'Trace principles of constitutional law to the Constitution of the State; resort to original understandings of the Constitution in instances where the constitutional text is unclear; determine the legitimacy of constitutional interpretation by considering whether the departure from the text or the original understandings violate traditional legal tools of interpretation; assess whether judges are usurping their powers by insufficiently paying attention to the text or the original understandings of the doctrine; and help in deciding how textualism and originalism can be modified by other methods of constitutional interpretation or constitutional construction as the case may be.

While Strauss' fifth point about originalism may not be applicable to Zimbabwe, it does help to demonstrate why Zimbabwean judges must strive to modify borrowed methods of constitutional interpretation in a way that is consistent with the Constitution's interpretation chapter.[129] Because the Constitution now provides for three to four generations of human rights in a justiciable manner, litigants and courts of law must be familiar with the philosophy and theories of human rights. Some theories are discussed in chapter 12 of this book. Zimbabwe's Constitution recognises fundamental rights and freedoms that are given special constitutional protection against interference, even by Parliament.[130]Because Parliamentary sovereignty does not precede constitutional sovereignty in Zimbabwe, judges must avoid the

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[127] Id.

[128] Ibid, 878.

[129] See section 46 especially the provisions relating to the use of foreign law.

[130] See section 44 of the Constitution and contrasts this with the position in the United Kingdom where there are no rights that are fundamental in the sense of constitutional protection. See also Lord Lester of Herne QC, Human Rights and the British Constitution,' in Jeffrey Jowell & Dawn Oliver, *The Changing Constitution* (2000, Oxford University Press) 91.

traditional and restrictive English theory on human rights where the judge's constitutional task is to:

> 'Faithfully and strictly to interpret the will of Parliament, expressed in detailed legislation, to be read according to its so-called plain meaning, and to declare the common law when it is incomplete or obscure. In accordance with this constitutional orthodoxy, if either the textual analysis of the words of a statute or the court's interpretation of the common law has undesirable consequences, the matter must be corrected by the legislature and not the courts.'[131]

Lord Lester contends that rigid legalism, written Constitutions and Bills of Rights provide no surety where there is benevolent exercise of administrative discretion by public officials acting as platonic guardians of the public interest, accountable to the legislature and the people through their political masters.[132]This viewpoint is critical, particularly, in countries where the state institutions and political party systems are entwined, such as Zimbabwe. It is also obvious, particularly in cases involving Members of Parliament, that there is no due process when the Speaker of Parliament has the authority to recall elected officials without due process. The courts, led by Justice Malaba, have not protected MPs in accordance with the Constitution, beginning with his tenure as Deputy Chief Justice,[133] and continuing through his tenure as CJ where he considers the recall provisions as unambiguous.[134]

In the *Madzimure* case, Malaba, then DCJ, took a shocking and abhorrent approach to interpreting the relevant constitutional provisions. We are not sure what his comments about the status of section 129 (1) (k) of the Constitution mean. He simply stated that:

> 'A Member of Parliament loses his or her seat in the specific circumstances prescribed under s 129 of the Constitution. Section 129(1) (k) of the Constitution provides for one of the circumstances prescribed. One cannot read any other value into the section, because s 129(1) (k) of the Constitution is a complete provision that is not subject to the Bill of Rights. The wording of s 129 (1) (k) of the Constitution is clear. Like any other provision of the Constitution, s 129 (1) (k) is a fundamental law, partaking of the status of supremacy of the Constitution, against which the validity of conduct can be measured. *It is not permissible to import notions from other constitutional provisions to impose a*

[131] Lord Lester (n 130) 91.
[132] Lost Lester (n 130) 91.
[133] *Madzimure and Ors v The President of the Senate and Others Judgment* No. CCZ 8/19.
[134] CJ Malaba has maintained the narrow interpretation of recall provisions as settled position.

duty that was not intended to be part of the requirements of a particular constitutional provision. (Italicisation is intentionally made).'

The judge did not explain why the wording of is not subject to due process of the law, even if we use the human rights conceptualisation of the rule of law. There were no comparable provisions cited to support such a line of reasoning. The other surprising aspect is that the reasoning was simply agreed upon by other judges in this case. If the judges continue to favor the plain meaning of the rules, it is preferable that they set the pace for amending the Bill of Rights to reflect the position that advances the development of constitutional democracy.

When viewed through the lens of constitutional interpretation as a living instrument, the approach in the *Madzimure* case is problematic. For example, Vincent Samar[135] contends that interpreting the Constitution from a human rights standpoint necessitates the following:

> 'Constitutional interpretation should proceed from the assumption that the Constitution remains binding law and should be used to privilege human rights if most citizens are to continue to find legitimacy in the Constitution's status as higher law. Theories of constitutional interpretation have either failed to account for cross-generational legitimacy or have widened interpretation in a way that threaten the importance of the constitutional document. Constitutional interpretation seems to be non-responsive to social and economic conditions in a society. The court should follow the legal tradition in a country. For instance, the living Constitution approach follows a common law-like approach which enjoins courts to resort to precedent or custom to create constitutional change but should give precedence to the Constitution's language and structure. Human rights serve as the glue for binding different interpretations together under a high ordered set of values, whether by adopting amendments or court interpretations.'

From the outset, Parliament represents the will of the people who elect their representatives to do so. Courts cannot be seen to ratify the mere production of a recall letter to remove a Parliamentarian simply because a political party claims that the Parliamentarian is no longer representing its interests. This is purely counter-majoritarian behavior. Second, the Court's insistence that section 129 (1) (k) is unambiguous endangers constitutional provisions that are simply framed similarly to section 129 (1) (k). The Malaba Court has not

[135] V.J. Samar (2019) 'Rethinking constitutional interpretation to affirm human rights and dignity.' *Hastings Constitutional Law Quarterly* 47 (6) 83-144, 83-84.

specified which provisions are framed similarly to the recall provisions. Zimbabwe's legal tradition is one that values constitutional supremacy over presidential and parliamentary sovereignty. In the absence of Court clarification on related provisions, the Court is required to demonstrate procedural fairness and legal certainty if its decision is to be legitimate. It has been demonstrated that the rule of law can also threatened by a court's adjudication failure, in which the Court is guilty of violating the rule of law.

Whether it is constitutional interpretation from the text, or original understandings, or from other approaches such as common law or human rights, the starting point should be the galvanized famous words of American judge, Chief Justice Marshall that constitutional interpretation must proceed on the basis that, '*it is the constitution we are expounding*.'[136] Terrance Sandalow contends that Chief Justice Marshall intended the Constitution to be read as a document meant to last for centuries and adapting to the various crises of human affairs.[137]Thus, constitutional interpretation should take precedence over moral code interpretation. Similarly, constitutional law should be viewed as the result of a continuous process of valuation carried out by those entrusted with the task of constitutional interpretation.[146]

We argue that the focus should be on a constitutional interpretation regime that cannot and should not be limited to treating the constitution as an ordinary statute. The preferred focus is beneficial in many ways. To begin, constitutional law primarily addresses special relationships and concepts relevant to statecraft and governance. There is no single concept known as constitutional law, and all the aspects so considered together provide a context for constitutional interpretation. Second, focusing on the entire Constitution rather than just one part, such as the Bill of Rights, is important because, as this book has demonstrated, constitutions provide the legal and political roadmaps for a polity. The emphasis on many of a constitution's the special concepts or provisions, such as a preamble on popular sovereignty, national objectives, founding principles or values, declaration of rights, supremacy

[136] *McCulloch v, Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

[137] T. Sandalow (1981) 'Constitutional interpretation.' *University of Michigan Law Review* 79: 1033-72. [146] Id, 1034.

clause, establishment clauses and so on, reflects the need to treat such concepts as self-contained aspects. In fact, constitutional concepts, like commercial law, are very succulent.

Thirdly, constitution-making that is followed by widespread adoption of a progressive constitution must be celebrated and should have a distinct jurisprudential impact in a polity. The Zimbabwean Constitution created the opportunity for courts, ordinary and active litigants, lawyers and academics to contribute to constitutional interpretation jurisprudence. Considering this, the individuals identified above must be prepared, first, as custodians of the Constitution and the creators of the constitution, to develop the jurisprudence innovatively. The goal of constitutional interpretation in democratic contexts is to foster a long-term democratic and legal culture and to make a polity's democratization efforts visible.

The essential aspects of a constitution should be interpreted primarily from a functional jurisprudential standpoint. Those who advocate for a particular model of constitutional interpretation must be familiar with the rules, doctrines, and general comments of human rights bodies, presumptions, and philosophical considerations that apply to specific constitutional provisions, clauses, rights and duties. The question that every interpreter must always strive to answer is: *what is the relationship between the special rules or concepts that apply in constitutional law*? The question assists the judge or those involved in a constitutional matter to, *inter alia*:

- Ascertain the significance of constitutional interpretation to the evolution of constitutionalism and constitutional experimentalism in Zimbabwe.
- Ascertain whether constitutional clauses are mandatory.
- Ascertain the nature of a state's constitutional systems and how examples from other jurisdictions influence a polity.
- Ascertain the essential internal features or aids to interpreting a national Constitution.
- Ascertain the nature of polity's constitutional clauses, such as whether they are eternal, establishment, and self-executing, absolutely framed, exhaustive, non-exhaustive clauses and so on.

- ✦ Ascertain whether the listed grounds in a constitutional provision are exhaustive.
- ✦ Ascertain whether or certain constitutional rights are absolute.
- ✦ Ascertain whether there are any substantive or procedural requirements to be met before awarding an effective remedy.
- ✦ Ascertain whether there are any practice directions or existing doctrinal aspects that must be considered when pursuing certain constitutional remedies.

Other Structural Concerns with Emphasis on Accessing Effective Constitutional Remedies

Structural concerns deal with a lot of issues relating to parties, beneficiaries, application of the Bill of Rights and so forth.

a) Amicus curiae should make an application to join the proceedings as a friend of the court. The issues relating to consent from the main litigating parties must be addressed and they have to demonstrate a need to present the arguments which would have been left out, overlooked, or underestimated by the main parties. The application should be made to the Chief Justice whether orally or in written form, see the Constitutional Court's Rules.
b) State actors and non-state actors are duty bearers and the Bill of Rights apply horizontally, diagonally, and vertically.
c) The purpose of limitation should be canvassed in detail when rights come into conflict
d) Internal modifiers relating to right to petition government must be understood as part of interpreting the scope of the right
e) Laws of general limitation can be Acts of Parliament or official government policies adopted to limit rights. This creates problems since ***policy is not law and law is not policy***.
f) The courts are still to define laws of general application through the lens of the nature of the right, the purpose of the limitation, nature and extent of the limitation, relation between limitation and its purpose and less restrictive means to achieve the purpose. The courts, see the *Teddy Bear Clinic for Abused Children & Anor v Minister of Justice and Constitutional Development (Justice Alliance of South Africa, Trustees for the time being of the*

Women's Legal Centre Trust, and Tswaranang Legal Advocacy Centre as Amici Curiae), 2013 (2) SA 168 (CC).

g) Constitutional remedies are usually lost on technicalities, and the courts struggle to balance laws of general application and making a finding that a right has been violated.

h) The general principles about constitutional remedies are not usually discussed under the concept of effective remedy and sometimes are granted using the separation of powers doctrine in mind when courts suspend the operation of their orders. Declaration of invalidity for instance have not been resolved using the doctrine of objective constitutional invalidity based on the law which was unconstitutional from the day it was passed. The instance when courts can suspend the declaration of invalidity have not been canvassed in detail or with sufficient reasons or with conditions attached to timelines in terms of allowing the courts to monitor Parliament or the Executive's compliance with the order. Constitutional damages remain a polemic and debatable part of Zimbabwean law. Declarations of rights remain a discretionary and weak remedy. Courts usually stop after the declaration because the courts cannot instruct any organ of state to comply with the order. Zimbabwean courts shy away from ordering structural or supervisory orders which, until the court is satisfied, the court will take down the order.

i) The courts in Zimbabwe are still to pronounce authoritatively on substantive and formal equality, including equality of outcomes. The presumption of unfairness has not been litigated based on comparative interpretation with South Africa's sections 9 (1), (3), (4) and (5) on equality before the law, restitutory equality, prohibition of unfair discrimination, horizontal application of the prohibition against unfair discrimination, and presumption of unfairness. Most cases only end on equal benefit and protection. Equality before the law has not been based on nuanced arguments distinguishing between mere and arbitrary differentiation. The same is true for factors which constitute unfair discrimination. Our courts are still to engage deeply into the two steps inquiry between discrimination and unfairness inquiry. Neither have shown whether we have a closed system, nor have they attempted to discuss discrimination under unlisted grounds of discrimination. The court are still to engage in ventilating intersectional discrimination based on

many grounds like race, class and gender, see Mahlangu case in South Africa. Distinctions between hidden or disguised discrimination and direct or indirect discrimination remain shrouded in mystery.

j) There are delays in shaping constitutional remedies relating to transformative transitional justice such as damages, unconditional apology, audit of lifestyle, and so forth to promote equal enjoyment of rights or spearhead the promulgation of laws equivalent to South Africa's Black Empowerment Act

k) A nuanced analysis of the distinction between protected, unprotected and hate expression is still to be discussed in Zimbabwe, see *Afriforum v Malema* 2011 (6) SA 240 (EqC).

l) Political rights are still to be protected for various people including prisoners, diaspora vote, and those suffering from cognitive disabilities. The right to know the state funding provided to political parties or the private funders is still a mystery.

m) The court sometimes simply reversed orders on protection of ECOSOC rights without reasons, see *City of Harare v Mushoriwa*. Distinctions between qualified and unqualified rights have also not been properly canvassed. The courts have not yet developed the concept of judicial enforcement of qualified ECOSOC rights in Zimbabwe. Standards of review of ECOSOC rights are still to be developed, including the reasonableness requirement, minimum core content requirements, progressive realisation, and judicial review.

Conclusion

The logical corollary to the development of the concepts of constitutional interest and constitutional justice in Zimbabwe is that the criteria used to select judges as the final interpreters of the supreme law should be based on advanced constitutional law or constitutional interpretation knowledge. Alternatively, judges must demonstrate a compelling need to employ constitutional interpretation methods that go beyond the plain meaning of constitutional provisions. If superior court judges are appointed on merit, including advanced training in comparative constitutional law or constitutional law and human rights, the potential for innovative and right-based constitutional interpretation can be greatly realised. This means that judges must thoroughly prepare for appointment into the Constitutional Court

through judicial activism, extensive reading, and scholarship or advanced legal training. A merit-based approach to appointing judges of the Constitutional Court would encourage judges of other superior courts to interpret the Constitution broadly and purposefully.

Chapter 3: The Anatomy of Constitutional Justice, Politics and Rights in Zimbabwe

Introduction

Many lawyers think that constitutional interpretation and identity are divorced from politics. While lawyers may not worry about the politics of law, there should worry about the politics of constitutional interpretation. If they invoke historical interpretation in cases involving customary law, Zimbabweans valued social constitutions that existed in Zimbabwe prior to the arrival of the colonialists. In fact, the position of the GoZ is that Zimbabwe was a multicultural society before 1890. The different social constitutions from pre-colonial societies can be used to remodel Zimbabwe's deeply westernized constitutional structure. There are cases where the Zimbabwean courts for instance have followed traditions that shun adultery and protect the sanctity of the monogamous marriage institution.

While the 2013 Constitution of Zimbabwe does not entrench *Ubuntu/ unhu* or humanness as one of the founding values, judges are now mandated to develop customary law principles such as *unhu* or ubuntu. Shona social constitutions for instance have *mhangwa neshwiro* (teachings and wisdom) and these can be used to decide concepts of constitutional justice and identity from a historical constitutional interpretation method. In discharging their constitutional responsibility to develop customary and common law, Zimbabwean judges may draw examples from constitutional justice cases from the English common law. They must appreciate that written constitutional justice in those countries arose from common sense applied by judges and the King's courts. Common sense was nothing more than an individual judge or king's emotions. The common law developed from common sense was used to frame the legal positions that were later supported by the legislature. The established customs of the English people provided the basis for such common sense which later became known as common law. The English Parliament itself is in Westminster, a part of London that has long related to royalty and government.

In Zimbabwe, the Harare Parliament was connected to king NeHarare's royal place. The Mount Hampden Parliament was also first sited by the white settlers who wanted to establish a capital city there. Customary and common laws in Zimbabwe are not codified. Many years before the adoption of the 2013 Constitution, Professor Julie Stewart who teaches women's law and succession at the University of Zimbabwe, lamented how, as a white lecturer, she did not understand Zimbabwean customary law or customs to properly teach them from a normative perspective.[138] Her sentiments influenced former women's law lecturers like Justice Amy Tsanga to write books such as *Taking Law to the People*, that emphasised grassroot approaches to understanding women's law.

Zimbabwe's customs and general law are beautifully depicted in a variety of old and new world literature. Many Europeans who had early contacts with the Shona and Ndebele people documented them well. Zimbabwe's constitutional interpretation of customary and common laws will fail unless judges attempt to understand the true customary law of Zimbabweans who appear before them. Many didactic proverbs, riddles, folktales and sayings demonstrate how diverse Zimbabwe's unwritten social constitutions were from tribe to tribe or language setting to language setting. Zimbabwean judges must develop indigenous common or custom law in the same way that the British have emphasised the importance of ensuring that their common law traditions are accepted by the so-called civilized world. The British common law is nothing more than their customs that were used to even modify the Greek form of direct democracy or popular rule by introducing representative democracy. Later, in the sixteenth and seventeenth century, the common law was used to fill gaps in statutory meaning in cases like *Fermor's case* (1602) 76 Eng. Rep. 800 that laid the rule that if any doubt is conceived on the words or meaning of an Act of Parliament, it is good to construe it according to the reason of the common law. Statutes were unimportant at the time because the courts saw them as exemptions or unwelcome intrusions into the legal framework established by the far superior common law.

The Anglicized form of common law has remained the background or default legal rule, referred to as trite common law positions by Zimbabwean judges

[138] Julie E. Stewart, 'Why I Can't Teach Customary Law.' 14 *Zimbabwe Law Review* (ZLREV.), (1997) 18-29.

(and all common law legal systems). Only judges who observe the *presumption of legislative awareness* and expectations attached to common law traditions change the form of the common law. Unfortunately, after independence, Zimbabwe's legal system continued to revere English common law, forgetting that it was nothing more than English customs glorified as general law. This was accomplished by implementing a Western education system that appears egalitarian/ constitutional and inquisitive.

The university format of teaching constitutional law has largely been responsible for the neglect of Zimbabwe's social constitutions. It explains why a variety of Zimbabwe's customs were not codified. Customary courts have however radicalised the application of living customary law. They have utilised social media to publicise their conceptualisation of customary laws applicable to different provinces in Zimbabwe. While the constitution refers to traditions, customs, and conduct that may conflict with it, most customs and traditions are simply unknown and can be accepted or rejected depending on whether the litigants or the concerned judge knows them. In rare murder and administrative cases, judges (rather than litigants) typically benefit from the input of assessors, who are lay people with extensive knowledge of social and constitutional values related to human life and administrative justice. While court rules give individual judges the authority to direct such assessors, the assessors help ensure that judges who follow the Western general law are not blind to important traditions that unite Zimbabweans. Zimbabwe's journey toward codification of customary and common law must include the assessor's system. Judges must ensure that they keep customary law remains customary law and English common law remains English common law. At some point, Zimbabwe's customary law becomes Zimbabwean common law.[139]

In our opinion, constitutional law education in contemporary Zimbabwe is still based on Western ideals. Zimbabweans must reflect in their recent and known past and follow jurisdictions that teach the foundations of African customary law. Today's English people, for example, know very little about

[139] The customs of the English people became the common law of many commonwealth and Anglo-Saxon countries. As such, Zimbabwe's customs must be a version of the common law that is strictly Zimbabwean if other versions of the common law are to make sense in Zimbabwe.

what happened before the Anglo-Saxon runes between the 5th and 7th Centuries AD. The period from the 7th to 10th Centuries is known as the earliest documented period of the English language. In the 10th to 11th Century AD, the Norman invasion of England became the known period of the usage of the English language. In many ways, England's social, legal and political traditions became Anglo-Francophone. The civil traditions of France and Continental Europe influenced the development of the English common law in many ways. As a result, it is critical for Zimbabwean judges to avoid relying solely on legal texts that seek to place the English common law as distinct from continental Europe's civil law tradition.

