

UNIT 3: INTEGRATING INTERNATIONAL, REGIONAL, AND COMPARATIVE LAW IN ZIMBABWEAN SRHR LITIGATION

3.1 Structure of the Unit

This unit is organised as follows:

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3.2 Objectives of the Unit

At the end of this unit, the reader should be able to:

- a) Identify key international, regional, and comparative legal instruments relevant to SRHR (United Nations, 1966, 1979, 2006; African Union, 2003).²³
- b) Relate foreign and regional jurisprudence to the Zimbabwean legal context (ACHPR, 2001, 2006).²⁴
- c) Define the role of comparative law in strategic litigation and constitutional interpretation (Viljoen, 2012).²⁵
- d) Explain how international and regional instruments can inform domestic SRHR litigation and advocacy (Motlatsi, 2020).

3.3 Overview

International, regional, and comparative legal frameworks serve as critical tools for reinforcing and expanding domestic constitutional

protections, particularly in the context of strategic litigation focused on sexual and reproductive health and rights (SRHR). While Zimbabwe adheres to a predominantly dualist legal approach-requiring the formal domestication of international treaties for them to be directly enforceable in domestic courts-its 2013 Constitution introduces important openings for a more integrative application of international law.

Section 46(1)(c) of the Constitution directs courts, when interpreting the Declaration of Rights, to consider international law and all treaties and conventions to which Zimbabwe is a party. This is a notable departure from rigid dualism and allows for international norms to influence rights-based adjudication even absent formal domestication. Furthermore, section 326 affirms that customary international law is automatically part of Zimbabwean law, provided it does not conflict with the Constitution or existing legislation. These provisions empower litigators to invoke international human rights norms and jurisprudence in challenging domestic legal and policy failures in SRHR.

The courts have progressively acknowledged and operationalised these constitutional clauses. In *Mudzuru & Another v. Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/2015, the Constitutional Court drew heavily on international and regional standards—including the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child—to declare child marriage unconstitutional, emphasising the transformative potential of the rights framework. Similarly, in *S v. Ncube & Others* 1987 (2) ZLR 246 (SC), the Supreme Court affirmed that customary international law forms part of Zimbabwean domestic law, thereby providing a doctrinal foundation for integrating global legal norms into constitutional analysis.

These precedents demonstrate the courts' willingness to embrace a more expansive and purposive interpretative approach, guided by international and comparative sources, especially in areas where domestic law is underdeveloped or regressive. Strategic litigators can thus utilise instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the African Charter on Human and Peoples' Rights, along with its Maputo Protocol, to advance claims around reproductive autonomy, maternal health, access to contraception, and protection from gender-based violence.

Comparative jurisprudence from other African jurisdictions further enriches the interpretative toolkit available to Zimbabwean courts. Decisions such as *Reproductive Health Alliance of Kenya v. Attorney General* (Kenya High Court, 2019), which affirmed access to reproductive health as a constitutional right, and *Attorney General v. Tapela & Another* (Botswana, 2014), which upheld the rights of non-citizen prisoners to HIV treatment, exemplify the growing role of African constitutional courts in operationalising international norms to fill domestic legal gaps. These cases not only provide persuasive authority but also underscore the region-wide judicial trend toward harmonising national laws with global human rights obligations (Chirwa, 2003; Viljoen, 2012; Motlatsi, 2020).

These provisions have been judicially acknowledged in cases such as *Mudzuru & Another v. Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/2015, where the Constitutional Court relied on regional and international norms to strike down child marriage, and *S v. Ncube & Others* 1987 (2) ZLR 246 (SC), which confirmed that customary international law forms part of domestic law. Such precedents illustrate how international and regional instruments, as well as comparative jurisprudence from other African states—can

guide judicial interpretation, fill legislative gaps, and expand the scope of rights protection (Chirwa, 2003; Viljoen, 2012). Courts across Southern Africa have increasingly referred to these sources to interpret constitutional rights, even when domestic law is silent or restrictive (Motlatsi, 2020).

3.4 Definition of Terms

International Law are rules and obligations binding on states through treaties, conventions, or customary practices (United Nations, 1966, 1979, 2006).

