5 Foreign Law, Constitutional Interpretation and the Challenges of Legal Transplantation in Zimbabwe

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1 Introduction

"Ours is a nascent constitutional order." In Chief Justice Luke Malaba's opinion,[1] Zimbabwe is on the age of 'experiential constitutionalism' judged by the way in which litigants have sought to test some of the provisions in the Constitution of Zimbabwe Amendment (No.20) Act, 2013 (hereinafter referred to either as 'the 2013 Zimbabwean Constitution', 'the Constitution of Zimbabwe 2013' or simply 'the Constitution'). This observation is possibly evinced and sustained by the reported gradual decline in the number of constitutional applications between 2015 and 2017 wherein there was a total of 101 filed cases in 2015; 76 in the following year; and a total of 70 in 2017.[2] For the Chief Justice, this dramatic decline in constitutional cases can be easily explained away due to the dwindling constitutional optimism and experimentation which suddenly normalised. He argues in the main:

> [T]hat trend is normal and attests to experimental constitutionalism. In the formal 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.[3]

Also, in the same context in which the above sentiments were intimated, the Chief Justice noted with serious concern the "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," and that his major worry was "about the time and resources wasted".[4] The 15 January 2018 statement could be construed as one of the epochs that underline the 2013 constitutional jurisprudence. In practical terms, the words intimated by the Chief Justice introduce one of the compellingly important aspects, that pertaining to the approach to constitutional interpretation. In the main, they probe the question as to how the Constitutional Court should resolve a constitutional matter fraught with facial procedural irregularities. Should these be condoned in the 'public interest' to promote and protect fundamental human rights and freedoms as dictated by the Constitution? Linked to this consideration is whether or not the focus of the Constitutional Court in such matters should be 'materialistic' in nature, in other words, focus on 'time and resources' or rather in the converse it should focus on justice specifically access to justice for the litigants. There are no hard and fast rules on this since they are both important, but the sentiments of the

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[1] L. Malaba, 'The Official Opening of the 2018 Legal Year,' 15 January 2018.

[2] *Ibid*., at p. 9.

[3] *Ibid.*

[4] *Ibid.*, p. 10.

Chief Justice invite questions as to constitutional interpretation in general and the role and discontents of foreign law in particular.

For Chief Justice Godfrey Guwa Chidyausiku, who is Chief Justice Malaba's immediate predecessor, foreign law has an important jurisprudential and practical contribution.[5] His 16 January 2017 parting statement reflected on his judicial journey, and therefore the tipping-point milestones he reportedly achieved as the Chief Justice of the Republic of Zimbabwe since 5 July 2001 respectively. However, his sentiments on the launching of the Judicial Service Commission (JSC) Law Reports in particular are crucial because they speak to the role (and judicial perceptions on) of foreign law in Zimbabwe. For the most part, Chief Justice Chidyausiku was extremely appalled by the privatisation and consequent commercialisation of law reports containing reported decisions (and thus important precedent) particularly by "third parties who compile the judgements into Law Reports which are then sold back to the judges".[6] And for this reason, he justified the "bold decision" that the JSC had to "take over the process of compiling Law Reports on behalf of the Judiciary".[7] To operationalise this decision, a decision was made to constitute an Editorial Board chaired by the Chief Justice, deputised by the Deputy Chief Justice, and comprised of the Judge President of the High Court, the Senior Judge in the Labour Court and the President of the Law Society of Zimbabwe. And consequently an editorial team was tasked to produce the inaugural JSC Law Reports spanning 1 July 2015 to 31 December 2015. The sentiments of the Chief Justice in the context of the 124 judgments contained in the first JSC Law Reports, which he considered "truly world class" is what sets a tipping-point context for the evaluation of the prospective contribution of foreign law in constitutional interpretation, and ultimately the judicial enforcement of human rights and freedoms in Zimbabwe. For that reason, the views of the erstwhile judiciary head are quoted verbatim below, as a unit of analysis:

> [I] have quickly perused through the Law Reports and note that it lists cases from other jurisdictions which were either applied or referred to in the reported decisions. I was impressed to learn that Judges in the preparation of their judgments went as far afield as Scotland, New Zealand, Canada, Namibia and The Netherlands, among other countries, in their search for the correct position at law deciding the matters that were placed before them. Congratulations to those Judges whose judgements found their way into the Judicial Service Commission Law Reports. This is how you make your name or distinguish yourself as a Judge. *Ex tempore* judgements do not find their way into Law Reports. If you specialise in that, no-one will ever know that you were a Judge, except your relatives.[8]

Accordingly, the above excerpt attests to the fact that foreign law has been (and may) be judiciously relied on to better understand and improve the Zimbabwean legal system. Moreover, it arguably demonstrates the view that in a globalised legal order, judges ought to consider relevant comparative law pronouncements and legislative declaration provided they do not fall foul of the standards of 'liberal democracy' and

[5] G. G. Chidyausiku, 'Speech Delivered on the Occasion of the Official Opening of the 2017 Legal Year', 16 January 2017.
[6] *Ibid*., p. 25.
[7] *Ibid*., pp. 25–26.
[8] *Ibid*., pp. 26–27.

'accuracy' enunciated below. Although the Chief Justice's 16 January 2017 statement applauded the judges whose decisions were found reportable and thus constituting a progressive contribution to the law; he however did not address the merits and demerits of foreign and/or comparative law nor speak to the importance of developing judicial canons on the use of non-Zimbabwean precepts in constitutional interpretation. Foreign law may very well speak directly or indirectly to the legal issues at hand, but it is usually unfit and should therefore be adapted to marry the local socio-economic, cultural and political context. The last thing the judiciary wants to do is to uncontrollably import alien legal norms, histories, cultures, institutions and so on from other jurisdictions. There is a strand of literature which identifies and supports the use of unproblematic and potentially problematic foreign law in interpretation. This literature is provided for in the subsequent paragraphs. In practical terms, an important consideration which still remains complex under the 2013 Zimbabwean Constitution is whether or not courts have developed canons on the application of foreign law. The answer is arguably in the non-affirmative despite the fact that lately the Constitutional Court of Zimbabwe has consistently applied and/or referred to various foreign laws (cases, legislation, journals, law texts, etc.) from countries such as South Africa, India, Australia and Canada.

The contribution of foreign law is easily discernible in constitutional making or constitutional reform projects. Although the dominant intention of the reformers would be to craft a people's constitution, meaning one grounded in local context, which follows the principles of participatory democracy; nonetheless constitutional reform experiences from other jurisdictions and international law cannot simply be ignored. The work of Kersting[9] somewhat buttresses this point. "It is a culmination of a conference of expert constitutional drafters and reformers from selected African countries such as South Africa, Kenya and European countries particularly, Germany. In the main, the intent of the conference was to share ideas on constitution making to guide Zimbabwe craft a better, transformative and democratic constitution." Some of the delegates in that conference included seasoned experts such as Professor Liebenberg who delivered a paper on the "South African Bill of Rights and the lessons Zimbabwe ought to have learnt from it".[10] Liebenberg argued with force that: "[T]he basic departure point is that in the absence of an independent, courageous and vigorous judiciary and civil society, a Bill of Rights cannot fulfil its objectives. Its transformative potential will remain unrealised."[11]