The inspiring question is: *how will Zimbabwe, or any other common law country, create indigenous common law in the same way that the English did*? Is it true that a completely new common law will provide legal certainty for many problems that the English common law fails to resolve? We will not go into detail about this, but it is important to note that judges should strive to divide the common law into several categories, such as English, mixed, Commonwealth, Zimbabwean common law, and so on. As in the categorization of the common law, Zimbabwean common law can be called Zimbabwe's customary law. Professor Lovemore Madhuku is one of the constitutional lawyers who has attempted to broaden the meaning of the common law. We frequently notice that there are at least three Madhukus in our conversational analysis with Professor Madhuku as one great contributor to constitutional law in Zimbabwe: the *academic* Madhuku; the *civic* Madhuku and the *political* Madhuku.

Madhuku shifted the University of Zimbabwe Faculty of Law's emphasis away from Marxian traditions under the late Kempton Makamure and Munyaradzi Gwisai toward the transformative power of an academic discipline known as constitutional law. While Madhuku did not make all the developments in constitutional law in the early years from 2000 to the present, the use of academic, civic and political engagements to develop constitutional jurisprudence in an important way became noticeable in Zimbabwe because of what the late President Robert Mugabe referred to as Madhuku's strategies. This strategy saw academic who could jump academic, civic and political ships at any time.

While Professor Madhuku left a constitutional legacy in Zimbabwe during his time as a civic leader, other CJs, such as including Gubbay and Enock Dumbutshena, and academic luminaries like, Reid Rowland, Greg Linington, and the late Walter Kamba, Vengai Guni, and Welshman Ncube were the early active constitutionalists. Justices Tsanga, Chirawu-Mugomba and Hlatswayo also contributed to constitutional justice in Zimbabwe as former law lecturers. There are judges such as High Court Masvingo's Justices Charewa and Zisengwe who were commended by Constitutional Court Judge Anne-Marie Gowora for clearing 1719 criminal cases in 2024 out of a total of 1 909 cases filed in 2023 and 2024. Both judges also finalized 810 civil cases out of 913 cases. The simple statistics show that the judges have a good work ethic. Justice Charewa served in the Zimbabwe Defence Forces as chief legal officer, worked in academia and private legal practice and has cross-border experience in constitutionalism and human rights since she worked at the African Court of Human and Peoples' Rights in Arusha. She even became special assistant to the court's president and served as deputy registrar. She also understands role of constitutional commissions such as the Zimbabwe Human Rights Commission. She was part of the notable judgment on the Chief Justice's tenure in *Kika v Minister of Justice and others*, HH 264/21 which Justice Zhou declared that the Chief Justice had ceased to hold office of Chief Justice of Zimbabwe and judge by operation of the law. They also declared that the extension of tenure as contemplated by section 186 of the Constitution did not apply to other judges who were cited. Justice Charehwa and Mushore agreed with the decision although it was appealed against. Justice Zhou and Mushore practiced law as advocates. Justice Zhou has postgraduate training in constitutional law and lectured delict law at the University of Zimbabwe while Justice Charewa was lecturing civil procedure. Justice Mushore served as legal adviser (Africa) of the International Organization of Consumer Unions at the Hagie in the Netherlands from 1993 to 1999. She had transborder appreciation of international law. Justices Mushore and Tsanga made groundbreaking judgments on statutes of limitations, Justice Tsanga in *Nyika v Minister of Home Affairs* HH 181/16, and *Justice Mushore in Mangwiro v Minister of Justice* HH 172/17.

Justice Zisengwe holds advanced training from Turin and WIPO Worldwide Academy. He has all-round experience in academia, third sector and cross-border jurisprudence since he worked as a judicial officer in Namibia. Justice Zisengwe has thus lived up to his promise when he was appointed when he committed to:

> 'The complexity, diversity and even volume of cases though daunting in prospect, is something to look forward to because it is an honour and privilege to serve society at that level. It is my hope and prayer that I will be able to serve with honour, integrity, and to the best of my ability for justice to be met.'
> Source: Manica Post 6 September 2019.

Justice Kabasa has postgraduate training in women's law and worked as a Labour Court Judge and third sector. Justices Tsanga and Chirawu-Mugomba radicalised the constitutional dimensions of family, succession and women's law while Justice Hlatswayo was involved in the Constitutional Commission Draft that was rejected in the referendum carried out in the year 2000. Today, many actors and judges we have not mentioned participated in the teaching of constitutional law, including law-based organizations, public institutions, universities, faculties, the Law Development Commission, Cabinet, the Attorney General, Law Society of Zimbabwe, Council for Legal Education, Parliament of Zimbabwe, the Zimbabwe Council for Higher Education (ZIMCHE), and the Government of Zimbabwe (through the Ministries of Justice and Higher and Tertiary Education). Litigants who underestimate the judges' ability to appreciate advanced comparative constitutionalism do so at their own peril.

Teaching of Constitutional Law and Third Sector Influence

While the teaching of law (and constitutional law) has been liberalized to include substantive law, quality assurance managers must ensure that serious concerns about examination leakage do not result in the production of half-baked lawyers or bad apples who will jeopardize the Constitution's constitutional responsibilities, including those relating to academic freedom and administrative justice.[140]

[140] See for instance, NewsdzeZimbabwe, UZ Exam Leaks Linked to Big Wigs, (27 November 2022) http://www.newsdzezimbabwe.co.uk/2022/11/uz-exam-leak-linked-to-bigwigs.html accessed 4 December 2022.

Zimbabwe's inspiration for constitutionalism has also been influenced by a culture of constitutional literacy fostered by civil society and human rights organizations. The JSC no longer has a monopoly on the production of Zimbabwe Law Reports. The involvement of organizations such as Veritas Zimbabwe and Legal Resources Foundation means that the collection of legal resources has become more open. Veritas Zimbabwe has gone above and beyond to collect all materials other than the Courts' judgments. Scholars can now decipher the details of the applicants' and respondents' cases, and various correspondences from other interested parties. Statutory instruments, post-Cabinet meeting briefings, pandemic updates, Acts of Parliament, and specific group aspects such as Veritas Women can all be found on the Veritas Zimbabwe website.[141] The Legal Resources Foundation provides resources; action-based empowerment; legal services, research, and advocacy.[142]

The birth of an indigenous constitutionalism in 2013 that judges must use to develop Zimbabwe's version of the common and customary law, is every constitutional lawyer's compass and sounder. Many Zimbabweans who also participated in the constitutionalism of Zimbabwe serve as inspiration for modified constitutional interpretation today. Zimbabweans first rejected a politically driven constitutional draft, the Constitutional Commission Draft, in 2000, after many years under a ceasefire Constitution, the Lancaster House Constitution. They also rejected the Kariba Draft Constitution, a politically smuggled draft sponsored by ZANU PF and the two Movement for Democratic Formations (MDC and MDC-T). Despite opposition to the 2013 Constitution as a bad constitution, approximately 3 million Zimbabweans, or 94.5% of the population, voted in favor of its adoption. Zimbabwe is not the only country where political events can shape people's lives. The political agenda in a nation will inevitably produce constitutional documents and institutions with political consequences, as was the case with the compromise Constitution enacted between 2009 and 2013 by the government of national unity.

Constitutional Interest

Constitutional justice and interest trigger the Zimbabwean society's commitment to the highest or supreme law and the founding values that bind

[141] veritaszim, accessed 4 December 2022.
[142] Legal Resource Foundation - LrF (lrfzim.com) accessed 4 December 2022.

them. Because it juxtaposes constitutional rights, duties and responsibilities, a constitution is both an asset and liability. The liabilities include the hurried provisions that encourage easy amendment provisions to the constitution, and those that expose the Constitution's full frailty in times of public emergency[143] and unreasonable restrictions of constitutional rights.[144] Zimbabweans now have transformative opportunities to demand constitutional justice through substantive and procedural constitutional law. Constitutional interest is used as a tool in a society to obligate superior courts in Zimbabwe to interpret the Constitution by giving full effect to the Bill of Rights and constitutional provisions. The constitutional structure envisions a situation in which the judges must not provide inadequate remedies for constitutional violations.[145] Constitutional interest also helped us to classify Zimbabwe's constitutional model as an *a la carte* constitutional model allowing for domestic, regional, and international human rights systems to be used to develop constitutional interpretation jurisprudence.[146] The constitutional responsibilities placed on judges to develop common and customary law also trigger the constitutional interest to make sure judges do not loosely apply concepts of judicial comity, judicial notice, or judicial discretions.[147]

Constitutional interest also encourages judges and lawyers to move with the spirit of the times. For example, in political and constitutional circles, the constitution is taught simply as some social contract. The social contract approach to democratic and constitutional theory has changed or been abandoned in most common law systems that have Anglicized philosophy of constitutionalism and constitutional rights. The social contract is used to explain how the general populace has rights and must be treated as equal sovereigns to their political counterparts. The Constitution exemplifies this social contract in which ordinary citizens and those in power: 1) agree on the type of government they want, 2) intend to follow that governance model, 3)

[143] Section 87 of the Constitution.

[144] See the general limitation or restriction clause in section 86 of the Constitution. See also the absence of key definitions to what for instance, constitutes compelling reasons that a judge can use to deny an accused person the right to bail, section 50 (1) (d) of the Constitution.

[145] See section 46 on holistic interpretation and & 85 of the Constitution on liberalization of legal standing and access to remedies such as declaration of rights, compensation and so forth. Sadly, the Constitution does not demonstrate the way our democracy or democratization can be financed to promote judicialization of constitutional gains.

[146] Section 46 of the Constitution.

[147] Section 176 of the Constitution.

set the terms and conditions in a Constitution and other laws, 4) agree on formalities such as having a written/ unwritten, flexible/ rigid, military/ civilian, Constitution, and 5) agree on methods of terminating, renewing or varying the social contract. This social contract was manifested during the French Revolution, when ideals such as *'liberty, fraternity and equality'* were prominently featured.

To illustrate the constitutional interest in a society, we use the fairness constitutional model that was designed by John Rawls to show how members of a society can show interest in their constitutional order. John Rawls proposed the concept of '*justice as fairness*' as the core of the democratic tradition that replaces the social contract or acts as a variation on the social contract.[148] The social contract is replaced by each individual's inviolability that is founded on justice and cannot even be overridden by the welfare of society as a whole.[149] Justice, according to John Rawls, is a comprehensive doctrine that cannot be reduced to economic, political, or social definitions of what is justice and fair. Associational justice is important to Rawls, and individuals must be able to enjoy both liberty and freedom. The Germans appear to have modified Rawls' liberal form of theory by involving citizens in their communities and viewing community life as essential for integration, recognition and emotional support.[150]In the German Basic Law or Constitution, communitarianism is defined as 'not the freedom from community and association, but freedom to associate in shared ways of life.'[151]The people's sovereignty clause, '*we the people of Zimbabwe*,' can also provide useful starting points for judges.

Freedom, as defined by a conservative, liberal and universalistic communitarianism, becomes the debate over whether or not communities promote or obstruct the fulfilment of human self-determination.[152] Equality becomes a question of what characteristics specific individuals, groups, or even all humans share (or should share), or under what conditions a community is

[148] John Rawls, *A Theory of Justice*, Revised Edition (1999, Belknap Press).
[149] Rawls (n 148).
[150] See Winfred Brugger, 'Communitarianism as the Social and Legal Theory behind the German Constitution,' 2 (3) *International Journal of Constitutional Law* (2004) 431-460, 431.
[151] Brugger (n 150) 434.
[152] Brugger (n 150) 437.

formed (or should be formed).[153]The Universalist will respond to the question by focusing on the fundamental interests of all humans, whereas the conservative will narrow or particularize the equality by focusing on what unites humans or members of a community.[154] The liberal will take a balanced approach.[155] In affirmative or critical sense, fraternity becomes an aspect of solidarity with an emphasis on interactions at family level or with all human beings. This latter sense can be applied to section 17 the Constitution's vision of gender equality in Zimbabwe.

The Connection Between Constitutional Law And Politics

Politics is ubiquitous. The concept of *'law is higher than the government'* summarizes the relationship between ordinary law and politics. While the power to do politics is thought to be everywhere, it is always somewhere, if not elsewhere. Judges who have done postgraduate studies in international relations, public administration, or governance are quicky to appreciate the ubiquity of state politics and how a polity's Constitution may both serve as a supreme law or political road map. The constitution prevents politicians from descending into snollygoster camps or from hiding behind theories like political realism, Machiavellianism, democratic dissonance, authoritarianism, regime change agenda, bald national interests, and other practices that trivialize the Constitution. Lawyers must assist judges to separate between state politics and the politics of constitutional interpretation. The promulgation of the National Security Council Act is also a sensitive area where litigants must tread cautiously when defending their clients. We suggest that they can hold the bail hearings or other hearings on camera and avoid media publicity. If media is invited, reportage guidelines must be gleaned from the court's directions. We believe that there is a National Security Act suspended in the air and where possible, lawyers must not politicize security related clients. Before alleging politicization of cases, they must first deal with the offence or criminal allegations levelled against their clients. This will make sure that the client is not sacrificed at the altars of political and lawyerly or

[153] Brugger (ibid).
[154] Brugger ibid.
[155] Ibid.

legalistic expedience. Appreciation of constitutional law and politics means astute lawyers remain perceptive and shrewd.

They can be resilient or bounce back even where they feel the courts have thrown justice outside the window or deliberately choose to frustrate them through litigation fatigue. Constitutionally resilient lawyers would not be euphoric about winning cases or politicizing litigation processes. Admittedly, they have a right to be irate, frustrated or pensive and so forth. Euphoria must be replaced with euphony and the judge's inquisitorial role must not be compared to fexting, phubbing, deep liking, or catfishing on social media controversies against individual judges. While some judges adopt political philosophies, litigants have a duty to bring passionate and trusted perspectives to the often-misunderstood subject of constitutional litigation. The Constitution assumes the existence of a value-based sovereign for whom the norms and constraints of the Constitution are intended. Values are thought to have supremacy characteristics, and they are fundamental tenets that provide the necessary guidance on how government and good governance should be conditioned.

Alternative approaches (instinctive and ideological) values must have their form and content aligned with the constitution. We can focus on four major constitutional aspects that make up a democratic constitutional system: constitutional review; indigenous constitutionalism; constitutional justice; and constitutional rights as principles. When a judge engages in political judicial philosophy, lawyers can respectfully implore them to avoid descending into the arena, engaging in judicial restraint, acting as lawyer for one of the parties (*Tsvangirayi v Mugabe* CCZ 71/13 & CCZ 20/17 where judgments were written when a notice of withdrawal of the petitions were made) or take judicial notice considerations constitutionally. Lawyers act outside the courtroom before, during, and after the electoral cycle. Those who litigate on urgent basis, sometimes nocturnally, are aware of institutional challenges were some institutions may not accept service or reveal their identities for endorsement on the court documents. Some electoral cases are resolved through criminal law. Political decisions relating to diaspora Zimbabweans, non-citizens, or independence of the Zimbabwe Electoral Commission have been common in Zimbabwe's constitutional society. There are case Laws which tread between

constitutional rights and politics such as *Timba v Chief Elections Officer & Others* SC 69/15; *Mliswa v Chairperson of ZEC & Others* EC 03/15; *Shumba v Chairman of the Zimbabwe Electoral Commission and Another* (EP133/08), *Makone and Another v Chairperson of the Zimbabwe Electoral Commission and Another* (EP 17/08) [2008]; *Zimbabwe Electoral Commission (2) The Chairperson Of The Zimbabwe Electoral Commission v. The Commissioner General Zimbabwe Republic Police & 19 Ors* CCZ 64/13 and *Madzingo and Others v Minister of Justice Legal and Parliamentary Affairs and Others* SC 22/05. During one elections litigation course attended by one of us, emphasis was placed on various scenario mapping strategies such as:

What are the Issues Arising?
What steps could have been taken prior to Election Day?
How could lawyers have secured a different outcome?

Administrative decisions that are taken at different court levels can easily be politicized in terms of outcomes, even under the integrated electronic case management strategy. Judges of other courts within the court hierarchy can mind map on potential points of law if the case is dismissed. This is common sense. Writing about law and politics, Cerar (2010), the relationship between law and politics, *Annual Survey of International and Comparative Law*, Vol. 15 (1) 8-30, saliently noted in the abstract that:

The law functions in relation to politics in three basic aspects, namely as a goal, a means, or an obstacle. First, politics can define certain predominantly legal values or institutions as its goal. In this case the political understanding of these values or institutions becomes almost identical to an authentic legal understanding of the same values or institutions. Second, politics can comprehend the law merely as a means for the fulfilment of certain political interests. In this case politics is neutral in its attitude toward the law. Finally, politics can interpret law as an obstacle on the way toward the realisation of certain political goals. In this situation either politics prevails over law, or vice versa. In the first case politics effectuates its solutions at the expense of the rule of law, while in the second case the autonomy of law is preserved through the decisions of the highest courts or by other actions taken by lawyers, intellectuals, associations, organizations, and the public to stop illicit acts of political actors. Law and politics create their own pictures of reality. Sometimes those pictures overlap, sometimes they differ. Yet, there is something that the law should never include in its sphere; namely, the differentiation of adversaries according to a purely political criterion. This leads to a strict separation between "ours" and "yours", or, in its most radical expression, to a strict separation between friend and enemy. When the latter occurs, politics inevitably prevails over the law and reduces or damages the autonomy of the rule of law.

The article helps lawyers to appreciate institutional, normative, and process-related dimensions in a constitutional polity. For example, there is no reason to issue practice directions that impose prohibitive elections fees for presidential candidates who are elected jointly and severally by all registered voters. The practice direction would serve as an institutional, normative and political process related hindrance to the realising political rights in Zimbabwe. Politics is also inherent in matters that could relate to the National Security Council as a constitutionally established council. A lot of political decisions were taken including disbanding the SADC Tribunal that can be compared to Brexit. Human rights litigation depends on political doctrines, margins of appreciation, progressive realisation of ECOSOC rights, and reliance on the Universal Periodic Review (UPR) or the African Peer Review Mechanism. International protection of human rights is difficult under restrictive laws. There has been furore over the purpose of the Patriotic Act enacted on 4 July 2023 which criminalizes willful injury on the sovereignty and national interest of Zimbabwe specifically relating to sanctions or armed intervention in Zimbabwe or overthrowing the government. This Act, while found in countries such as America, can limit the ability of Zimbabweans or third sector practitioners to file shadow reports on international forums since they would be afraid of being watched under the Act. National interests are also defined by the President of the day who also heads the National Security Council. It would also be difficult for institutions like JOC, civil society, and media organizations to be heard because they are not part of Cabinet. National interests are at the end of the day, defined by the political party in power or its leaders.