Regional Law are instruments or decisions applicable to specific geographic areas, e.g., the African Charter on Human and Peoples' Rights (OAU, 1981).²⁶

Comparative Law is the analysis or use of legislation, judicial decisions, or legal principles from other jurisdictions to inform domestic law (Viljoen, 2012).²⁷

3.5 Key Issues for Discussion

International treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Maputo Protocol, play a significant role in shaping domestic SRHR litigation in Zimbabwe by providing normative frameworks that courts and practitioners can reference (United Nations, 1979; African Union, 2003). Similarly, regional instruments such as the African Charter on Human and Peoples' Rights guide judicial interpretation by establishing rights standards and state obligations that inform constitutional reasoning (OAU, 1981). Comparative case law from countries such as Malawi, South Africa, Lesotho, and Nigeria further offers persuasive guidance for Zimbabwean courts, demonstrating how constitutional and statutory rights can be expanded to protect SRHR, even in contexts where domestic law may be restrictive or underdeveloped (Republic of Malawi, 1994; Republic of South Africa,

1996; Kabanza, 2014; Mojekwu v. Ejikeme, 2004; Odafe v. Attorney General, 2004).

While Zimbabwe generally follows a dualist legal system, section 46(1)(c) of the Constitution obliges courts, when interpreting the Declaration of Rights, to take into account international law and conventions to which Zimbabwe is a party, and section 326 recognises customary international law unless inconsistent with the Constitution or legislation. These provisions have been tested in practice: for example, in *Mudzuru & Another v. Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/2015, the Constitutional Court struck down child marriage by drawing on both the African Charter on the Rights and Welfare of the Child and the Maputo Protocol. This demonstrated the Court's willingness to integrate international human rights standards into constitutional interpretation, providing an important precedent for future SRHR litigation in Zimbabwe.

To navigate these challenges effectively, legal practitioners can employ strategies that leverage foreign and regional jurisprudence persuasively, drawing parallels between Zimbabwe and similarly situated jurisdictions to strengthen litigation outcomes (Viljoen, 2012).

3.6 Case Law and Examples

Several regional and comparative cases illustrate how international and regional instruments can inform domestic SRHR litigation in Zimbabwe. For instance, in *Legal Resources Foundation v. Zambia* (ACHPR, 2001), the African Commission confirmed that treaties not domesticated can still impose obligations on states, a principle that Zimbabwean courts could adopt in SRHR cases. Similarly, *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (ACHPR, 2006) affirmed state obligations to prevent and redress human rights violations, even when perpetrated by private actors. Importantly, Zimbabwean jurisprudence has already demonstrated this approach: in *Mudzuru & Another v.*

Minister of Justice, Legal and Parliamentary Affairs & Others CCZ 12/2015, the Constitutional Court struck down child marriage by relying on the African Charter on the Rights and Welfare of the Child and the Maputo Protocol, affirming that international human rights instruments can guide constitutional interpretation. Likewise, in *Magaya v. Magaya* (1999), although the Supreme Court privileged customary law over equality rights, the case remains a cautionary example of the dangers of failing to harmonize domestic law with international obligations. Comparative constitutional examples further demonstrate practical approaches: Section 11(2)(c) of the Malawi Constitution directs courts to consider international law and foreign case law (Republic of Malawi, 1994), while Section 39(1) of the South African Constitution obliges courts to consider international law in interpreting the Bill of Rights (Republic of South Africa, 1996)."

"In Lesotho, the Court of Appeal in *Ts'epe v. Independent Electoral Commission & Others* (Kabanza, 2014) cited the African Charter, CEDAW, and ICCPR despite their non-domestication, highlighting the persuasive authority of regional instruments. Nigerian cases, including *Mojekwu v. Ejikeme* (2004) and *Odafe v. Attorney General* (2004), similarly illustrate the enforcement of rights using international instruments where domestic law was silent. Additionally, courts across Southern Africa have cited non-binding international instruments, such as ILO guidelines on HIV and workplace discrimination, to reinforce constitutional rights to health, non-discrimination, and dignity (ILO, 2010). These examples are directly applicable to Zimbabwe because section 46(1)(c) of the Constitution obliges courts, when interpreting the Declaration of Rights, to consider international law and conventions to which Zimbabwe is a party, while section 326 incorporates customary international law unless inconsistent with the Constitution. Zimbabwean courts have already acted in this spirit, as seen in *Mudzuru & Another v. Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/2015, where the Constitutional Court relied on the African Charter and Maputo Protocol to outlaw child marriage. Together, these

regional and comparative precedents reinforce the opportunities for Zimbabwean litigators to strategically use international, regional, and comparative law to advance SRHR protections within the domestic constitutional framework."