Although sovereign countries are not compelled to consider legal developments from other countries, it is nonetheless advisable for them to take into account accepted 'good practices' which put strong and inclusive institutions such as the judiciary at the epicentre of constitutionalism and therefore practically speaking its core elements, for example, the separation of powers, independence of the judiciary, judicial review, the enforcement of human rights and freedoms, etc. The work of

[9] N. Kersting (ed.), *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (2009).
[10] S. Liebenberg, 'Reflections on Drafting a Bill of Rights: A South African Perspective', in *ibid.*, p. 21.
[11] *Ibid.*

Mhodi[12] speaks directly to the doctrine of constitutionalism, its status and evolution in Zimbabwe. And the work of Mavedzenge[13] and Marumahoko[14] address the issues of inclusivity and participatory constitution making in Zimbabwe. Despite arguments pointing to the endogenous nature of a Constitution (and therefore supporting a domestic law inclined interpretive process) another growing body of literature further reinforces the important function of exogenous factors such as international and foreign law in constitutional interpretation. The 2013 Zimbabwean Constitution adopts a cocktail approach to constitutional interpretation. Foremost, it establishes a two-tier system of interpretation by distinguishing between binding (where judges have a positive injunction to use a particular rule) and non-binding (persuasive force, where judicial officers are conferred with judicious discretion to decide whether or not a specific rule if (in) applicable).

Also, the Constitution creates a dichotomy amongst hierarchized norms characterised by the domestic normative systems which epitomises a grand norm Constitution whose founding values and principles, national objectives and so on should guide the interpretive endeavour. The primacy of the Constitution even in interpretation stems from the long-established practice that the Constitution expresses the will of the people, was negotiated by them and as such has legitimate purpose and therefore is better suited to create a sense of collective constitutional polity and identity, define the structures of government desired by the 'people' and provide for human rights and freedoms-and their enforcement. Using this classification, the 2013 Zimbabwean Constitution acquires a binding and grand norm (bestows legal validity and therefore creates a compatibility exercise) like character.

Furthermore, the continuum embodies externalist or exogenous tools of constitutional interpretation. These are typified by the reference to international law and foreign law. An essential point is necessary at this stage: the most notable difference is that the 2013 Constitution confers judicious discretion on judges to apply relevant foreign law. The converse is true for international law and all treaties and conventions to which Zimbabwe is a party[15] which courts are mandated to use when interpreting the Declaration of Rights. However, as practice has shown, courts prefer to deter to foreign decision each time they are confronted with a legal matter. This has prompted scholars to probe whether or not the practice of courts truly reflects the constitutional injunction that foreign law is really discretionary?

The 2013 Zimbabwean Constitution was adopted in May 2013 as a mind map and tool to re-configure and re-engineer Zimbabwean society. For scholars such as Moyo, this Constitution is a transplant of the Constitution of the Republic of South

[12] P. T. Mhodi, 'The Constitutional Experience of Zimbabwe: Some Basic Fundamental Tenets of Constitutionalism which the New Constitution Should Embody', (University of Kwa-Zulu Natal, 2013).
[13] J. A. Mavedzenge, 'An Examination of the Relationship between Public Participation in Constitution Making Processes and the Objective to Write a Democratic Constitution: The Case of Zimbabwe's 2010-2013 Constitution Making Exercise', (University of Cape Town, South Africa, 2014).
[14] S. Marumahoko, 'Constitution-Making in Zimbabwe: Assessing Institutions and Processes', (University of the Western Cape, South Africa, 2016).
[15] Section 46(1)(c) of the Constitution.

Africa, 1996.[16] Accordingly, in certain grey and novel matters, the Constitutional Court should be empowered to consider decisions from other jurisdictions preferably those in the same legal family. Wilson17 puts it succinctly as follows:

> [B]y looking overseas, by looking at other legal systems, it has been hoped to benefit the national legal system of the observer, offering suggestions for future developments, providing one's own national system and look at it more critically, but not to remove it from first place on the agenda. Comparative studies have been largely justified in terms of the benefit they bring to the national legal system. In some areas it is easy to see why. In countries that have adopted codes or constitutions which originated in another system, it has been natural for legal scholars to look at the way that system has developed and has been developed in its original habitat.[18]

Moreover, Wilson adds with equal force and clarity that "this looking at other systems for the benefit of one's own is not confined to doctrinal systems," but also "happens even among common law countries, where one finds cases being cited in courts from other common law jurisdictions and where legal scholars show a natural interest in developments in their areas of expertise in other common law jurisdictions".[19] The scholars Currie and De Waal confirm Wilson's perspective in South Africa because they observe and contend that "many of the Constitutional Court's judgments indeed read like works of comparative law".[20]

Nevertheless, according to these eminent jurists, over the years, the South African apex Court has become circumspect to foreign and comparative law in the broader scheme of constitutional 'interpretation'. They add with brevity that "[t]he Court appears to be more concerned on whether foreign case law provides a safe guide to the interpretation of our (South African) Bill of Rights".[21] The rationale for such a watchful approach is to be found in the case of *Sanderson v. Attorney-General, Eastern Cape*,[22] where the Constitutional Court of South Africa cautioned that "[t]he use of foreign precedent requires circumspection and acknowledgement that transplants require careful management".[23] In Zimbabwe, section 46(1)(e) of the 2013 Zimbabwean Constitution states that "[w]hen interpreting this Chapter, a court, tribunal, forum or body may consider relevant foreign law". By way of introduction, the reasoning of the Constitutional Court in the *Mudzuru* case to the extent that it relates to constitutional interpretation in the context of constitutional rights offers vital guidance. According to the Court:

> [S]ection 46(1)(a) of the Constitution obliges a court when interpreting a provision contained in Chapter 4 to give full effect to the rights and freedoms enshrined in the Chapter. The court is required by s 46(1)(d) to pay due regard to all provisions of the Constitution, in particular, the

[16] A. Moyo, *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019).
[17] G. Wilson, 'Comparative Legal Scholarship', in M. McConville and W. Hong Chui, *Research Methods for Law* (2012).
[18] *Ibid.*, p. 87.
[19] *Ibid*., p. 88.
[20] I. Currie and J. D. Waal, *The New Constitutional & Administrative Law Volume 1 Constitutional Law* (2001) p. 334.
[21] *Ibid*., pp. 334–335.
[22] 1998 (2) SA 38 (CC).
[23] Para. 26. *See also* Currie and De Waal, *supra* note 20, pp. 334-335.

> principles and objectives set out in Chapter 2. The purpose of interpreting a provision contained in Chapter 4 must be to promote the values and principles that underlie a democratic society based on openness, human dignity, equality and freedom, and in particular, the values and principles set out in s 3 of the Constitution.[24]

Some of the constituents of section 46(1) of the Constitution are cast in light of international law which enjoins states parties to hold in good faith and observe the rights and obligations in a treaty to which they are a party. The Vienna Convention on the Law of Treaties (1980) is the bedrock of such legal provision, and therefore underlies section 46(1)(c) of the 2013 Zimbabwean Constitution.