Constitutional Review and Related Issues

Constitutional review is concerned with how Constitutional Courts or courts that serve in that capacity review legislation, either in the abstract or in relation to the actual controversy. In contrast to the '*American*' or other cross-border models, in which all courts have the authority to adjudicate constitutional issues while deciding legal cases and controversies, most European countries review legislation in the abstract.[156] Lawyers must

[156] Victor F. Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization,' 2 (3) *International Journal of Constitutional Law* (2004) 461-491, 461. [166] Comella (n 165) 462.

understand the schema legislation, ontological guidelines, distinctions between abstract, base, amending, and consolidated Acts and so forth. There are analysis links such as Zimbabwe's Law Portal, articles and subdivisions, EU directives and so forth governing EU law. Zimbabwe follows the American model by adopting either political or avoidance doctrines to avoid declaring a statute as unconstitutional. Judges have taken a political approach, postponing the implementation of their decisions until the legislature or executive has addressed public concerns. This was followed by Justice Rita Makarau declaring the provisions of POSA unconstitutional. POSA was subsequently repealed and replaced by the Maintenance of Peace and Order Act.

Prior to the enlargement of the European Union in 2004, eight countries had constitutional courts: Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal and Spain.[166]Three of the remaining seven, namely, Denmark, Sweden and Finland, rarely find a statute unconstitutional.[157] The constitutions of Finland and Sweden establish the '*clear mistake rule*,' which states that 'only when the statute is unconstitutional beyond any reasonable doubt may a court set it aside for the purposes of deciding the case.[158] Because it lacks a Constitutional Court, Ireland delegated constitutional review authority to the High Court and Supreme Court. Before the adoption of the 2013 Constitution, there was an '*Irish position*' in Zimbabwe. The difference with Ireland is that, at the request of the President, the Supreme Court of Ireland can rule on the constitutionality of legislation before it is enacted.[159]Unfortunately, Acts of Parliament in Zimbabwe are usually promulgated to show opposition politicians that party A controls the legislature or wields political power. The president of a political party in power forgets that they are a product of direct democracy that differs from how parliamentarians gain power. Greece gives all the courts the authority to declare legislation unconstitutional if they believe it is unconstitutional,[160] though the Special Highest Court resolves cases involving the constitutional validity of statute that arise among the supreme

[157] Ibid.

[158] Article 14 of the Swedish Constitution and section 106 of the Finnish Constitution. See further Jaakko Husa, 'Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective' 48 *AM. J. Comp. L.* (2000) 345.

[159] Article 34 of the Constitution of Ireland 1937, cited in Comella (n 155) 462.

[160] Article 93, s 4 of the Greek Constitution.

courts.[161] Because judges are either prohibited by the Constitution or lack capacity, the Netherlands and the United Kingdom (both before and after Brexit) lack a system of constitutional review of legislation.[162]

When petitioning Zimbabwe's courts to declare statutes as unconstitutional, the above models must be applied to the Constitution and Zimbabwe's constitutional model. Lawyers and judges must also consider the structural features in the Constitution relating to decentralization of powers to declare statutes unconstitutional from the High Court, Supreme Court and Constitutional Court. Because only the Constitutional Court has the final say on whether a statute is unconstitutional, it has some centralization features. The other structural feature is abstract review, in which courts examine statutes in the abstract and declare them unconstitutional with general effects (obligations *erga omnes*). Zimbabwe's courts are hesitant to declare statutes unconstitutional in this format. Typically, they grant partial relief or postpone the operation of their declarations of invalidity for a set period to allow the executive to address the issue.

Two approaches are typically used when triggering constitutional review. One, litigants use constitutional challenge to strategically test or challenge the statute. In Zimbabwe, public interest groups typically use this route. In other countries, public institutions such as the government, ombudsman, the prosecutor general, parliament, and so on file the challenge within the deadlines set by the Constitution after the official publication of the statute.[163] State institutions in Zimbabwe rarely, if ever, challenge the constitutional validity of statute. This has given rise to allegations of conflation between state institutions at all levels, resembling Machiavellian governance. Even when Parliament is normally controlled by a dominant opposition or ruling political party, statutes are rarely challenged as unconstitutional by successive Parliament.

Secondly, the other option to trigger constitutional review is to raise constitutional concerns. If an ordinary judge is seized with a particular case, he

[161] Article 100, s 1 of the Greek Constitution.
[162] Human Rights Act 1998, c 42 England.
[163] Comella (n 156) 464.

or she may refer the applicable statute to the Constitutional Court if he or she believes it is unconstitutional or doubts its validity.[174]Using this route, the Court does not decide the case but simply determines the relevant statute's constitutionality.[164] Zimbabwe appears to follow this procedure, but in critical cases, the Constitutional Court stymies it by invoking the so-called '*wrong format*' arguments. It begs the question of common sense why the Constitutional Court judges do not simply correct the anomaly and regulate the processes of the other superior courts as the Constitution requires. It appears to allow this procedure through its constitutional referral system, in which a court can refer a case to the Constitutional Court.

The third procedure is initiated by applicants who file a constitutional complaint, raising constitutional arguments, and requesting that a case be referred directly to the Constitutional Court.[165] The Constitutional Court unanimously agreed in the *Kamurendo* case that section 121 (3) of the Criminal Procedure Act violated sections 13 (1) and 18 (1) of the Lancaster House Constitution (now iterated in sections 49 and 50) of the 2013 Constitution. All of this requires balancing constitutional review with the form of representation envisaged in the Constitution. According to Robert Alexy, balancing is part of discursive constitutionalism that links the concept of balancing to constitutional rights, constitutional review, and representation.[166]Balancing is based on a rational form of argument that is based on a weight formula which is more pronounced in German constitutional law, for example, where it is required by a more comprehensive principle, namely, the principle of proportionality (*VerhältnismäBigkeisgrundsatz*).[167] In Zimbabwe, a special type of mandatory constitutional review exists, in which litigants approach the courts to compel state institutions or functionaries to comply with constitutional provisions. This was done in the case of *Nyasha Chiramba v Minister of Justice* HH 584/22, to compel the Ministry of Justice to create a code of conduct for Zimbabwe's Vice Presidents.

[164] See Article 142, s 3 of the Belgian Constitution, and constitutions of Spain, Australia, Italy, Luxembourg and Spain.

[165] See the famous case of *S v Fanuel Kamurendo and others* CCZ 84/2015.

[166] See Eobert Alexy, 'Balancing, Constitutional Review, and Representation,' 3 (4) *International Journal of Constitutional Law* (2005) 572-581, 572.

[167] Ibid.

Indigenous or Autochtonous Constitutionalism

Indigenous constitutionalism is linked to internal democracy. It occasionally creates constitutional quandaries that prevent ordinary people from embracing the benefits of constitutionalism. Constitutionalism, in any form, must assist ordinary people or the generality of the population in determining a state's democratic and moral standing in the modern world. [168] Cross-state constitutional discussions shape national norms and doctrines, but constitutions that transition from the colonial legacy to independence typically abandon representative democracy or representative government for pragmatic reasons. The debate over constitutional nativity becomes critical in autochthony constitutional debates when new charters seeking to respond to colonial charters are adopted. These new charters, on the other hand, rarely create 'indigenized' new spaces for democracy and risk serving as calcified monuments or symbols of compromise after periods of crises. Zimbabwe's 2013 Constitution is a product of compromise after the rejection of the Constitutional Commission Draft in 2000. Other drafts, such as the Kariba Draft, were also rejected because they were party based charters smuggled into the public domain. Under the government of national unity (GNU) (2009-2013), the 2013 Constitution was ratified. This Constitution is not wholly autochthonous because it benefits from cross-border/trans-national constitutionalism. It is autochthonous because its supremacy clause has the force of law,[169] and it speaks to Zimbabwe's own history of the liberation struggle and diverse peoples. [170] Because of its uniqueness, Zimbabwe's Constitution should not be referred to as Amendment 20 because it is not an amendment. While an amendment was used to replace the Lancaster Constitution, the 2013 Constitution is the result of the people's sovereign will that ratified the compromises of the political parties that represented them between 2009 and 2013.

Many vestiges of colonial and Anglo-Saxon constitutions, such as the rule of law, separation of powers, three branches of government and nominated state officials, still exist in Zimbabwe. While Zimbabwe has no monarchy, there are

[168] See Margaret A. Burnham, 'Indigenous Constitutionalism and the Death Penalty: The case of the Commonwealth Caribbean,' 3 (4) *International Journal of Constitutional Law* (2005) 582-616, 583.

[169] Section 2.

[170] See the main preamble to the 2013 Constitution.

legalistic manifestations of a monstrous presidency that reflect some monarchical absolutism. [171] The autochthonous nature of Zimbabwe's Constitution is also evident in many areas where Zimbabwe combines versions of nativity and comparative constitutionalism. While Zimbabwe borrows from many worlds, the Constitution contains many features that create a constitutional identity that can be described as Zimbabwean.

Constitutional Rights

The inclusion of a Bill or Declaration of Rights in the Constitution marks Zimbabwe's departure from the Westminster model of fundamental rights and freedoms.[172]The inclusion of Bills of Rights marks a transition from reliance on common law to the explicit grant of judicially enforceable rights.[173]Margaret Burnham sees Bills of Rights as important because the Constitution grants the courts the power of judicial review and establishes constitutional supremacy.[174]Some rights such as right to strike, are conditional, possibly because English common law did not recognise such a right.[175]This does not imply that Zimbabwean courts must read or interpret freedom to petition or demonstrate in accordance with the frozen concept theory that is used in parliamentary systems of sovereignty, and reduces the Bill of Rights from higher to ordinary law.[176]Bills of Rights are also important if the ideals of freedom, fraternity and equality mentioned in the introduction to this chapter are followed by courts in their adjudicative roles. Zimbabwe's preamble emphasises solidarity or fraternity, while the concepts of equality and freedom are incorporated into the content of many rights or freedoms from section 44 to 87 of the Constitution. Furthermore, Bills of Rights adhere to the universalism model of human rights protection advocated by soft laws like the Universal Declaration of Human Rights.

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[171] See section 89 of the Constitution where the President is head of government, head of state and commander in chief of the Zimbabwe Defence Forces.

[172] See Chapter 4 of the Constitution, sections 44-87.

[173] See Burnham (n 168) 596.

[174] Burnham (n 168) 596.

[175] See section 59 of the Constitution; Cf. Burnham (n 180) 597 citing the case of *Collymore v A.G of Trinidad and Tobago* [1997] 12 W.I.R. 5 (CA) [1970] A.C. 538.

[176] Zimbabwe is a constitutional sovereign state. For further details, see Walter S. Tarnopolsy, 'The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms,' 44 *Law and Contemp. Problems* (1981) 169.

Other countries follow regional courts and bloc charters such as the European Convention on Human Rights; the African Charter on Human and Peoples' Rights; and the Inter-American system. Bills of Rights in some countries were intended to preserve the status quo rather than to confer expanded rights against the state.[177] When it comes to preserving colonial legacies like the death penalty, this has been the case in countries with retentionist policies. Some countries that still use the death penalty assert categorically that they do so in accordance with international human rights standards.[178]For example, some argue that the death penalty falls outside the purview of the human rights regime because international law permits it, and it is a matter squarely within the domestic jurisdiction of sovereign states.[179]Zimbabwe also retained the death penalty for males aged 21 to 79 but this has now been changed.[180]The existence of such legacy saving clauses that transport colonial legal systems into independence era, has been compared to the constitutional Frankenstein's monster that destroys the founding instruments' central covenants and leaves behind a pitiful heap of unrealised hopes.[181]The monster is compared to mythological figure Prometheus, who created humans from clay and gave them fire.

Simply put, under a retentionist system, a constitution becomes high sounding nothing, much like the tall and emotional Frankenstein who tries to fit into the human society but is rejected. The amendment of Zimbabwe's Constitution through amendments 1 and 2 demonstrates how both the protagonists and antagonists of the amendments have undermined the integrity of Zimbabwean constitutionalism. The protagonists have used the simple formula of controlling two-thirds in parliament, whereas the antagonists have not sought the Court guidance to clarify this area of immature and rushed or hurried amendments intended to consolidate political power through the judicialization of politics.

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[177] Margaret DeMerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (University of West Indies, 1992) 15.

[178] See Burnham (n 180) referring to Basdeo Panday, the Trinidad and Tobago Prime Minister at a 1999 meeting of the Permanent Council of the OAS.

[179] Panday ibid, see ‹ http. www.oas.org/OASpage/press2002/en/Press99/092399.htm› accessed 30 November 2022.

[180] See section 48 of the Constitution.

[181] Burnham (n 168) 606.

Constitutional Justice

In Zimbabwe, the adoption of a justiciable constitution represents the pinnacle of constitutional justice. Constitutional justice envisages the need for procedural constitutional law. According to the Constitution, judges have the constitutional responsibility to develop or modify the common law and customary law in Zimbabwe.[182] There is a presumption that the existing common law and customary law at the time of the adoption of the 2013 Constitution was incompatible or inconsistent with the expansive bill of rights introduced by this Constitution. The drafters of the 2013 Constitution did not explain why common law and customary law needed to be changed. They also failed to define what constitutes common law or customary law in Zimbabwe. The answers are not even provided in the Constitutional Select Committee (COPAC) preparatory documents which could serve as aids to constitutional interpretation. We propose that judges who are likely to resolve constitutional questions summon the drafters to explain some of the Constitution's missing links or terse provisions. In jurisdictions such as the United States of America (USA), the practice has been to wrestle with the original intention of the drafters who have died. The drafting process in Zimbabwe, of course, raised security concerns, and it remains to be seen whether the drafters can reveal the rationale behind the framing or content of specific rights and freedoms in the interests of constitutional justice.

During the drafting process, it was noted that the COPAC drafters were placed in a secret location in the Eastern Highlands to plug data leaks.[183]The drafters are well-known and can be interviewed or provide guidance on areas where legal certainty is lacking. Former High Court Judge Justice Moses Chinhengo; Priscilla Madzonga and University of Zimbabwe Lecturer, Brian Crozier are the three drafters. While ZANU PF accused them of lifting information from foreign constitutions to suit the aspirations of the two Movement for Democratic Change formations in the GNU[184] they were never given an opportunity to publicly explain the motivations behind the framing and content of the provisions in the Constitution. Governance and constitutional models based on a ratified constitutional structure must always treat the

[182] Section 176.
[183] African Research Bulletin, 'Zimbabwe: Constitutional Drafters Moved,' 49 (1) *ARB* (2012).
[184] Ibid.

people as the repositories of governmental power. Our setting is Zimbabwe, but the challenges to constitutional democracy are universal. Zimbabwe, a constitutional society of 14-16 million people, is a unique phenomenon that does not require silo monopoly, rhetoric or political correctness from the powers that be. Dialogic engagement rather than rhetorical adherence to cheap politics is needed to foster long-term constitutional democracy in Zimbabwe. Zimbabweans must approach governance issues in the spirit of the Constitution. Intense discussions about governance and constitutional models have been summarized, for example, from the perspective of India as follows:

> 'We will open the box that we see as given, with logic and reason, yet avoid rhetoric. Our passion will be concrete. These intense conversations will help us discover more friends than we think we have and trigger logical sensitivities (what may otherwise be called revolutionary or radical) towards certain issues. We must approach the problem in the spirit of right is right even if no one is doing it, wrong is wrong even if everyone is doing it. We are not attacking anybody, only our problems. If the constitutions of the day are causing our journey to stall, then we seek to address them with double diligence. We are in a positive mode; we are looking for solutions. These problems and their solutions are right here, for none of those problems fell from the sky.'[185]

Reflecting on the fundamental concepts of constitutional justice in Zimbabwe demonstrates that every informed citizen can help to build a Zimbabwe that values such justice. When Zimbabweans first debated the need for a people-driven constitution at the turn of the millennium, they intended to create a constitutional society that respects the sovereignty of the Constitution[186] and the people,[187] and the other sovereigns such as the Parliament,[188] the republic of Zimbabwe,[189] and the President.[190] The mosaic of Zimbabwe's constitutional democracy provides the primary reason for respecting the many sovereigns espoused by the Constitution.[191]The crucial question in constitutional justice protection is whether it will be guided by the judges' commitment to direct

[185] Atul Khanna, *Between You and Me: Flight to Societal Moksha* (2018, Bloomsbury India) xi.
[186] See the constitutional supremacy clause in section 2 of the Constitution.
[187] See the main preamble and the devolution preamble in the Constitution.
[188] See section 116 and 117 of the Constitution. Section 119 also makes Parliament a unique sovereign since all institutions of the state are accountable to it.
[189] See section 1 of the Constitution.
[190] See section 89 and 92 of the Constitution.
[191] Sharon Hofisi, 'The Mosaic of our Democracy,' (11 April 2018, the Herald) https://www.herald.co.zw/themosaic-of-our-democracy/ accessed 5 December 2022.

democracy. In Zimbabwe, judges are elected by the President or by their peers. This implies that they are directly accountable to the people.

When they consolidate the state's gains in direct defiance of the people's will, they risk being removed from office along with leaders in the executive arm of government.

Chapter 4: Zimbabwe, Homegrown (Autochthonous) Constitutionalism and Cross-Border Constitutionalism

Introduction

The autochthonous are loosely *zvidzazvepo* or the natives. Following countless amendments to the 1980 Lancaster House Constitution and attempts by politicians to impose politically-driven constitutions from 2000 to 2007, the idea of creating a constitutional society with a homegrown constitution was characterized by three important features: the participation of the Zimbabweans in the constitution-making process; the essentially people-driven character of that process; and the adoption of a constitution that has progressive provisions that promote diagonal, vertical and horizontal accountability. People's participation was expressly stated in the general political agreement reached by the political parties that comprised the government of national unity (GNU).[192]People were divided on contentious issues that were left out, such as sexual orientation.[193]Vertical, horizontal and diagonal accountability are all part of Zimbabwe's principles of good governance that can promote homegrown constitutionalism.[194]Centripetal and centrifugal forces drove the adoption of a homegrown constitution. At home and internationally, the bloodbath in the 2008 June presidential runoff soiled Zimbabwe's human rights dashboard. During discussions about to intervene on humanitarian grounds, Zimbabwe and the Southern Africa Development Community (SADC) acted quickly to end the complicated crisis.

The concept of a peaceful Zimbabwe was created by exogenous forces. Allowing Zimbabweans to resolve their internal problems meant that Zimbabwe's client state status with countries such as China saved the politicians of the day. Political power was never a straight-jacket, according to the motto for interparty negotiations and other slogans like ***peace begins me, you and all of us***. The GNU was never based on credentials in the liberation struggle. The influence of SADC and the United Nations (UN) on Zimbabwe's

[192] See Article 6 of the Global Political Agreement, 2008.

[193] While Zimbabwe's section 56 of the Constitution which deals with non-discrimination was borrowed from the South African Constitution, the provisions in Zimbabwe leave sexual orientation from the grounds of discrimination.

[194] Section 3 (2) (g) and section 9 of the Constitution.

constitutional structure created a sense of *pax in universitate* (peace in universal unity). Peace as a common interest that promotes community solidarity won the day. The degree to which that peace was contextualized depended on the political will of the warring parties in 2008. This included the need to stabilize economic and social conditions that aided Zimbabweans' progress following a peaceful resolution of the political disputes that threatened their survival. Zimbabwe's 2013 Constitution benefited from the UN's Charter-based system that can trigger collective security measures when any county threatens global peace.[195]Zimbabwe benefited from Russia's and China's veto power over non-procedural matters brought before the UN Security Council. It also benefited from the UN Charter's allocation of powers to regional blocs like SADC in dispute resolution and peacekeeping.[196]Because peace cannot be achieved in situations of deep wrongs and instability, the UN Charter promotes functional cooperation and humanitarian or human rights cooperation.[197] The GNU created an atmosphere of political stability and justice and respect for basic human rights.