3.7 Lessons Learnt and Drawn

Comparative and regional jurisprudence offers persuasive authority for expanding SRHR protections in Zimbabwe, as demonstrated by cases such as *Legal Resources Foundation v Zambia* (ACHPR, 2001) and *Zimbabwe Human Rights NGO Forum v Zimbabwe* (ACHPR, 2006). Even when international instruments have not been domesticated, they can guide constitutional interpretation and inform advocacy strategies, providing a normative framework for litigators (Viljoen, 2012). Comparative case law from other African jurisdictions illustrates practical methods for addressing gaps in domestic law, as seen in *Ts'epe v Independent Electoral Commission & Others* (Kabanza, 2014) and Nigerian cases such as *Mojekwu v Ejikeme* (2004). By strategically deploying these instruments, legal practitioners can strengthen litigation, advocacy, and public policy reform, particularly in critical SRHR areas such as safe abortion, obstetric violence, and child marriage.

3.8 Practical Implications

Legal practitioners are encouraged to integrate international, regional, and comparative law into SRHR litigation to strengthen constitutional arguments and expand the scope of rights protection (Viljoen, 2012; Chirwa, 2003). Similarly, NGOs and activists can leverage foreign and regional jurisprudence to complement advocacy campaigns and influence policy reforms, ensuring that legal strategies are supported by broader normative frameworks (Motlatsi, 2020). Policymakers, on the other hand, should harmonize domestic law with international and regional obligations to remove legal barriers and enhance rights protection, particularly in areas such as safe abortion, child marriage,

and obstetric violence (United Nations, 1979; African Union, 2003). Finally, law students and researchers should cultivate multidisciplinary skills, combining legal analysis with an understanding of international human rights frameworks to effectively engage in SRHR litigation, advocacy, and research.

3.9 Reflecting Back on the Unit

By the end of this section, the reader should be able to:

- Explain how Zimbabwean courts integrate international and regional law when interpreting the Constitution.
- Identify how comparative jurisprudence provides persuasive authority.
- Analyse the role of constitutional provisions (Sections 46(1)(c) and 326) in bridging Zimbabwe's dualist system with international norms.

3.10 Activity of Learning

Case Study – *Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs & Others* (2015)

1. Which international and regional instruments did the Court rely on in striking down child marriage?
2. How did the Court interpret Section 46(1)(c) of the Constitution in light of Zimbabwe's dualist legal system?
3. Compare this approach with South Africa's Section 39(1) of the Constitution, which obliges courts to consider international law when interpreting the Bill of Rights.
4. In small groups, draft a short argument showing how a future Zimbabwean court could use *Mudzuru* as precedent in another SRHR issue (e.g., maternal health or access to contraception).

3.11 Unit Summary

This unit has demonstrated the strategic value of international, regional, and comparative law in shaping domestic SRHR

jurisprudence. By linking foreign and regional experiences to Zimbabwe's legal context, practitioners can use persuasive authority to expand constitutional protections, influence judicial reasoning, and strengthen advocacy efforts. While Zimbabwe generally follows a dualist system, section 46(1)(c) of the Constitution obliges courts to consider international law and conventions when interpreting the Declaration of Rights, and section 326 recognises customary international law as part of domestic law unless inconsistent with the Constitution or legislation. These provisions significantly enhance the legal toolkit available for litigating SRHR cases and advancing the rule of law, as illustrated in *Mudzuru & Another v. Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/2015, where the Constitutional Court relied on the African Charter and Maputo Protocol to strike down child marriage (ACHPR, 2001, 2006; Viljoen, 2012; *Mudzuru*, 2015).