Foreign law is distinguishable from domestic, municipal or national law in many respects. In practical terms, domestic laws of Zimbabwe do not have an extraterritorial effect, meaning they are generally inapplicable (except to say they might have a persuasive value depending on the Constitution of the country concerned) in other countries such as South Africa, India, Zambia, Botswana, Tanzania, Malawi and Canada. Typical examples of national law include constitutions, statutes/legislation, indigenous law, subsidiary legislation and the body of precedent emanating from courts. However, to further augment domestic laws, courts may consider developments in other countries for purposes of enriching their legal systems. This is true in the context of human rights protection. Therefore, the various legal families such as the common law and civil law systems matter the most here. From constitutional practice, most judges from common law jurisdictions usually consider the judgments of their contemporaries to further develop their municipal systems. And so, some of the fundamental questions which arise include: what value should courts attach to foreign law when interpreting fundamental human rights and freedoms? What is the approach of the Constitutional Court of Zimbabwe to the application of foreign law particularly when it comes to Chapter 4 of the Constitution? In the main, have courts developed clear canons on the application and role of foreign law on the interpretation of fundamental human rights and freedoms? The next section below briefly examines elementary aspects of constitutional interpretation.

2 Constitutional Interpretation

2.1 *Definition*

According to Currie and De Waal, "constitutional interpretation is the process of determining the meaning of a constitutional provision".[25] Thus, interpretation could be read to denote the quest by justices of the Constitutional Court when presented with a 'constitutional matter'[26] to carve out, find or construct an appropriate meaning to a particular provision/tenet of the Constitution. In other words, it can be argued

[24] *Mudzuru & Another v. Ministry of Justice, Legal & Parliamentary Affairs (N.O) & Others* CCZ 12/2015 p. 43.
[25] Currie and De Waal, *supra* note 20, p. 332.
[26] In terms section 332 of the Constitution of Zimbabwe 'constitutional matter' denotes "a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution".

that constitutional interpretation refers to the judiciary's deliberate attempt to ascertain the legislative intent given the peculiar merits of the case presented before it. Also, for Currie and De Waal, the overarching objective of interpretation "is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with the provision".[27] The process involves two equally important steps: determining the meaning or scope of a fundamental right and whether or not the challenged law or conduct conflicts with the fundamental rights.[28]

2.2 *Main Sources of Constitutional Interpretation*

This section summarises the major sources of constitutional interpretation based on Professor Bobbit, Kelso, Currie and De Waal's seminal works.[29] These provide a constitutional basis for the approach to constitutional interpretation. Professor Bobbit is one of the leading authorities in constitutional interpretation.[30] Contemporary contributions by scholars such as Currie and De Waal and Kelso are, for the most part, a refinement of his major work.[31] According to Bobbit, the main sources of constitutional meaning are textual, structural, historical, doctrinal, prudential and ethical.[32] These are explained by Professor Kelso as follows:[33]

2.2.1 Contemporaneous Sources of Meaning

These are primary sources to determine constitutional meaning. They are three specific sub-categories as explained below. Kelso has further observed that contemporaneous sources of meaning "are sources which exist at the time a constitutional provision or amendment is ratified".[34]

2.2.1.1 Constitution's Text in Determining Constitutional Interpretation Direction[35]

Kelso considers the Constitution's text as an important contemporaneous source of meaning in constitutional interpretation.[36] Carving meaning therefore involves making a value judgement: "a judge must decide whether to read the text literally (and thus risk missing the spirit, or purpose, behind why the text was adopted) or whether to interpret the provision in light of both its letter and spirit".[37] In respect to this argument, there is precedent against narrow, strict and literal constitutional

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[27] Currie and De Waal*, supra* note 20, p. 332.
[28] *Ibid.*
[29] *See generally* R. R. Kelso, 'Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History', 29 *Valparaiso University Law Review* (1994) and Currie and De Waal, *supra* note 20, pp. 335–337.
[30] *Ibid*., p. 124.
[31] *Ibid*., p. 126.
[32] *Ibid*.
[33] *Ibid.*
[34] *Ibid*., p. 128.
[35] *S v. Zuma* 1995 (2) SA 642 (CC) para. 20.
[36] Kelso, *supra* note 29, p. 128.
[37] *Ibid.*

interpretation in favour of a more liberalised and purposive approach.[38] Currie and De Waal concur with Kelso.[39] They opine that purposive interpretation is "helpful in that it recognizes that the interpretation of the Bill of Rights involves a value judgment."[40] The Kelso inquiry, as confirmed by Currie and De Waal, has permeated our law via the *Mudzuru* case.[41] Nonetheless, Currie and De Waal further contend that a generous interpretation may sometimes become inimical to progressive legal jurisprudence. They conceptualise of it as "the most perplexing of all the principles of constitutional interpretation".[42] These scholars also claim that a generous interpretation "is supposed to ensure that individuals receive the full measure of the fundamental rights and freedoms referred to".[43] The contrary, however, is that generous interpretation "becomes problematic when the other principles and rules of constitutional interpretation point to a different, narrower, meaning of a provision".[44] Moreover, Kelso has also argued with equal force and brevity that:

> [I]f the judge chooses to interpret a provision in light of both its letter and spirit, the judge must then decide how to determine the purpose, or purposes, of the text. Some purposes are stated in the Constitution itself … Such purposes, however, are very general and do not provide unequivocal guidance on how to interpret specific constitutional provisions. They may provide, however, some background understanding of the constitutional enterprise embarked on by the framers and ratifiers.[45]

With this overview, it is essential to note that the Constitutional Court is endowed with immeasurable constitutional interpretation competence under the 2013 Zimbabwean Constitution to realise the constitutional objective and therefore determine a positive jurisprudential paradigm. On the whole, the Constitution envisages a transformative, just and egalitarian society, articulates invaluable values and principles and national objectives that courts must consider when teasing out the meaning of any constitutional provision including the Declaration of Rights (which enlists rights and freedoms). Overall, an effective and successful constitutional system arguably depends on the courts' ability and determination to uncover meaning, purpose and scope of the Constitution. Kelso has argued boldly that:

> [O]nce a judge determines the spirit or purposes of a constitutional provision, the judge must decide the extent to which these purposes will be allowed to override the literal meaning of the text when conflicts arise. Factors which might be relevant in making this determination include the clarity of the textual language (the more clear the language, the more weight it is given); how much conflict exists between the letter and spirit of the provision (a clear conflict between letter and spirit suggests either that the letter of the language was not well-drafted or the judge has misidentified the provision's purposes); and does the literal meaning trample on fundamental

[38] *See United States v. Whitridge* 197 U.S. 135**,** 143 (1905) (Holmes, J.). "The general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."
[39] Currie and De Waal, *supra* note 20, p. 336.
[40] *Ibid.*
[41] *Mudzuru and Another v. Minister of Justice* 2016 (2) ZLR 45 (CC), Law Reports citation.
[42] Currie and De Waal, *supra* note 20, p. 336.
[43] *Ibid*., pp. 328–329. *See also Minister of Home Affairs (Bermuda) v. Fisher* [1980] AC 319 (PC).
[44] *Ibid*., p. 336.
[45] Kelso, *supra* note 29, p. 129.

rights otherwise protected (suggesting that the literal meaning is not well-drafted, given our framers and ratifiers' commitment to protecting certain fundamental rights).[46]