Zimbabwe needed both positive and negative peace in June 2008. The GNU became a symbol of positive peace in Zimbabwe because it established structures that addressed the root causes of political violence. The need for political opponents to rely on self-help was reduced. GNU provided a platform for the development of friendly relations and peaceful dispositions. It evolved into a social and economic progress platform. All these positive peace pillars were oiled by the exogenous forces that also escalated Zimbabwe's situation to a humanitarian crisis. It also provided negative peace by suppressing serious political violence that used as a weapon to stifle dissent. Even subsequent arrangements on '*peace begins with me, you and all of us*' and political party commitments to avoid and reduce election-related violence stemmed from the need to achieve negative peace. Zimbabwe's government had failed to uphold the responsibility to protect its citizens (R2P).[198]

[195] See Article 39 of the United Nations Charter, 1945.
[196] See Chapter VIII of the Constitution.
[197] For a discussion on positive and negative peace as they relate to the UN, see Robert Kolb (tr. Katherine Del Mar), An Introduction to the Law of the United Nations (2010, Hart Publishing) 30.
[198] Daniel Nasaw, 'China and Russia veto Zimbabwe sanctions' (11 July 2008, The Guardian) ‹ https://www.theguardian.com/world/2008/jul/11/unitednations.zimbabwe› accessed 5 December 2022.

Essentially, the R2P is supported by three equally important and non-sequential pillars listed by Alex J. Bellamy, Sara E. Davies & Luke Glanville, 'Introduction,' in Alex J. Bellamy, Sara E. Davies & Luke Glanville (eds.) *The Responsibility to Protect and International Law* (2011, Martin Nijhoff Publishers) 1:

> 'the primary responsibility of the state to protect its own populations from genocide, war crimes, ethnic cleansing and crimes against humanity and their incitement; the international responsibility to assist the state to fulfil its RtoP; and the international responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the host state has manifestly failed to protect its population from the four crimes.'

Zimbabwe benefited from the fact that the situation in Zimbabwe did not go beyond the test of situations where domestic means could be used to resolve the crisis before escalating it to international level.[199] The UNSC's main point was that Zimbabwe's situation posed a threat to regional security because violence in Zimbabwe appeared to be unabated. There were echoes of a variety of RtoP offshoots, such as individual RtoP and will to intervene (W2I) that focused on the need for the Government of Zimbabwe to respect how individual citizens could be agents of change if the government fails to generate the political will for the international community to stop mass atrocities. To put it in another way, the government must show political will to deal with perpetrators of violence against citizens if it is to stop external intervention.[200] Other critical aspects of constitutional interpretation and constitutionalism must be mentioned. Legal certainty, for example, was difficult to achieve in claims sounding in money. In *Mukorera v Ocean Breeze Engine and Cooling Systems* HH 13-08, at the height of runaway inflation that caused numerous social injustices, Makarau JP (as she was then known) took a conservative stance and refused to take a legal reformist approach to currency nominalism, holding that:

> "The concept of currency nominalism has been held to be applicable in all aspects of South African law ..... I hold the view that the distortions caused by inflation in the economy should not lead to the wholesale distortion of legal principles that have withstood the test of time in a bid to find legal solutions to a problem that is not legal in nature and origin and may prove to be transient. I am yet to be persuaded that revalorization is part of our law of debt collection".

[199] See the remarks of China's UN ambassador, Wang Guangya cited in Nasaw (n 198).

[200] We will not discuss criticism of the RtoP doctrine that see it as a dangerous and imperialist doctrine that threatens to undermine the national sovereignty and political autonomy of weak states.

Following the GNU multicurrency regime, some judges, including Mutema J and Chiweshe JP who succeeded Makarau were also willing to take the same conservative stance despite the clear need to change the laws in *Christopher Shava v Bergus Investments (Private) Limited* HH 226/11.

Overview on the Quest For Indigenous Constitutionalism in Zimbabwe

The goal of this section is to collect several constitutional developments that have inspired Zimbabwe's constitutionalism. Zimbabwe now has a self-made Constitution, and its judges are expected to advance homegrown constitutionalism. Furthermore, Zimbabwe's Constitution entrenches values and provisions that were borrowed from mature democracies and other African countries, and as such, its judges must be prepared to interpret the Constitution through the lens of cross-border constitutionalism. Judges and lawyers in Zimbabwe have had the opportunity to present their interpretive role and discuss ideas on interpretation with established lawyers, trainers, researchers, and colleagues both within and outside Zimbabwe's jurisdiction. The most visible aspect of Zimbabwe's constitutional developments is cross-border constitutionalism. Constitutional law that is much debated in Zimbabwe these days, is not about Anglicizing Zimbabwe's constitutional system (few aspects, in fact, are Anglicized). It is not enough to select specific themes and then run with them based on how they are understood in the English and other legal systems to understand the inspirations for Zimbabwe's constitutionalism. Zimbabwe's constitutional system consists of the benefits of many worlds. The major inspirational tool appears to be cross border constitutionalism.

The starting point for understanding Zimbabwe's cross-border constitutionalism is that Zimbabwe was colonized by Britain and thus has an English common law legal system.[201]The common law also includes Roman and Roman-Dutch common law principles in commercial law and family law. Roman Dutch law mixes Roman civil law and customary legal principles. Zimbabwe has followed civil practices such as codified contract and delict law, Judges also use jurisprudence from Zimbabwean legal scholars in their judgments which borrows from civil tradition. Judges adopt inquisitorial

[201] See section 176 of the Constitution

proceedings under the new case conferences and in proceedings relating to maintenance, inquests, custody, or where the High Court is the Upper Guardian of minors. English law also influenced Zimbabwe's procedural rules and constitutionalism from the *Madzimbamuto* case cited in preceding chapters while Roman Dutch law was inherited from South Africa where Rhodes was a Prime Minister when he annexed Zimbabwe in 1890. The civil tradition remains the foundation of Zimbabwe's private law. Judges also use the three common law aspects such as stare decisis, use of unwritten customary law, and flexible statutory and constitutional interpretation. A wholly Zimbabwean common law should be context-specific, rights-driven, and decolonized. This enjoin judges to be mindful of Third World approaches to international law (TWAIL), critical legal studies and decolonial approaches to law.

Judges also adopt liberal democratic concepts or values such as the rule of law, separation of powers, human rights, and vested rights. Zimbabwe also has institutional structures that are similar to the British system, such as the legislature, judiciary and executive, albeit with different functionaries or identities.[202] Zimbabwe has an *a la carte* or mixed legal system that benefits from many worlds, including common and civil law systems. The Zimbabwean Constitution also envisions the establishment of a customary legal system in addition to the common law legal system.[203] Civil law derives from Roman law, as codified in the ***Corpus Iuris Civilis*** of Justinian, and evolves because of reforms that mark a new legal life in a nation.[204] The Criminal Law (Codification and Reform) Act of Zimbabwe fits in this description because it codifies crimes under the law.[205] The criminal procedure in Zimbabwe is governed by the Code and the Criminal Procedure and Evidence Act.[206] Despite the existence of a Code in criminal law, Zimbabwe has no Magistrates Court criminal rules.[207] The Supreme Court Magistrates Court Criminal Appeals Rules are outdated, frequently confuse accused persons, and are not in

[202] For instance, the executive in Britain is led by the Prime Minister while Zimbabwe has a President. The doctrine of separation of powers is also watered down by concepts such as separation of functions and parties in the British system.
[203] See section 176 of the Constitution.
[204] Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to The Same Goal,' *Poredbeno Pomorsko Pravo* 40 (2001) 7-32, 8.
[205] (Chapter 9:23).
[206] (Chapter 9:07).
[207] Compare this with the Magistrates Court (Civil) Rules, 2018 (Chapter 7: 10), SI 11 of 2019.

accordance with the Constitution in terms of protecting the accused persons' rights. Much of the interlocutory procedures in criminal proceedings in Zimbabwe are carried out as a matter of routine by prosecutors and courts rather than in accordance with the rules.[208] Confusion also arises when the executive issues arbitrary regulations on a regular basis to govern issues such as fines in times of financial, political and legal uncertainty.[209] In most cases, such fine schedules are issued without consulting the public or following due process that is a pillar of the rule of law. In fact, the lack of Magistrates Court criminal rules makes it even more difficult for accused persons to assert their constitutional rights in many issues relating to appeals, reviews and bail, because the Magistrates and prosecutors will exercise discretion on how such matters progress, even if that means seriously interfering with accused persons' rights. Rules that establish specific time limits are critical for achieving legal certainty and procedural fairness.

At a structural level, if all other courts have rules to guide them, it makes legal sense to discourage reliance on the rules from other courts, such as the High Court, the Supreme Court and the Constitutional Court, to determine how accused persons who appear before Magistrates' Courts must assert their constitutional rights and freedoms to challenge the allegations levelled against them. While criminal law reflects some elements of civil legal systems, customary law in Zimbabwe is another area that is likely to benefit from codification soon. Courts in Zimbabwe are required to modify customary law in the same way that they modify common law in Zimbabwe.[210]The extent to which customary law in Zimbabwe can be reconciled with the common law and civil law in the country, and the significance of customary law to Zimbabwe's legal system, is largely dependent on codification of various aspects of customary law in Zimbabwe. This will make it easier for Zimbabweans to choose between general law and customary law easily and to

[208] In many situations challenging placement of accused persons on remand is a waste of time even if you raise important constitutional averments. The same goes with instances where magistrates unnecessarily descend into the arena or refuse to recuse themselves. Clear rules are needed on many issues such as the role of intermediaries in sexual offences; private prosecution; appearance of amicus organizations and scholars and so forth.

[209] See for instance Criminal Law (Codification and Reform) (Standard Scale of Fines) Notice, 2021 (Chapter 9: 23) SI 25/ 21.

[210] See section 176 of the Constitution.

seek protection from the Constitution regarding which aspects judges of superior courts should modify in accordance with the Constitution.[211]

It may also be necessary to identify the aspects of civil law that may be subjected to constitutional interpretation. Caslav Pejovic observes in relation to civil law that:

> 'The main features of civil law systems are civil codes which are authoritative and contain a lot of general rules and other principles, often lacking details. One of the basic characteristics of the civil law is that the courts main task is to apply and interpret the law contained in a code, or a statute to case facts. The assumption is that the code regulates all cases that could occur in practice, and when certain cases are not regulated by the code, the courts should apply some of the general principles used to fill the gaps.'[212]

If Zimbabwe is to codify customary law, a great deal of information is required to ensure that judges of superior courts are properly guided on what they would modify as customary law as contemplated by section 176 of the Constitution. This is significant in light of the 16 languages (and thus cultures) officially recognised by Zimbabwe's Constitution.[213]Added to this is the idea that culture is made up of highly contested codes and representations that necessitate poetic, political, historical and linguistic processes.[214]This is linked to the need for judges to examine customary law through the lens of dialogic and discourse approaches to democracy.[215]Suzan Williams, for example, notes how dialogic democratic theory can ensure that customary legal systems do not discriminate against specific rights in that:

> 'If the problematic culture is a majority culture, then the question becomes whether legal sources of human rights-such as a constitution or international convention-should be understood to prevent the majority from expressing its culture through discriminatory customary legal rules. Whatever one thinks of the theoretical arguments in this context, there is a powerful pragmatic problem with simply choosing equality rights over culture in this situation: it often does not work very well.'[216]

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[211] Section 176 of the Constitution.

[212] Pejovic (n 204) 9.

[213] See section 6 of the Constitution.

[214] James Clifford, '*Introduction*,' *in James Clifford & George E. Marcus, Writing Culture: The Poetics and Politics of Ethnography* (1986, University of California Press) 2.

[215] See in detail approaches in this regard from Susan H. Williams, 'Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption," 18 (2) *Indiana Journal of Global Legal Studies* (2011) 65-85, 65.

[216] Williams (n 215) 68.

Susan Williams goes on to argue that dialogic democracy theory provides valuable tools for a legal system to protect both customary law and the equality of its women (and other vulnerable) citizens.[217] Dialogue in the cultural community helps ensure that the customary legal system can create legal incentives and capacities for vulnerable members of the community, such as women, to shape the customary law of their communities.[218] Because it is obviously regarded as foreign or alien, Western-type general law in Zimbabwe rarely achieves this ability for women to easily influence their cultures in the community. Zimbabwe's current education reforms toward heritage-based Education 5.0 that guides universities and the Ministries of Primary and Secondary and Higher and Tertiary Education, can greatly benefit from the codification of customary law. Law schools in Zimbabwe, such as the University of Zimbabwe, are also teaching foundations in law in Zimbabwe and can carry the torch on consultancy and research work in this area. Many organizations that work on customary practices, such as Musasa Project, Zimbabwe Women Lawyers Association, Women in Law Southern Africa, Padare Men's Forum, and others, can play an important role in codifying customary law in Zimbabwe. Furthermore, judges who have long taught women and succession law, such as Justice Sylvia Chirawu-Mugomba and Amy Tsanga, can play a huge role in interpreting the Constitution as it relates to customary law or using gender-specific approaches such as the grounded approach, feminism and vulnerability. They are also best placed to oversee a Customary Law Codification Commission in future together with other judges who took family law litigation seriously such as Justice Chitakunye during his days at the High Court.

Justice Chirawu-Mugomba, for instance, has demonstrated commitment to the need for judges to follow the Constitution in their judicial roles. She has been a marvel to watch in the High Court's family court and civil divisions as an all-rounder in the civil society, academia, legal practice and the bench. She mentions, for example, that:

> 'Historically women were perceived as being incapable of studying law, let alone being judicial officers. So, being on the bench breaks that myth. Another reason that women are important in the judiciary, is that women judges bring different

[217] Williams (n 215) 65.
[218] Ibid.

> perspectives to the bench, according to their experiences. They contribute to the development of the law as per s176 of the constitution of Zimbabwe. Female judges bring a culture of thoroughness and hard work."[219]

The judge has also demonstrated her determination to interpret the law in accordance with her constitutional responsibilities, noting, for example, that:

> 'I have also contributed significantly to the development of jurisprudence in family and the law of succession including child rights, based on my experience in teaching at the university, she says. I am also on a quest to add to the development of common law and customary law.'[220]

The same attributes can be said Justice Amy Tsanga who taught at the University of Zimbabwe's Women's Law Centre for many years. She also wrote a book on taking the law to the people[221] and co-edited another one on women and the law.[222]Other female judges, such as Justice Mwayera, have also defended the sanctity of marriage in Zimbabwe by upholding adultery claims under Zimbabwe law.[223]In any customary case, the examples that an individual judge chooses can overwhelmingly centre on contested issues that can either be ventilated by the High Court or other superior courts such as the Supreme and Constitutional Courts. In terms of the common law in Zimbabwe, judges must provide clarity on what is meant law by Zimbabwe's common law. The common law is a broad one, and its application can be perplexing in the absence of clarity from the judges in a constitutional system. What features of the common law should be considered, for instance, if Zimbabwean judges adopt a common law definition from the standpoint of homegrown constitutionalism? In general, statutes are the primary sources of law in common law systems, as are Court decisions rendered in a largely adversarial system.

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[219] Raoul Wallenberg Institute, Women Judges Matter: Meet Hon Justice Slyvia Chirawu-Mugomba from Zimbabwe,' https://rwi.lu.se/news/women-judges-matter-meet-hon-justice-slyvia-chirawu-mugomba-fromzimbabwe/ accessed 23 November 2022.

[220] Raoul Wallenberg Institute (n 232).

[221] See Amy Tsanga, *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe*, (2003, Weaver Press Zimbabwe).

[222] See Amy Tsanga & Julie Stewart, *Women and Law: Innovative Regional Approaches to Teaching and Research*, (2011, Weaver Press Zimbabwe).

[223] See for instance Daniel Nemukuyu, 'Adultery Damages Test Case Spills into ConCourt,' (2 February 2016, The Herald Newspaper) < https://www.herald.co.zw/adultery-damages-test-case-spills-into-concourt/> accessed 23November 2022.

In the common law system, judges must thus play a dominant role in developing case law or legal precedent based on precepts or doctrines such as *stare decisis*. The doctrine of stare decisis is not codified, but it directs common law courts to follow higher court decisions.[224]However, the idea that common law is created by case law is only partially correct because it is also dependent on the statutes that judges interpret in the same way judges in civil law systems do.[225]In that sense, both civil and common law loosely become 'judge-made law,' though the term has mostly been used to describe common law in England. In England, common law evolved because of appellate judges influencing specific laws and policies, particularly in commercial areas of the law such as contract, property and tort (delict).[226]

The judge's role is also important in the interpretation of statutes. It has been argued that the common law enhances the role of judges in three ways. First, judge-made law preserves freedom through apolitical judicial decisions rather than centralized and arbitrary legislative law-making.[227]Second, legal realism as a tradition, particularly in mature democracies such as the United States of America (and even Zimbabwe), allows judges to make decisions based on their political and other beliefs that is beneficial because judges can balance each other through different approaches.[228]To support this point of view, Nicola Gennaioli & Andrei Shleife cite Judge Benjamin Cardozo (1921: 177) who notes that:

> 'The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.'[229]

The preceding remarks make sense because each judge is exposed to various legal philosophies and may end up favoring one over another. Some judges are political and legal philosophers, while others are legal puritans, utilitarian,

[224] See Pejovic (n 204) 9-10.

[225] Ibid, 10

[226] Nicola Gennaioli & Andrei Shleife, 'The Evolution of Common Law,' 115 (1) *Journal of Political Economy* (2007) 43-69, 43.

[227] Gennaioli and Shleife (n 226) 44.

[228] Ibid. It is argued here that judges have some philosophical viewpoint that guides their interpretation whether political, social, historical, religious or institutional.

[229] Ibid, 44-45.

constitutionalists, legalists, positivists, realists, reformists, activists, gatekeepers, feminists, and so on. They must apply their legal philosophy in a way that does not give the impression that they are not institutionally and individually independent of the other branches of government. This brings us to the third point: common law assists judges in developing the law in specific areas such as commercial law and economics, and other areas of the law where there are inefficient legal rules that require interpretation from the courts.[230]

Judges in Zimbabwe must be mindful of Zimbabwe's *a la carte* legal rules when designing a model of constitutional interpretation in a mixed system. While it is obvious that judges in common law systems develop the law through case law, it has been lamented that there is a lack of a conceptual structure on how the courts are allowed to create the law in a way that does not conflict with the legislature's role in making the law.[231]Again, because Zimbabwe has a mixed legal system, litigants' lawyers and judges may need to strike a balance between being conceptual and being pragmatic when dealing with cases. Judges and lawyers should go beyond the description of civil law systems as codified or inquisitorial jurisdictions and common law systems as adversarial or court decision jurisdictions when distinguishing between lawyers in civil and common law jurisdictions, for example. It has been observed that:

> 'The civil law is based on codes which contain logically connected concepts and rules, starting with general principles and moving on to specific rules. A civil lawyer usually starts from a legal norm contained in a legislation, and by means of deduction makes conclusions regarding the actual case. On the other hand, a lawyer in common law starts with the actual case and compares it with the same or similar legal issues that have been dealt with by courts in previously decided cases, and from these relevant precedents the binding legal rule is determined by means of induction. A consequence of this fundamental difference between the two systems is that lawyers from the civil law countries tend to be more conceptual, while lawyers from the common law countries are more pragmatic.'[232]

When Zimbabwean courts interpret the common law, for instance, the pillars of the common law that are relied on must be clear. To begin, in England,

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[230] Ibid, 45.

[231] Pejovic (n 204) 10.

[232] Pejovic (n 204) 10. See also, Pier.G. Monateri, 'Understanding Civil Law,' *Conference Paper* (January 2015, Researchgate).

where the term originated, common law refers to judge-made law, and precedents considered include very old court cases. The common law in the United States (and perhaps in Zimbabwe) refers to the common law rules brought over from England when the US (and perhaps Zimbabwe) became a nation.[233] If we accept the argument that English common law was developed by Judges rather than Parliament in England, and that these judges created and defined crimes such as felonies, murders, and so on,[246] we can conclude that common law in England began or evolved from common sense or moral rights. Common law countries should develop their own common law traditions, according to the modern approach. This is reflected in the view that American courts abandoned the English common law tradition and developed their own as the number of their decisions grew.[234] Caution has been issued that understanding the limitations of common law requires understanding the distinction between, say, the common law tradition followed by the United States (or Zimbabwe, South Africa, Kenya, Zambia, Botswana or Namibia as common law countries), and other nations that follow the English model and the civil law tradition which developed in Europe.[235]

Zimbabwean judges have not yet presented a Zimbabwean version of the common law that differs from the English, American or Canadian versions. Until Zimbabwe has its own common law, it can rely on English and other jurisdictions that follow the Anglicized model. While the Constitution distinguishes between customary and common law, it appears that Zimbabwean superior courts can modify the Anglo-model of the common law to produce wholly Zimbabwean elements of the common law. This is especially true given that English judges used common sense to shape the tenor of crimes before Parliament legislated them. As a result, it is expected that Zimbabwean judges will not continue to postpone the implementation of their judgments simply because they want to wait for Parliament to pass legislation to that effect. Courts themselves can create common law crimes that Parliament can be ordered to legislate if the courts are clear in their creation of such crimes.

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[233] H.B. Kerper, *Introduction to the criminal justice system* (1979, 2nd ed., West Publishing Company) 27. [246] W.R LaFave, *Criminal law* (2000, 3rd ed., West Group) 70).
[234] Kerper (n 233) 27.
[235] Kerper (n 233) 27.

Conclusion

The preceding analysis has demonstrated when courts control the judicial atmosphere from an informed position and as dictated by the legal system in which they operate, they should not feel alone. Every day, come to learn how to improve their adjudicative approach from litigants and legal scholars. Zimbabwe's mixed legal system requires judges to not only actively participate developing or modifying the common law, but also to consider legal scholars from various jurisdictions to correctly apply common law and civil law rules. In another sense, litigants should address various legal doctrines to draw the court's attention to specific methods of interpretation. Every Constitution contains some internal and external aids to interpretation. As we have seen, Zimbabwe's homegrown constitution and cross-border constitutionalism require considerable thought. As a result, judges should decide the applicability of constitutional principles derived from common law systems that it follows. Zimbabwe follows both Anglicized and Americanised versions of the common law. As previously discussed, the Anglo-model is followed from the value-based approach to the rule of law and separation of powers (separation of functions or parties). The Americanised version is followed considering a written Constitution and canons of judicial restraint such as the constitutional avoidance doctrine. There are also influences from common law countries such as South Africa and Canada's adjudicative approaches. Zimbabwean judges should create Zimbabwe's own common law as a term of art, interpretive control mechanism and part of constitutional norms to be embedded in Zimbabwe's indigenous constitutionalism.

Chapter 5: Motivations for Litigious Litigation under an Internal Model of Constitutional Interpretation in Zimbabwe

Introduction

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

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

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

Innovative Constitutional Interpretation before the 2013 Constitution

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

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

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

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

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

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

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

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

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

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

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

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

[239] Meese (n 238) 24.

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

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

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

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

[244] Meese (n 238) 26.

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

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

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

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

[245] Meese (n 238) 26.
[246] Juan Colombo Campbell, Constitutional Court Judges' Roundtable,' 3 (4) *International Journal of Constitutional Law* (2005) 543-550, 547.
[247] Campbell ibid.
[248] Campbell ibid.
[249] Campbell ibid.
[250] Campbell ibid, 548.
[264] Campbell ibid, 549.
[251] Campbell ibid, 550.

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

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

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

[252] Campbell ibid.

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

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

[255] Ibid.

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

The Importance of Purposive and Generous Constitutional Interpretation

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

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

> 'This Court has held that the provision is to be given a benevolent and purposive interpretation. It has repeatedly declared the vital and fundamental importance of freedom of expression to the Zimbabwean democracy – one of the most recent judgments being that in *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others* 1997 (2) ZLR 254 (S) at 268C–F,1998 (2) BCLR 224 (ZS) at 235I– 236C.

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

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

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

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

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

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

and strategic litigation. Accordingly, constitutionalism promises that people can change their lives and society by arresting their rights.[258]

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

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

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

The Analogous Constitutional Interpretation

Judges could occasionally go beyond literal interpretation or textualism and purposive interpretation to adopt an analogous method of interpretation.[260]We cannot say that the judge in the *Chaduka* case abandoned textualism, because the court was interpreting the same constitutional text in novel ways. In that case, the applicant was a female trainee teacher at a church-run college. She

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

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

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

In support of the analogous approach, the Court also held that the lack of childcare facilities could not be used to justify requiring pregnant students to withdraw; rather, the lack of facilities was a form of discrimination in and of itself. It also held that the principle of fairness outweighed the principle of freedom of contract. In any case, students did not in reality contract freely. They had no choice but to accept the contract's terms. The contract did not

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

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

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

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

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

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

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

The Holistic, Living Constitution Or *Sui Generis* Approach

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

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

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

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

[268] SC 162/2001.

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

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

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

Constitutional Interpretation under the 2013 Constitution

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

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

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

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

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

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

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

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

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

[276] Section 46.

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

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

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

[278] Superior court judges for instance have the constitutional responsibility to develop the common law and customary law and to regulate their internal processes.
[279] Jeanrond (n 254) 2.
[280] Cf *In re Chinamasa* supra where the applicant challenged whether the High Court could on its own invite an amicus curiae to determine if the offence of contempt of court had been committed.
[281] For instance, relating to the need for litigants to hold pre-trial conferences in complex cases.

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

The Interpretation Provision in The Constitution (Intrinsic Model)

Section 46 of the Constitution identifies as the interpretation provisions:

46. Interpretation of Chapter 4

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

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

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

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

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

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

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

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

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

[282] See Hofisi (n 62).

doctrine deny future litigants the access to constitutional justice. It has been noted, for example, that the legal protection of constitutional provisions must be done through due process to promote constitutional justice and constitutional legitimacy, because due process:

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

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

[283] Campbell (n 246) 546.

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

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

[286] Ramraj (n 285) 493.

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

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

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

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

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

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

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

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

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

[290] *Madzimure* case.

[291] See *Majome* case.

says, neither more nor less. In this way rules contain fixed points in the field of the factually and legally possible. This means that the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule of principle.'[292]

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

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

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

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

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

[307] Knight ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[302] *Huang*, at 16.

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

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

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

[306] Campbell ibid, 545.

[307] Campbell ibid 546.

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

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

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

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

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

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

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

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

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

[309] Campbell (246N) 546.
[310] Section 327 of the Constitution.
[311] Section 326.
[312] Litigants must present to the courts the treaties that Zimbabwe has ratified and the human rights approaches by various bodies under the UN and African Union.
[313] While Zimbabwe has not ratified the Rome Statute of the International Criminal Court (ICC), this branch of law may be applicable if successor governments decide to refer situations to the ICC.
[328] Zimbabwe has a law relating to genocide and IHL can apply in this regard.
[314] Section 326 (1).

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

Application of Treaty Law in Zimbabwe

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

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

[315] Section 326 (2).

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

[332] Section 327 (2) (a).

[317] Section 327 (3).

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

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

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

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

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

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

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

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

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

(e) May consider relevant foreign law

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

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

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

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

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

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

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

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

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

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

[332] See Breyer in Dorsen ibid, 522.
[333] Ibid.
[334] We could not find the citation for the case involving National Electoral Reform Agenda that later led to the repeal of the Public Order and Security Act (POSA) in Zimbabwe. That case generated interest including emergence of some citizen groups such as Coalition against Violence and Anarchy that also wanted to counter the use of protests to assert human rights and freedoms.
[335] Campbell (n 246) 544.
[336] Campbell ibid 544.

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

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

[337] Campbell ibid 545.

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

Chapter 6: Alternative Ways of Interpreting The Constitution Of 2013

The interpretation of constitutional rights also depends on many issues. The main constitutional provisions provide for content and holders of human rights. There are presumptions and limitations and generations of different rights. The Constitution imposes duties on holders of fundamental human rights and freedoms in four ways: protect, promote, fulfil and respect human rights and freedoms.[339] Even members of security institutions are not allowed to violate human rights according to section 206 of the Constitution.

> **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.

Added to specific duties are presumptive considerations;[340] provision of specific framing[341] and content of rights,[342] general limitations[343] and specific limitations in section 87 of the Constitution. Added to these are challenges linked to the margins of appreciation given to States, the minimum content of various categories of second-generation human rights which limit how right holders can assert or enjoy their right.[344] Judgments of superior courts on ESCR have not interacted a lot with the minimum core content from soft

[339] Section 44.
[340] Section 47.
[341] For instance, some rights are given to a Zimbabwean citizen and permanent resident, every person, and so forth.
[342] For instance, each right has some content. Other rights such as administrative right can have many rights protected in the same section, see section 68.
[343] Section 86.
[344] See rights such as freedom from arbitrary eviction (74); right to education (75); right to healthcare (76) and right to food and water (77).

sources of international law such as General Comments of the ESCR Committee.[345] .

The Constitution as Starting Point in Constitutional Rights Adjudication

A Constitution is in most countries 'the supreme national law.'[346] Essentially, the evaluation of a national constitution must assess the extent to which it can facilitate the democratization process and will serve as a basis for determining the direction of future constitutional development.[347] Against this setting, this think piece focuses on the various categories of fundamental human rights and freedoms that are listed under the Declaration of Rights or Bill of Rights in the Constitution of Zimbabwe 2013.[348] Most commonly, a right enshrined in a national constitution may also be recognised as an international human right.[349] This book, intended for the understanding of the limitations on fundamental rights and freedoms in Zimbabwe, may not provide excessive detail, the basis for understanding such limitations from the perspective of international law.[350] It suffices to state that Zimbabwean courts can apply provisions of international treaties relating to human rights[351] and customary law principles when interpreting such rights.[352]

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[345] See *Farai Mushoriwa v City of Harare and Anor* HH 195-14 and *City of Harare v Mushoriwa* SC 54 of 2018.

[346] Fidelis E. Kanyongolo, '*The Constitution and the Democratization Process in Malawi*' in Owen Sichone (ed), The State and Constitutionalism in Southern Africa (SAPES 1998). I note however that it may not always have a special legal status as it is sometimes used as a political roadmap.

[347] Ibid 2.

[348] The Constitution of Zimbabwe 2013, Chapter 4, lists various rights from S48 to 84. These rights can be grouped into first generation or civil and political rights such as right to life and freedom from torture; second generation rights or Economic, Social and Cultural rights (Ecosoc) such as right to education, healthcare, food and water and freedom from arbitrary eviction; and third generation rights/ collective rights such as environmental rights. The generations of rights are not listed in order of priority but simply in terms of how the international community came to focus on certain rights and freedoms. The Constitution entrenches a broad category of rights, and this is a remarkable constitutional gain for Zimbabwe.

[349] Siri Gloppen and Mindy J. Roseman, '*Introduction: Can Litigation Bring Justice to Health?*' in Alicia E. Yamin and Siri Gloppen (ed), Litigating Health Rights: Can Courts Bring More Justice to Health? (HUP 2011)3.

[350] The Constitution of Zimbabwe 2013, S 34, however obligates courts of law to ensure that Zimbabwe domesticates international laws to which she is a state party.

[351] The Constitution of 2013, S 327, envisages a situation where Zimbabwe follows the process of dualism when incorporating international treaties into national law. Some laws may be approved by parliament without the need for a parliamentary Act whereas parliament is obliged to promulgate Acts for matters relating to national finances.

[352] The Constitution of 2013, S 326 speaks to the process of monism when dealing with customary international law as it envisages a situation where customary international is part of Zimbabwean law

Conceptualising Constitutional Ethos Properly

Terminology is not merely semantic, it is also conceptual and practical.[353] A duty is a legal requirement to carry out or refrain from carrying out any act.[354] From the entrenchment of various categories of constitutional or human rights in Zimbabwe, there is need to locate them as part of the tentacles of democracy and principles of good government in Zimbabwe. The adoption of a homegrown Constitution in Zimbabwe came after years of using the ceasefire charter, the Lancaster House Constitution of 1980. There were several amendments to the Lancaster House Constitution since independence, but the document remained essentially a non-Zimbabwean, colonial relic, and a source of much political tension and dissatisfaction.[355] As such, a constitutional conference was seen as a sine qua for meaningful democratic development in a liberalizing postcolonial society like Zimbabwe. Zimbabwe embarked on constitution-making exercises that led to the rejection of a government-led draft under the leadership of the late Chief Justice Godfrey Chidyausiku; the rejection of the Kariba Draft Constitution mainly by political parties and a national referendum during the Government of National Unity (GNU) which led to the adoption of the Constitution in 2013.

Accountability can be associated with representative democracy, since it implies an act of delegating by citizens to a government that must act in representation of their interests. In fact, the classic distinction between vertical and horizontal accountability reminds us that the first type is carried out in relationships that are the result, for example, of an act of authority in relation to citizens who in turn ask for accountability from their governments, or else in hierarchical relationships where a parliament asks a minister for accountability.[356] Horizontal accountability is presented as a two-legged term in this article. Firstly, it is the ability of government institutions to check

unless it is inconsistent with the Constitution and an Act of Parliament. [Thus, Customary international law, is superior to subordinate legislation]

[353] Megan Daigle and Henri Myrttinen, *Bringing Diverse Sexual Orientation and Gender Identity (SOGI) into Peacebuilding Policy and Practice*' in Caroline Sweetman, Sexualities, Gender and Development (Oxfam 2018) 105.

[354] Jonathan Law and Elizabeth A. Martin (eds), 'A Dictionary of Law' (OUP 2009) 187.

[355] John Makumbe, 'Electoral Procedures and Processes in Zimbabwe' citing Welshman Ncube, *'Minister Remains Unembarassed by Electoral Shortcomings*' Zimbabwe Independent (1 May 1996), in Owen Sichone (ed), The State and Constitutionalism in Southern Africa (SAPES 1998) 73.

[356] Ixchel P. Duran, '*Accountability from the Perspective of the Forum: Citizens' Perception of Political Accountability in 20 European States*', (UAB 2014) 3.

abuses by other branches of government, a system in which government institutions are independent and no agency or branch becomes too powerful compared to the others.[357] Secondly, although institutions such as parliament represent the will of the citizen in maintaining checks and balances on other State institutions, citizens themselves must be accountable to each other. The development of human rights is fundamentally linked to the need for individual persons, communities and the State to respect the rights of different holders of such rights. Zimbabwe's declaration of rights is largely similar to the South African Bill of Rights. The South African Chapter of Rights has a horizontal effect or what the Germans call '*drittwirkung*', i.e. an application of the fundamental rights as between citizens.[358] Effective promotion, protection, respect and fulfilment of human rights demands that civics, academia, monitoring institutions, institutions supporting democracy and State institutions focus on the duties of right holders. Appositely, effective litigation, defending and challenging of human rights abuses depends on the litigant's ability to assess the limitations imposed by a constitution in a democratic society. For citizens to accuse the State as undermining the rule of law, practicing bad governance, or behaving in a totalitarian or autocratic way is not enough. Citizens themselves must also act within the confines of the law; the constitution included.

Human rights are rights and freedoms to which every human being is entitled.[359] It is sometimes suggested that human rights (or some of them) are so fundamental that they form part of natural law, but most of them are best regarded as forming part of treaty law.[360] The United Nations Universal Declaration of Human Rights (1948) spells out most of the main rights that must be protected but it is not binding in international law.[361] Human rights are ordinarily understood to be the rights that one has simply because one is

[357] Larry Signe, 'Accountability and Demand for Democracy Drive Leadership Changes in Africa' (Brookings, 14 June 2018), ‹ https://www.brookings.edu/opinions/accountability-and-demand-for-democracy-driveleadership-changes-in-africa/›accessed 26 January 2019.
[358] Azhar Cachalia, Halton Cheadle, Dennis Davis et al, Fundamental Rights in the New Constitution', (Juta 1994) 20.
[359] Law and Martin (eds) (n 354) 269.
[360] Ibid.
[361] Ibid.

human.[362] Human rights are also inalienable rights, because being or not being human usually is seen as an unalterable fact of nature, not something that is either earned or can be lost.[386] Human rights are thus "universal" rights in the sense that they are held "universally" by all human beings.[363] Conceptual universality is in effect just another way of saying that human rights are, by definition, equal and inalienable. Human rights are often held to be universal in the sense that most societies and cultures have practiced human rights throughout most of their history.[364] In conventional human rights language, 'rights' refer to claims that individuals or groups such as indigenous peoples or minorities hold against States and to the obligations of States to comply.[365] This arrangement, from a vertical accountability perspective, presupposes the existence of States, and the notion that individuals or groups may claim something from a political authority.[366] In traditional societies and from the perspective of horizontal accountability, rights are inconceivable without obligations.[367] All social claims are enmeshed in networks of mutual obligations and all persons are family members or at least thought about and addressed in a kin-based idiom. Human rights are frequently described as inalienable, indivisible and universal rights. The universality of human rights has been understood from both occidental and oriental conceptualisations and the need to incorporate arguments on cultural relativism.[368] The importance of the Bill of Rights is that it applies to all law and binds the legislature, executive, organs of the State and the judiciary.[369] It should also be noted that the concept of human rights concerns the relationship between the individual and the state; it involves the status, claims, and duties of the former in the jurisdiction of the latter.[370] As such, it is a subject as old as politics.[371]

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[362] Jack Donnelly, '*The Relative Universality of Human Rights*' (JHUP 2007) 282.
[363] Ibid 283.
[364] Ibid 284.
[365] Stener Ekern, '*Development Aid to Indigenous Peoples is an Exercise in Crossing Boundaries*' in Hugo Stoke, Astri Suhrke and Arne Tostensen, Human Rights in Developing Countries' (Kluwer 1997) 8.
[366] Ibid.
[367] Ibid 9.
[368] Donnelly, '(n362).
[369] Carole Cooper, *Labour Relations*' in Stuart Woolman and Michael Bishop, Constitutional Law of South Africa' (Juta 2013) 53-2.
[370] Donnelly (n 362) citing Hung-Chao Tai, '*Human Rights in Taiwan: Convergence of Two Political Cultures?*' in James C. Hsiung (ed), Human Rights in East Asia: A Cultural Perspective (1985).
[371] Ibid.