Resultantly, a progressive approach to interpretation is one that is underpinned by a mutually shared constitutional vision, values and principles such as is in the 2013 Zimbabwean Constitution. It is therefore pertinent for judicial officers to deliberate on cases as informed by this aspiration. However, this is usually a cumbersome and complicated endeavour as constitutional interpretation is mooted in literature. Those grounded in legal philosophy would recall seminal but perplexing scholarship by legal jurists like John Austin, Herbert Hart, Kelsen, Lon Fuller, Ronald Dworkin, Holmes and others. The notorious Hart versus Fuller debate and Dworkin versus Hart fall-out highlight the complex nature of legal interpretation. Cognisant of this, judges are required to consider certain values and principles such as those contained in section 3 of the Constitution. However, an argument has been made that in principle the 2013 Zimbabwean Constitution is transformative and progressive in nature. Its preamble is forward-looking and sets the general tone for the whole constitutional enterprise. As a result, constitutional interpretation must be conceptualised holistically taking into account constitutional supremacy and other auxiliary mechanisms such as judicial independence, separation of powers, judicial review, the fundamental human rights and freedoms and good governance. A corollary to the rule of law is that judges should interpret the Constitution in such a manner as to realise the intent of the drafters. They have an enormous task to promote social justice and democracy. And accordingly, they must come to terms with the inherent constitutional vision and deal with constitutional matters holistically, contextually and purposively fully aware that their decisions can have wide-reaching economic, social and political consequences. The 2013 Zimbabwean Constitution therefore embodies the country's broader ambitious vision and aspirations. The courts are therefore presented with a fruitful opportunity to turn the constitutional vision into reality and thereby drive wheels of social change and shared prosperity. At the court's behest lies the country's rule of law outlook and development prospects. This sometimes means adopting an external focus and drawing inspiration from comparative and foreign jurisprudence.

2.2.1.2 Structure of the Government Contemplated by the 2013 Zimbabwean Constitution

The structure contemplated in the Constitution is vital in the context of constitutional interpretation. The drafters of the 2013 Zimbabwean Constitution were alive to this fact because there included the separation of powers, the rule of law, constitutional supremacy and good governance as founding principles and values. For purposes of the present discussion, it is important to note that the distribution of power is a factor to be considered by courts when interpretation the constitution. The effects of the *trias politica* doctrine are evident in the Constitution: power is distributed among the executive, judiciary and legislative branches. The tiers of government are articulated. Inherent in the constitutional enterprise is the fact that power is derived

[46] *Ibid*., p. 130.

from the people (codification of popular sovereignty) and that it is limitable and reviewable owing to the doctrine of constitutionalism.

2.2.2 The History Surrounding the Constitutional Provision's Drafting and Ratification

The decision of the Constitutional Court in the *Mudzuru* case illustrates this point well. Justice Hlatshwayo specifically considered the legislative history of section 78(1) of the Constitution to justify his holding to outlaw early marriages in Zimbabwe. The approach to consider the history surrounding a constitutional provision finds credence in scholarship.[47] Kelso provides the basis for invoking history and argues that "these historical sources may aid in determining the provision's purpose, or purposes. A judge must decide which of these sources are appropriate to use, what weight to give each, and at what level of generality to view historical insights".[48] Accordingly, the 2013 Constitution should be analysed within the framework of Article VI of the Global Political Agreement and the complex debates and criticisms surrounding the Lancaster House Constitution. In practical terms, the history surrounding constitutional provisions can easily be found in the constitutional drafting documents including sentiments made by the drafters/negotiators themselves. In the context of exogenous constitutional interpretation, the question is always whether or not a foreign precedent is in tune with the local context.

2.3 *Subsequent Events*

The conventional wisdom on interpretation provides that subsequent events such as court decisions, legislative and executive practice also influence constitutional interpretation.

2.4 *Non-Interpretive Considerations*

For Kelso non-interpretive guidelines incorporate arguments pertaining to the consequences of a judicial pronouncement from the perspective of justice or sound social policy considerations of politics.

2.5 *Individual Bias*

Furthermore, the literature on constitutional interpretation supports the view that interpretive bias, specific case bias, party and individual bias may also influence constitutional interpretation.

[47] *Ibid*., p. 129.
[48] *Ibid*., p. 130.

3 The Challenges of Legal Borrowing

Mhango[49] relying on Tebe and Tsai[50] argues that legal borrowing is "the process of importing legal doctrines or rationales from other legal sources or domains in order to persuade someone to adopt a certain reading of a constitution".[51] For Osiatynski,[52] "borrowing is inevitable because there are a limited number of general constitutional ideas and mechanism".[53] The complex debates on the application of foreign law abroad span various jurisdictions. And for Tushnet, these discussions are "a tempest in a teapot".[54] Foreign law has therefore become ubiquitous and an important epoch to frame discussions on constitutional interpretation in both developed and developing countries (Global North and Global South), and particularly in countries that follow the common law tradition such as, among others, Zimbabwe, South Africa, the United States of America (US) and Canada. Sitaraman reinforces the observations made in Tushnet and highlights the academic debates on the subject of non-domestic norms. According to Sitaraman, the remarks of the Justices of the US Supreme Court further buttress the above analysis. For some, the use of foreign law is akin to "moods, fads or fashions," for Justice Scalia the trend "can make the opinions of Americans essentially irrelevant," and for Justice Ginsburg it denotes a "unified concept of what dignity means."[55]

In the main, Sitaraman evaluates the "use and abuse of foreign law in constitutional interpretation".[56] His examination of the typology or ten modes on the use of foreign law range from non-problematic, potentially problematic and troublesome uses of foreign law in constitutional interpretation through the prism of two epochs: arguments from liberal democracy, arguments from methodological and accuracy. By and large, he argues that the proper approach should not be to overgeneralise on the suitableness or unsuitableness of foreign law but to consider its opportunities, pitfalls and discontents influenced by the 'trouble-some' uses of foreign law in constitutional interpretation.

And for efficaciousness, Sitaraman recommends a focused approach wherein scholars should lean towards a specific mode or continuum on the use and abuse of foreign law, as opposed to an ominous and absolute analysis. Consequently,

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[49] M. O. Mhango, 'Separation of Powers and the Political Question Doctrine in South Africa: A Comparative Analysis', (University of South Africa, 2018).
[50] N. Tebe and R. Tsai, 'Constitutional Borrowing', *Michigan Law Review* (2009) p. 463.
[51] Mhango, *supra* note 49, p. 70.
[52] *See also* W. Osiatynski, 'Paradoxes of Constitutional Borrowing', 1 *International Journal of Constitutional Law* (2003) p. 244.
[53] Mhango, *supra* note 49, p. 70.
[54] M. V. Tushnet, 'Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars', 35 *University of Baltimore Law Review* (2006) pp. 299–312. This scholar examines references to foreign law by the Supreme Court and individual justices. Some of the cases discussed in Professor Tushnet's paper include *Atkins v. Virginia*, 536 U.S. 304*; Lawrence v. Texas*, 539 U.S. 558 (2003); Roper *v. Simmons*, 543 U.S. 551 (2005); *Printz v. United States* 521 U.S. 898 (1997); *Knight v. Florida* 528 U.S. 990 (1999); and *Grutter v. Bollinger* U.S. 306.
[55] G. Sitaraman, 'The Use and Abuse of Foreign Law in Constitutional Interpretation', 32 *Harvard Journal of Law & Public Policy* (2009) p. 655.
[56] *Ibid*.

Sitaraman correctly posits that "the foreign law debate should focus specifically on the few potentially problematic uses, rather than on 'foreign law' more generally".[57] Moreover, Sitaraman provides an exhaustive American (US) "typology of the uses of foreign law in order to provide insight into whether foreign law can appropriately be used in constitutional interpretation, when it can be used, and what the stakes and parameters are in each case".[58] The piece focuses on two considerations: the practical ways in which foreign law can be used and limited categorisation of foreign law and its attendant impact.[59] The article can be categorised according to the arguments about the use and typology of foreign law.