Introducing Analytical Theories and Model Specifications in Adjudication

Litigants and courts should also appreciate that the provisions of the Constitution of Zimbabwe are scrutinised in terms of their frame or phraseology and content, conditional rights, presumptions on the existence of other rights, general limitations and special limitations imposed. In terms of theory preference, normative theory best explains the obligations that flow from the Constitution as the grundnorm. The normative theory of law was developed in the early 20th Century and set out to build a system of generally valid notions which presuppose the normative contents of the various legal orders.[372] The traditional science of law has never been equipped with any uniform methodology.[373] This explains why the normative theory does not object to or criticises any existing legal methodology, but points to, and complains of, the utter lack of methodology in the traditional science of law.[374] The proponents of this theory include Hans Kelsen who founded and developed the theory together with his Austrian disciples who preferred 'pure theory of law' and called it the 'Vienna School of Jurisprudence' than 'normative theory'.[375] The other is Frantisek Wyr who founded and developed the normative theory in Brno and called it the 'Brno School of Jurisprudence' which died with its founder in 1951.[376] The applicability of the theory to modern constitutional debates is steeped in the realisation that 'the fact that these two schools ceased to exist in the sense of law schools where the theory is systematically developed and cultivated does not affect the existence or importance of the theory.[377] Fundamentally, the objects of normative cognition are norms.[378] The norm and the obligation are logically united.[379] Essentially, normative legal theories are by their nature *evaluative.*[380] They fit into the category of justificatory theories such as Ronald Dworkin's theories that "fit and justify" existing law.[381]

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[372] George E. Glos, '*The Normative Theory of Law*' *(WMLR 1969)* 151.
[373] Ibid.
[374] Ibid.
[375] Ibid 152 footnote 2.
[376] Ibid footnote 3.
[377] Ibid.
[378] Ibid 158.
[379] Ibid 159.
[380] Legal Theory Lexicon, '*Positive and Normative Legal Theory.*'
‹ https://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le.html› accessed 26 January 2019.
[381] Ibid.

Building a model of legal analysis may seem herculean but it is not impossible. The development of constitutional rights jurisprudence depends on the society's focus on sovereignty-consensus models which look at individual right holders as sovereign equals with other sovereigns envisaged by the Constitution. The people of Zimbabwe are sovereigns under the '*We the People of Zimbabwe*' clause and are the ultimate repositories of State power which they vest in various members of the executive, legislature or judiciary.[382] The individual right holders must exercise their rights in a way that respects the sovereignty of the Constitution which is the supreme law of the land as envisaged in the Constitution.[383] The State called Zimbabwe is also a sovereign, unitary and democratic republic.[384] To create conditions in which citizens can enjoy rights and freedoms they hold, it is argued that they must respect the constitutional obligations imposed upon them and use their compliance with the constitution or commitment to respecting horizontality of the constitution as effective vehicles for combating impunity and complicit in human rights violations in Zimbabwe.

Key Issues in The Constitutional Rights Provisions

Duties of state, state institutions and natural or juristic persons

Constitutional rights are not uniformly framed. They are framed firstly in terms of duties and responsibilities to protect, promote, respect and fulfil rights.[385] The duties are elaborated in various human rights Committee reports, guidelines, preliminary/concluding observations, session reports, general comments.[386]Other key documents that can also be used to determine the obligations from an international law perspective include reservations, declarations, objections relating to human rights treaties, the *travaux preparatoires*, manuals on human rights reporting, state reports and shadow reports from civil society. The implementation checklists may also be important to determine the status of compliance. For instance, progressive

[382] This position is captured in the preamble to the Constitution. The other preamble in the Constitution speaks to devolution and is found in the Constitution of Zimbabwe 2013, Chapter 14.
[383] Constitution of Zimbabwe, S 2.
[384] Constitution of Zimbabwe, S 1.
[385] Section 44 of the Constitution.
[386] See for instance UNICEF, Implementation Handbook for the Convention on the Rights of the Child (2007, UNICEF) xx.

judgments on children or women married before the age of 18 years could have been made before the *Mudzuru* case by drawing the Courts to the Committee on the Rights of the Child's Guidelines for Periodic Reports 1996 wherein states were requested to provide relevant information with respect to Article 1 of the CRC on the following:

- Any differences between national legislation and the Convention on the definition of the child (*the Marriages Act and Customary Marriages Act were different*).

  The minimum legal age defined by the national legislation for the following:

  - Legal and medical counseling without parental consent (current debate on primary school children carrying condoms to school);
  - Medical treatment or surgery without parental consent (*refusal by parents to sign indemnity forms or to have children reveal sexual transmitted infections*);
  - End of compulsory education;
  - Admission to employment or work, including hazardous work, part-time and full-time work (Zimbabwean children can have IDs and drivers' license at 16 years. Rarely do they work and get remunerated unless it is in menial jobs).
  - Marriage;
  - Sexual consent;
  - Voluntary enlistment in the armed forces;
  - Conscription into the armed forces;
  - Participation in hostilities;
  - Criminal responsibility;
  - Deprivation of liberty, including by arrest, detention and imprisonment, inter alia in the areas of administration of justice, asylum seeking and placement of children in welfare and health institutions;
  - Capital punishment and life imprisonment;
  - Giving testimony in court and civil and criminal cases
  - Lodging complaints and seeking redress before a court or other relevant authority without parental consent;

- Participating in administrative and judicial proceedings affecting the child;
- Giving consent to change of identity, including change of name, modification of family relations, adoption and guardianship;
- Having access to information concerning the biological family;
- Legal capacity to inherit, to conduct property transactions;
- To create and join associations;
- Choosing a religion or attending religious school teaching;
- Consumption of alcohol and other controlled substances;
- How the minimum age for employment relates to the age of completion of compulsory schooling, how it affects the right of the child to education and how relevant international instruments are taken into account;
- In cases where there is a difference in the legislation between girls and boys, including in relation to marriage and sexual consent, the extent to which article 2 of the Convention has been given consideration;
- In cases where the criterion of puberty is used under criminal law, the extent to which this provision is differently applied to girls and boys, and whether the principles and provisions of the Convention are taken into consideration.

Further guidance could also have been sought from the African Charter on the Rights and Welfare of the Child which departs from the CRC by making children duty holders and rights holders at the same time. The CRC does not make children duty holders.

The Frame and Content of Constitutional Rights Provisions

Some constitutional rights and freedoms are given to all persons, every person, every Zimbabwean or permanent resident or every Zimbabwean citizen. Essentially, right holders are expected to determine if they fall under the category of the holders of the right which they seek to assert. Framing rights differently is fundamentally important as it determines how courts of law can either refuse or agree to grant rights holders certain remedies in the event of an allegation of a constitutional breach. Some rights are framed as relative rights.

59 Freedom to demonstrate and petition
Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully.

The content of the freedom to demonstrate and petition is not absolute but conditionally depends on peaceful enjoyment of this freedom. The conditions of peace are also given content in the MOPA. The content of other rights is such that they are enjoyed by the present and future generations.[387] Other rights are enjoyed by *everyone*, *all persons*, *no persons*, or *Zimbabwean citizens and permanent residents*.

Jurisdiction of the Court and Legal Standing

We saw in the *Ndewere* case that courts utilise the distinction between inherent and competent jurisdiction to interpret cases involving members of the three arms of government. Citizens who claim redress for certain breaches on their own behalf or on behalf of others must ensure that they fit in the category of people who are described under the standing provisions in the constitution.[388] This is important so that the court approached to determine the alleged constitutional violation can assume jurisdiction over the matter. Where the courts feels that it lacks jurisdiction it treats the matter as non-justiciable and may not grant remedies envisaged under the standing provision which include compensation and declaration of rights.[389] Zimbabwean courts are still to determine on the remedy of compensation for constitutional violations. Importantly though, the Constitution of Zimbabwe 2013 liberalized legal standing and those who can approach a court of law include those acting on their own behalf, for others and those acting in the public interest. Litigants are still obligated to demonstrate that they fit in the category of such persons described above.[390] Like the South African position, Zimbabwe's constitution

[387] Constitution of Zimbabwe, sect 73 shows that environmental rights are enjoyed by the present and future generations and those exercising them must also ensure the spirit of the constitution is promoted.

[388] Constitution of Zimbabwe, sec 85.

[389] Ibid.

[390] In *Loveness Mudzuru and Another v Minister of Justice* CC 12 of 2015, two young women challenged the provisions of the Marriage Act which set the minimum age of marriage as 16 years. The nub of their argument was that it is at variance with the Constitution of Zimbabwe, sec 78 that describes a child as someone below 18 years. The State, as the respondent raised the argument that the applicants did not meet the standing requirements since they were not directly affected. The court held that they did satisfy the requirements since they were acting on behalf of all affected young women. It made sense since the women were also raising the point that they were also married off at tender ages. Essentially, it is the litigant's duty to satisfy the court that indeed they have the requisite standing to seek redress in the event of a constitutional breach to their or other people's rights.

brought important and substantial changes to the common law of standing in that associations can act in the interests of their members. The common law has traditionally been hostile to representative actions in circumstances where an association has no direct substantial interest in the subject matter of the dispute but seeks to act on behalf of its members.[391] Fundamentally, the liberalization of standing removed the dirty hands principle. The fact that a person seeking a constitutional remedy has contravened a law does not bar the person from being heard or from seeking such remedy.[392]

Conditional Rights

Human rights may be enjoyed absolutely or conditionally. 'Absolute' is used to describe what is complete, unconditional; not relative or qualified.[393] Constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.[394]The constitution places a conditional duty on holders of the freedom to demonstrate and petition government to do so peacefully.[395] Those who do not exercise their rights in a peaceful manner used to be arrested in terms of the now repealed Public Order and Security Act (POSA) and the Criminal Law (Codification and Reform) Act. POSA dealt with the obligations for certain categories of petitioners or demonstrators to notify the Zimbabwe Republic Police of the intended petition or demonstration. While the police are part of the security institutions which are obliged not to violate human rights and freedoms,[396] they are empowered to investigate crimes and arrest suspects.[397] In a case note on *DARE & Others v The Commissioner of Police & Others*[398], it was argued that the right to protest is linked to freedom of assembly.[399] This right is protected under Article 21 of the International Covenant on Civil and Political Rights, and it was emphasised

[391] Cachalia, Cheadle, and Davis et al (n 358) 23.

[392] In contradistinction, the dirty hands principle was invoked in the Associated Newspapers of Zimbabwe & Author v Minister of Information HH ANZ case in early 2000s when the Daily News, a private media newspaper was closed on the basis that the publishers had refused to apply for registration.

[393] Law and Martin (eds) (n 354) 2.

[394] Iain Currie and Johane de Waat, *The Bill of Rights Handbook* (Juta 2014).

[395] Section 59 of the Constitution.

[396] Constitution of Zimbabwe, sec 208.

[397] Constitution of Zimbabwe, sec 219.

[398] HH 554-2016

[399] G. Feltoe, G. Linington and F. Mahere, 'Worlds Apart: Conflicting Narratives on the Right to Protest' ZELJ (2016). The authors cited the case of *Nyambirai v NSSA & Anor* 1995 (2) ZLR (S) @ 13 C-F.

under General Comment 31 that restrictions imposed on this right must never impair the essence of the right.[400] When the court in the *Dare* case failed to protect the right to protest, it was argued that the decision amounted to a negation of a right rather than a mere limitation.[401]

Presumption on the Existence of other Rights

A presumption is a supposition that the law allows or requires to be made.[402] Most relate to the interpretation of written documents, particularly statutes. Because a constitution is an extraordinary statute, the presumption that the enjoyment of rights under the Declaration of rights does not preclude the existence of other rights is considered in this article to be one of the key issues considered when interpreting the constitution.[403] As such, right holders are supposedly expected to assert their right as a matter of constitutional principle but in doing so must not violate the rights of other people.[404]

Listed Grounds

When dealing with discrimination, right holders are also expected to check whether the listed grounds of non-discrimination are provided in exhaustive or non-exhaustive form. Discrimination is when a person is treated less favourably than others on grounds unrelated to merit, usually because he or she belongs to a particular group or category.[405] For Zimbabwe, whose constitution was largely borrowed from the South African constitution, certain provisions relating to sex and sexuality were not adopted. For instance, sexual orientation is not provided as a ground for discrimination in the constitution of Zimbabwe because issues relating to Lesbian Gender Bisexual Transgender or Intersexual Queer and Asexual (LGBTIQA) were considered sticky points during the constitution-making process.

Lesbians, bisexuals, and transsexuals and gays practice homosexuality as a matter of choice. Some categories of intersexual people, also known as

[400] Ibid.
[401] Ibid.
[402] Law and Martin (eds) (n 354) 420.
[403] Constitution of Zimbabwe 2013, sec 47.
[404] Ibid.
[405] Law and Martin (eds) (n 374) 174.
[432] Constitution of Zimbabwe, sec 78.

hermaphrodites, are unfairly classified under homosexuals as they do not choose to be born with two organs or some medical intersexual aspects. Zimbabwe has cases of children born with penile and vaginal atresia where the genital area is closed. Families can thus come into the open and seek protection, including amending Zimbabwe's two sex default references. Transgenders are different although they argue that they are trapped in the wrong body. We have all grew up with male persons who have feminine traits and vice versa. Queer people are considered strange by society and do not necessarily practice homosexuality. In Zimbabwe, queer people are called outcasts or spiritually indwelt (*vane chinzvi*) or those with spiritual husbands or spiritual wives. Asexual people prefer to enjoy sex on their own. Meterosexuals fancy colourful things. Social media is awash with socialites giving each other homosexual labels. Zimbabwe criminalizes sodomy and what this means is that gays can still be arrested in terms of sodomy laws. It seems there is no law that criminalizes lesbianism and other key populations on sexuality. The Constitution takes away marriage rights from persons of the same sex but does not prohibit sexual intercourse between them.[432] Those who indulge sexually cannot consummate their marriage under the Constitution or the Marriages Act (Chapter 5: 17). The COPAC drafts and preparatory documents can also be used by courts to resolve complex cases as was done by Justice Hlatswayo in the *Mudzuru* case. COPAC treated homosexuality as a sticky issue. The Constitution provides that:

> **78 Marriage rights**
> (1) Every person who has attained the age of eighteen years has the right to found a family.
> (2) No person may be compelled to enter into marriage against their will.
> (3) **Persons of the same sex are prohibited from marrying each other**.

COPAC impasse was based on the COPAC report which stated that:

> The debate was based on the feeling that the constitution is there to protect minority rights while others felt that people spoke strongly against the issue during the outreach programmes that they argued was a clear indication they wanted it forbidden in this country…Mugabe considered homosexuals as worse than 'pigs and dogs.'
> Source The Standard, Homosexuality issue referred to Mugabe, Tsvangirayi, The Standard, Nov. 20, 2011.

Presidential statements such as Mugabe's anti-homosexuality remarks at home and before international platforms normally serve as policy statements that

influence the legislative agenda. Gays who indulge with each other sexually can still be penalized under sodomy laws because those laws have not yet been declared unconstitutional and only men are criminalized under Zimbabwe's sodomy laws. Right holders need to distinguish between discrimination and differential treatment when dealing with the non-discrimination clause in the constitution.[406] In *Harksen v Lane*,[407] a case dealing with the interpretation of certain provisions of the Insolvency Act in South Africa, the applicant argued that sections 21, 64 and 65 of the Act were inconsistent with certain provisions of the bill of rights to the extent that they impact on the property and affairs of a solvent spouse upon the sequestration of the estate of an insolvent spouse.[408] The case is important in showing that grounds not listed but analogous to the listed provisions may be used to determine what constitutes discrimination in a particular case. The question whether differential treatment is based on listed or unlisted ground is answered objectively.[409] If an inquiry shows that the differentiation is based on unspecified ground, then the court determines if it is unfair.[410] In the case of determination on the specified ground the unfairness of the discrimination is presumed, but the contrary may still be made. The importance of this case is that the constitution prohibits unfair discrimination, not discrimination per see.[411]

Margin of Appreciation, Constitutional Tests and Proportionality

Generally, States are allowed to balance between national interests and individual rights. International law allows States to limit certain rights using tests such as progressive realisation of human rights or the availability of resources. This is linked to the proportionality principle which deals which ends and means based on factors such as legality, legitimacy (respect for rights and reputation of other), public morals, public order and welfare of society. Ultimately such tests must however allow the State to demonstrate the commitment to fulfiling the minimum threshold of certain rights.

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[406] Constitution of Zimbabwe sec 56.
[407] CCT 9/97
[408] Ibid at 4.
[409] Ibid at 32.
[410] Ibid.
[411] Constitution of Zimbabwe, (n 406).

General Limitations

The Constitution imposes several limitations of a general nature on how rights may be interpreted using certain circumstances.[412] It contemplates a situation where no law of a general nature may limit rights relating to human dignity. The use of the discretionary word 'may' may be problematic, but courts have generally been prepared to protect those rights as non-derogable rights. In a democratic society, courts in Zimbabwe considered questions such as: is the legislative objective sufficiently important to justify limiting a fundamental right; are the measures designed to meet the legislative object rationally connected to it; are the means used to impair the right or freedom no more than is necessary to accomplish the objective.[413] Essentially the power to limit a right does not go beyond the power to restrict a right.[414] Zimbabwe's constitution empowers courts to use foreign law and lessons can be drawn from the Canadian Charter which lists reasonableness as one of its threshold values on weight and means.[415] Essentially the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of the limitation.[416] Proportionality requires the following of the limitation: that it be 'rationally connected to its objective; that it impairs the right or freedom .

'*As little as possible*' and that there is 'proportionality between its effect and its objectives'.[417] In some cases, a value-based analysis is adopted where a court is guided by the values and principles essential to a free and democratic society. Other considerations include the need for the limitation not to negate the essential content of the right which speaks to the legitimate circumscription of rights not their evisceration;[418] to be necessary (inviting the strict scrutiny test).[419]

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[412] Section 86.
[413] G. Feltoe, G. Linington and F. Mahere, 'Worlds Apart: Conflicting Narratives on the Right to Protest' (ZELJ 2016). The authors cited the case of *Nyambirai v NSSA & Anor* 1995 (2) ZLR (S) @ 13 C-F.
[414] Ibid.
[415] This was decided in the case of *R v Oakes* 26 DLR (4th) 200.
[416] Azhar Cachalia, Halton Cheadle, Dennis Davis et al (n 358) 111.
[417] Ibid citing the case of Oakes at 227
[418] Ibid citing Attorney General, *Quebec v Quebec Association of Protestant School Boards* 10 DLR (4th) 321.
[419] Ibid at 115.

Special Limitations

The constitution imposes special limitations in times of a State of emergency.[420] Essentially, rights are summarily taken away and holders are expected to take note of the said declaration. They can off course assert their rights if the period of emergency ends or is arbitrarily declared. For South Africa, a state of emergency sometimes referred to as a state of exception or a state of siege provides for the suspension of some of the fundamental rights contained in chapter 3 of the South African Constitution.[421] In a state of emergency, the very life of the nation is threatened by some threat of natural or human origin and for these reasons public international law makes provision for more drastic or abridgments of fundamental rights.[422] The reason for specifically setting out the nature and extent of the exercise of emergency powers in a constitution is precisely to protect fundamental rights.[423] By specifying these limits in the constitution, itself, the limits are protected from statutory inroads.[424] In South Africa, the constitution incorporated the equivalent of Syracuse Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984 which include: declaration of a state of emergency in a proper procedural manner; parliamentary oversight on the declaration of the State of emergency, judicial supervision and non-derogable rights.[425] The rights which are non-derogable may be core rights or even superior rights.

Specific Right Holders

The Constitution lists six categories of special right holders: women, children, the elderly, persons with disabilities, veterans of the liberation struggle and juristic persons. Their rights are interpreted in the same way with other rights in the constitution and right holders are expected to uphold the duties expected of them. Some of the rights depend on the availability of State resources and holders must factor this consideration when seeking remedies related to constitutional breaches on the part of the State. While women and children have benefited, persons with disabilities and veterans of the liberation struggle are still to benefit from these elaborated rights.