The Sitaraman piece creates a multi-layered structure on the use of foreign law in constitutional interpretation. It creates a continuum or hierarchy of units whose place is determined by their (un)constitutional effects. The trouble-free or untainted function of foreign law occupies the first level and is comprised of linguistic considerations, the rationale to illustrate contrasts, logical reinforcements and factual propositions. Sitaraman calls these 'unproblematic uses of foreign law' because they do not undermine the democratic values provided for in the Constitution. The second layer is composed of partially problematic constitutional variables. Sitaraman calls these 'potentially problematic uses of foreign law' since they can acquire a different and troublesome mould in certain instances (under this categorisation, their empirical consequences, direct application and persuasive reasoning). The most radical nuance which occupies the Sitaraman base are the 'troublesome uses' which are three-fold: authoritative borrowing, aggression and no usage.

4 Application of Foreign Law by the Constitutional Court

In *Liberal Democrats*,[60] the Constitutional Court dismissed a constitutional application which sought to expunge the former president's, Robert Mugabe, resignation as involuntary. In the opinion of the Court, the applicant dismally failed to prove their case. The Constitutional Court relied on foreign law to make a ruling on legal costs. Some of these decisions include *Affordable Medicines Trust and Others v. Minister of Health and Others*[61] and *De Lacy and Another v. South African Post Office*[62] to uphold the court's discretion to order costs as appropriate according to Rule 55(1) of the Constitutional Court Rules. The same strand is seen in *Mpofu & Anor v. The State*[63] (a case dealing with the deliberate transmission of HIV/AIDS), the court referred to the case of *Sunday Times v. The United Kingdom,*[64] to amplify the meaning of the right to equal protection of law. Moreover, in the *Mudzuru* case, the Court annulled section 22(1) of the Marriage Act [Chapter 5:11] "and any other

[57] *Ibid*., p. 653.
[58] *Ibid.*
[59] *Ibid.*
[60] *Liberal Democrats & 4 Others v. President of the Republic of Zimbabwe E.D. Mnangagwa N.O & 4 Others* CCZ 7/18.
[61] 2006 (3) SA 247 (CC) paras. 296H-297E.
[62] 2011 (9) BCLR 905 (CC).
[63] CCZ 5/2016.
[64] (1970-80) 2 EHRR 245 para. 49.

practice or custom which authorised a person under the age of eighteen to marry as being inconsistent with section 78(1) of the Constitution".[65]

This decision is distinguishable from those cases which were decided under the now repealed first Constitution of Zimbabwe, which came into effect on 18 April 1980, in many respects. Importantly, the Supreme Court jurisprudence then, particularly on section 24(1) of the defunct Constitution, supports this argument. As such, an argument is made in Kersting's 2009 treatise that the successor to (being section 85(1) of the 2013 Constitution) had to be broader and all encompassing. Accordingly, Kersting refers to several cases which were dismissed on the basis of a restricted interpretation of standing. However, in this contribution, the *Mudzuru* case is relied on as an example of a constitutional matter where foreign law (decisions) were applied and/or referred to assist the court to interpret the Constitution of Zimbabwe 2013.

In *Mudzuru*, the applicants, aged 18 and 19 years, brought an application before the Constitutional Court challenging the constitutional validity of section 22(1) of the Marriages Act [5:11] and the Customary Marriages Act [Chapter 5:07]. The applicant argued that the first impugned statute was contrary to the dictates of the 2013 Constitution because it empowered minors (persons below 18 years) to enter into a marriage, exposing them to unconscionable abuse or harmful practices and therefore constituted a serious violation of their fundamental human rights, as protected under the 2013 Constitution. The Customary Marriages Act was challenged on the basis that it was silent on the marriageable age. Amongst the provisions relied on by the applicants are sections 78(1) (which states that "every person who has attained the age of eighteen years has the right to found a family") and 81(1)[66] (on children's rights) of the 2013 Zimbabwean Constitution.

The Court ruled that the effect of section 78(1) was to prescribe 18 years as the marriageable age in Zimbabwe. And therefore, that "no person can enter into 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)".[67] Consequently, the Court declared section 22(1) of the Marriages Act and the Customary Marriages Act unconstitutional since they diverged from the dictates of the Constitution which provided for 18 years as the age of entering into any marriage, customary or religious union. The conclusion in the *Mudzuru* case was prompted by an analysis of multiple sources of law including international, regional, domestic and foreign ones which were heavily inclined towards the prohibition of early marriages, and therefore favoured a human rights protection approach.

In the above case, the Court was asked to adopt "a broad, generous and purposive interpretation of s 78(1) as read with s 81(1)".[68] The core of their contention was that section 78(1) could not "be subjected to a strict, narrow and literal interpretation to

[65] L. Malaba, 'Superior Courts and the Consolidation of the Rule of Law in Zimbabwe', The Herbert Chitepo Memorial Lecture, Great Zimbabwe University (11 October 2019) p. 18.
[66] Section 81 of the Constitution. *See also Mudzuru*, *supra* note 41, p. 2.
[67] *Ibid.*
[68] *Ibid*., p. 3

determine its meaning if regard" was "had to the contents of similar provisions on marriage and family rights found in international human rights from which s 78(1) derives inspiration".[69] Thus said, the intent of this contribution is to examine and introduce a discussion on the (mis)use of foreign law and its discontents in constitutional interpretation. Accordingly, the *Mudzuru* decision is used here as an epoch to highlight the importance of these alien decisions at the domestic level. The stance of the Constitutional Court in framing section 85(1) of the Constitution buttresses this view. This contentious aspect in the decision was triggered by the hotchpotch reliance on two separate grounds, being section 85(1)(a) and (d) of the Constitution, which either entitle "any person acting in their own interests", or "any person acting in the public interest", "to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter (Chapter 4) 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".[70]

On the contrary, the respondent contended that the applicants lacked the right to approach the Constitutional Court because there was no sufficient proof that "any of their own interests was adversely affected by the alleged infringements of the fundamental rights of the girl child" and that none of the applicants alleged that she entered in marriage with the boy who made her pregnant. In other words, the respondent's contention was that "the applicants were no longer children protected from the consequences of early marriages by the fundamental rights of the child enshrined in section 81(1) of the Constitution".[71]

Furthermore, it was also the respondent's argument that applicants failed to meet the standard required to rely on section 85(1)(d) of the 2013 Constitution. The applicants failed to produce cogent evidence of girls "whose rights had been infringed and on whose behalf they purported to act".[72] In practical terms, the contention was that the applicant failed to discharge evidence that were acting in the public interest. It is this latter point which caused the court to invoke foreign decision particularly on the approach to the interpretation of *locus standi* in an open and democratic society. For the Malaba bench, the matter could not solely be dismissed on the literal construction of the Constitution because more was required-a liberalised nuanced construction which sought to protect rather than abrogate or undermine Chapter 4 rights and freedoms.

The Court noted that one of the pertinent albeit preliminary issue pertained to the capacity in which the applicants were acting in claiming the right to approach the court on the claims they advanced.[73] In the same case, the Court outlined the general rules on *locus standi* and importantly the corpus of section 85(1)(a) and (d) of the 2013 Constitution. And the succeeding paragraphs will demonstrate that foreign law played a crucial role to persuade the Court to reason and hold the manner it did. Accordingly, the Court held that a hodgepodge reliance on multiple grounds under

[69] *Ibid.*
[70] Section 85(1)(a) and (d) of the Constitution.
[71] *Mudzuru*, *supra* note 41, p. 5.
[72] *Ibid.*
[73] *Ibid*., p. 8.

section 85(1) is impermissible. It thus reasoned that "in claiming *locus standi* under section 85(1) of the Constitution, a person should act in one capacity in approaching the court and not in act in two or more capacities in one proceeding".[74] The context of these otherwise unassailable sentiments is that the applicants had sought to base their claim on two grounds under the standing provision.

Nevertheless, the Court found in favour of the applications, as it was demonstrated that they had genuinely believed to be acting in the public interest and not in their personal capacities. The inquiry thereafter transitioned to consider if the requirements of 'public interest' were fulfilled. Conversely, in relation to section 85(1)(a) the Court held that it "requires that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom".[75] And therefore, the section 85(1)(a) leg constituted the traditional or narrow concept of standing.

In the opinion of the Court, section 85(1) had another dimension which was *sui generis* and therefore novel and unfamiliar in most legal systems. This meant there were neither domestic laws nor precedent to guide the Constitutional Court. Accordingly, the Court turned to Canadian jurisprudence (foreign law) specifically *R v. Big M Drug Mart Ltd*[76] and *Morgentaler Smoling and Scott v. R*[77] to interpret standing. These decisions served the important purpose of providing the Constitutional Court with interpretive guidance on the second leg of section 85(1)(a) of the Constitution, on direct access. For the Malaba Court, the import of these decisions:

> illustrate the point that a person would have standing under a provision similar to s 85(1)(a) of the Constitution to challenge unconstitutional law if he or she could be liable to conviction for an offence charged under the law even though the unconstitutional effects were not directed against him or her per se. It would be sufficient for a person to show that he or she was directly affected by the unconstitutional legislation. If this was shown it mattered not whether he or she was a victim.[78]

In the main, the court held that the *Mudzuru* case applicants were not victims of the alleged infringements of the rights under section 81(1) of the Constitution, and they could not benefit personally from a declaration of unconstitutionality of any legislation authorising child marriage. Moreover, there is a strand of additional foreign decisions (specifically from South Africa, Australia, India and Canada).[79]

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[74] *Ibid.*
[75] *Ibid*., p. 9.
[76] (1985) 18 DLR (4th) 321.
[77] (1988) 31 CRR.
[78] *Mudzuru*, *supra* note 41, p. 10.
[79] Such as: *Ferreira v. Levin NO and Others* 1996 (1) SA 984; *R v. Inhabitants of the County of Bedfordshire* [1855] 24 LJQB 81; *Lion Laboratories Limited v. Evans* [1985] QB 526; *O'Sullivan v. Farrer* [1989] 168 CLR 2010; *Mckinnon v. Secretary Department of Treasury* [2005] FCAFC 142; *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171; *Sinclair v. Miming Warden at Maryborough* [1975] 132 CLR 473; *Lawyers for Human Rights & Anor v. Minister of Home Affairs & Anor* 2004 (4) SA 125 (CC) and *SP Gupta v. The Union of India & Ors* (1982) 2 SCR 365.

Regarding section 85(1)(d) of the Constitution, the Constitutional Court held the contention by the respondents that the applicants lacked standing was erroneous in view of the fact that children are a vulnerable group in society whose interests constitute a category of public interest. Consequently, the Court reasoned that the section under review rested on the presumption that the effect of the infringement of a fundamental right impacted upon the community at large or a segment of the community such that no identifiable or determinate class of persons who would have suffered legal injury. This jurisprudential reasoning was heavily influenced by foreign law, particularly South African authorities. According to the Court, the reliance on South African law was based on the fact that section 38(d) of the Constitution of the Republic of South Africa, 1996[80] "is in identical terms as s 85(1)(d) of the Constitution".[81] Having reflected on the requirements required obtaining access in terms of section 85(1)(d) and consequently the meaning of 'public interest' as influenced by foreign law, the Court concluded that "the applicants had no personal or financial gain to derive from the proceedings. They were not acting *mala fides* or out of extraneous motives as would have been the case if they were meddlesome busy bodies seeking a day in court and cheap personal publicity."[82]

The cumulative impact of foreign law (and some domestic decisions) is crisply demonstrated in the extract below, where the Constitutional Court stated that:

> [T]he liberalisation of the narrow traditional conception of standing and the provision of the fundamental right of access to justice compel a court exercising jurisdiction under s 85(1) of the Constitution to adopt a broad and generous approach to standing. The approach must eschew over reliance on procedural technicalities to afford full protection to the fundamental human rights and freedoms enshrined in Chapter 4. A court exercising jurisdiction under s 85(1) of the Constitution is obliged to ensure that the exercise of the right of access to judicial remedies for enforcement of fundamental human rights and effective protection of the interests concerned is not hindered provided the substantive requirements of the rule under which standing is claimed is satisfied.[83]

The portion of the judgment which follows the Court's pronouncement strikes at the core of foreign law. The influence of the jurisprudence of the Constitutional Court of South Africa is beyond doubt. In *Ferreira v. Levin NO & Others* (which the Constitutional Court of Zimbabwe, relied on in the case of *Mudzuru*), Judge Chaskalson emphasised the importance of a broad nuance to *locus standi* in constitutional matters.

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[80] *See* section 38 of the Constitution of the Republic of South Africa, 1996 states that:
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

[81] *Mudzuru*, *supra* note 41, p. 22.

[82] *Ibid*., p. 23.

[83] *Ibid*., p. 14.

Additionally, to interpret the fundamental rights implicated in the matter, the Court considered applicable international laws such as the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Universal Declaration of Human Rights (UDHR), Convention on Consent to Marriage and Minimum Age of Marriage and Registration of Marriages 1962, among others.

Foreign law (South African) was also used in the *Greatermans* case to confirm that founding values and principles such as "section 3(2)(k) of the Constitution does not confer a fundamental right in itself. It is not justiciable."[84] The same strand is seen in the Court's reasoning on the presumption against retrospectively wherein it cites the South African case of *Curtis v. Johannesburg Municipality*;[85] Canadian precedent particularly the case of *British Columbia v. Imperial Tobacco Canada Ltd*,[86] academic PW Hogg in *Constitutional Law of Canada*,[87] and section 11(g) of the Canadian Charter of Rights. *Greatermans* is cited here because it raises issues on the legality of retrospective application of civil law and therefore the likely impact of retrospectivity on fundamental human rights. The applicants contended the retrospective application of the law violates the right to equal protection of the law (the Court dismissed this claim), labour rights and property rights. In the main, the Court considered primary and secondary sources of law in foreign jurisdictions such as South Africa and Canada. These were used to amplify the Court's understanding of key constitutional issues, scope and application of rights in the context of labour. Nonetheless, the Constitutional Court has not developed guidelines on the application of foreign law in domestic decisions.