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[420] Constitution of Zimbabwe, sec 87.
[421] Azhar Cachalia, Halton Cheadle, Dennis Davis et al (n 358) 117.
[422] Ibid.
[423] Ibid.
[424] Ibid 117-118.
[425] Ibid. Zimbabwe includes non-derogable provisions on general limitation under sec 86.

Conclusion

Constitutional rights are very important. The Constitution of Zimbabwe has a declaration of rights which protects many rights under the three generations of human rights. In the wake of the discussion above, with constitutional literacy and awareness prioritised, right holders can immensely contribute to rights constitutionalism if they observe the constitutional duties imposed upon them. This article showed that some of the challenges faced by human right holders have been occasioned by their failure to uphold constitutional duties related to their rights or the rights of other citizens. The rationale for a rights-duty dichotomy is that the constitution limits absolute enjoyment of certain human rights. This should be emphasised in exercises on constitutional literacy and awareness. There is a need to sensitize communities and individual right holders that the need for citizens to uphold constitutional duties imposed on them can meaningfully contribute to nation building, peace and security and good governance. Moreover, observing constitutional duties embeds the rule of law and enables citizens to demand that the State must not be complicit in human right violations. In this way citizens can greatly participate in combating impunity and in ensuring that the State observes constitutional principles which speak against rule by law or other repressive inclinations. All this can greatly lead Zimbabweans to strive to foster a sustainable culture of human rights which promotes good life, personal security, security of property and nation building.

Chapter 7: Comparative Guidance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

General Influence of Democracy on Constitutions

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

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

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

[441] Section 92 of the Constitution.

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

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

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

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

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

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

[445] Toerell (n 443) 18.

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

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

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

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

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

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

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

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

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

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

[454] Id, 20.

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

[456] Teorell (n 443) 22.

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

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

Cross Border Constitutionalism

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

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

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

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

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

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

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

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

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

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

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

Comparing Internationalised Constitutional Moments Before and after Independence

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

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

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

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

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

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

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

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

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

[478] Hopton (n 472) 79.

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

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

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

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

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

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

Constitutional Dimensions of Politics in Zimbabwe

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

Towards Prioritising Hybrid Constitutional Law in Zimbabwe

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

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

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

[486] Section 5 of the Constitution.

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

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

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

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

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

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

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

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

[493] Id.

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

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

The Constitution must Remain a Supreme Source Of Law

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

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

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

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

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

Conclusion

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

The Period 1890- 1923

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

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

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

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

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

Chapter 9: Time to Delink Constitutional from Ordinary Statutory Interpretation

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	*Chawira & Ors v Minister of Justice* 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	*Kadungure v The State* HH 191/24
Right to freedom of expression	*The Prosecutor General of Zimbabwe v Beatrice Mtetwa & Anor* HH18/16 and *Madanhire v AG* CCZ 2/14
Right to human dignity confirming High Court's order outlawing judicial corporal punishment	*S v Chokuramba* CCZ 10/2019
Right to freedom of assembly and association	*DARE v Saunyama* N.O CCZ 9/18
Political rights	*Mawarire v Mugabe*
Right to equality and non-discrimination	*Mawere v Registrar-General* CCZ 27/13

Collective or group rights	**Cases**
Communal land rights	Livison Chikutu & Ors v Minister of Lands CCZ 3/23
Environmental rights	*Bonnyview Estate (Pvt) Ltd v Zimplats* CCZ 6/19
Environmental management rights	*Community Water Alliance v Environmental Management Agency* HH 258/19
Religious property rights	*Chiangwa v Apostolic Faith Mission in Zimbabwe* CCZ 6/23
Environmental rights	ZELA v Anjin Investments (Pvt) Ltd 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	*Mudzuru* case.
Rights of the elderly	
Rights of persons with disabilities or potentially crime-related disability	*Mapingure v Minister of Home Affairs and Others* S 22/ 14
Rights of veterans of the liberation struggle	*War Veterans Pressure Group & Ors v Minister of Defence and War Veterans v Minister of War Vet* HH 26/2020.

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

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

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

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.

.....

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. [511] The most general but important approach to understand the special status of a Constitution is from Elliot Bulmer[512] 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

[511] E. Bulmer, *what is a constitution? Principles and Concepts*. International Institute for Democracy and Electoral Assistance (2017) 5.
[512] Ibid.

the superior ones will declare it to be invalid.[513] 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*,[514] 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*[515] 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.[516] The mischief rule depends on the legislature's intention in curing certain defects in a statute or law. The leading case is *Heydon*[517] which is used by the Courts to determine the meaning of ambiguous words. Courts invoke the mischief rule to determine the many

[513] 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.

[514] HH 195/14.

[515] 1988 (1) ZLR 188 (H).

[516] See Botha, Statutory interpretation: An Introduction for Students 5 ed, 2017.

[517] 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.[518] 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.[519]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-employ 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

[518] See *Madzimure and Ors v Senate President and Ors* CCZ 8/ 2019.
[519] 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 socis* (contemporaneity or surrounding meaning); e*xpressio unius est exclosio alterius (*mentioning other words to exclude others) and certain presumptions that are observed by our courts such as retrospectivity, constitutionality, and so forth.[520]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.[521] The Supreme Court however accepted that another way to interpret the Constitution is to treat it sui generis and requiring special guidelines of interpretation.[522] 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.[523]

Before and after a justiciable constitution in 2013:

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[520] See further Lovemore Madhuku, *Introduction to Zimbabwean Law*, (2010, Weaver Press).

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

[522] Capital radio (n 55 above) page 11 and the precedents cited therein.

[523] 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.[524] Administrative common law principles and natural justice principles were used to describe principles that govern the exercise of powers and duties by public authorities.[525] 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.[526] There is no demarcation of administrative law but conventionally it includes the exercise of power by central[527] and administrative government, planning, housing, social security, education, immigration, and tribunals and inquiries.[528] 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.[529] The aggrieved party may approach an administrative tribunal[530] or may approach courts such as the Administrative Court and High Court[605] 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.[531] Judges must develop their knowledge on sources and types of international treaties;[532] 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

[524] 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).

[525] 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.

[526] Ibid.

[527] See how Mnangagwa challenged his expulsion from Government when former President Mugabe summarily dismissed him.

[528] Law and Martin (n 525).

[529] 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).

[530] 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.

[531] 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.

[532] 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.[533]

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'.[534] 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), ppl-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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[533] 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.

[534] 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 Mpofu 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 interpretd 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 J*ayesh* 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 tenur), 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 sepration 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 111B 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 tempo 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.

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?.

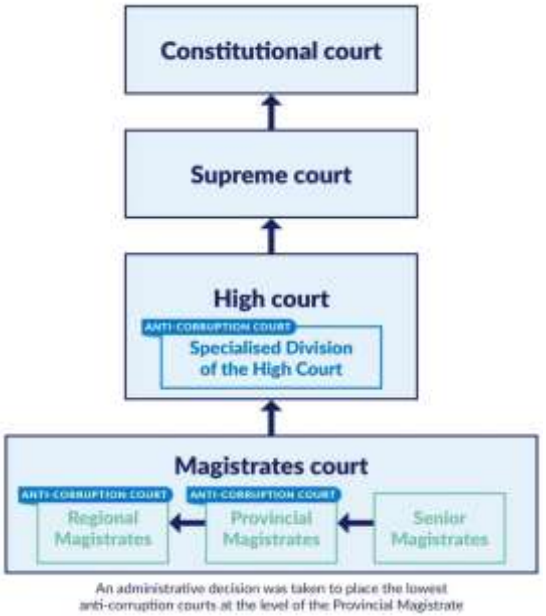
[610] J.M Eekelaar (1967), Splitting the Grundnorm, https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.14682230.1967.tb01144.x, accessed 29 October 2019.

[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	

Chapter 11: Towards a Coherent Zimbabwean Model

Constitutional identity and constitutional interpretation operate like Siamese twins. The expansive internal Bill of Rights has an interpretation method that could provide the starting point in modifying or crafting innovative methods of constitutional interpretation in Zimbabwe. The Constitutional Court can torch bear on designing various methods that resonate with the Bill of Rights model. The imploration in this book is that the superior courts, particularly the Constitutional Court, should adopt a progressive approach to rights constitutionalism that is contemplated by the Constitution. There is need for judges to revisit the '***hands-dripping-with hands'*** doctrine which began in the *Mawarire* case. This approach must be used to shun the obsolete ***dirty hands*** doctrine which is brought back to Zimbabwe's constitutional system through various means such as:

- constitutional avoidance
- unnecessary resolution of constitutional matters on the merits
- Deference doctrines
- Postponing constitutional orders without accompanying court supervision
- Selective judicial restraint which is usually employed to frustrate litigants in strategic cases through judicially constructed litigation fatigue.

The Envisaged Model

Zimbabwean judges are appointed by the President. By extension, they are supposed to be directly answerable to the people who directly elect their appointing authority, the President of Zimbabwe. Judges, whatever their legal philosophy, must uphold the constitutional responsibilities that are enshrined in section 176 of the Constitution to develop the constitutional common and constitutional customary law of Zimbabwe. Where they regulate their internal processes is ways that smack of borrowing the best of many worlds, especially the South African and American doctrinal influences, they must realise that such doctrinal canons are not expressly mentioned in the Constitution or national laws. The interpretation clause in the Constitution provides peremptory guidelines which range from:

- The constitution and its entrenched values must be utilised first before prioritising other approaches
- Constitutional interpretation is a matter of constitutional responsibility

- Judges as part of functionaries in state institutions must not interpret on a frolic of their own. They must uphold duties of those identified as duty-bearers in the protection of human rights;
- The doctrines of entrenchment and justiciability must guide judges in interpreting the generations and categories of rights in the Bill of Rights.

The Duty Bearer-Rights Holder Dichotomy

The Zimbabwean constitution requires active justiciability to grow rights constitutionalism. The right holders must be treated as autonomous individuals as contemplated by the main preamble to the Constitution which underlines individual sovereignty. Conversely, they must assert their rights and freedoms responsibly as guided by the boiler plate constitutional presumption in section 47 of the Constitution which presumes the existence of other rights. The presumption must be read together with limitations in the Bill of Rights relating to:

- general or special limitations in sections 86 and 87 of the Constitution
- those limitations relating to persons who can claim certain rights, conditional or relative rights,
- absolute exceptions or non-negotiable rights,
- standards of review.

The availability of the rights and freedoms assist citizens to enhance the practical value to others who hold different rights and freedoms. We can reduce the ways of protecting constitutional rights through constitutional interpretation and rights constitutionalism to the following critical standpoints:

- Zimbabwe's Constitution has a Bill of Rights which has peremptory starting points and standards of constitutional interpretation judges must use to build Zimbabwe's constitutional identity and rights constitutionalism.
- Currently, Zimbabwean judges continue to vacillate between narrow and purposive method of constitutional interpretation, especially in political and economic cases. To effectively protect constitutional rights and encourage rights holders to also assert their rights responsibly, judges must balance between justiciable concepts and the boiler plate constitutional presumption in the Bill of Rights model.

- Judges also choose constitutional moments to be inventive or to abandon strict narrow constitutional methods. The abandonment approach is normally used in women and children's rights, or other rights such as rights to privacy, rights to human dignity. This has also been the case with how the courts are prepared to utilise analogous or evolutionary methods of constitutional interpretation, albeit with or without interrogating the methods as contemplated by the constitution. When they simply refer to evolutionary concepts on ripeness or constitutional avoidance, their approach is no different from simply comparing the wings of a bird to the wings of an airplane.
- ECOSOC rights are still lagging in terms of benefiting from reasonable standards of review or any other methods of judicial protection of ECOSOC rights. Courts justify state policy and rarely refer to soft law such as general comments or the hard sources of international law to protect such rights. Where hard sources of international law are referred to, judgements rarely interrogate with soft laws that provide content to those rights or soft law that have the status of *jus cogens* or *erga omnes*.
- Judicial reliance is still given to foreign law doctrines that are used to stifle or frustrate litigants. The doctrine of ripeness and judicial restraint are frequently use by the Constitutional Court and we opine that this is inimical to the constitutional democracy envisaged in the constitution since the Constitutional Court is the apex court in constitutional matters. The judges must not frustrate litigants by invoking doctrines that bring back the dirty hands doctrine which is explicitly outlawed by the constitution.

What is next for the judges?

There are many potentially effective judicial techniques that can be employed to promote the Bill of Rights model. They include the following:

1. Protecting the Basic Features doctrine in constitutional adjudication

Using the basic or essential features doctrine, judges and the President are the two major custodians of the constitution. The President is directly elected and is given a direct constitutional mandate by the people who are the repositories of governmental authority. Judges are the neutral constitutional arbiters and

custodians who work for the people who directly elect their appointing authority, the President. The provision of effective constitutional remedies through constitutional courts starts with the courts' preparedness to protect the basic features which the judges preside over. Constitutional matters must:

- Clarify the law as contemplated by the Constitution's features such as the sovereignty clause, values provisions, Bill of Rights clauses, constitutional presumptions and limitations to rights;
- Treat the plain meaning to mean 'textual clarity' and not just ordinary or dictionary meanings of word employed mainly in the cases that were used to expel parliamentarians who are again directly or indirectly elected by the people depending on how one puts it;
- Read the constitutional provisions through the lens of due process in processes where the essential features of the constitution are threatened,
- Proclaim the impropriety of certain state conduct and avoid postponing the operation of court orders against such conduct without active supervision from the courts;
- Reinforce the need to resolve constitutional rights cases through domestic and international law through the lens of the Bill of Rights model, including designing alternative dispute resolution methods enshrined in the constitution (mediation, arbitration, conciliation and perhaps facilitation);
- Avoid sweeping reliance on the Westminster version of the common law that is largely based on conventional rule of law rather than rights-based rule of law. Put simply, judges in Zimbabwe must develop constitutional common law so that superior courts avoid what is called '*dull*' constitutional moments. This approach shows that what passes out as authoritative constitutional interpretation must be a substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.[672] Such constitutional common must of course, be subject to amendment, modification, and reversal by the legislature depending on how judges a constitutional common law model to satisfactorily explain the various constitutional doctrines they employ, especially when dealing with

[672] See more on constitutional common law from Henry P. Monaghan, Constitutional common law, 89 *Harv. L. Review* 1. (1975).

constitutional common law of individual freedoms.[673] The beauty of constitutional common law is that Zimbabwean judges are obligated to develop it as a matter of constitutional responsibility.

The basic features doctrine is now part of our law as is clear from the Bill of rights and the justiciable features that are now protected in the main preamble, the devolution preamble, the constitutional supremacy clause, and the founding values. The 'founding values' of constitution must now be treated as significant to Zimbabwe's constitutional democratic system in light of section 3(1) of the Constitution of Zimbabwe.

3 Founding values and principles
(1) Zimbabwe is founded on respect for the following values and principles—
(a) supremacy of the Constitution;
(b) the rule of law;
(c) fundamental human rights and freedoms;
(d) the nation's diverse cultural, religious and traditional values;
(e) recognition of the inherent dignity and worth of each human being;
(f) recognition of the equality of all human beings;
(g) gender equality;
(h) good governance; and
(i) recognition of and respect for the liberation struggle.

The 2013 Constitution as consolidated at 2023 begs the question of the role and function of the essential features paradigm as a structural pillar of constitutional rights in Zimbabwe. The starting point is to ask the question, can a constitution be unconstitutional? We approach this question from two ways, procedural and substantive approach. Our courts have shown that where a constitutional amendment or a new constitution is purportedly enacted contrary to the Constitution, the amendment/new constitution is null and void ab initio.[674] From the standpoint of the essential features doctrine, the *Gonese* case supra shows that procedural unconstitutionality has not raised problems with constitutional theory. What remains problematic and elusive from our superior courts' constitutional jurisprudence is substantive unconstitutionality, where the constitution is said to be unconstitutional because of its substantive content, such as going against certain values and principles. From comparative

[673] Ibid.
[674] See *Innocent Gonese and Another v Parliament of Zimbabwe* CCZ04/2020.

jurisprudence, section 3 of the Constitution of Zimbabwe and section 1 of the Constitution of South Africa 1996 are now part of the basic features doctrine that was pioneered by the Indian Courts.[675]

Before the essential doctrine was expressly part of our law, Zimbabwe rejected the essential features doctrine following cases where constitutional amendments out the jurisdiction of courts to entertain any challenge concerning land acquisitions.[676] In the *Campbell* case, the Commercial Farmers Union approached the court arguing that amendment 17 was unconstitutional in the sense that it undermined the basic features of the Zimbabwean Constitution. A unanimous SC sitting as a Constitutional Court in a judgment written by Malaba J (as he then was) dismissed the application on the basis that the basic features doctrine was not part of Zimbabwean law. We believe the legal implication of this judgment is no longer tenable in Zimbabwean law in light of constitutional interpretation considering the justiciable significance of 'founding values' under the current constitution. This position is buttressed by the fact that when the Commercial Farmers Union approached the SADC Tribunal with the same arguments, and the SADC Tribunal held that the amendment in question undermined the basic features doctrine in light of The SADC Treaty which provided in Art. 4 that SADC is bound by the 'rule of law'.

From cross-border constitutionalism, Zimbabwe's constitution borrowed features from the South African, Kenyan, Canadian, and American constitutions. Recently, the Kenyan courts recently dealt with the basic features doctrine in what is famously referred to as the BBI cases.[677] The issue went through three courts namely High Court, Court of Appeal and the Supreme Court. The government lost in all three courts. The courts found the BBI amendment bill which proposed 74 amendments to be unconstitutional on the basis that the basic structure doctrine was applicable to Kenya. The courts grappled between the basic structure vs. internal constitutional safeguards arguments to determine how the People become the primary constituent power which existed outside the Constitution. The people decide how to make or remake the Constitution. The Court proposed four steps which must be done

[675] See the case of Kesavanda (1973) 36 SCR.

[676] Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement SC 49/07. See also *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 2008.

[677] *The Hon. Attorney General v David Ndii and Others*, Petition No. 12 of 2021 (consolidated with Petitions No.s 11 & 13 of 2021) KSC (The BBI Appeal), para. 35.

sequentially. The first step is civic education (which can be done in light of section 7 of the Constitution whenever a referendum or people's power is to be affected.

> **7 Promotion of public awareness of Constitution**
> The State must promote public awareness of this Constitution, in particular by—
> (a) translating it into all officially recognised languages and disseminating it as widely as possible;
> (b) requiring this Constitution to be taught in schools and as part of the curricula for the training of members of the security services, the Public Service and members and employees of public institutions; and
> [Paragraph amended by s. 25 of Act No. 2 of 2021]
> (c) encouraging all persons and organisations, including civic organisations, to disseminate awareness and knowledge of this Constitution throughout society

Zimbabwe can also use historical steps such as the referendum that culminated in the rejection of the Constitutional Commission Draft Constitution in 2000 or steps under COPAC or constitutional process that culminated in the adoption of the 2013 Constitution.