5 Brief Commentary on the Use of Foreign Law in Constitutional Interpretation

The use of foreign law in constitutional interpretation should be understood in light of the interpretation provision which bestows a judicious discretion on a court, tribunal, forum or body to apply it.[88] Constitutional interpretation has gained primacy for the main reason that the 2013 Zimbabwean Constitution contains elaborate fundamental rights and freedoms which are more or less similar to inalienable human rights enshrined in international law instruments such as the Universal Declaration of Human Rights , the International Covenant on Civil and Political Rights the International Covenant on Social, Economic and Cultural Rights, the African Charter on Human and People's Rights ,among others. The constitutional rights follow the conventional classification of human rights particularly civil and political rights, social, economic and cultural rights and collective rights.

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[84] At p. 12 where the court relied on a decision of the Constitutional Court of South Africa *Minister of Home Affairs v. National Institute for Crime Prevention and Reintegration of Offenders (NICRO) and Others 2005* (3) SA 280 (CC).
[85] 1906 TS 308 at 311. The Court does rely on Zimbabwean cases as well.
[86] [2005] 2 SCR 473
[87] 3rd edition (1992) at p. 111.
[88] Section 46(1)(e) of the Constitution.

The Declaration of Rights is touted as an auxiliary instrument of constitutionalism to limit the power of government by bestowing fundamental entitlements on every person. Over years, particularly under the Lancaster House Constitution, human rights discussions became an important item to frame discussions on the rule of law or lack of it thereof in Zimbabwe. Despite the home-grown feature of the 2013 Zimbabwean Constitution, certain alien and international and foreign norms found their way into the new burgeoning Constitution. And in certain provisions, such as section 48 on the right to life, the drafters took exception to the comparative provisions such as in the phraseology in section 12 of the Constitution of South Africa. And the nascent constitutional jurisprudence of the Constitutional Court has on numerous moments resorted to foreign law to interpret the Declaration of Rights.

The intent here is not to demonstrate the approach (whether it is liberal, conservative, progressive or regressive) but to rather create an entry point upon which the contribution of foreign law abroad can be understood. Although there is limited scholarship on the subject in Zimbabwe, the work of scholars such as Sitaraman and Tushnet cited above helps us to appreciate variant perspectives on the use of foreign law in interpretation. And therefore selected cases such as *Mudzuru* and *Greatermans* could be used to introduce discussions on this important subject. As demonstrated above, the Court in both *Mudzuru* and *Greatermans* heavily relied on foreign decisions (and international law) to interpret the Constitution. In that light, it is necessary to add a caveat, that this contribution is not for a strictly endogenous interpretation approach (where the court confines itself only to domestic laws) nor a heavily laden exogenous interpretive approach (where the court embarks on a literal copy and paste transplantation exercise) to interpret the Constitution.

An emerging body of scholarship has evaluated the Constitutional Court's approach to standing. In *Mudzuru*, the Court relied on Canadian jurisprudence to interpret section 85(1)(a) of the Constitution, particularly the second leg which surmises 'own interests' to include indirect interests of a commercial nature. However, the unit of analysis in the cited case is that the Court directly resorted to foreign jurisprudence without embarking on an analysis of democratic values and accuracy concerns. This raises important questions because constitutional interpretation is essential in a democratic establishment founded on equality, freedom, dignity and reasonableness. An erudite constitutionalist and human rights expert has argued that:

> [T]he interpretation of fundamental human rights and freedoms is an important aspect of constitutional law. If rights are wrongly or narrowly interpreted, citizens will not adequately enjoy what is constitutionally due to them. The interpretation clause is part of the Declaration of Rights under the Zimbabwean Constitution. It provides courts, legal practitioners and law-and policy-makers with guidance on how to interpret the provisions of both the Declaration of Rights and Acts of Parliament. To give appropriate meaning and content to the rights and freedoms set out in the Declaration of Rights, it is important to ensure that human rights are interpreted in a way that pays homage to the letter and spirit of the interpretation clause.[89]

[89] Moyo, *supra* note 16, p. 48.

In the main, section 46(1)(e) of the Constitution providing for the role of foreign law in interpretation should be understood in its constitutional history. Despite the 19 amendments to the former Constitution, Moyo nevertheless contends that constitutional analysis was done haphazardly since "there was no interpretation clause that stipulated, in a comprehensive manner, how courts had to interpret the provisions of the Declaration of Rights".[90] Moreover, this scholar posits that "the interpretation clause anticipates huge transformation in the way courts and other decision-making bodies interpret and limit the fundamental rights and freedoms protected in the Constitution".[91] In addition to this observation, by virtue of incorporating new and arguably progressive norms which serve to re-engineer society and therefore achieve social justice, human rights, security and health, there is need for the development of judicial canons on the application of certain tenets. That Zimbabwe is in its nascent constitutional phase is undisputable.

In the context of foreign and comparative law, there is need to guard against whimsical and uncontrolled application of foreign law devoid of any analysis grounded on chapter 2, chapter 3, and chapter 4 and indeed other segments of the Constitution, which define the overall constitutional purpose. The argument should apply even in cases where the constitutional norms and institutions were borrowed from elsewhere: courts should discover the true intentions behind these values, principles and objectives. The Constitutional Court jurisprudence so far has not produced clear guidelines on the application of foreign law and how to militate against its discontents. For that reason, Sitaraman's work is useful. This scholar tests ten typologies (modes) of foreign law against the values of liberal democracy and accuracy.

First, he argues that borrowing the language used by foreign courts is not inimical to constitutional progress. He argues that quoting language "does not undermine expressive, democratic, or institutional competence values because the court is merely using words, not their underlying reasoning and the sources themselves are not authoritative".[92] Neither is it 'methodologically troubling' but instead it demonstrates that a judge is conversant in human rights language and therefore comparative and international developments. Accordingly, certain terminologies have found themselves into our domestic decisions through universalisation of use.

Secondly, Sitaraman argues that foreign law can be relied on to illustrate constricts with national practices or law.[93] He cites the perspective of Professor Vick Jackson who argued that foreign law served as "interlocutors, offering a way of testing, understanding of one's own traditions and possibilities by examining them in the reflection of others".[94] In the main, he concludes that drawing sharp contrasts "does not gravely implicate any of the values at stake in the foreign law debate".[95] In terms of this argument, the innocuous reference to a foreign statute or constitution provides

[90] *Ibid.*
[91] *Ibid.*
[92] Sitaraman, *supra* note 55, pp. 664–665.
[93] *Ibid*., p. 665.
[94] *Ibid.*
[95] *Ibid.*

a reflective lens to understand domestic laws and regulations and therefore how to apply them.

Thirdly, for Sitaraman, using foreign law for logical reinforcement is unproblematic. To buttress this perspective, he cites the work of Professor Steven Calabresi and Stephanie Zimdahl, particularly the various ways "in which the court looks to foreign law and practice to demonstrate that its decisions are logical and supported by reason".[96]According to this perspective,[97] judicial decisions are home grown "but the court uses foreign sources to show that its interpretation is not unreasonable".[98] For Sitaraman, logical reinforcement follows a particular sequence: the judge makes a decision based on municipal sources or his own logical reasoning and thereafter looks abroad and finds that others have made the same decision.

The last pillar under 'unproblematic uses of foreign law' in Sitaraman is factual propositions. Sitaraman argues that courts can rely on exogenous sources of law to establish factual propositions about history, practices, structure, or anything else.

The fifth pillar which falls under 'potentially problematic uses of foreign law' in Sitaraman is known as empirical consequences. The argument is that foreign law "might be useful for judges to identify what consequences to a certain rule might have been if adopted".[99] Accordingly, Sitaraman argues that the courts would seek to ascribe the occurrence or non-occurrence of an event to a certain legal norm.

The sixth pillar falls under the same continuum as the fifth one. Sitaraman posits that in some instances foreign law could be applied directly by the courts.[100] The reason for this could be that the Constitution requires or suggests "looking to foreign or international law for interpretation".[101] Under the 2013 Constitution, judges may rely on foreign law when interpreting the Declaration of Rights. Accordingly, Sitaraman posits that the use of foreign law via direct application merges into the foundational debate and theories of constitutional interpretation. The conferral of discretion under section 46(1)(1) should also be seen in light of Morrison's observation that discretion is a relative concept and as such it always makes sense to ask: 'discretion under which standards?' or 'discretion as to which authority?'.[102]

Furthermore, foreign law may be relied on for persuasive reasoning. The argument is that different nations may face similar situations and therefore one judge's analysis of a situation may be helpful to another judge elsewhere. And therefore, in terms of this pillar, foreign law provides an example of an intelligent person reasoning through a legal problem.

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[96] *Ibid*., p. 666.
[97] *Ibid*., pp. 666–667.
[98] *Ibid.*
[99] *Ibid*., p. 670.
[100] *Ibid*., p. 672.
[101] *Ibid.*
[102] W. Morrisson, *Jurisprudence: from the Greeks to Post-Modernism* (Cavendish Publishing Limited, 1997) p. 424.

The last three categorisations in the Sitaraman piece are termed 'troublesome uses of foreign law'.[103] They include authoritative borrowing whereby a court or judge uses foreign law as if it were binding precedent on his court. Sitaraman invokes the writings of Professor Schauer to distinguish between substantive reasons and content independent reasons for relying on a rule. He argues that "a substantive reason for following a rule is a reason grounded in an inherent value of the practice- the practice could be efficient, desirable, or fair"[104.] Furthermore, 'content-independent reasons' "are reasons for following a rule that derive solely from the fact of another stating rule".[105] And therefore, Sitaraman contends that authoritative borrowing is the use of foreign materials for content-independent reasons. He nevertheless opines that borrowing is disadvantageous because: "it offends democratic values by directly implementing the law of a foreign country without judges considering domestic values and interpretive materials", and "it is methodologically problematic because it requires a considerable amount of knowledge about a foreign jurisdiction's law, culture, history and tradition on that judges are unlikely to possess".[106]

The penultimate troublesome pillar is called aggression. According to Sitaraman, this is a process whereby judges collect similar court decisions "that adhere to a particular position, aggregates them into a larger total, and uses numerical consensus to indicate the validity of the widely held position".[107] However, this component gives normative force and legitimacy to the numerical dominance of the particular position. Sitaraman argues that aggregation "should be the locus of future debates on the uses of foreign law".[108] The last component under the Sitaraman troublesome architecture is 'no usage.' As the name suggests, this is where judges refrain from using foreign law.

Overall, the Sitaraman reading is useful because it demonstrates that foreign law could aid constitutional interpretation specifically in jurisdictions such as Zimbabwe were the constitutional jurisprudence on fundamental human rights and freedoms is still emerging. Therefore, critical and yet evolving key questions should be asked about how to adapt the exogenous tools of constitutional interpretation to suit local context and values. For Sitaraman, the fact that "the majority of ways in which foreign law can be used are not necessarily problematic", implies "any broad zero sum debate over foreign law use is largely overblown".[109] Moreover, Sitaraman recommended that the disciplinary parameters on the use of foreign law in constitutional interpretation be fleshed out. Therefore, implying that conceptual and contextual considerations be resolved. Lastly, the literature emphasises the point that aggregation is the most complex mode of foreign law use and as a result it raises fundamental themes and issues in constitutional interpretation.

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[103] Sitaraman, *supra* note 55, pp. 677–691.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*, p. 691.

6 Conclusion

Critical discussions about the role of foreign law are not only justified by the constitutional codification and conferral of discretion on the judiciary to consider relevant foreign law. However, the discourse on foreign law in constitutional interpretation spans most jurisdictions particularly those which fall under the common law system. On the other hand, the enactment of the 2013 Zimbabwean Constitution has resulted in 'critical constitutional reflexity' because it invites a series of fundamental (both conceptual and practical) questions which hinge on constitutionalism and its core elements such as the independence of the judiciary, the separation of powers doctrine, judicial review, etc. In the context of interpretation, the approach of the judicial branch as demonstrated by the views of Chief Justice Chidyausiku and the nascent constitutional projects particularly the *Mudzuru* and *Greatermans* decisions, demonstrate sustained and growing references, reliance and/or application of foreign law in domestic decisions. As was demonstrated above, this constitutional strand caused the former judiciary leader to applaud those judges who had invoked foreign precedent to develop Zimbabwean constitutional jurisprudence and impliedly rebuked non-usage of foreign law.

An assessment of the few cases delivered by the apex court proves that we should reframe the discussions on the role of foreign law in constitutional interpretation. The proposed inquiry is one which transitions from the advantages and disadvantages of using foreign law into how it is/should be used in practice. Although foreign law is important, there is a dearth of literature in Zimbabwe about what Sitaraman termed the 'values of foreign law' (arguments based on liberal democracy and accuracy) and the typologies on foreign law in constitutional interpretation. Accordingly, the protection of fundamental human rights and freedoms under Chapter 4 of the Constitution, to the extent that their interpretation also hinge on foreign law, should be grounded on a casuistic analysis of the ways in which the Constitutional Court has used and could use foreign law effectively.

Arguably, the *Mudzuru* decision reflects a cocktail and nuanced role of foreign law in interpretation. Not only has the Constitutional Court borrowed foreign linguistic human rights formulations, but it has also used foreign decisions from India, Australia, South Africa, Canada among others, for purposes of logically reinforcing its domestically inclined decisions, and to draw sharp contrasts between its holdings and those of foreign courts. Moreover, this demonstrates piecemeal analysis infused with the domestic values and principles, particularly the *Mudzuru* decision, in relation to the first leg of section 85(1)(a) formulation which appears to be a nuanced application of authoritative borrowing which in itself is an example of a troubling mode of foreign law typology. Not only do the democratic values in Zimbabwe and Canada diverge but the temptation to misinterpret, misapply and even adopt a shallow application of foreign doctrines is real due to differences in history, culture, structure, politics and economy. Accordingly, the Constitutional Court should be circumspect in how certain alien doctrines are applied.

Moreover, some of the typologies such as aggression call for a more robust analysis in the Zimbabwean context. In the main, this contribution has demonstrated that the use of foreign law raises concerns based on legal borrowing and/or transplantation. Critical questions which the scholarship should engage with involve the constitutional diligence to avoid importing foreign norms and institutions which are unsuitable to the local context. It is still early to reach a definitive conclusion on this aspect. Although some of the decisions are progressive in some respects, the Constitutional Court should adopt a critical reflective analysis when confronted with section 46(1)(e) inspired interpretation to realise the objective of fulfilling the fundamental rights and freedoms. In sum, the post-2013 constitutional jurisprudence arguably point to default foreign application mode as opposed to a discretionary use of same as enunciated in the 2013 Constitution. Accordingly, this critical disjuncture between theory and practice is what has made some countries to become critical in their approach to foreign lan