The second step relates to public participation which again stems from section 7 of the Constitution. The third step involves the Constituent Assembly, the people who should effectively participate in the fourth step, the referendum. The steps were rejected by the Supreme Court of Kenya and the applicability of the basic structure with a 6-1 decision, with Ibrahim J dissenting. The basis for the finding was that the High Court and Court of Appeal had created a judicially fourth pathway contrary to the tiered amendment process enshrined in Articles 255-257 of the Kenyan Constitution. We argue that the Zimbabwean Constitution is unique in that it obligates the Courts to look into the justiciable internal solution that cures amendment processes or any governmental steps which affect the essential features of the Constitution. This solution is expressed in section 46 of the Constitution. Zimbabwe's position goes beyond the positions even in India where the basic structure is used to protect the Constitution from Parliamentary abuse. While the basic structure has been used as the judicial veto over constitutional amendments or other aspects that affect the Bill of Rights, the Zimbabwean Constitution addresses both the substantive and procedural role of courts in relation to basic structure of the courts. The High Court and Court of Appeal had focused on the

procedural aspects protected by the People as the constituent power without ventilating on the substantive aspects in the amendment provisions.

In South Africa, the Constitution empowers the Constitutional Court to determine whether a constitutional amendment is constitutional. The same applies to Zimbabwe which entrenches the rule of law. To contextualise the essential features doctrine in the Zimbabwean jurisdiction, we also refer to the political questions doctrine. Zimbabwe's good governance principles in section 3 (2) of the Constitution creates a possibility that Political questions can affect constitutional interpretation under the separation of powers doctrine. While separation of powers is entrenched value, judges have a constitutional responsibility to balance between factors that affect the constitutional equilibrium in Zimbabwe as contemplated by section 176 of the Constitution. The **basic structure doctrine** that originated in India, holds that certain fundamental principles of a constitution cannot be amended even by a parliamentary supermajority. In **Zimbabwe**, section 328 of the Constitution although yet to be ventilated by our courts, provides strong indications that the essential features doctrine is recognised in both **substantive** and **procedural** aspects. Procedurally, section 328 (6) mandates a **national referendum** for amendments to critical chapters (such as Chapter 4 on fundamental rights), reinforcing the idea that certain provisions require direct public consent beyond parliamentary approval. This also can be used to aspects relating to direct democracy such as acts of the President and how he or she appoints judges. Substantively, section 328 (7) prevents **retrospective amendments** to term-limit provisions, ensuring that those in power cannot extend their tenure through constitutional amendments—an essential safeguard against executive overreach. Furthermore, section 328 (8) restricts simultaneous amendments to key procedural safeguards, making it difficult to undermine democratic principles through a single legislative move.

We have noted above that **India** has explicitly upheld the basic structure doctrine since *Kesavananda Bharati v. State of Kerala (1973)*, ruling that Parliament cannot alter the fundamental framework of the Constitution. **South Africa**, while allowing constitutional amendments, embeds the doctrine through section 1 of its Constitution that lists foundational values such as democracy and the rule of law—amendable only with a **three-fourths** majority and provincial support. Meanwhile, **Kenya's** recent *BBI (Building Bridges Initiative)*

cases (*David Ndii v. Attorney General*) rejected the basic structure doctrine, arguing that the Kenyan Constitution already provides sufficient **internal safeguards** against unconstitutional amendments without the need for an external doctrine. The judges however engaged in unnecessary splitting of hairs failing to justify their attempt to distinguish a doctrine from a school of thought. Unlike Zimbabwe's **referendum requirement**, Kenya's courts ruled that no inherent limitation prevents Parliament from amending any constitutional provision, provided legal procedures are followed. Zimbabwe's **section 46** that requires courts to interpret constitutional provisions in a manner that promotes fundamental rights and values, can reinforce **substantive basic structure** by ensuring that any amendments align with human dignity, democracy, and the rule of law. When combined with **section 328's procedural safeguards**, these provisions create a constitutional framework that—while not explicitly naming the basic structure doctrine—effectively embeds its principles, making it difficult to alter the core foundation of the legal system without broad democratic participation. Principles of democracy entrenched in the constitution are no longer considered mere principles or tenets to be ignored by state institutions.

328 Amendment of Constitution

(1) In this section—

"Constitutional Bill" means a Bill that seeks to amend this Constitution;

"term-limit provision" means a provision of this Constitution which limits the length of time that a person may hold or occupy a public office.

(2) An Act of Parliament that amends this Constitution must do so in express terms.

(3) A Constitutional Bill may not be presented in the Senate or the National Assembly in terms of section 131 unless the Speaker has given at least ninety days' notice in the Gazette of the precise terms of the Bill.

(4) Immediately after the Speaker has given notice of a Constitutional Bill in terms of subsection (3), Parliament must invite members of the public to express their views on the proposed Bill in public meetings and through written submissions, and must convene meetings and provide facilities to enable the public to do so.

(5) A Constitutional Bill must be passed, at its last reading in the National Assembly and the Senate, by the affirmative votes of two-thirds of the membership of each House.

(6) Where a Constitutional Bill seeks to amend any provision of Chapter 4 or Chapter 16—

(a) within three months after it has been passed by the National Assembly and the Senate in accordance with subsection (5), it must be submitted to a national referendum; and

(b) if it is approved by a majority of the voters voting at the referendum, the Speaker of the National Assembly must cause it to be submitted without delay to the President, who must assent to and sign it forthwith.

(7) Notwithstanding any other provision of this section, an amendment to a term-limit

provision, the effect of which is to extend the length of time that a person may hold or occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment.
(8) Subsections (6) and (7) must not both be amended in the same Constitutional Bill nor may amendments to both those subsections be put to the people in the same referendum.
(9) This section may be amended only by following the procedures set out in subsections (3),(4), (5) and (6), as if this section were contained in Chapter 4.
(10) When a Constitutional Bill is presented to the President for assent and signature, it must be accompanied by—
(a) a certificate from the Speaker that at its final vote in the National Assembly the Bill received the affirmative votes of at least two-thirds of the membership of the Assembly; and
(a) a certificate from the President of the Senate that at its final vote in the Senate the Bill received the affirmative votes of at least two-thirds of the membership of the Senate.

2. Appreciating the Categories of Rights Protected Bill of Rights

In interpreting the Bill of Rights, courts must take cognisance of the Bill of Rights debates before the adoption of the Constitution, the expansive nature of the Bill of Rights and special rights enshrined in sections 80-84 of the Constitution. We will address the three aspects in the following manner:

(a) The Bill of rights debates help in ironing out sticky or contentious issues that relate to constitutional provisions. For instance, section 73 (3) of the Constitution prohibits same-sex marriages. The COPAC reports can be used to also interpret this provision in the event that it is interpreted on the grounds of sexual orientation. Those documents form what can be called the *travaux preparatoires* of Zimbabwe's constitutional negotiations under COPAC.

(b) The choice of rights in the Bill of Rights is highly expansive. It is no longer a question of does Zimbabwe need a Bill of Rights or should certain rights be entrenched? It is now clear that courts are part of the institutions that help rights holders to enjoy their rights and freedoms. Effective enforcement Bill of Rights depends on the system of checks and balances in the constitution. This is because the Bill of Rights helps in correcting certain inadequacies in the political system of checks and balances. The generation of rights in the Bill of Rights are guaranteed in international instruments some of which Zimbabwe is a state party. The Bill of Rights addressed the concern relating to the appearance of hypocrisy which results from agreeing at the international level to guarantee rights but failing to incorporate constitutional guarantees under Zimbabwe's constitutional law. The merit

in acceding to and ratifying international and regional treaties is to ensure a sustainable culture of human rights is fostered both domestically and internationally. The entrenchment of those rights was made possible as a matter of Zimbabwe's constitutional law. The availability of entrenchment in Zimbabwe is not compromised by parliamentary sovereignty because the Constitution is a sovereign in its own right. Zimbabwe's Parliament derives its authority from the constitution as a higher law, and not merely from judicial acceptance. Zimbabwe's position is different for instance, from the UK where Parliament does not derive its power from a written constitutional document and relies on the doctrine of judicial acceptance of legislative authority. Parliamentary sovereignty depends on judges unlike constitutional sovereignty which depends on itself and the constituent power, the people.

(c) So far, legal discussions of the special rights in sections 80-84 are limited to women's rights and children's rights following the *Mudzuru* landmark case. A legal analysis in light of a wider set of protection mechanisms needs to be made also of other rights relating the elderly, persons with disabilities and veterans of the liberation struggle.

3. Ways of protecting constitutional rights

In terms of domestic, regional, and international protection of constitutional rights, academics and judges need to engage with these concepts early on in their careers and build them into their case planning and litigation strategies. Failure to adopt such an approach means the legal fraternity is forever trivializing constitutional jurisprudence in Zimbabwe. The growth of constitutional monographs just be an important issue which could actually be recognised by ZIMCHE or the Zimbabwe Council for Higher Education. Academics cited in this book have shown a keenness to contribute to constitutional debates around role and independence of courts; constitutional mandates of national institutions which protect human rights; role of constitutional commissions and so forth. There are many constitutional provisions which, lawyers might say, need to be ventilated through an interactive process that consider ways of protecting human rights such as:

(a) Understanding the political philosophy of civil and political rights. This should involve clear distinctions between natural and positive rights; negative and positive rights; and how rights link with constitutional

democracy and the rule of law. Where judges employ emerging jurisprudence or comparative jurisprudence, they need to do so in nuanced fashion.

When litigants or judges focus on the politics of interpretation, especially the politics thereof, focus can be on the work of Iain Currie especially his article on, "Constitutional Avoidance.....";

A political economy approach in ECOSOC rights can benefit from integrating the views from "The political economy view of law."

If TWAIL is considered a sound and apt theoretical optic on law; the following works can be integrated into the judge or litigant's reasoning:

- Makau W. Mutua (2000). What Is TWAIL? The American Society of International Law.
- Balakrishnan Rajagopal (2003). International Law from Below: Development, Social Movements, and Third World Resistance. Cambridge University Press.
- Antony Anghie (2005). Imperialism, Sovereignty and the Making of International Law. Cambridge University Press.
- Sujata Shivani (2016). Decolonizing International Law: TWAIL and the Role of the Global South. Harvard International Law Journal, 57(2), 227-257.
- Nsongurua J. Udombana (2009). The Third World and the International System: The Political Economy of the Third World Approach to International Law. International Law and Politics, 41(4), 871-907.

We believe it is the responsibility of litigants and interpreting authorities to protect the constitutional identity by supporting a change in attitude towards constitutional jurisprudence. Constitutional interpretation should go beyond statutory interpretation as taught in undergraduate classes.

What Lawyers must do?

(a) Lawyers must help courts to identify international human rights law applicable to certain constitutional rights. The civil and political rights must be explained using developments at the United Nations human rights system and through the ICCPR. ECOSOC rights must be understood through developments relating to the ICESCR. Third and fourth generation rights must be understood through living international law relating to green transition and other emerging protection mechanisms such as business and human rights, sustainability issues, environmental governance, and so forth. Zimbabweans have also participated during the

international supervision mechanisms such as Universal Peer Review (UPR), despite threats from statutes such as the Patriotic Act which may threaten the participation of civic organizations.

(b) Regional systems must be properly understood. For instance, the African human rights system imposes rights and duties on both states and their citizens. Certain regional instruments have comparable provisions that protect specific right holders. For instance, protection of children against less severe violence is to be found in the Convention on the Rights of the Child (CRC) and the European Convention on Human Rights; Article 9 of ICCPR, Article 16 of the Convention on the Rights of Persons with Disabilities; Article 4 of the African Charter on Human and People's Rights and Article 16 of the African Charter on the Rights and Welfare of the Child. These provisions can be read in light of the established international legal position that practices that are incompatible with the rights established in the CRC are not in the best interests of the child.[678]

(c) Zimbabwe's approach tilts in favour of minimal state activity. This is explained by progressive constitutionalism espoused in the supremacy clause, the main preamble, Bill of Rights and the founding values of the democracy. Different institutions also help in protecting human rights. Parliament scrutinises state intervention, and also mandates the President to establish independent commissions to check state action as was done after the killing of six civilians in 2018. People rely on elected MPs who must be accountable to the people and political parties that elect them into Parliament. The ordinary active citizens have not displayed public complacency about the extent of their constitutional rights and freedoms. The state has officially recognised generations of rights, creating a culture of ethical realism rather than outright Machiavellian realism. The gradual development of rights-consciousness has also been influenced by sub-regional human rights litigation before the disbanded SADC Tribunal and cases submitted before the African Commission on Human Rights. The African human rights system also includes the African peer review mechanism.

(d) There is increasing development of tools to protect special right holders. Zimbabwean institutions have moved away from vulnerability to livelihood measurements in terms of social development. This can be used to amend

[678] CRC General Comment No. 14 (29 May 2013) UN Doc CRC/C/GC/14 @57.

the constitution in future so that the right to social security currently protected in the national objectives would be made justiciable under the Bill of Rights. The vulnerability and livelihood tools fit into a dichotomy that particularizes human rights law so that universal human rights norms are complemented with special protection of some rights that traditionally were left behind.[679]

What Constitutional Law, Constitutional Identity and Constitutional Interpretation should Look Like in Zimbabwe?

We have stressed the importance of constitutional law, constitutional identity, and interpretation in this book. We believe the following tables help illustrate how the three aspects can be in light of the Constitution of Zimbabwe as amended at 2023. Academics, lawyers, and ordinary citizens are free to add other ways of improving the constitutional society of Zimbabwe.

Table 1: Overview of Zimbabwe's Constitutional Law

Aspect	Description
Supreme Law	The Constitution is the supreme law of Zimbabwe, and any law, practice, custom, or conduct inconsistent with it is invalid (Section 2).
Founding Principles	Principles include the rule of law, good governance, recognition of human rights, and separation of powers (Section 3).
Bill of Rights	Chapter 4 guarantees fundamental rights and freedoms, including civil, political, economic, and social rights.
Democratic System	Zimbabwe is a unitary, democratic, and sovereign republic with regular elections (Section 1 & 3).
Separation of Powers	Government divided into Executive, Legislature, and Judiciary to ensure checks and balances.
Devolution of Power	Power is devolved to provincial, metropolitan, and local governments for citizen participation (Chapter 14).
Judicial Independence	Judiciary is independent and subject only to the Constitution and the law (Section 164).
Amendment Process	Amendments require a two-thirds majority in Parliament and may need a referendum for certain provisions (Section 328).
Executive Authority	The President is the Head of State and Government, with powers limited by the Constitution (Chapter 5).
Parliamentary	A bicameral Parliament (National Assembly and Senate) enacts laws and

[679] See Heikkilä, M, Katsui H, & Mustaniemi-Laakso, M, Disability and vulnerability: a human rights reading of the responsive state, The International Journal of Human Rights Law, 24 (8), 1180-1200.

Aspect	Description
System	oversees the Executive (Chapter 6).

Table 2: Zimbabwe's Constitutional Identity

Feature	Description
Republicanism	Zimbabwe is a republic with elected leadership, ensuring that sovereignty resides in the people (Section 1).
African Identity	The Constitution acknowledges the liberation struggle, traditional values, and African customs (Preamble & Section 16).
Multiculturalism	Zimbabwe recognises and protects its diverse cultural, religious, and linguistic groups (Section 6).
Human Dignity	The Constitution guarantees equality, dignity, and protection of human rights (Section 56).
Democratic Governance	Elections must be free, fair, and conducted transparently to reflect the will of the people (Section 67).
Judicial Review	Courts have the power to interpret and apply the Constitution, ensuring the legality of government actions (Section 167).
Gender Equality	The Constitution promotes equal rights for men and women, including gender balance in public institutions (Section 17).
Land and Natural Resources	Land reform is an integral part of Zimbabwe's identity, emphasising equitable access and state custodianship (Section 72).
National Unity	The Constitution emphasises national cohesion, respect for all ethnic groups, and reconciliation (Section 10).

Table 3: Constitutional Interpretation in Zimbabwe

Principle	Application
Purposive Interpretation	Courts interpret constitutional provisions broadly to fulfil their intended purpose, especially in human rights cases (Section 46).
Harmonization	The Constitution is interpreted in a way that aligns with international law, customary law, and principles of justice (Section 326 & 327).
Living Document Approach	Courts recognise the evolving nature of the Constitution, adapting it to modern societal changes.
Historical and Cultural Context	Interpretation considers Zimbabwe's historical struggles, indigenous traditions, and national aspirations.
Principle of Supremacy	Any law or conduct inconsistent with the Constitution is declared invalid by the courts (Section 2).
Access to Justice	Courts promote broad access to justice, ensuring remedies for constitutional violations (Section 69 & 85).
Balancing Rights	Courts balance individual rights against public interests, national security, and societal needs.

Consolidated Table: Harmonization of Constitutional Identity, Law, and Interpretation in Zimbabwe

Aspect	Details
Constitutional Identity	- **Supremacy of the Constitution**: The Constitution is the supreme law; any law or conduct inconsistent with it is invalid.
Statutory Interpretation	- **Purposive Approach**: Courts interpret legislation to give effect to the Constitution's objectives, ensuring laws align with constitutional principles.
Presidential System	- **Direct Election**: The President is directly elected by the populace, serving as both Head of State and Government.
Judicial Appointments	- **Senior Judges**: The Chief Justice, Deputy Chief Justice, and Judge President of the High Court are appointed by the President after consultation with the Judicial Service Commission, without the need for public interviews.
Interpretative Clauses	- **"According to this Constitution"**: Ensures actions and laws are consistent with constitutional provisions.
Justiciability and Entrenchment of Rights	- **Elements of Justiciability**: Presence of a statute, existence of a violation, content clarity, locus standi (right to bring a case), available forum, effective remedy, and understanding of limitations.
Limitations on Rights	- **General Limitations (Section 86)**: Rights may be limited only by law, and only to the extent that the limitation is fair, reasonable, necessary, and justifiable in a democratic society.
Special Limitations (Section 87):	Certain rights may be limited during public emergencies, but such limitations must be strictly necessary and proportionate.

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Synopsis

The Constitution of Zimbabwe which came into operation in May 2013 ushered in new dimensions in constitutional discourse. There can be no better way of unpacking these dimensions than through academic inquiry and interrogation of the diverse facets of the constitution from different perspectives. *Constitutional Law, Identity, and Interpretation Under Zimbabwe's Rights Constitutionalism* has thus come at an opportune moment in the constitutional history of Zimbabwe. It will greatly assist the judicial officers in Zimbabwe who have hitherto been vexed by attempting to transpose to the local context meanings ascribed to constitutional provisions in other jurisdictions. Evidently, the text prioritises the judiciary as a special constituency in its thrust. This is clear from the numerous aspects of the work that are dedicated to judicial interpretation of and interface with the Constitution in particular, and constitutional law in general. This renders the text a necessary tool for every judge to have. That approach espoused in the text is not without justification when one considers the strategic position of the judiciary in a constitutional democracy such as one that Zimbabwe clearly aims to attain. The wise words of Rose E. Bird, American Jurist and Chief Justice of the Supreme Court of California, in *Los Angeles Times*, November 16, 1977, are apposite: "The courts hold a unique position among our democratic institutions. In a sense, they represent one of our last bastions of participatory democracy, in which disputants go directly before a judge or jury to resolve an issue. In no other governmental context does an individual could take a problem to a decision-maker who represents the full force and power of that particular branch of government. This direct interchange between the individual and the state is at the heart of the democratic process . . . We must protect this unique heritage and strive to preserve the values it represents."

About the Author

Sharon Hofisi is an independent researcher based in Turku Finland. He writes for many newspapers as a columnist and participates in Think Africa International's advocacy issues on a volunteer basis. He has interests in green legal guidance, private, and international law and publishes in recognised pre-prints and journals. He is a lawyer and has written on strategic litigation, air and military law, law of war, social innovation and so forth. Sometimes he is also an entertainment musician, poet, novelist, and plays *rummikub* and Mölkky games. He considers himself a Mölkky champion on many occasions.

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